

**CALIFORNIA COASTAL COMMISSION**

CENTRAL COAST DISTRICT OFFICE  
725 FRONT STREET, SUITE 300  
SANTA CRUZ, CA 95060  
(831) 427-4863 FAX (831) 427-4877  
[www.coastal.ca.gov](http://www.coastal.ca.gov)

**F4**

# CENTRAL COAST DISTRICT (SANTA CRUZ) DEPUTY DIRECTOR'S REPORT

*For the*

*December Meeting of the California Coastal Commission*

MEMORANDUM

Date: December 11, 2009

TO: Commissioners and Interested Parties  
FROM: Charles Lester, Central Coast District Deputy Director  
SUBJECT: *Deputy Director's Report*

Following is a listing for the waivers, emergency permits, immaterial amendments and extensions issued by the Central Coast District Office for the December 11, 2009 Coastal Commission hearing. Copies of the applicable items are attached for your review. Each item includes a listing of the applicants involved, a description of the proposed development, and a project location.

Pursuant to the Commission's direction and adopted procedures, appropriate notice materials were sent to all applicants for posting at the project site. Additionally, these items have been posted at the District office and are available for public review and comment.

This report may also contain additional correspondence and/or any additional staff memorandum concerning the items to be heard on today's agenda for the Central Coast District.

***REGULAR WAIVERS***

1. 3-09-038-W Caltrans, District 5, Attn: Ryelle Leverett (Big Sur, Monterey County)

***IMMATERIAL AMENDMENTS***

1. 3-00-164-A2 E. Wendell Chambers (Live Oak, Santa Cruz County)

***EXTENSION - IMMATERIAL***

1. A-3-SLO-00-040-E1 Dennis C. Schneider (Harmony, San Luis Obispo County)

**TOTAL OF 3 ITEMS**

## DETAIL OF ATTACHED MATERIALS

### REPORT OF REGULAR WAIVERS

The Executive Director has determined that the following developments do not require a coastal development permit pursuant to Section 13250(c) and/or Section 13253(c) of the California Code of Regulations.

<i>Applicant</i>	<i>Project Description</i>	<i>Project Location</i>
<b>3-09-038-W</b> Caltrans, District 5, Attn: Ryelle Leverett	Culvert replacements and enlargements.	Highway 1 (Post Mile 0.3 (Pepperwood Gulch) and Post Mile 0.9 (Silver Spur Creek)), Big Sur (Monterey County)

### REPORT OF IMMATERIAL AMENDMENTS

The Executive Director has determined that there are no changes in circumstances affecting the conformity of the subject development with the California Coastal Act of 1976. No objections to this determination have been received at this office. Therefore, the Executive Director grants the requested Immaterial Amendment, subject to the same conditions, if any, approved by the Commission.

<i>Applicant</i>	<i>Project Description</i>	<i>Project Location</i>
<b>3-00-164-A2</b> E. Wendell Chambers	Amend previously CDP to allow the approved deck cable rail to be substituted with a clear glass railing.	101 26th Avenue (bluffs and beach seaward of 101 26th Ave., immediately adjacent to the 26th Avenue Beach public coastal access overlook and stairway), Live Oak (Santa Cruz County)

### REPORT OF EXTENSION - IMMATERIAL

<i>Applicant</i>	<i>Project Description</i>	<i>Project Location</i>
<b>A-3-SLO-00-040-E1</b> Dennis C. Schneider	Construction of a 10,000 square foot single family residence with a detached indoor lounge/pool structure, a 2,500 square foot barn, a 1.25 mile access road, and related residential development (e.g., well, water tanks, septic system, etc.) on a 40.6 acre agricultural blufftop lot.	West Side Highway 1 (on the marine terrace approximately one-half mile south of China Harbor and one mile north of Cayucos along the Harmony Coast), Harmony (San Luis Obispo County)

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## NOTICE OF PROPOSED PERMIT WAIVER

**Date:** November 20, 2009  
**To:** All Interested Parties  
**From:** Dan Carl, Central Coast District Manager *DCM*  
Katie Morange, Coastal Planner *KM*  
**Subject:** Coastal Development Permit (CDP) Waiver 3-09-038-W  
Applicants: Caltrans District 5, Attn: Ryelle Leverett

### Proposed Development

Abandonment of one existing 36-inch culvert; partial fill of an existing 36-inch culvert and placement of a new 18-inch pipe within it; installation of a new 63-inch culvert; removal of existing inlet risers; and a new outlet energy dissipater, all of which would occur at two locations on Highway 1 (Post Mile 0.3 (Pepperwood Gulch) and Post Mile 0.9 (Silver Spur Creek)) in the Big Sur area of unincorporated Monterey County.

### Executive Director's Waiver Determination

Pursuant to Title 14, Section 13253 of the California Code of Regulations, and based on project plans and information submitted by the applicant(s) regarding the proposed development, the Executive Director of the California Coastal Commission hereby waives the requirement for a CDP for the following reasons:

The proposed project involves repair and replacement of two failing existing culvert systems that transport runoff under Highway 1 in Big Sur, and is necessary to ensure that Highway 1 remains open and safe for vehicles and pedestrians. Aboveground elements of the proposed project will not be visible from the Highway 1 corridor once vegetative screening is established, and the project includes measures to protect sensitive habitat and public access during construction, including temporary flagger(s) that will allow one through lane to remain open at all times; avoidance flagging and fencing of sensitive habitat; and erosion and pollution control measures. In sum, the proposed project will protect public access, habitat, and visual resources consistent with the Coastal Act and the certified Monterey County Local Coastal Program.

### Coastal Commission Review Procedure

This waiver is not valid until the waiver has been reported to the Coastal Commission. This waiver is proposed to be reported to the Commission on Friday, December 11, 2009, in San Francisco. If three Commissioners object to this waiver at that time, then the application shall be processed as a regular CDP application.

**If you have any questions about the proposal or wish to register an objection, please contact Katie Morange in the Central Coast District office.**



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## NOTICE OF PROPOSED PERMIT AMENDMENT

**Date:** December 2, 2009  
**To:** All Interested Parties  
**From:** Dan Carl, Central Coast District Manager *DCM*  
Susan Craig, Coastal Planner *S. Craig*  
**Subject:** Proposed Amendment to Coastal Development Permit (CDP) 3-00-164  
Applicant: Wendell Chambers

### Original CDP Approval

CDP 3-00-164 was approved by the Coastal Commission on April 14, 2004, and provided for the reconstruction of a deck and a revetment located seaward of an existing single-family residence at 101 26th Avenue, immediately adjacent to the 26th Avenue Beach public coastal access overlook and stairway, in the unincorporated Live Oak region of Santa Cruz County.

### Proposed CDP Amendment

CDP 3-00-164 would be amended to replace the previously approved stainless-steel-cable deck railing with a clear, non-reflective glass railing.

### Executive Director's Immateriality Determination

Pursuant to Title 14, Section 13166(b) of the California Code of Regulations, the Executive Director of the California Coastal Commission has determined that the proposed CDP amendment is immaterial for the following reasons:

The proposed glass railing will be made of tempered glass that has a laminate coating on the outside surface for low reflectivity. The Applicant proposes to maintain the glass railing in a manner that allows for clear viewing through the railing, i.e. the railing will be kept clean and unblemished and will be replaced as necessary if it becomes more opaque due to coastal salt air or other influences. Such clarity is important at this location because the public view from the accessway at 26<sup>th</sup> Avenue is over and across this deck area, and the base CDP includes explicit parameters to ensure maximum public view protection, including through the railing. In addition, bird window-alert decals will be placed on the glass to decrease the potential for bird strikes into the clear glass (these decals contain a component that brilliantly reflects ultraviolet sunlight. This ultraviolet light is invisible to humans, but glows like a stoplight for birds). The decals will be used on all of the glass panels in a sufficient quantity to prevent bird strikes. The decals will be maintained for the life of the project, i.e. as decals become worn and less effective, these worn-out decals will be replaced with new decals. In sum, the proposed amendment will enhance public views of the ocean and beach from the adjacent 26th Avenue Beach public coastal access overlook and stairway, will adequately prevent bird strikes, and is consistent with the Commission's original coastal development permit approval, as well as consistent with the Coastal Act and the certified Santa Cruz County Local Coastal Program.



## **NOTICE OF PROPOSED PERMIT AMENDMENT**

**CDP 3-00-164 (Chambers Deck and Revetment)**

**Proposed Amendment 3-00-164-A2**

**Page 2**

### **Coastal Commission Review Procedure**

The CDP will be amended as proposed if no written objections are received in the Central Coast District office within ten working days of the date of this notice. If such an objection is received, the objection and the Executive Director's response to it will be reported to the Commission. If three Commissioners object to the Executive Director's determination of immateriality at that time, then the application shall be processed as a material CDP amendment.

**If you have any questions about the proposal or wish to register an objection, please contact Susan Craig in the Central Coast District office.**



12/6/09

To: CAP - San Carl

Re: Amendment - CAP 3-00  
Wensell Chambers

From: Ralph & Loni Martin  
145 26th Avenue

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We are against the proposed  
Amendment for the following reasons.

- 1) It will not enhance the view
- 2) The glass panels will be subject to the ocean spray, etc, therefore altering the view.
- 3) The panels will not be cleaned regularly. The house has been an eye sore for years!
- 4) Keep our view clear of all construction.

In addition, we are one of three neighbors who sponsored a bench at the end of the street for the pleasure of all who wish to enjoy the view and not looking through glass panels with steel.

We have long supported the Commission and sincerely hope that this permit will be denied.

Sincerely,  
*[Signature]*

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**NOTICE OF PROPOSED PERMIT EXTENSION**

**Date:** November 20, 2009  
**To:** All Interested Parties  
**From:** Dan Carl, Central Coast District Manager *DC*,  
Jonathan Bishop, Coastal Planner *JB*  
**Subject:** **Proposed Extension to Coastal Development Permit (CDP) A-3-SLO-00-040**  
Applicant: Dennis Schneider

**Original CDP Approval**

CDP A-3-SLO-00-040 was approved by the Coastal Commission on January 10, 2008, and provided for the construction of a single-family residence and associated improvements north of the community of Cayucos along the Harmony Coast of San Luis Obispo County (APN 046-082-008).

**Proposed CDP Extension**

The expiration date of CDP A-3-SLO-00-040 would be extended by one year to January 10, 2011. The Commission's reference number for this proposed extension is A-3-SLO-00-040-E1.

**Executive Director's Changed Circumstances Determination**

Pursuant to Title 14, Section 13169 of the California Code of Regulations, the Executive Director of the California Coastal Commission has determined that there are no changed circumstances affecting the approved development's consistency with the certified San Luis Obispo County Local Coastal Program and/or Chapter 3 of the Coastal Act, as applicable.

**Coastal Commission Review Procedure**

The Executive Director's determination and any written objections to it will be reported to the Commission on Friday, December 11, 2009, in San Francisco. If three Commissioners object to the Executive Director's changed circumstances determination at that time, then the extension shall be denied and the development shall be set for a full hearing of the Commission.

**If you have any questions about the proposal or wish to register an objection, please contact Jonathan Bishop in the Central Coast District office.**



F8a

**FORM FOR DISCLOSURE OF  
EX-PARTE COMMUNICATIONS**

Name or description of the project: Agenda Item F.8.a. - Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)

Time/Date of communication: Monday, December 7th, 2009 9:00 am

Location of communication: Oceanside

Person(s) initiating communication: Dave Grubb

Person(s) receiving communication: Esther Sanchez

Type of communication: Meeting

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**Support** the staff recommendation to deny.

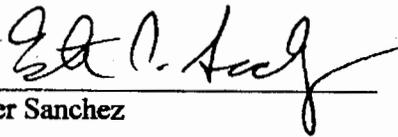
The proposed project is inconsistent with a variety of LCP requirements and Coastal Act provisions.

It lacks adequate water supply, would not avoid or minimize hazards over its lifetime, would block and otherwise impair significant public views, would not protect dune landforms and natural resources, and would exacerbate Highway One traffic problems.

It also has not assured that maximum public access will be provided.

We agree with Staff's recommendation to deny this permit.

Date: December 7, 2009

  
\_\_\_\_\_  
Esther Sanchez

**FORM FOR DISCLOSURE OF  
EX-PARTE COMMUNICATIONS**

Name or description of the project: Agenda Item F.8.a. - Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)

Time/Date of communication: Friday, December 4th, 2009, 9:30 am

Location of communication: La Jolla

Person(s) initiating communication: Dave Grubb, ~~Cecil Grubb~~ *OK*

Person(s) receiving communication: Patrick Kruer

Type of communication: Meeting

Support the staff recommendation to deny.

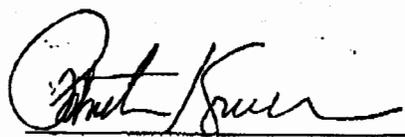
The proposed project is inconsistent with a variety of LCP requirements and Coastal Act provisions.

It lacks adequate water supply, would not avoid or minimize hazards over its lifetime, would block and otherwise impair significant public views, would not protect dune landforms and natural resources, and would exacerbate Highway One traffic problems.

It also has not assured that maximum public access will be provided.

We agree with Staff's recommendation to deny this permit.

Date: December 4, 2009

  
Patrick Kruer

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**FORM FOR DISCLOSURE  
OF EX PARTE  
COMMUNICATION**

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**Date and time of communication:**  
(For messages sent to a Commissioner by mail or facsimile or received as a telephone or other message, date time of receipt should be indicated.)

December 2, 2009, 10:00 a.m.

**Location of communication:**  
(For communications sent by mail or facsimile, or received as a telephone or other message, indicate the means of transmission.)

Commissioner Neely's Eureka Office

**Person(s) initiating communication:**

Maggy Herbelin, Local ORCA Representative

**Person(s) receiving communication:**

Commissioner Bonnie Neely

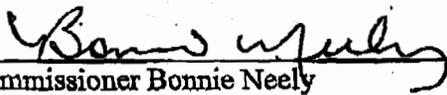
**Name or description of project:**

Agenda Item F8a - SNG Development Co.  
Application to build Monterey Bay Shores Resort -- construction of 260,000 sq ft mixed-use residential and visitor serving development with hotel rooms, condominiums, restaurant, conference center, spa, swimming pools and surface and underground parking. Requires grading in san dunes seaward of Highway One in Monterey County.

**Detailed substantive description of content of communication:**  
(If communication included written material, attach a copy of the complete text of the written material.)

Ms Herbelin states that ORCA supports the staff recommendation to deny the application.

**Date:** December 2, 2009

  
Commissioner Bonnie Neely

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceedings and provide the Executive Director with a copy of any written material that was part of the communication.

Coastal Commission Fax: 415 904-5400

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**FORM FOR DISCLOSURE  
OF EX PARTE  
COMMUNICATIONS**

Name or description of project, LCP, etc.: Item F8a Application No. A-3-SNC-98-114, Monterey Bay Shores Eco Resort (SNG Development, Monterey County)

Date and time of receipt of communication: 12/2/09, 1:00 pm

Location of communication: Board of Supervisor's Office, Santa Cruz, California

Type of communication: In person meeting and teleconference

Person(s) initiating communication: Grant Weseman  
Lennie Roberts  
Sarah Corbin  
Margie Kay

Person(s) receiving communication: Mark Stone

Detailed substantive description of content of communication:  
(Attach a copy of the complete text of any written material received.)

They are in support of the staff recommendation to deny the project. They cited the issues of water (for example the well on the property does not produce potable water), traffic, siting in the dunes, erosion and coastal hazards.

Date: 12/2/09 Signature of Commissioner: *Mark Stone*

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred within seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used; such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceeding and provide the Executive Director with a copy of any written material that was part of the communication.

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*FJa*

**FORM FOR DISCLOSURE  
OF EX PARTE  
COMMUNICATIONS**

Name or description of project, LCP, etc.: Application No. A-3-SNC-98-114,  
Monterey Bay Shores Eco Resort  
(Sand City)

Date and time of receipt of communication: 12/2/09, 11:00 am

Location of communication: Board of Supervisor's Office, Santa  
Cruz, California

Type of communication: In person meeting

Person(s) initiating communication: Ed Ghandoar  
Sheri Damon

Person(s) receiving communication: Mark Stone

Detailed substantive description of content of communication:  
(Attach a copy of the complete text of any written material received.)

The applicant and attorney talked about the need for an extension of time. They want to not have the hearing until the water issues have been resolved. They showed me two orders from the Superior Court of San Francisco that indicated that the hearing was to happen at a time that was mutually agreed upon and that the Commission should wait to make a decision until the water issue is finally resolved.

The attorney also felt that the process to date has not been fair. She complained that communications between the applicant and staff have broken down and does not like the process. The applicant complained that he has been treated inappropriately. He feels entitled to develop this project because he has proposed an environmentally friendly development.

I was told that the AMBAG sediment study shows that there is accretion on the site, not erosion, so the proposed setbacks to the 75 year erosion level should be more than adequate.

Date: 12/2/09 Signature of Commissioner: *Mark Stone*

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

**Name of project:** Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)

**Date and time of receipt of communication:** Dec 4<sup>th</sup> 11am

**Location/Type of communication:** Pescadero, In Person Meeting

**Persons in attendance:** Ed Ghandour- SNG Development, Paul Kephart- Rana Creek, Sheri Damon - Counsel

**Person receiving communication:** Steve Blank

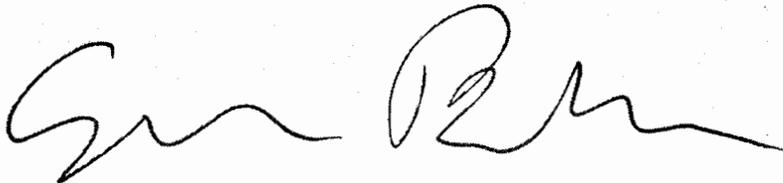
**Detailed description of the communication:**

I received a briefing on the history of the Monterey Bay Shores project and an update on the elements of the project: which included local jobs, enhanced habitat; sustainable elements of project including recycled water and reduced water use; and the applicants concerns with the staff's analysis of the project.

The applicant detailed their view of the status of the litigation involving the water distribution permit with Monterey Peninsula water Management District and their request for continuance to allow resolution of that issue. They believed that as there was a motion to expedite granted by the Appellate Court that was expected to be heard in the next few months, the commission should continue rather than here this item.

**Date:** Saturday, Dec 5, 2009

**Signature of Commissioner:**



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Security National Guaranty

December 4, 2009

By Federal Express and by E mail

Mr. Charles Lester  
Mr. Mike Watson  
California Coastal Commission  
725 Front Street, Suite 300  
Santa Cruz, California 95060

Re: Monterey Bay Shores Ecoresort ("MBSE")  
A-3-SNC-98-114  
Applicant Security National Guaranty, Inc. ("SNG")  
Hearing Date December 11, 2009  
CONTINUANCE REQUESTED

Dear Charles and Mike:

We reiterate our request that the matter be continued to allow for the resolution of the water distribution permit. Water supply is not the issue, but rather the connection distribution permit by the MPWMD. We believe that the original writ requires that this issue be resolved before the Commission's determination of any proposed project on the site. Even the staff report<sup>1</sup> acknowledges that the commission cannot evaluate any project without this issue resolved. The Attorney General has indicated that upon concurrence of the Coastal Commission to continue the matter, that he will enter into a stipulation with Applicant's attorney to extend the writ return date, much like what was done in May when the parties stipulated to the extension to December 30, 2009.

SNG proposed a continuance and a stipulation to extend the writ return date until 60 days after the final decision is made by the Appellate Court, which would allow time for the water issue to be resolved and also accommodate the Commission's desire to have the CDP hearing in northern California close to the project site

<sup>1</sup> See page 25.

Again, we believe that a continuance makes more sense for the reasons stated in our letters to the Commissioners and in this and prior responses. Otherwise, we request Approval of the project as it has complied with the LCP Policies and the Coastal Act.

The Commission is subject to a peremptory writ issued by this Court on May 27, 2008, ordering the Commission to rehear its denial of a coastal development permit. The writ was issued because the Court of Appeal ruled that the Commission had exceeded its jurisdiction in denying the permit application. The Court has previously ordered the writ return date extended, sometimes due to the Commission's request and sometimes due to the parties' stipulation. The writ return date was first January 31, 2009, but the Court adjusted the date to March 31, 2009 because the Commission wanted the delay and wanted the hearing in Monterey, which was in March. Next, the parties then stipulated to extend the date until June 30, 2009 to allow for another agency, the Monterey Peninsula Water Management District, to hold a hearing on a water distribution system. Water supply for the project is governed by the Monterey County Superior Court which has reserved and continuing jurisdiction over disputes concerning water from the Seaside Groundwater Basin, which is the water source for the SNG project. The Monterey Court then set a April 29, 2009 hearing on disputes concerning the proper jurisdiction of the MPWMD in light of the Court's authority over the Seaside Basin. The Monterey Court **accepted** SNG's proposed remedy ruling in favor of SNG, and ordered the MPWMD to rehear SNG's water distribution system permit by June 10, 2009. At the request of SNG, next the Commission agreed on May 7, 2009 to a continuance so as to allow SNG enough time to resolve the water distribution permit and come back to a Northern California local hearing. The parties stipulated to a December 30, 2009 writ return date. Next, the MPWMD appealed in June the Superior Court's Judgment in favor of SNG to the Appellate Court, where now the matter sits. The Appellate Court approved an expedited process to facilitate coming back to a Coastal Commission hearing after its decision. Court hearing is expected in February or March 2010 with a decision within 90 days thereafter. However, now the Commission Staff is suddenly insisting on a Coastal Commission hearing on SNG's coastal development permit (CDP) application **before the water permit issue is resolved (reversing its prior request to the Court)**. The staff acknowledges and the writ requires that the proposed project be given a fair hearing and that no adequate evaluation of *any* project can be made until the water issue is resolved. Based on comments made by the Commission's counsel, SNG fears that the Commission staff is simply doing this so it has an excuse for denying SNG's CDP application.

Nevertheless, we are submitting the Applicant Security National Guaranty's response to the Commission Staff Report on the MBSE.

## I. General Issues Regarding Staff's Analysis of the MBSE Project.

### A. The Commission/Staff Has Failed to Allow for a Fair Hearing

In May, the Commission directed that the Applicant and staff communicate only in writing as a retaliatory measure against Applicant's disclosure of comments received from third parties about the Commission staff's communication with the MPWMD and/or its board members. Applicant has more fully set forth the facts and hereby incorporates by reference his May 4, 2009 comments on this issue. Communication requires that one respond to written communication, yet the Commission staff never responded to the issues, comments or concerns raised by Applicant on May 4, 2009. For that reason, Applicant is incorporating all applicable comments set forth in May 4<sup>th</sup> into this response. Nor when Applicant's new attorney was told to simply contact staff to review the commission's files was my attorney able to review the file in the same manner as any other member of the public which is to walk into the office and review the files. Instead, the request was treated as a public records act request. Commission staff from San Francisco insisted on reviewing the file and withholding information from the files under "general categories" under the Public Records Act. Applicant's attorney was delayed by a week in viewing the file. Commission staff insisted on sitting with the applicant's attorney for over 4 hours in an extremely inefficient and unnecessary use of staff time to review five boxes of documents.<sup>2</sup> Documents which were relied upon in the staff report and which were clearly not protected documents, were withheld from disclosure at that time.<sup>3</sup> Applicant's attorney has requested the citation for the lack of a privilege log which was represented to be provided by San Francisco staff, but no response has been had. Staff has further disregarded Applicant's request on many occasion to meet in person and discuss the issues. The last meeting between the parties occurred April 2, 2008, immediately after the Appellate Court's Decision on January 25, 2008.

The staff is further not allowing for a fair hearing of the MBSE Project because of the Thanksgiving holiday break. The Commission itself is closed the entire week of Thanksgiving and on November 29. Applicant did not receive the hard copy staff report until Tuesday, November 24 and many consultants are unavailable due to the holiday. While staff has represented in its December staff report that he it is "willing to work with the applicant" on a new application, staff is apparently not able to work with the applicant<sup>4</sup>, as evidenced by its refusal to meet, discuss or even respond to Applicant. Thus, there is less than 10 days to prepare any type of substantive response to the new issues raised in the December Staff report. In Benson v. California Coastal Commission, the Commission argued that one month was too little time to prepare a

<sup>2</sup> It should be noted that local staff in the Santa Cruz office allowed Applicant's attorney to review the fifth file on Monday, without staff supervision which is typically how files are reviewed in that office and how virtually every other member of the public is treated with respect to file review.

<sup>3</sup> For example, staff relies heavily upon the LCP certification which was not contained in the file. Additionally, only a portion of the emails directed to outside agencies were provided.

<sup>4</sup> See Page \_\_\_ of Staff Report dated \_\_\_

substantive response to materials received in advance of a Commission hearing. Yet, the Commission published a 372-page (single-spaced) Staff Report (with exhibits) for the MBSE Project on November 20, 2009 (a Friday), just before Thanksgiving, and expects the Applicant to pull together all of its consultants and experts to review and be prepared to respond by December 4, 2009 for the December 7 (Closed Session) and 11<sup>th</sup> Commission hearing. Less than 10 days is less than one-third of the time that the Commission itself argued was insufficient to prepare a substantive response in the Benson case.

Further, staff purposefully set the matter for hearing without notifying or discussing with either the Applicant or Sand City whether a December hearing date was appropriate. The Applicant set numerous written request for a continuance and most of them were ignored without a response. The Writ requires that a public hearing be held only with the *mutual consent* of both parties. (See submissions for record, submitted herewith.) In fact, the Applicant sent the most recent request for a Continuance on October 19<sup>th</sup> and 20<sup>th</sup>, 2009, and appeared on November 4<sup>th</sup> in Long Beach, CA Commission Hearing appealing for continuance. Letters were submitted by the Applicant and its legal counsel as the matter was supposed to be acted on the November 4<sup>th</sup> Closed Session. Instead, staff decided to not act on an agenda item. This appears to have been designed to make it impossible for SNG to respond in an adequate manner for a December hearing.

Staff also failed to discuss any of the issues it raised in the Staff Report with SNG before issuing the report. Staff made no effort to engage in a dialogue to address those issues as encouraged by the January 30, 2009 San Francisco Superior Court order. Such conduct does not reflect a genuine desire to reach agreement on the project, but rather seems singularly designed to "kill" the project through procedural gamesmanship. The Applicant deserves more than that from a public agency that should follow the process in order to allow the Applicant the time necessary to submit all information for consideration by the Commission.

Staff also has for months implemented a policy of refusing to meet in person with the Applicant or its consultants and refusing any direct communication, insisting instead that all communication must be between Applicant's legal counsel and the State Attorney General's Office who represents the Commission.<sup>5</sup> Given Attorney General's Office

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<sup>5</sup> The reasons given for this new policy don't make sense. Deputy Attorney General Pete Southworth stated to Applicant's legal counsel that the reason for this policy was the "Peter Douglas' letter." He was referring to a letter from Commission Executive Director Peter Douglas denying that Coastal staff had engaged in behind the scenes pressure on, and discussions with, Monterey Peninsula Water Management District Board members in an effort to "kill" the project. SNG had reported to the alleged Water District communications from the head of LandWatch, an environmental organization, to SNG and its consultant to that effect. The LandWatch Executive Director subsequently denied making the communication and then resigned from his position of Executive Director days later. But none of this provides any logical reason for Coastal staff to refuse to speak with *the Applicant*. The Applicant explained it was simply reporting what the LandWatch head had communicated. Staff's refusal to speak has imposed an obstacle to the proper processing of the permit that makes it impossible for SNG to obtain a

quite limited and inadequate knowledge of the technical details of the project or the technologies involved, this approach has placed yet another obstacles to the efficient or fair processing of this permit application. These constraints imposed by the Staff further makes it impossible to process the permit application. It is apparent that staff has decided that by imposing new artificial constraints and interpretations on the site that are outside the scope of the LCP and the Decision in First Appellate District Court. Security National Guaranty v. California Coastal Commission, (2008) 159 Cal.App.4<sup>th</sup> 402, 422. (see further below) coupled with an impossible review process, it can prevail in denying the Monterey Bay Shores Ecoresort from moving forward or even coming back with an economically viable project. This is strictly forbidden.

If the resources of the State of California are not sufficient to prepare a substantive response in 28 days' time, the Applicant certainly cannot be expected, in **one third** that time, to substantively address all issues raised in a 372-page Staff Report. This short time period violates Coastal Act § 30320, § 13059 of the Commission's regulations, and the procedural due process rights of the Applicant. Evans v. Department of Motor Vehicles (an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections).

In addition, the refusal of the Commission to **grant a continuance** is arbitrary, contrary to law and not supported by substantial evidence. There was no reason that the hearing on SNG's application must occur on December 11, 2009. Just as the Commission and the Applicant stipulated to the extension of the writ in May, they are able and required to do so by the original writ in December. There is no prejudice to the Commission in granting a continuance. But there is great prejudice to SNG in not granting a continuance. First, as noted above, the overwhelming amount of information in the Staff Report, the failure of staff to discuss it with the Applicant beforehand, the lack of communication with staff, staff's failure to respond to Applicant's May 4<sup>th</sup> letter response and the extremely short period of time to respond places an unfair and unnecessary burden on SNG. Second, as detailed below, nearly one third of the Staff Report is prima facie erroneous because it misinterprets the existing Adjudication orders relevant to this project, ignores other water sources in the nearby area, and speculates as to the other water issues which are all pending review in various courts in California. Staff speculates that the water issue won't be resolved until late next year and quotes from the reply brief of the Water Management District, to support its contentions that the SNG project is precluded from connecting to the Cal Am system by virtue of provisions of the cease and desist order. Yet the cease and desist order is stayed, the reply brief is only argument and is pending judicial review and the Staff review is clearly one-sided

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fair and impartial hearing and appears designed solely to punish the Applicant. In fact SNG recently learned that there were several email communications between WMD staff and Coastal Commission staff prior to the denial of the water distribution permit by the WMD.

without consideration of the arguments on the other side of the case. In other words, there is no balanced review of the water issues here.

Finally, the extension in May was made and documents filed with the court extending the date for the writ return specifically refer to the *resolution of the water distribution permit issue*. The original writ is specific that the substantive hearing is to be heard upon concurrence of both the parties. Commission staff has expressed desire to work with Applicant, on the one hand, but on the other has applied conflicting standards and policies which either are not in conformity with the LCP or if taken at face value render the lot unbuildable.

It is noteworthy that Staff's steps and actions are directed at the most environmentally designed "green" project ever designed, with visionary sustainable designs and features, water recycling and conservation measures, habitat restoration, renewable energy sources, large setbacks, biodiversity, living roofs, alternative transportation modes, beach and dune trails, public access and other very green amenities and elements. [note that the lateral access by the public to the sites beach is excluded from the public trust doctrine under the Bueno Noche Mexican Land Grant]. See attached exhibit for green project highlights Exhibit 0. Staff has provided virtually no credit to this massive undertaking by the Applicant nor the economic benefits that the MBSE would bring to the Community in the form of 500 green jobs, or environmental project funds committed by the Trust set up by the project, at a time when the local economy and environmental projects are hurting. It's clear from Staff's position, contrary to the law and certified LCP, that Staff prefer to "kill" the project by rendering the site unbuildable [see below for further details]. This in spite of the fact that this Ecoresort is significantly smaller, less intensive and covers less land than the original City approved 495 units project. Given Staff's position of changing rules and introducing new "artificial" constraints, if Staff cannot tell the Applicant what can be built on the site (as they claim and argue in the Staff Report), then who can? How is anybody to know what can or should be built on site when Staff keeps moving the goal post?

#### B. The Commission/Staff Fails to Follow the Sand City LCP Standards and Is Applying Arbitrary and More Onerous Standards That Exceed Requirements Applied to Similar Permits in the Monterey Bay Area

The Staff Report frequently fails to base its review of the MBSE Project on existing Sand City LCP standards and requirements, but instead applies standards that Staff appears to have *created* for their review of this project – standards that it does not apply to other projects in the Monterey Bay area.<sup>6</sup> In fact, the project in front of the Commission is a modification of the original project, and the Writ requires that the regulations and LCP Standards in effect at the time of the original project be applied. [page 19 of the Decision attached to the Writ]. In other instances, Staff impermissibly

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<sup>6</sup> Staff also improperly relies upon the "substantial issue determination" to support its position that the intent of the commission in adopting language of the LCP. This not only ignores the plain language of the LCP, it is not the actual certification document and ignores the subsequent amendments and certifications of the Sand City LCP.

attempts to amend or revise the standards and requirements set out in the LCP, outside of the amendment process authorized in the Coastal Act. And instead of focusing only on the clear written standards of the Sand City LCP compares it to other jurisdictions LCPs some not even in Monterey County. This comparison is completely inappropriate as each jurisdiction is *unique* and has responsibility for planning its own jurisdictional area. As such, staff is exceeding its jurisdiction. Such actions are arbitrary, capricious and not in accordance with the law and prohibited by the previous appellate court decision in this matter. Amending the LCP by declaring “new” conditions and constraints or imposing development constraints that are excessive then those written in the certified LCP and using farfetched interpretations to the LCP is a legislative act, not within the purview of the Commission. In doing so, Staff has defacto rendered the site as ESHA placing constraints that permit “only uses that are coastal dependent [habitat] [Section 30240]. These “new” constraints places very significant limitations on permissible development, if any. This defacto ESHA designation using Coastal Resources as a vehicle violates and sidesteps the Court’s Decision and Writ and affects the investment and project development choices to only those activities which are subject to the designation of ESHA. In effect, the Staff has used coastal resources constraints as a *functional equivalent* to ESHA. The Commission has no statutory authority to make a “defacto ESHA” designation in the context of a permit appeal and in doing so, the Commission has intruded upon powers that the Coastal Act expressly allocate to local governments. That was the Decision already rendered in SNG vs the Californian Coastal Commission on January 25, 2008 and the Writ Order entered May 27, 2008 in favor of SNG as the Applicant. These new constraints and designations by Staff contradict the terms of the certified LCP itself which the Court has expressly said can serve as the only standard of review.

By way of example, in the Commission’s approval of the California Department of Parks and Recreation coastal development permit application for improvements related to Fort Ord Dunes State Park (App No. 3-06-069, approved 3/14/07), the Commission approved a large parking area and pedestrian paths to beach the beach located in the former footprint of the Stillwell Hall officers’ club. The parking area is located adjacent to the bluff top, which has the highest erosion rate in the area due to being hit by the waves perpendicularly and is clearly visible from Highway 1. However, the Commission Staff Report now uses erosion rates at the Stilwell Hall bluff as a basis for claiming that the MBSE project cannot proceed.

In addition, in that same Parks and Recreation permit, the Commission approved trails from the parking area to the beach even though in those areas, in 2006, 21 western snowy plover nests and 29 fledges were surveyed. Introduction of humans into western snowy plover nesting sites (where it has been devoid of humans for many years, and nesting has increased) has thus been approved at a State site in Monterey, but the Staff Report objects to substantially less impact to potential plover habitat found on the edge of Project site (even though SNG has a full habitat Protection Plan and on-site biologist to manage any conflicts between people and potential plovers in the area).

Another example: In the Commission's approval of the Monterey Beach Hotel Seawall (App. No. 3-07-022, approved 11/16/07), the Commission accepted a similar shoreline erosion analysis as that performed by SNG's well-respected consultants here. That report used a 2.5 ft/year erosion rate, which is considered quite conservative. SNG's experts used 2.4 ft/year, plus additional buffer to address global warming considerations. Despite this, and despite the fact that the Monterey Beach Hotel Seawall is located in a Critical Erosion Area identified in a regional erosion study prepared for Monterey Bay (and adopted by AMBAG (11/2008) and the Applicant's site is not, the Commission has objected to the Applicant's studies as not being conservative enough. Moreover, the project site has seen accretion on the beach (see HKA December 4, 2009, as well), confirmed by comparing topographical images of the site over the past 16 years from 1993 to 2009, also confirmed by the AMBAG (11/2008) report, yet, Staff prefers to ignore that fact-let alone ever mention it in its report- and declare that erosion rates reductions over the past 20 years are merely "episodically" and speculate that due to global warming, we need to look at the extreme spectrum of erosion rates, none of which are site specific to the MBSE nor accepted by the respected scientific community. A mere speculation by Staff.

Equally importantly, Sand City's LCP does not require the use of the 6.4 ft/yr erosion assumption that Staff insists on. Indeed, Sand City has adopted the Moffatt Nichol Study which requires assumptions that are more within the industry norm. The Commission Staff acknowledged back in 2000 that the Moffatt Nichol study "may be an appropriate way to ascertain the project's consistency with LCP standards regarding natural hazards." (May 22, 1998 letter to Sand City from Commission; see also previous Staff Report.)

### C. Staff's Inflexible and Overly Rigid Interpretation of Sand City's LCP Is Contrary to Planning Law and the Coastal Act.

In numerous places in the Staff Report, Staff has taken extreme positions in interpreting the MBSE Project's compliance or noncompliance with the LCP. However, since the LCP is part of the General Plan for the City of Sand City, compliance with the LCP does not require "perfect" conformance as the Staff demands here, but rather "substantial" compliance. Thus many of Staff's conclusions are extreme, not in conformity with California planning law, the LCP or the Coastal Act, and should be rejected.

A "project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." (Corona-Norco Unified Sch. Dist. v. City of Corona (1993).) In applying this standard, California courts have been very clear that perfect conformity is not required. (Endangered Habitats League, Inc. v. County of Orange (2005); Families Unafraid to Uphold Rural etc. County v. Board of Supervisors (1998).) "[A] finding of consistency requires only that the proposed project be compatible with the objectives, policies, general land uses, and programs specified in the applicable plan. The courts have interpreted this provision as requiring that a project be in agreement or harmony with the

terms of the applicable plan, not in rigid conformity with every detail thereof. (San Franciscans Upholding the Downtown Plan v. City & County of San Francisco (2002).)

Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes. General plans have goals and policies relating to disparate issues, and most projects involve trade-offs among them. The plan's attempts to address competing interests does not equate to "inconsistency." A given project need not be in perfect conformity with each and every general plan policy. Specifically, the LCP promotes the *balancing of resources* approach, while Staff completely ignores that fact and policy.

In fact, California courts have held that it is nearly, if not absolutely, impossible for a project to be in perfect conformity with each and every policy set forth in the applicable plan. An agency, therefore, has the discretion to approve a plan even though the plan is not consistent with all of a . . . plan's policies. It is enough that the proposed project will be compatible with the objectives, policies, general land uses and programs specified in the applicable plan. (Sequoyah Hills Homeowners Assn. v. City of Oakland (1993); and San Franciscans Upholding the Downtown Plan v. City & County of San Francisco (2002).)

Staff here appears to be insisting on "perfect conformity" (with their views, not the Court mandated LCP Standards) even when various elements of the LCP conflict in application to the MBSE Project and balancing under the Coastal Act is obviously called for.

#### D. The Commission/Staff Has Interpreted the Sand City LCP Standards Differently Even From When It First Considered SNG's Application in 2000.

Staff has not interpreted the Sand City LCP in the same way when compared to its interpretation in 2000 when the Commission first denied SNG's CDP. For example, the water issue analyzed in 2000, specifically referred to the lack of groundwater to serve this project. The Adjudication decision, which is not under appeal,<sup>7</sup> conclusively establishes that this project has a paramount right to groundwater and that its use does not create any overdraft and conclusively establishes wheeling of the water (i.e. the movement of pumping from one water right holder to another). The Commission has not explained or provided any understandable reasoning for shifts in its position. Another example, is that the alternative which was analyzed in 2000 included a larger footprint and more grading and alteration of the dunes. Yet the issue of modification of land forms was not discussed as an impediment to project design. Now staff appears to have changed its position, on a much smaller project concluding, erroneously, that no alteration of landforms may occur. If there was not a problem with the 2000 project then, there should be absolutely no problem with the much smaller project. To the extent that the Staff

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<sup>7</sup> The Adjudication Decision, as opposed to the *post Judgment order of the superior court*, is beyond challenge.

raises issues now that could have been raised in its earlier Staff Report, but were not, the issues are waived.

#### E. Staff Bias

Staff has evidenced a bias against the MBSE Project and the Applicant and as such Applicant cannot get a fair hearing. In addition, in such circumstances, the Commission should not benefit from deference to agency action.

#### F. Over Reliance on General Studies Rather than Applicant's Site Specific Analyses

Staff repeatedly ignores the Applicant's site specific analysis in favor of more general studies that don't take the site conditions into consideration. Examples are included throughout this submission.

### **II. Specific Issues Regarding Commission Staff Report**

The Applicant finds it impossible and infeasible to address point-by-point every comment made by Staff, given the time constraint imposed on the Applicant by Staff. An effort is made to address the salient key issues. However, given that Staff relies heavily on newly created "constraints" and interpretations that are not part of the Commission certified LCP, the Applicant finds that Staff's Report is not consistent with the LCP and that Staff is wrong in its conclusions.

### **WATER AVAILABILITY**

The Staff report is one-sided and biased in several respects. First, staff relies only upon *arguments and documents, which are pending judicial review*, in a legal brief to make "factual assertions" regarding the water supply for the project. For example, staff concludes there is no water available, yet ignores that the Coastal Commission itself approved a 300 acre foot per year desalination plant within the City of Sand City (a new water supply and establishes Sand City as the *only* Peninsula jurisdiction who make NO demand on the Carmel River and is thus unaffected by the connection moratorium in the CDO). Yet the Applicant has 149 ac-ft that can be pumped today from the Seaside Basin. Staff erroneously states that this property is not within the Cal Am service area and thereby cannot be served by Cal Am. In fact, the annexation of the site to the Cal-Am service area is pending with the PUC, and the MPWMD has already approved annexation of the site into the Cal-Am service area when it approved the Sand City desalination plant. Staff erroneously misinterprets the statements made by Cal Am in the context of the Water Management District hearings to say they could not comply. Staff erroneously ignores the Adjudication decision regarding the use of on-site wells to serve this property, instead concluding that such action would be inconsistent with LCP 4.3.27. Staff ignores that such studies were done and adopted by the Court in the adjudication decision concluding and adjudicating water use within the basin. Staff ignores the provisions of

the LCP which specifically requires the MPWMD to provide replacement water for this property should the property wells become unusable due to salt water intrusion. (See Appendix F) Staff further ignores that an additional source of water is available within Sand City to provide a back-up water supply. Staff has been provided with an Agreement between Cal Am and the applicant to “Front Load” the pumping from the Seaside Basin so as to clarify there is no impact on the Carmel River. Yet this document, which was provided to the Monterey Peninsula Water Management District in May (and as a corollary provided to the Court of Appeal during the briefing process) is not mentioned. Staff apparently obtained information from the District regarding its reply brief but not other documents held in its files.

Second, Coastal Staff is misinterpreting the Sand City LCP which merely requires “water availability.” The LCP does not require the water distribution permit to be issued before the Commission may consider or approve the CDP. Coastal staff has rejected Sand City’s interpretation of its LCP without any, much less sufficient, justification. Conditional approval is the typical way to address this circumstance and is reasonable here in light of the Monterey Court’s adjudication of the Seaside Basin and imposition of a physical solution. In fact, the Applicant proposed several conditions designed to address these issues, which staff has ignored. Thus, the Staff’s refusal to allow a conditional approval is clearly unreasonable and not supported by substantial evidence. Indeed, the insistence on a ministerial water distribution system permit before Coastal consideration, ignores the Monterey Court’s jurisdiction over Seaside Basin environmental issues. Coastal Staff is not recognizing the reduced role that the Water District now plays in managing the Seaside Basin. Provisions of the Sand City LCP that conflict with the Seaside Basin adjudication and physical solution (and watermaster powers) are preempted by the Monterey Court and cannot be applied.

Staff’s water analysis is further flawed. Coastal staff applies the wrong standards for interpretation of consistency with the LCP provisions which is to ensure a reliable water supply. In several places, staff relies upon decidedly outdated information and reports, such as the Feeney Report of 2005, despite the fact that the Monterey Superior Court has made factual findings and resolved any conflicting scientific evidence related to the Seaside Basin. Staff also inaccurately describes the background setting, mischaracterizes the public utility by referring to California American as a “private purveyor” when in fact, California American Water is heavily regulated by the California Public Utilities Commission. Staff likewise misapplies LCP provision 4.3.27 which pertains only to private wells and not public purveyors such as Cal Am<sup>8</sup>. Likewise, staff erroneously concludes that because Cal Am endorses the Applicant’s application it cannot be said to comply with LCP policy 4.3.27 regarding impact on Cal Am customers. Staff further erroneously tries to justify its action by concluding that “Cal Am is not a regulatory agency charged with protecting water resource or the general public interest.”<sup>9</sup> However, Cal Am is regulated by the Public Utilities Commission which is charged with, among other things, protecting the “public interest” in water.

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<sup>8</sup> See page 14 Staff report,

<sup>9</sup> See Page 23, Footnote 49

Staff likewise erroneously relies upon documents which have not yet survived judicial review thus making them not only unreliable but not substantial evidence. The bottom line is the only documents which are not under challenge: the Adjudication Decision of February 2007 and the Sand City desalination plant approval. The CDO (which has nothing to do with the SNG water, but was “introduced” contrary to Monterey Superior Court Decision against the MPWMD on April 29, 2009) has been stayed and is pending judicial review and Monterey Peninsula Water Management District denial of the water distribution permit (and the attendant post-Judgment order of remand) are pending judicial review (see Exhibit 5 as Attachment). The hearing in that matter is set for January 27, 2010. Staff’s analysis appears to speculate as to the predicted outcome of the Court Orders, or misrepresent the fact that Cal-Am has stated in writing that it will only pump Seaside Basin water for the Ecoresort project, or that the preference to have Cal-Am pump SNG’s water from inland wells was made by the MPWMD as an environmentally superior alternative to pumping from wells located on-site, an option the Applicant sought as part of its distribution permit application.. CCC staff must interpret and apply the LCP and IP policies and provisions to harmonize with the Court’s decision. Staff’s analysis is one-sided and not a fair and impartial review of the actual documents and facts which apply to this project in this jurisdiction. There is more than sufficient water within the jurisdiction of Sand City to provide water for this project. In fact, SNG can transfer, sale or lease its 149 ac-ft which it can pump today, without regard to the MPWMD or other unrelated Carmel River questions that Staff relies on, and do so by a mere Notice to the Watermaster. If fact, Staff appears to completely ignore the conclusions of the Watermaster, which is charged with the implementation of the groundwater management plan for the Seaside Basin, instead relying on the Water Management District. Staff’s review is one-sided, biased and with complete disregard of the legal system review and facts which demonstrate conclusively that water is available for the Monterey Bay Shores Ecoresort.

## **HAZARDS**

### **A. Project Economic Life**

Staff states that Applicant has not proposed either sufficient mitigation; or 2) redesign to alleviate hazards issues<sup>10</sup>. Staff then concludes by stating that it cannot come up with any conditions to resolve this “staff alleged” inconsistency and therefore renders the property unbuildable.<sup>11</sup> The Staff Report states that the Applicant has failed to provide a specific economic lifetime for the MBSE Project, and the lack of a lifetime leaves the Staff “unable to precisely determine the degree of setback required by the LCP.” . Staff interprets LUP Policy 4.3.5 (b) to require projects to provide a specific economic lifetime for analysis, and then proceeds to define the economic lifetime of the

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<sup>10</sup> Likewise, Staff erroneously asserts that Applicant has not proposed any mechanism which would require it to remove or relocate the building if it is threatened by hazards. To the contrary, Applicant proposed a condition of approval which would do exactly that.

<sup>11</sup> Staff report, Page 54

project without any input from the Applicant (p. 45). This is a misinterpretation of the LUP on the part of Staff in a manner that has specifically been forbidden by the First Appellate District Court. Security National Guaranty v. California Coastal Commission, (2008) 159 Cal.App.4<sup>th</sup> 402, 422. LUP Policy 4.3.5 (b) only requires that setbacks address “at least a 50-year economic life for [analyzed] project[s].” Therefore, so long as the Applicant has provided an analysis showing that its project contains sufficient setbacks to meet at least a 50-year project life, the Applicant complies with the LUP, and the Applicant’s submitted reports have done so for this application.<sup>12</sup> Any attempts by Staff to assign a specific project life to the MBSE Project beyond what the Applicant has identified consistent with LUP Policy 4.3.5 (b) are inconsistent with the language of the certified LCP, and barred. Security National Guaranty, *supra*, at 422. Staff suggests that the Applicant consider the economic life as “is as long as the time during which the development is not in danger” [page 31]. This is simply an absurd and convoluted statement that is patently false. In fact, the Applicant has provided setbacks that are the 75 year setbacks calculated by its consultants Bestor Engineers using the Haro Kasunich methodology (see Site Plan, Exhibit 4), and HKA as respected geotechnical consultants has opined that these setbacks have a conservative economic life of at least 70 years. The Projected economic life conservatively using global warming and safety factors provide for a “lower bound” of prediction and statistically can be relied upon with 95% probability of confidence level. The same setback, may in fact be good for 150 years or 200 years, if one looks at the other side of erosion rates and global warming predictions following the IPCC norm. SNG previously provided Staff with City reviewed Master Set of Conditions that included a condition that would relocate or remove structures if they are breached. That Master Set of Conditions is incorporated herein by reference as Exhibit 4.

#### B. Sea Level Rise

No section of the Sand City LUP requires CDP applicants to analyze sea level rise. Although sea level rise may be a factor in hydrologic and geomorphic analysis required certain sections of the LUP and IP, neither portion of the LCP requires an applicant to provide an analysis of sea level rise, and any attempt to do so would be a reinterpretation or attempted amendment of the requirements of the LCP, which is barred by the law of the case and the Court of Appeal decision. Security National Guaranty, *supra*, at 422.

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<sup>12</sup> Reports prepared by HKA on behalf of the Applicant and submitted to the Commission indicate that project setbacks are sufficient to protect the MBSE Project for at least 50 years and as much as 75 years (based on conservative assumptions), thus exceeding the LCP requirements. After that point, the project Applicant has indicated that if the project becomes threatened by erosion the threatened portions would be removed. This discussion fully satisfies the LUP requirements.

At the Commission's request, the Applicant provided a range of sea level rise estimates for a 50-year time horizon,<sup>13</sup> which can be used in the calculus necessary to determine safety setbacks that comply with the requirements of LUP Policy 4.3.5 (b).

Staff insists on using assumptions that are not supported by good science. See the attached letter by Haro Kasunich & Associates dated December 4, 2009 which concludes the faulty arguments of Staff and its foundation, which also addresses the issues described below (Exhibit 6). SNG submitted in its May 4<sup>th</sup> letter as part of this packet information from the Intergovernmental Panel on Climate Change (IPCC)—the IPCC Fourth Assessment Report's Working Group. It projects sea level rise 7-23" in next 100 years. IPCC received Nobel Prize for their work. By comparison, the Staff suggests 59 inches. The average IPCC projections to 2100 are 17", with a maximum of 23 inches. IPCC is considered very conservative, i.e., it assumes worse case. Thus, Coastal Staff insists on using assumptions that exceed IPCC's maximum numbers by 256% and exceed IPCC's average number by 350%. That is unrealistic, not supported by science and not required by the LCP. In fact, for various scenarios of future energy use, Staff admits that published sea level rise tables actually anticipate *less* rise in sea level by 2050 and 2100 than that predicted by the 2001 IPCC Report. (page 36). Just this week China and India announced reductions by 2020 of carbon emissions by as much as 42%, which will help reduce sea level rise dramatically.

### C. Tsunami

In compliance with LUP Policy 4.3.7, the Applicant provided the Commission with a study of tsunami run-up elevation prepared by HKA 2/3/2009) citing Dr. Warren Thompson. The Staff Report states that "it does not appear that the 1984 [report] remains current and up to date (sic), nor can be used as a baseline from which to measure consistency with the LCP tsunami requirements." . Staff's basis for this assertion is simply speculation, not substantial evidence. To wit, Staff indicates that unspecified "increased awareness of a large tsunamigenic source of the California Coast" and "improved understanding of landslide generated tsunamis" render the 1984 Thompson Report out-of-date, and attempt blatant fear-mongering by alleging a comparison of this site with the 2004 Indian Ocean tsunami disaster. Nothing in the superficial Staff Report discussion analyzes the inputs or information discussed in the HKA letter, nor does the Staff Report point to any specific portions of the Thompson Report. The Staff Report simply speculates that because the Thompson Report was prepared in 1984, it must be out-of-date. Unless Staff can point to something more concrete, this speculative discussion does not rise to the level of substantial evidence necessary to demonstrate that the report prepared and provided by the Applicant is insufficient. Bixby v. Pierno (1971) (courts examine whether the agency's findings are supported by substantial evidence in light of the whole record).

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<sup>13</sup> Letter to E. Ghandour from HKA Engineers, 03 February 2009.

The sole quantitative data the Staff Report does cite are draft maps prepared by the California Emergency Management Agency. According to the Staff Report, these maps “should be released for review by the County sometime in 2009,” but conveniently “Commission staff has had the opportunity to review draft maps *for other parts of the State.*” Now, based on publicly unavailable draft maps not specifically relevant to this site, the Staff Report predicts that tsunami inundation zones for Sand City will be significantly higher than those based on the HKA/Thompson Report conclusions.

The problems with this speculative conclusion are as obvious as they are manifold. The Staff Report bases its refutation of the HKA/Thompson Report on draft maps not yet available to the public or the applicant,<sup>14</sup>. None of these maps have been finalized as to any part of the California coastline, and specifically have not even been created for the portion of the coast where the MBSE Project is to be located. Instead, the Staff Report extrapolates from draft maps of other parts of the coast to conclude that the HKA conclusions underestimate tsunami inundation zone for the MBSE Project site. The Pacific Institute maps, which are merely informational, uses the artificially created Sand Mining pit to anchor its erosion predictions for year 2100 on the site as is evidenced by the sharp turn eastward in the 2100 erosion line, when in fact, that pit when reclaimed [a reclamation plan has been previously been approved by the Commission and is part of the record] under the project grading would return the erosion line for the year 2100 toward the sea in line with the South East area of the site. In this case, all setbacks provided by the Applicant would be well east of that erosion line. The maps are not intended for hazard planning, yet Staff attempts erroneously to make their point that a “large part” of the site may be affected in order to beef up its argument as it does in speculating on future sea-level rise calling it “mathematical extrapolation”. Such methodology is unscientific and false to say the least.

It is arbitrary and capricious and contrary to law for the Commission to find that the Applicant's project is inconsistent with the policies of the LUP based on speculative information, when more specific evidence in the administrative record exists, which demonstrates that the Project provides an adequate margin of safety to comply with LUP polices. As indicated above, Staff has applied different standards to the MBSE. As another example, in August 2008, the Commission approved Application No. 3-08-013 for the Ocean View Plaza in Monterey (on Cannery Row, 2 miles across the Bay from MBSE, and located on Bay waters). That project actually sits in the 100 coastal flood zone, with wave run-up to 31 feet NGVD, and in the tsunami zone.

Lastly, the Staff Report states “removal of fore dune crests as is proposed with the project would worsen the potential [tsunami inundation] risk.” . The fore dune crests on the project site are proposed to be recontoured to comply with FEMA 100 year food zone and to establish nesting habitat for the federally threatened western snowy plover, as discussed in the project's Habitat Protection Plan, October 2008, by EMC Planning Group (Section 4), and the environmental review documentation for the Project. In

addition, higher bluff tops (with sand foundation) and sand dunes actually increase erosion risk in the models assessing wave run up.

The LCP requires restoration of dune or sensitive species habitat where possible, and this requirement must be balanced with the Commission's speculative (and wrong) assertion that recontouring these dune areas would exacerbate a hypothetical tsunami threat. Given that the existing evidence in the HKA (2008 and 2009) letters indicates that tsunami inundation is not a threat, and that the Commission has failed to produce any substantiated evidence to the contrary, the requirement to restore dune habitat in the fore dune area must be favored over the speculative threat of a potential tsunami inundation risk. Public Resources Code § 30007.5.

#### D. Wave Run-Up/Flooding

The Staff Report asserts that the MBSE Project application is inconsistent with LUP Policy 4.3.4 and IP Policy 2.2, both of which require applicants to site proposed development in a manner that minimizes flooding, among other things. The Staff Report states that analyses of potential flooding by wave run-up prepared and submitted by the Applicant are inadequate because they: (1) "look only at the expected run-up elevation on the existing dune slope (i.e. the pre-project condition) ; (2) although the MBSE Project would exceed 100-year-storm wave run-up projected by the Federal Emergency Management Agency for this area for the required 50-year span of the project, this is not sufficient in the eyes of the Commission to meet LCP requirements.

As to the first of the Staff Report's objections, their argument is flawed. SNG has submitted studies by HKA (1997-2009) and others that established a 50 years setback for a finished grade of 32 NGVD. The project's lowest living habitable floor elevations of the buildings are at 32 ft and totally conform to the wave run-up elevations, which range from 11ft to 31ft. Wave run-up is a function of topography, slope and other factors, and HKA and other geotechnical scientists and civil engineers, including Bestor Engineers, have demonstrated that wave run-up elevations inland of the bluff edge diminishes as the wave energy spreads laterally and the wave momentum dissipates inland. For the MBSE, that means at least 70 years before possible breaching under the conservative global warming and sea level rise assumptions incorporated by HKA.

As to the second objection, the Staff Report admits that they quibble with HKA's usage of 12 inches of sea level rise over the 50-year time horizon required by the LUP, citing a report hand-picked by Staff which indicates that sea level rise is expected to fall between 20 and 55 inches by 2100.<sup>15</sup> As the Staff Report acknowledges, the Rahmstorf

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<sup>15</sup> The Staff Report states that the report, *A Semi-Empirical Approach to Projecting Future Sea-Level Rise*, prepared by Dr. S. Rahmstorf, has "become the central reference point for much of recent sea level rise planning." Staff does not substantiate this statement (they point only to its use in a yet-to-be-finalized paper of the California Climate Action Team), and ignore the danger of using the conclusions of a single study as a basis for planning over 1,000 miles of diverse and varied coastal areas. Despite its asserted "central reference point," the Rahmstorf study was not cited a single time in the IPCC's 2007 Fourth Assessment Report, nor in probably the most voluminous recent governmental action regarding global climate change and sea level

Report concludes that sea level rise is not expected to occur in a linear fashion, but will be backloaded, i.e., sea levels will increase at a more rapid rate towards the end of the century, after the expected lifetime of this project. In fact, the 12-inch rise in sea level assumed by HKA in its wave run up studies is the average of the amounts expected by the Rahmstorf Report at or about the 50-year time horizon required by the LCP. HKA's use of the average predicted sea level rise from the Staff's chosen report is a reasonable approach to including sea level rise as a factor in wave run-up modeling, particularly since the Staff Report admits that "direction on sea level rise to coastal permit project applicants is in flux," and that there is "great uncertainty future concerning sea level".

More importantly, it is completely consistent with the requirements of the LCP, which simply require that flood risk be analyzed and minimized. Here and elsewhere, Staff attempts to reinterpret the provisions of the LCP to require that applicants eliminate the flood hazard from wave run-up posed by the most drastic or catastrophic predictions of sea level rise, even those analyses on the fringe of science. The LCP does not require this. It simply states "all developments shall be sited and designed to minimize risk from . . . flood . . . hazard . . ." based on at least a 50-year economic life for the project. LUP policies 4.3.4 and 4.3.5 (b). Staff's extreme interpretation of these sections is not consistent with the plain language of these sections or of the LCP in general, and is tantamount to impermissible amendment or revision of the LCP. Security National Guaranty, supra, at 422.

#### E. Slope Stability

The Staff Report states that the 2:1 setback from bluff toe designed into the MBSE Project is sound and offers a sufficiently conservative setback from the toe bluff, but the Report quibbles with the Applicant's analysis deriving the bluff toe because of what the Staff views as incorrect assumptions regarding shoreline erosion/retreat. As discussed further below, the Staff's critique is arbitrary and capricious as it is based on generalized, regional information and speculative assumptions regarding beach erosion, when existing reports and data indicate that erosion rates in this area are consistent and will likely remain consistent with the assumptions used by the Applicant in its beach erosion hazard analyses.

#### F. Shoreline Erosion/Retreat

The Applicant has prepared and submitted at the Staff's request several shoreline erosion and retreat studies for the MBSE Project site demonstrating that the MBSE Project as proposed retains adequate setback from bluff toe/mean high tide line to satisfy the safety requirements of the LUP policies 4.3.4, 4.3.5 and 4.3.12. These studies

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rise, the United States Fish and Wildlife Service's Endangered Species Act listing of the polar bear.

conclude that shoreline erosion would not threaten the project for at least 70 years (and even in this instance using more conservative erosion rates that have been observed on this site for more than ten years). Despite this conservative and site-specific approach, the Staff Report states that the Applicant's estimates of shoreline erosion are insufficient for two general reasons: (1) the studies' estimate of shoreline erosion are too low; (2) the studies "likely greatly underestimate the necessary safe bluff setback" if they underestimate future sea level rise.

With regard to sea level rise, our earlier discussion of the extreme position of the Staff Report applies here. The Applicant has chosen a reasonable estimate of sea level rise based on a review of the range of estimates, and has met the standard of the LCP. Staff appears to insist on the most radical and catastrophic estimates of sea level rise even though the LCP does not call for it. Staff approach is not supported by any formal Commission regulation or published policy, and is arbitrary and capricious.

In suggesting that the MBSE Project does not meet the requirements of the LUP, Staff impermissibly ignores site-specific data provided by the Applicant in favor of generalized information for the Sand City area. (Agency findings must be supported by substantial evidence in light of the whole record). As discussed by the Applicant's reports (attached, see, e.g. Haro, Kasunich and Associates to E., Ghandour dated 28 Sept 2008), erosion rates at the site since the cessation of sand mining in 1984 have dropped from rates of ~6'/year in the historic sand mining era to *no net erosion* in the post-mining era. In fact, a study cited by the Staff Report and in which the Commission participated in preparing, indicates that the MBSE Project area is within a *null zone*, that is an area of shoreline accretion. See Coastal Regional Sediment Management Plan for South Monterey Bay (2007), by Phillip Williams and Associates (available online and incorporated herein by this reference). Because of this, the Coastal Regional Sediment Management Plan (CRSMP) quite rightly does not include the MBSE Project site a Critical Areas of Erosion. Despite this current, site-specific evidence of minimal erosion threat and actual shoreline accretion in the MBSE Project area, the Applicant used a conservative 2.4 foot annual erosion rate together with other conservative buffers and assumptions (additional) in locating the MBSE Project footprint well outside the 50-year setback requirement set out in the LUP. This is certainly consistent with the requirements of the LUP as written.

The Staff Report ignores this site specific information, and instead sums up its critique of the Applicant's shoreline erosion conclusions by stating, "probably the best site-specific data available are those reported in Thornton et al.<sup>16</sup> (2006) and Hapke and Reid (2007).<sup>17</sup>" (p. 44). Neither of these reports provide site-specific data for the MBSE

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<sup>16</sup> In fact, the author of the Thornton Report is a vocal critic of development in the Monterey Bay area and there is no indication in the record that this report has been peer-reviewed to eliminate possible bias in the preparation of the report.

<sup>17</sup> It is noteworthy that Thornton is a vocal opponent of the Project and has been for quite some time.

Project site, but instead use data to the north and south of the site. Staff may not ignore more appropriate and specific information in the administrative record in favor of general information. The more accurate data from the HKA Reports and the CRSMP should be used in this instance, and if they are used, Staff's objection (that the MBSE Project does not meet safety setback requirements in the LUP) fails.

The Staff Report goes on to calculate recommended safety setbacks for several retreat rates set out in the Thornton Report, the historic mining era retreat rate, an average of the mining era retreat rate and the post-mining retreat rate as measured by that report. Obviously, historic retreat rates are not applicable, as sand mining at the MBSE Project site significantly increased erosion rates in comparison to post-mining conditions. As for the average retreat rate identified in the Staff Report, the methodology is unsound and the average rate should be ignored. This is because the average rate uses the historic, mining era rate that was substantially increased by mining activities on site, and averages that rate with the current, post-mining rate without weighting or otherwise compensating for the current absence of mining. Lastly, although the post-mining retreat rate of 2.6 feet/year is closer to the conservative estimate used by the Applicant's reports, this rate is not the most accurate for the MBSE Project site because it is taken from a data point north of the Project site, closer to the last remaining sand mine in the area (the Marina dredge pond mine, ). Thus, all three general, estimated rates of erosion used in the Staff Report are not more accurate than data collected for the MBSE Project site itself by the Applicant's consultants, and cannot be used to the exclusion of the Applicant's more accurate data.

Lastly, the Staff Report is incorrect in positing that low, post-mining erosion rates identified in the Thornton Report should be adjusted upward due to mining upcoast, at the Marina dredge pond site, even though Thornton acknowledges reduction in bluff retreat. (p. 45). The Staff Report states that potential effects of the Marina dredge mine "would not have been captured by the [Thornton Report] for the [post-mining period] of 1984 to 2004; this time period could represent an aberrant lull in the effects of sand mining on the San City shoreline." . However, the CRSMP, which the Staff Report cites as the basis for this assertion, contradicts this position. The first and most obvious bar to this argument is that the CRSMP determined the MBSE Project site sits within a null zone, and currently experiences accretion, not erosion. Secondly, according to the CRSMP, the volume of sand mining in the Plan area has decreased from 350,000 to 200,000 cubic yards/year. The Marina mine has been operating continuously since the closure of mining at the MBSE Project site (CRSMP p. E-7) and nevertheless, erosion rates have dropped dramatically at the site. If the Marina mine were affecting the MBSE Project site, it would have been observed in the existing data. In fact, the CRSMP states, "Erosion rates at **Marina** increased after 1985, and are believed to be related to an increase in sand extraction at the Marina sand mine in the mid 1980s, 1990s, and 21st century. Erosion rates at **Sand City decreased** after 1985, and are believed to be related to closure of drag-line mining at three sites at Sand City between 1970 and 1990." Id.

The evidence in the record at this time demonstrates that low, post-mining erosion rates in the Sand City area are stable and not subject to increase by mining upcoast at the Marina site, contrary to assertions in the Staff Report.

#### G. Additional Concerns with Staff Analysis

The project MBSE is sited landward of the 75 years setback line as determined by Haro Kasunich and Associates (HKA) and Bestor Engineers, and is based on using very conservative, above average sea-level rise, erosion rates, wave run-up and tsunami run-up zones with a sound scientific methodology and foundation. The economic life for the project exceeds the 50 years referred to in LCP Policy 4.3.5(b) and has been noted, exceeds the 70 years period. HKA uses the methodology reported initially in their Coastal Recession Evaluation for Coastline of Sand City, California (December 2003), adjusted further for higher sea level rise and the "Bruun calculations" for bluff edge positions, then adding a "safety factor" of 32 feet. It is noteworthy that the only Sand City adopted erosion setback methodology is the Moffatt & Nichol Study, Sand City Resolution No. SC-21 (1990), which is the LCP standard for Sand City. Nonetheless, HKA used significantly more conservative approach and updated the calculations with aggressive global warming sea level rise assumptions. We are available to discuss with staff any concerns that they may have about SNG's analysis as we believe Staff is wrong.

The Staff Report notes that the "greatest" sea level rise projections should be used now for the MBSE. Those projections represent statistical "outliers," meaning, they are typically ignored by the scientific community and the conclusions derived there from are erroneous and mis-represent the consensus thinking of the scientific community (that does not accept "dooms-day" scenarios). The scientific community accepts the IPCC (2007) projections by year 2099 of sea level rise under numerous scenarios from liberal to conservative as being the best projections, namely, 20 cm to 43cm (7.1 inches to 20.1 inches). They received the Nobel Prize in 2007 for their Climate Change work. The coastal staff rejects their projections and instead go to 140 cm (55 inches) by 2100 based on purely speculative reasoning, some 325% increase, and requesting that we analyze for the MBSE setbacks based on extreme unrealistic 15mm/year, or 150 cm (59 inches) sea level rise. Staff's analysis is flawed. The scientific community accepts the fact that sea level rise over the next 100 years will rise in an exponential manner, namely, the rise will be back loaded such that in the first 50 years, roughly a third of the rise will occur, while the latter 50 years will see two-thirds of the rise. That means, even if you used the coastal staff outlandish assumptions, then the first 50 years seal level analysis should be based on no more than 50 cm sea level rise, or 19.68 inches. Coastal staff has chosen to use different standards for the MBSE and go beyond that by seeking assumptions for MBSE that are greater by over 250% than those accepted by them just in the previous year, which lead to flawed recession rates and setbacks. It is important to note that on 11/16/07, the Commission approved in a consent calendar Application No. 3-07-022 for the Monterey Beach Hotel Seawall (about 1.5 miles to south of MBSE), in which HKA

used in their analysis 2.5 ft/year as recession rate. That analysis was not challenged by staff, yet for the MBSE staff seeks recession rates of 6.4 ft/yr. in order to "kill" the MBS Ecoresort project. Likewise, to the north of the MBSE (about 1 mile), the Commission approved the State Parks paved parking area which sits practically on the Bluff top, without apparent concern for erosion, wave run-up or tsunamis (Application No. 3-06-069, Hearing Date 3/14/07). In August 2008, the Commission approved Application No. 3-08-013 for the Ocean View Plaza in Monterey (on Cannery Row, 2 miles across the Bay from MBSE), wherein it sits in the 100-year coastal flooding zone with wave run-up to 31 ft NGVD that will strike and breach the structures. The HKA calculations to determine setbacks and wave run-up for the MBSE were far more conservative than those 3 projects above; yet, staff is recommending 325% increase in sea level and 256% increase in recession rates for the MBSE? Those cannot apply to the MBSE because (i) those are not the LCP standards for this site, and (ii) they are extreme and unfounded scientifically. Even the well regarded PWA report (11/3/2008) Coastal Regional Sediment Management Plan for Southern Monterey Bay, adopted by AMBAG, on which coastal staff worked (as did Ed Thornton who now suggests for the MBSE a 256% increase just a few months later), suggests that the MBSE setbacks could have an economic life of 170 years or more (MBSE engineers have provided a range of 70-300), and that the MBSE site is located in a "null zone" where sediment transport is neutralized, resulting in accretion. In fact, over the past 16 years, Bestor Engineers has documented that the MBSE shoreline has accretion and no change to bluff top was detected. Coastal staff point to the Pacific Institute report, but fails to point to the fact that the MBSE site is one of only few in the Monterey Bay that is not impacted by sea level rise scenarios of Coastal Base Flood plus the 55 inches (1.4m) sea level rise. In fact, once the sand-mining pit is graded, the building setbacks for the MBSE will all be located landward of the erosion high hazard zone in 2100! MBSE is a green Ecoresort, and as such, we believe that if at some distant point in the future the buildings will be breached, that they will either be relocated or removed (no seawalls).

Further concerns regarding the Staff Report are contained in the May 1, 2009 and December 4, 2009 (Exhibit 6 attached) Haro Kasunich & Associates letter submitted herewith and incorporated herein by reference.

## TAKINGS WITHOUT JUST COMPENSATION

### A. SNG Asks the Commission to Exercise Whatever Power It Has Under PRC § 30010

SNG has provided with this letter, expert opinion as to the minimum economically feasible project which could be built on this property assuming that all of the Staff's positions [including all that are not permitted by law and the Decision, Security National Guaranty, supra, at 422] were correct and what could actually be placed on the property. The overriding conclusion is that by imposition of some or all constraints by staff [valid and artificial], *effectively no economically viable project can be built on the site.* No

building envelope can be provided that will not violate any or all the constraints imposed by the Commission staff.<sup>18</sup> As discussed above, and without waiving those arguments, imposition of those findings would impose a taking of this property. The Commission itself has previously determined that in order for a resort to be economically feasible, it must contain 375 units. Sand City conducted its own economic analysis (McGill et al 1998) as part of its extensive environmental and CEQA review and they concluded that going much smaller than 495 units will jeopardize the economic viability of the MBS project. This last analysis was done for the prior City approved project.

As an example of the strict limitations placed by the Commission on the Applicant's site with many and numerous "artificial created constraints" that are not part of the certified LCP and are in violation of the Court's Decision and Writ against the Commission (in excess of 50), we'll use only 4 "moderate" constraints imposed by the Commission to illustrate that by overlaying these constraints on the site plan of the MBSE, it conclusively leads to an unbuildable development envelop, and hence, interferes with a reasonable investment-backed expectations, rendering the site unbuildable. If you add the many additional created "artificial constraints" imposed by the Commission, nothing whatsoever could be built on the site. It appears, the actual intention of Commission staff is to burden the site with constraints beyond the certified LCP and *render the site unbuildable as open space*, and connect it to the Fort Ord Dunes State Park system since the southern part of the Park has no access point. In doing so, the Commission once again is side stepping the Decision and Court Order and Writ and the Sand City LCP and the Applicant's fair due process.

Constraint 1: Hazards 75 years, 6.4ft/yr:Set back from Coastal Bluff 603 feet

Constraint 2&3: Dune landform alterations, views from Fort Ord Dunes State Park.

Constraint 4: Natural Resources, Monterey Spineflower, Limit development to southwest of where Spineflower is located.

See attached overlay results Exhibit "1" "made part hereof. Even though we chose only "moderate" constraints, no development envelop is possible except a "tiny" rectangular strip piece along the easterly boundary, which would alter views and hence cannot be consistent with LCP as asserted by Commission Staff Report.<sup>19</sup> Exhibit 2 shows clearly that with the Staff's preferred Setback of 100 years , nothing could be built with this one only constraint. In fact, if that setback was applied south towards Monterey, an entire section of Sand City and Monterey would be within the erosion zone and not allowed, including Highway 1. See Exhibit 3. If you included the additional numerous new

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<sup>18</sup> Staff alludes to a "smaller" less intense project, but never discusses what that could possibly be. Given all the constraints staff has erroneously overlaid on the site, it is no wonder that even Staff cannot articulate what could be approvable on the site. Staff has created an "over-constrained" site with no possible building envelope.

<sup>19</sup> Even though staff appears to suggest that a "smaller less intense" development could possibly be sited and approved, it makes no evaluation of that alternative to the proposed project. Every CEQA EIR document is required to include an alternatives analysis. Every responsible agency is required to consider alternatives within its jurisdictional area to address impacts. Neither has been done here.

constraints (non LCP consistent) introduced by Staff, absolutely nothing could be built on the site, not even a small single family house.

To obfuscate the issues, the Commission is clearly putting itself in the position of saying that *irrespective* of the water connection permit [marginalizing the water connection which prior to today was the most significant issue] , whether a permit is issued or not, the site is so constrained that it is not buildable, suitable only for open space.

Public Resources Code § 30010 states that the Coastal Act does not authorize the Commission "to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor." Previously in the history of the above-referenced project, the Commission's counsel has asserted the position in pleadings filed with the courts that § 30010 allows the Coastal Commission to ignore or override coastal policies, which otherwise would prevent approval of a project, as necessary to avoid a taking of an applicant's property.

SNG has contended that the Coastal Commission is not constitutionally empowered to decide whether its own actions constitute a taking. Without waiving that position and reserving all rights with respect thereto, SNG asks the Commission to exercise what power it has under § 30010 to approve SNG's project.

"The state and federal Constitutions prohibit government from taking private property for public use without just compensation." (Kavanau v. Santa Monica Rent Control Bd. (1997); Cal. Const., art. I, § 19; U.S. Const., 5th Amend; Chicago Burlington Q.R. Co. v. Chicago (1897) [applying the federal takings clause to the states].) It is settled that a land-use regulation constitutes a taking that requires compensation if its application denies an owner economically viable use of his land. (Palazzolo v. Rhode Island (2001); NJD, Ltd. v. City of San Dimas (2003); Lucas v. South Carolina Coastal Council (1992) [denial of permit caused a taking]; Nollan v. California Coastal Commission (1987) [permit condition lacking nexus to legitimate state interest caused a taking]; Dolan v. City of Tigard (1994) [permit condition lacking rough proportionality to expected impacts of project caused a taking].)

In Palazzolo v. Rhode Island, the United States Supreme Court recently summarized the guidelines to be followed by "courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications ... that a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the *Takings Clause*. [Citations.] Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. [Citation.] These inquiries are informed by the purpose of the *Takings Clause*, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' [Citation.]"

In enacting the Coastal Act, the Legislature anticipated that the application of development restrictions to deny a coastal development permit could deprive a property owner of the beneficial use of his or her land and thereby cause an unconstitutional taking. (4 Manaster & Selmi, Cal. Environmental Law and Land Use Practice (2004) Coastal Zone Regulation, § 66.57, pp. 93-96 (4 Manaster & Selmi).) Consequently, the Legislature enacted § 30010 which provides, in relevant part, "The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor."

The Commission has asserted in other court cases that § 30010 generally authorizes projects where doing so is necessary to avoid an unconstitutional taking. Thus, where a restriction would require the denial of a permit, and the denial would, in turn, deprive an owner the economic benefit or productive use of his or her land, the Commission theoretically has two options: deny the permit and pay just compensation; or grant the permit with conditions that mitigate the impacts that limitations were design to prevent. However, because, as one commentator has observed, "the Commission is not authorized to purchase property, it has instead determined to limit application of the resource protection policies to the extent necessary to allow a property owner a constitutionally reasonable economic use of his or her property." (4 Manaster & Selmi, *supra*, § 66.57, p. 96, fn. omitted.)

Whether the owner has been denied substantially all economically viable use of the property is a factual inquiry that requires the analysis of such factors as the economic impact of the regulation, interference with the landowner's reasonable, investment-backed expectations and the character of the government action. (Buckley v. California Coastal Com'n (1998); Keystone Bituminous Coal Assn. v. DeBenedictis (1987); Kaiser Aetna v. United States (1979).)

SNG purchased its property with the expectation of developing it along the lines of the original 495 units City approved project (See Ghandour Declaration submitted herewith.). After 2000 Commission denial, it reduced it further to almost 50% of the 650 units allowed on the site. The April 1996 MOU Accord, which the Commission sanctioned when it approved unanimously LCP Amendment 1-93 (which incorporates the MOU) allows for 650 units on the site and designated this site as one of only two, and the larger one at that, to be developed in Sand City, with over 80% of the City coastline set as open space. Clearly, Commission Staff feels it can "take" the entire City coastline, violate the MOU and the LCP and Court's Decision and set the whole coast as "open space". SNG's expectation was reasonable. Its investment was substantial. The proposed development, reduced substantially, is commensurate with SNG's reasonable investment-backed expectations for the site. (4 Manaster & Selmi, *supra*, § 66.57, p. 96.) Denial of a permit would deprive SNG of economic benefit or productive use of its property and constitute a taking.

Denial of SNG's requested permit would result in a finding that the owner has been deprived of all beneficial use of the property, a result that the Coastal Commission must avoid under the Coastal Act. Two conditions of note are the Commission's coastal hazards analysis and its claim that the entire site is dune habitat. In fact, the Executive Director of the Commission specifically stated to the Applicant (after the Appellate Court Decision, January 25, 2008) that he views the dunes as ESHA, in clear violation of the Decision and Writ Order against the Commission. To avoid a taking, the Commission must relax the restrictions and remove "created constraints" identified in the Staff Report that make the project infeasible or impossible to build and instead approve the Project with conditions that mitigate impacts to the extent possible. If the Commission declines to do so, SNG asks for written findings to support its decision. (§ 30604(a)-(c.); Regs., § 13096(a).)

SNG has also asked (previously and now) the Commission's legal counsel for an explanation of the processing of this request since it is not addressed in Commission regulations. To date, no explanation has been received.

### **VISUAL RESOURCES**

The Staff Report misinterprets several provisions of the LCP regarding coastal visual resources, essentially attempting to amend, unlawfully, these provisions to create an absolute prohibition against alteration of coastal dunes and views. In fact, the Writ requires that the LCP Standards in effect of the time of the original project be applied here. When the Sand City LCP was certified by the Commission, mining was active on the site and cranes were visible from Highway 1. Staff Report states "existing dunes must be protected . . . [and] the intent of the LCP is to protect existing dunes." However, the LCP sections the Staff Report cites for these assertions say nothing of the sort. In fact, one of the premises of the LCP is "balancing coastal resources", something that the MBS Ecoresort has done. For example, providing vertical and lateral access (none available now) or creating vista point to enhance the visual experience of the public. Providing dune restoration and stabilization in conjunction with habitat restoration activity, which is consistent with protection of natural resources and land forms under LUP policy 4.3.20. Of the sections identified in the Staff Report as "requiring that existing dunes must be protected," not one contains such a statement. Although the LCP policies on Coastal Visual Resources certainly encourage the restoration of dunes and usage of natural and manmade dunes to protect and complement existing visual resources in the Plan area, the Staff Report's extreme and unsupported interpretation of these LCP provisions are not supported by the text of the LCP and are flatly impermissible.

Similarly, the Staff Report impermissibly ignores the clear language of the LUP that states the MBSE Project site and other areas of the Sand City shoreline are not in a natural condition but instead are manmade features consisting mainly of denuded shifting sands in a condition remnant from mining activities in the area. Friends of Lagoon

Valley v. City of Vacaville (2007) (the primary method for construing a statute is giving words their ordinary commonsense meaning). Specifically, LUP Policy 4.2.2, which the Staff Report cites, repeatedly and explicitly states that unprotected shoreline areas of the City, including the northern part of the City where the MBSE Project is located, “are not in a natural condition.” LUP Policy 4.2.4 states “the dunes west of Highway One are in a *severely disturbed state* [and d]ue to human uses over time, the original dune landform in this area is generally absent.” Both of these sections clearly and plainly state that no natural dune landforms exist, neither generally in unprotected areas of the Sand City shoreline, nor in particular at the MBSE Project site. Staff’s interpretation of “regenerative” processes to recreate these landforms is totally wrong, not grounded in science and not applicable here.

Nonetheless, the Staff Report states “the Commission does not agree,” and attempts a tortured argument that subverts the LCP’s clear language by: discounting the language of the LCP because of its age; using verbal tricks to suggest that references to “dune restoration” elsewhere in the LCP, instead of “dune creation,” indicates the LCP does not mean what it says; using unsubstantiated allegory that “much has been learned regarding dunes since the LCP polices were certified,” as if extrinsic evidence gained at a later time were at all relevant to the interpretation of the LCP’s language. Lastly, the Staff Report simply, baldly asserts, “it [the LCP] should not be read to say that the City’s dunes are not natural landforms, because of course they are.” On this basis, together with an unelaborated reference to the “rest of the plain language of the LCP,” the Staff Report asserts that the LCP “clearly recognize dunes as natural landforms features to be protected.”

The plain language of a statute or regulation is given extreme deference (Friends of Lagoon Valley), and in this case, the language clearly states “original landform absent,” and “not in a natural condition.” Contrary to the Staff Report’s tortured interpretation of the language, i.e., that “not natural” actually means “natural” and “severely disturbed” actually means “protected natural resource,” the language of LUP Policy 4.2.4 clearly indicates that the City anticipated the argument the Staff is now making, and explicitly inserted language in the LUP indicating the lack of natural landforms in the altered shoreline west of Highway One, so as not to run afoul of Coastal Act § 30253(b). The Commission’s attempt to alter the plain language of this certified LCP is arbitrary, and tantamount to amending the provisions of the LCP, which the Commission is not permitted to do in these proceedings. The existing LCP contradicts all of the Staff Report’s descriptions of the site, characterization of the site as natural, important, significant, part of a littoral cell or regional dune complex, and is therefore impermissible and cannot be allowed. All of this violates the direction given by the Court of Appeal in this case.

Despite the impermissible nature of its interpretation of the LCP, the Staff Report applies the interpretation in several instances to assert that the MBSE Project is inconsistent with the LCP. The Staff Report states that grading of the dune restoration area on the Project site identified in Figure 9 of the LUP “is only allowed for purposes of dune habitat restoration . . . [and] must be kept in open space.” No section of the LUP

contains such a statement, and particularly, the LUP Policies cited by the Staff Report, Policies 5.3.1 and 5.3.2 do not contain such requirements.

Similarly, the Staff Report states that grading of the fore dunes on the Project site is inconsistent with LUP policies that require protection of natural and visual resources, despite the fact that the LCP has already unequivocally stated that these areas are not natural. In addition, the views which the Staff Report emphasizes are important in this area – views of the Bay and Monterey peninsula – are not altered by the proposed fore dune restoration. Thus, although the Staff Report asserts that views will be impermissibly impacted by the restoration of the fore dune area, there is no factual basis for this assertion. Furthermore, the Project complies with the Policy of restoring dune habitat in the fore dune area, and this must be favored over nonexistent threats to views in the area. Public Resources Code § 30007.5.

Lastly, as shown by the video DVD submitted with the May 4<sup>th</sup> letter, there is a minimal blue water view from Highway 1 even today – literally a few seconds as a car travels 55 mph down the Highway. The most significant views occur after the traveler passes the property. While part of the “few second view” will be impacted, the impact is created by the need to restore the dunes as required elsewhere in the LCP. Such balancing is expected and authorized under the Coastal Act. Public Resources Code § 30007.5.

Contrary to the assertion of Staff, very little of the project would be “plainly visible” from public views, even though they “cascade” up the dunes organically in a seamless design of 1 – 4 story structures. It would be shielded in the LCP view corridor. Staff includes many additional view corridors that are not view corridors in the LCP, including lateral walk along the lower beach which provides virtually no view of the structures, even though, they cascade up the dunes. . Thus, again, Staff ignores the Court of Appeal direction and adds things that it would like to see in the LCP <sup>20</sup> rather than simply applying the LCP.

Contrary to Staff’s assertion, the Applicant did provide detailed product information on the solar arrays and wind turbines.

Staff seems to be under the impression that no person should be able to see any building from any view. Of course, the LCP contains no such standard.

In addition, the exhibits submitted by staff are of dubious evidentiary value. Exhibit 23 are made from digital maps that are not site specific, show “viewing” only at a certain elevation slice, meaning, there is no 3D view corridor quality, and thus are not accurate for the site, and in fact, have never been shared with the Applicant prior to May 2009.. Neither the digital origin nor the scale is provided. It appears these are submitted in order to give a deceptive idea of what the view actually looks like. Further, it is

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<sup>20</sup> Staff throughout the document refers back to the “certification” of the LCP in 1982 to justify what it would have liked to have seen in the plain language of the LCP. In fact, the Commission is not charged with drafting any part of the LCP and its language is clear as to the identification of view corridors. Not only is this improper it ignores the existing setting in 1982 which contradict its now tortured “intent” argument, such as an active mining operation on site and other buildings in the view corridors which impacted the views it now states are protected.

unclear where these are taken, but apparently from a point stopped on Highway One which is illegal. It also appears that a super telephoto lens was used to accentuate the view, which doesn't really exist to the human eye. It does not state who Sanborn is, whether the photos predate the baseline, or whether he has a stake in opposing the project.

In summary, Staff erroneously applies the wrong visual impact standards to this project and with the wrong baseline. Staff erroneously concludes and applies environmentally sensitive policies to the sand dunes, when in fact the LCP requires no such requirement. Indeed, if Staff's interpretation were correct, then nothing could be placed on this site because it is constructed entirely of sand dunes. That is clearly not the case, given that this property was explicitly zoned for development. Not only is the site explicitly zoned for development but specific landforms and specific view corridors were placed upon the property. Therefore, it is wholly inappropriate to conclude that there was any other "intent" by the Commission in adopting the LCP and thus specifically distinguishes this LCP from that considered in the McAllister decision which is now relied upon by the staff to conclude that no dune modification may occur. As called out in the SNG v. Coastal Commission case, the specific will prevail over the general. Here, Staff relies upon the general with "newly created constraints". Staff also ignores the other safety issues related to the dune size, which includes the blowing of sand on to Highway 1. Every year the Applicant is required to remove large quantities of sand from Highway 1 which come from the dune. Topographical comparisons of old and new topos confirms that the large dune requires stabilization as it has shifted east and practically lies on the access road to Highway 1, were it not for Applicant's preventive measures done routinely few times a year. In the 2000 staff report, no mention was made of dune grading or modification despite the fact the previous proposal included over 880,000 cubic yards exportation, substantial dune modification while the current project includes only around 400,000. Staff previously didn't include any analysis of dune modification as a visual impact and to that extent the issue has been waived.

## NATURAL RESOURCES

Staff makes every effort to avoid the limitations placed on it by the Court of Appeal in this case. Staff first attempts to claim that LUP Policy 4.3.20 mandates that certain areas, including the major sand dune formation, remain in place and that the policy prohibits grading "except in conjunction with habitat restoration." However, Policy 4.3.20 states that grading and use of these areas is allowed "in conjunction with approved development." Obviously, in order to restore what is presently a man made sand dune created from sand mining, some grading and dune stabilization activity is necessary. Further, the restoration and stabilization of the dune must be undertaken in conjunction with the preparation of the adjacent area for the project buildings. The policy clearly discusses "restoration"; it does not suggest that the area is pristine or

ESHA, so that it can never be touched even in restoration. The policy must be read in conjunction with Policy 4.2.4. Staff further acknowledges that Figures 7 and 9 identify the area for “dune stabilization/restoration.” Stabilization/restoration requires grading on a dune that size.

With respect to ESHA adjacent to the project site, the Staff has presented no evidence in the record that lands next to the project site have been legally deemed “ESHA.”

Staff has provided no evidence that impacts to the dune system generally in the area has increased the risk of extinction for any species, or “cumulative decline.” The fact that species are listed does not provide evidence that fewer dunes are the cause of the listing. More to the point, many of the species listed in the Staff Report are not located on the project site and there is no evidence that the proposed project would impact them at all if they exist on adjacent sites, which also has not been established in the record.

Information provided by Staff is seriously out of date. For instance, biologists have long ago determined that the “black legless lizard” is not a separate species. It has never been listed. And it has never been found on the project site or even nearby.

Staff’s discussion of large dune areas to be ESHA, even when devoid of plants is not supported by evidence in the record, nor is the statement that the Commission has “often found” such areas to be ESHA. The appropriate legal standard is the Sand City LCP, not some “often found” standard created by staff.

Staff next claims that although it is bound by the Court of Appeal’s “no ESHA” determination, it can still regulate areas on site as “dune landform and natural habitat area.” This is a transparent attempt to side step the Court ruling. The area mapped by Figure 7 is for “dune restoration” – it does not say that natural dune areas currently exist there. In fact, Policy 4.2.4, which Staff routinely ignores, makes clear these areas are not natural after 60 years of sand mining. Calling them natural doesn’t make them so. Staff then says the LCP is not up to date. But the Court of Appeal addressed that issue as well and said that’s not a proper inquiry. Nor is the fact that the Commission believes that it has learned more since 1985. The Commission is limited by the Coastal Act to simply suggesting changes to the LCP. It cannot unilaterally implement changes. It must work in a collaborative manner with Sand City. It cannot just ignore the City or its interests. There are not natural dune resources on site. There are simply areas that the LCP targets for restoration and the project made sure that it incorporated adequate restoration that meets or exceeds the LCP requirements.

Contrary to Staff’s assertion, there has not been significant “self restoration” of dune habitat on site. In fact biological studies during the past 16 years, show exactly the

opposite – they show that invasive, non-native ice plant continues to expand and threaten the very dune habitat that the Staff professes to want to protect.

With respect to the western snowy plover, Staff largely ignores the more recent biological studies and HPP. It also misleads the reader by claiming that plover nesting was increasing on Monterey County beaches. The truth, clearly described in the biological reports, is that the plover all but disappeared on the project site because the plover started nesting 16 miles to the north on the man made salt flats at Moss Landing.

Nests located on the Fort Ord property to the north have nothing to do with this project. There is no evidence in the record that the project would have even the slightest impact on nests so far away.

Staff's analysis ignores the way in which Monterey spineflower expands and contracts and ignores the biological studies' conclusion that the spineflower is being impacted by ice plant on site.

The development does not impermissibly encroach the dune stabilization area, especially considering that the living roofs will functionally operate as dune habitat. Again, the area is targeted for dune stabilization and restoration, not for preservation of an existing natural area.

Staff next seeks to avoid the limitations imposed by the Court of Appeal by seeking to analyze natural resource impacts not under the Coastal Act, but rather under CEQA. In doing so, the Staff ignores the findings of the lead agency, Sand City. It is questionable whether the Commission legally can ignore the Court of Appeal limitation, throw aside the Coastal Act provisions, ignore the legal agency's findings under CEQA, and make its own findings under CEQA that contradict all of the above. This exceeds the Commission's jurisdiction. Staff has misconstrued its authority under § 13096, even if that provision is legally valid, which is doubtful.

Nothing in the Coastal Act requires or authorizes the type of CEQA analysis by the Commission Staff here.

Staff also has failed to take into consideration SNG's proposed conditions of approval in determining whether the project complies with CEQA.

In addition, Staff has made assumptions about "feasibility" without any evidence in the record as to what is feasible from an economic or engineering perspective; indeed, they have made no requests whatsoever from the Applicant regarding this issue.

Staff assumes the entire site contains "natural resources" when in fact the biological studies show that is not the case. Staff cannot fall back on its argument that the site falls with the regional dune range so it must all be a natural resource that must be

protected. Not so. The site is badly damaged from long term sand mining. It is not natural or pristine: the LCP acknowledged this fact. Again, Staff is trying to bring in ESHA standards that the Court of Appeal prohibited, and that has been verified by the Executive Director's comments noted earlier.

Staff's disagreement that temporary impacts are insignificant is not supported by substantial evidence. In fact, there areas that are especially sensitive are being protected fully and are not disturbed even temporarily, i.e. the buckwheat and total avoidance. Impacts to spineflower is easily mitigated because the plant grows so readily in bare sand.

The Fish and Wildlife Service does not require protecting the Monterey spineflower in situ if it can fully mitigated. The plant grows readily in bare sand and it is easy to re-establish areas and indeed to enhance them after grading. Staff has presented no evidence whatsoever to the contrary. Staff has provided no evidence that it requires mitigation of 3:1 or 4:1 for spineflower mitigation. SNG's biological consultant notes that in Monterey County, spineflower is usually 1:1, especially when the project is not located within spineflower critical habitat. (See submission herewith.) The project site was specifically removed from critical habitat for the spineflower in the recent past few years, a fact that Staff completely ignores. Mitigation success for spineflower has a very high rate of success. (Ref. FWS studies.) But instead Staff wants to move the remaining development envelope South West of the Spineflower location, to areas where Staff earlier said no development can occur.

Staff essentially ignores all of the analysis on the plover in the Addendum and HPP. It makes contrary assumptions to the conclusions in those reports without supporting its assumptions with any evidence. It relies on out dated information. FWS believes that management of plover/human interaction is far superior to assuming or trying complete separation which is not realistic, in spite of the recent letter provided by the USF&W Service , solicited by Staff, and not shown to the Applicant until its legal counsel checked the Commission files two weeks ago. Has anything changed since the USFW Service provided its prior opinion to the Applicant and the Commission? Undoubtedly, there is no new information. But Staff wishes to change the USFW Service prior ruling that there is no critical habitat, and resort to the long and drawn out process of submitting the MBSE to an incidental permit requirement [HCP], when none is required by law. There are numerous examples on the California coast of well-managed program that allow plovers to survive and increase despite a close human presence. FWS opines it all depends on the management program. The program developed by SNG and its biologists is not merely conceptual; there are well-developed plans that have been provided to the Staff.

The project does not displace any documented plover nesting locations that existed in the past 11 years.

With respect to the butterfly, Staff fails to note that the existing 40 or fewer buckwheat plants will not be disturbed and will be avoided entirely during grading. Despite this, SNG has agreed to add 400 additional plants – a 10 fold increase. Yet, staff still finds this inadequate. So with respect to spineflower Staff insists on a 3:1 mitigation ration, but with respect to buckwheat, a 10:1 mitigation ration is insufficient even where there is full avoidance. Again, Staff is ignoring the LCP and imposing whatever standards it feels like on a given day.

Staff claims there are not contingency plans in the HPP but apparently misunderstood the entire “adaptive” management approach of the mitigation designed specifically to expand or change mitigation if the plan is not working. FWS specifically encouraged this.

There is no evidence of impacts on the adjacent Fort Ord as shown by the Applicants biologist (EMC Planning and Rana Creek) and Staff has provided no evidence to contradict the findings in the environmental documents or to suggest that impacts are likely or even possible. SNG already has refuted this.

Staff also cites a personal communication with a FWS employee that plovers have traveled to the project site from distant locations but the Staff Report does not state when the FWS employee made these observations or how he could track them over such distances. Presumably, he was referring to events in the 1990s, not anytime in the past 11 years. There is no evidence to the contrary in the record. In fact, the FWS made no such observations in its official response to the project and the most recent communication between FWS and the Staff was never provided to the Applicant even to review..

## **TRAFFIC AND CIRCULATION**

The Staff Report states that the MBSE Project would not comply with LUP Policy 6.4.10 and IP Section 3.2. These policies require new development to provide for adequate parking and circulation and not create traffic congestion. The City’s Addendum to the Final EIR for the MBSE Project (October 2008) estimates that the project as proposed would result in significant traffic impacts without mitigation. The City’s Final EIR for the project identifies specific measures that can be taken to mitigate traffic impacts at congested intersections within the City’s authority. The State highway transit authority, CalTrans, has also prepared a report identifying necessary improvements to Highway One that would mitigate traffic impacts in the vicinity of the Project. These and other traffic improvement projects are to be funded and carried out by CalTrans and the Transportation Agency for Monterey County, the regional transportation authority with jurisdiction over Sand City and the Project. The TAMC has implemented a Regional Development Impact Fee that allows for the collection of fees from development projects

within the County that will be used to fund transit improvement projects such as those identified in the Project EIR and Addendum, and the Project Applicant has agreed to pay the Project's fair share of Development Impact Fees. Staff ignores that TAMC, the *transportation expert*, has rendered an opinion that the TAMC program is sufficient despite the letters directed to the Coastal Staff directly on this point. Applicant incorporates its communications to Staff on November 5, 2009 regarding this matter (Exhibit 7). See attached. TAMC rejected Coastal Staff assertions, and also notified staff that the projects identified in the program undergo and have already undergone CEQA review. Staff's analysis is not only speculative but ignores already adopted plans in place to address traffic issues related to development in this area. Staff contends further that a shuttle program or other program would be required to make this project "consistent" with Coastal Act 30252 providing enhanced public access, yet, the MBSE has provided an extensive TDM and alternative transportation plans that address and mitigate any concerns. Applicant would certainly consider reviewing its TDM with staff to see if additional shuttling might be appropriate. The Addendum concludes that agreement to pay these fees, which when consolidated with other fees will pay for intersection and highway improvement work in the vicinity of Project, is sufficient to mitigate traffic impacts of the Project.

The Staff Report states that because there is a predicted gap in funding between the fees to be collected from the TAMC Regional Development Impact Fee and the cost of 17 regionally-specific projects to be paid for by the fee, the payment of these fees by the Project Applicant is not sufficient to mitigate impacts. Staff also argues that "it has been [its] experience that the time it takes to bring such major Highway One improvements to fruition can be considerable, thus it could be many years" before these improvements are fully implemented.<sup>21</sup> The Commission's arguments are contradicted by case law in this appellate district, which unequivocally holds that the payment of traffic impact fees is a reasonable mitigation measure for project-related traffic impacts, even in the face of potential funding shortfalls or delay in implementation of such measures. Friends of Lagoon Valley. Nothing required the City in that case to set out a time-specific schedule for the completion of specific roadway improvements. *Id.* The same reasoning applies in this matter as well; the Applicant's identification of the Development Impact Fee and agreement to pay the Project's determined fair share is sufficient to meet the requirements of the LUP requirements. SNG also has agreed to a TDM plan. SNG has addressed its fair share of impacts; it is not required to single-handedly resolve the entire region's traffic concerns. Neither the LCP, the Coastal Act nor the case law requires that.

### CEQA

Staff's CEQA analysis does not comply with the regulatory programs certified by the Secretary of Natural Resources in the following manner. First, 14 CCR § 15252 requires that the certified document contain alternatives or mitigations to reduce

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<sup>21</sup> In fact, the Commission itself often contributes to the delay of those projects.

significantly potential impacts that the project might have on the environment. The Applicant has proposed conditions of approval that would mitigate environmental impacts yet none of these, nor any proposed by Staff, have been identified or discussed. Second, 14 CCR § 15253 requires that the Coastal Commission allow Sand City, as the lead agency under CEQA, a period of time to review and consult regarding its environmental document. That has not been done here with this Staff Report. Likewise, Public Resources Code § 21104 requires consultation.

Third, this Commission specifically certified Sand City's LCP Amendment in 1997 which specifically identified this property for mixed use development of up to 650 units. In order to make such certification of the LCP, the Commission was required to find no substantial adverse impacts to the mixed use development of this property. Under the now proffered staff analysis there would be no circumstance where this property could be developed at such a mixed use density or even a fraction of that density because of the Staff's new interpretation of the coastal erosion policies and other policies.

Fourth, the lead agency, Sand City, certified the environmental document and adopted its Addendum document. As a responsible agency reviewing LCP consistency, the Coastal Commission is bound by the environmental determinations in Sand City's environmental documents. The Coastal Commission participated in the preparation of the 1998 FEIR document and the addendum and cannot now assume lead agency status. A responsible agency is limited in CEQA to either challenging the underlying document, taking lead agency status or making findings which comply with the changed circumstances provisions of 14 CCR 15162 allowing additional environmental review. (14 CCR § 15096). A responsible agency is required to presume that the environmental document is fully defensible and binding. PRC § 21167.2 provides a conclusive presumption that the environmental document complies with CEQA. A responsible agency cannot determine that it is inadequate. In any event, the Commission did not make any such objection in a timely manner.

Fifth, the Coastal Commission made comments on the more dense version of the project in 1998. In every respect what is now proposed as an environmentally superior alternative is less intensive and more environmentally sensitive. The Commission is bound by its previous comments and determinations on the project.

## PUBLIC ACCESS AND RECREATION

The Staff Report states that the MBSE has addressed many of the Public Access and Recreation elements of the LCP and the Coastal Act, but that "certain details have not been specified, and maximum public access is not assured." While the Staff has noted that these items can likely be addressed through "conditional approval," they can only be done so if the "project is otherwise approvable." Other aspects of the project have been addressed above, and as noted, staff is erroneous and flawed on many of their

statements and assertions. The MBSE has complied with all LCP policies and the Coastal Act, and contrary to staff's assertions, has provided conformity with the Coastal policies. The MBSE site has no public access, vertical or lateral (pursuant to the Mexican Land Grant). MBSE has provided vertical access and lateral access, public recreation and enhanced vista points, ample public parking, bike trails, trails to the beach, and connectivity to the regional bike path. While they quibble about the width of the vertical access, that matter they acknowledge can be fixed easily. They bring up low cost housing, § 30213, but fail to point to the fact that the MBSE has set aside in lieu housing fee to comply with that section payable to Sand City. Staff selectively picks on various points, such as potential historical use of the site by the public and "ridicules" the fact that the property is fenced. In fact, the property is fenced and posted "no-trespassing" which provides constructive notice to the public, along with recorded documents with the Monterey County Recorder that have provided additional public notice. Staff notes that public access easements raise three issues (i) 25ft beach , (ii) beach access subject to erosion , and (iii) width of vertical accessway.

As to the first issue, dedication below the 20 ft contour provides a sandy beach greater than 25ft. As for the second point, again staff fails to note that it has approved public access in areas to the north and south of the site that have higher erosion rates, and the fact that the Applicant will relocate the beach access if and when erosion breaches the 20 ft contour and causes the beach access to move landward. As for the third item, addressing that concern is easily done by the conditions of approval . Public Parking for the project exceeds the standards required by the LCP, yet, staff is requesting additional details that Applicant is willing to provide the Commission, but has been unable to do so because the Commission would not communicate with the Applicant. If staff needed additional information it should have asked for it. Applicant has received no writing from Staff regarding need for additional information on the project since January 2009. Staff has failed to include in its analysis the Applicant's Report "Access, Signage and Lighting Plan" for the MBSE , EMC Planning Group (October 2008), submitted to the Commission in October 2008, which details a very comprehensive public access and recreation plan for the public.

## SUMMARY

As you recall, the agreement of the parties in April 2008 meeting held in your office in Santa Cruz after the Court's Decision was rendered on January 25, 2008 in favor of SNG, was that we would go through the approval process and public hearing at the Commission level on the modified project, and after that the City would review the Commissions approvals and conditions and hold a public hearing 30 days thereafter to certify or amend whatever was necessary for final project approval.

I invite Staff , as I have done previously on many occasions, to meet with Sand City and SNG to resolve the differences, and as stated in your staff report: "*Commission Staff remains available to work with the Applicant and the City...*" (page 5).

In sum, the Applicant has complied with the LCP Policies and the Coastal Act and to the extent that there are minor modifications to the plan, they can be easily worked with the Applicant through modifying the Master Set of Conditions. We have included once again Master Set of Conditions that were previously submitted to you (Exhibit 4), and by Condition No. 37 requires that before recordation of the final map and issuance of a CDP, a water distribution permit be obtained from the MPWMD. This would be a conditional permit to your approval at the Public Hearing on December 11<sup>th</sup>. As such, I request that you either (i) grant the Continuance to resolve the water permit, or (ii) **Approve** the project on December 11<sup>th</sup> .

Sincerely,



Ed Ghandour, Ph.D.  
President  
Security National Guaranty, Inc.

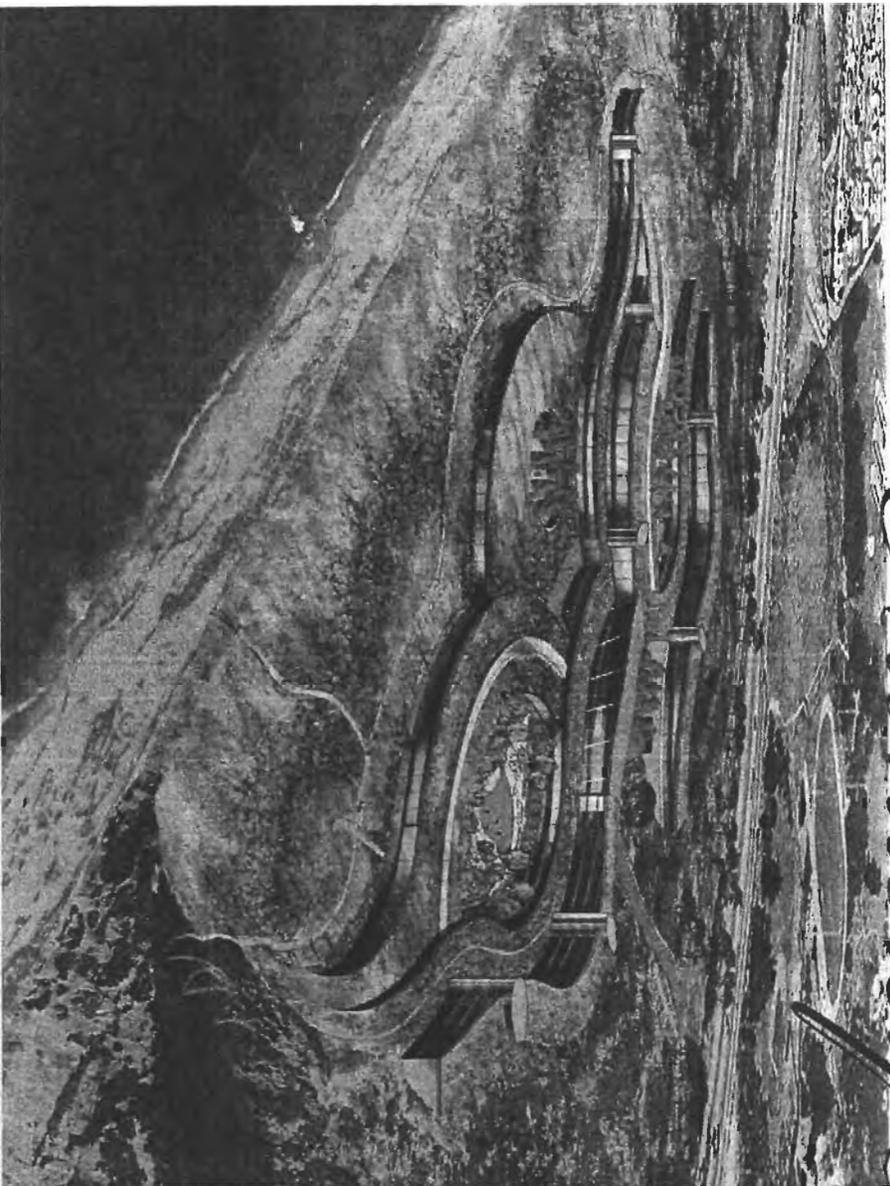
## **List of Attachments**

- 1. Exhibit 0: Highlights of the Monterey Bay Shores Ecoresort**
- 2. All Exhibits attached to the May 4, 2009 SNG Response Letter (by Reference)**
- 3. Exhibit 6: Haro Kasunich & Associates Letter Dated December 4, 2009**
- 4. Exhibit 7: November 5, 2009 Letter to Charles Lester reference  
TAMC/Traffic Fees**
- 5. Exhibit 1**
- 6. Exhibit 2**
- 7. Exhibit 3**
- 8. Exhibit 4: Master Set of Conditions**
- 9. Exhibit 5: CDO Stay**



# Monterey Bay Shores

*Ecoresort, Wellness Spa, and Residences*



## The Ecoresort and Its Experience

STEWARD OF THE COAST



RESPECT • RESTORE • RENEW

- Visionary and Sustainable Design
- Restorative Approach to Degraded Site by Improving Biodiversity, Habitat & Dune Restoration
- Respect for Monterey Bay National Marine Sanctuary
- Large Setbacks Provide Buffer for Habitat & Natural Coastal Processes
- Living Roofs Support Native Species
- Up to 500 Green Jobs
- Water Conservation and Graywater Reuse
- Over 50% Reduction in Carbon Footprint
- 30% Renewable Energy Sources
- Beach and Dune Trails
- Public Access and Parking
- Botanical and Herbal Gardens
- Panoramic Views of Monterey Bay
- Hollistic Lifestyle and Wellness Spa that Teach & Inspire
- Sustainable Green Dining
- Connection to Regional Bike Path
- Access to World Class Activities on Monterey Peninsula
- Giving Back to the Community by Funding Local Environmental Projects
- Alternative Energy Transportation Systems



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CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA



NRTON ENGINEERS, INC.



WESTING ENGINEERING MAP

PRELIMINARY  
NOT FOR CONSTRUCTION

OVERLAY OF 4  
CONSTRAINTS IMPOSED  
BY COASTAL COMMISSION  
STAFF

CCC Exhibit 4  
(page 1 of 4 pages)

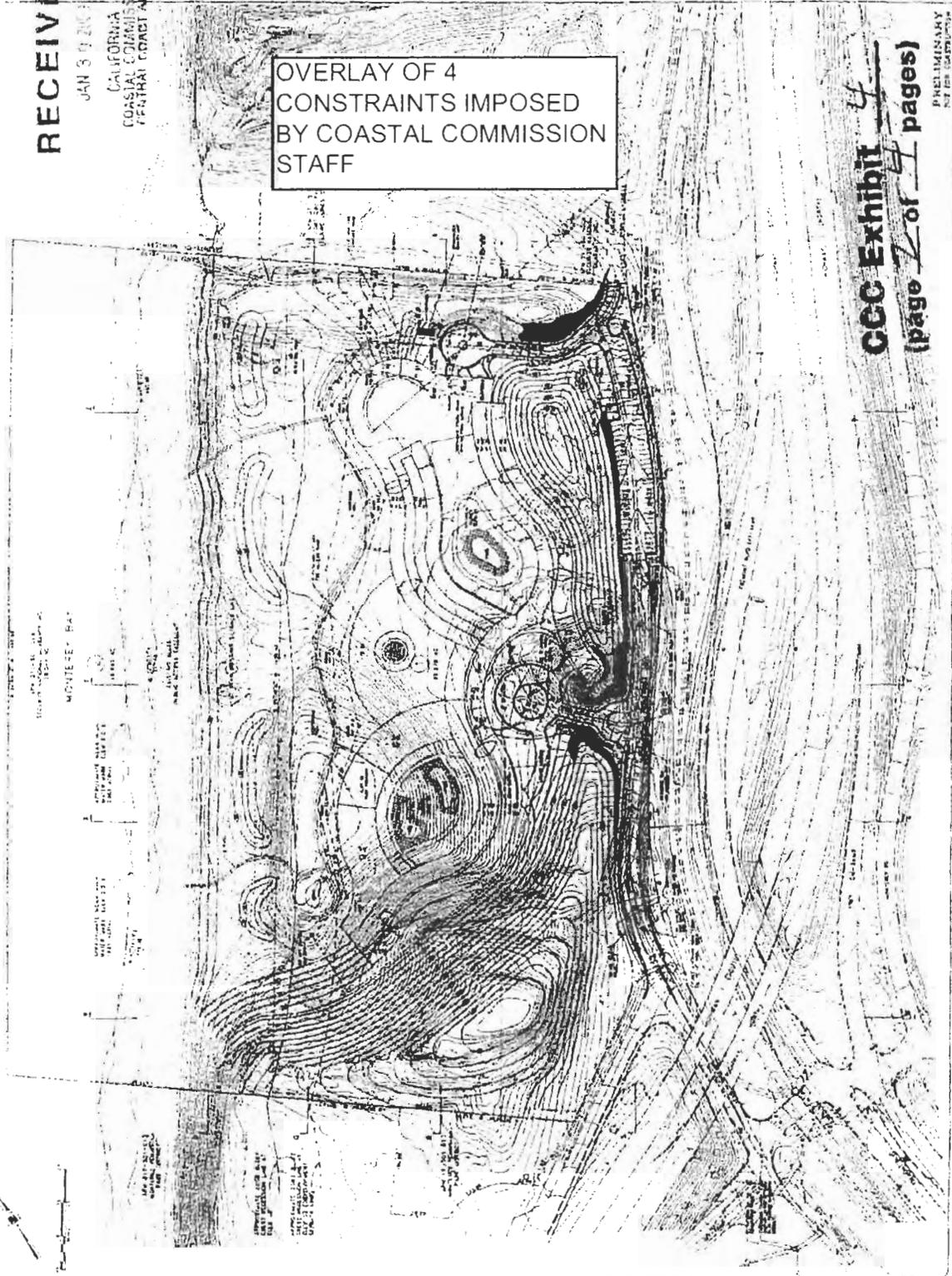
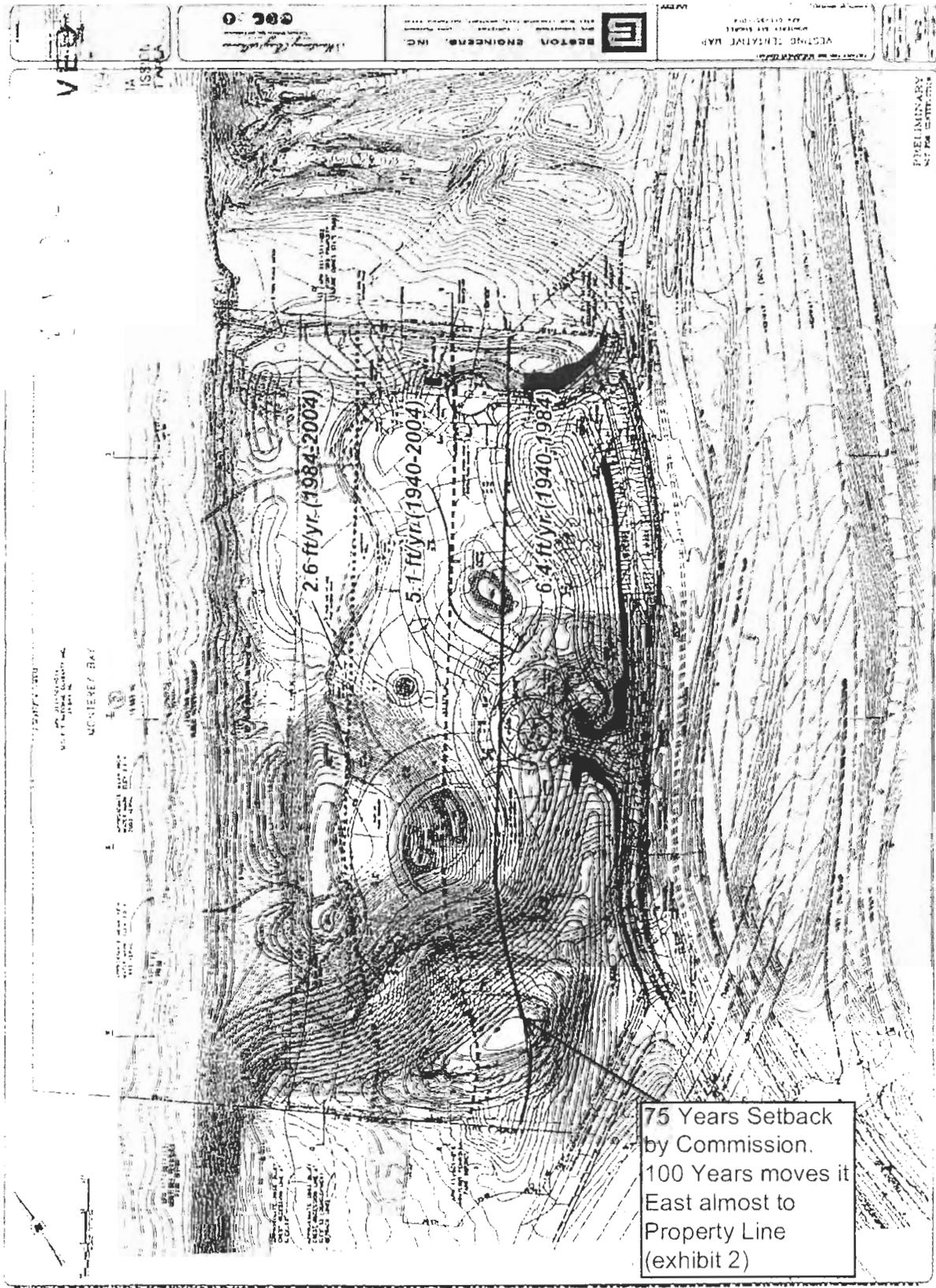


EXHIBIT 1  
(6 pages)

Staff Recommendation for Total Setback (75 year economic life)  
 under various assumed future bluff retreat rates (based on historic interval in parentheses)





DUNE  
LANDFORM  
APPROXIMATION

NOTE: Commission Staff designates entire Site as a protected Dune Landform, which mean no building envelope exists. ESHA designation.

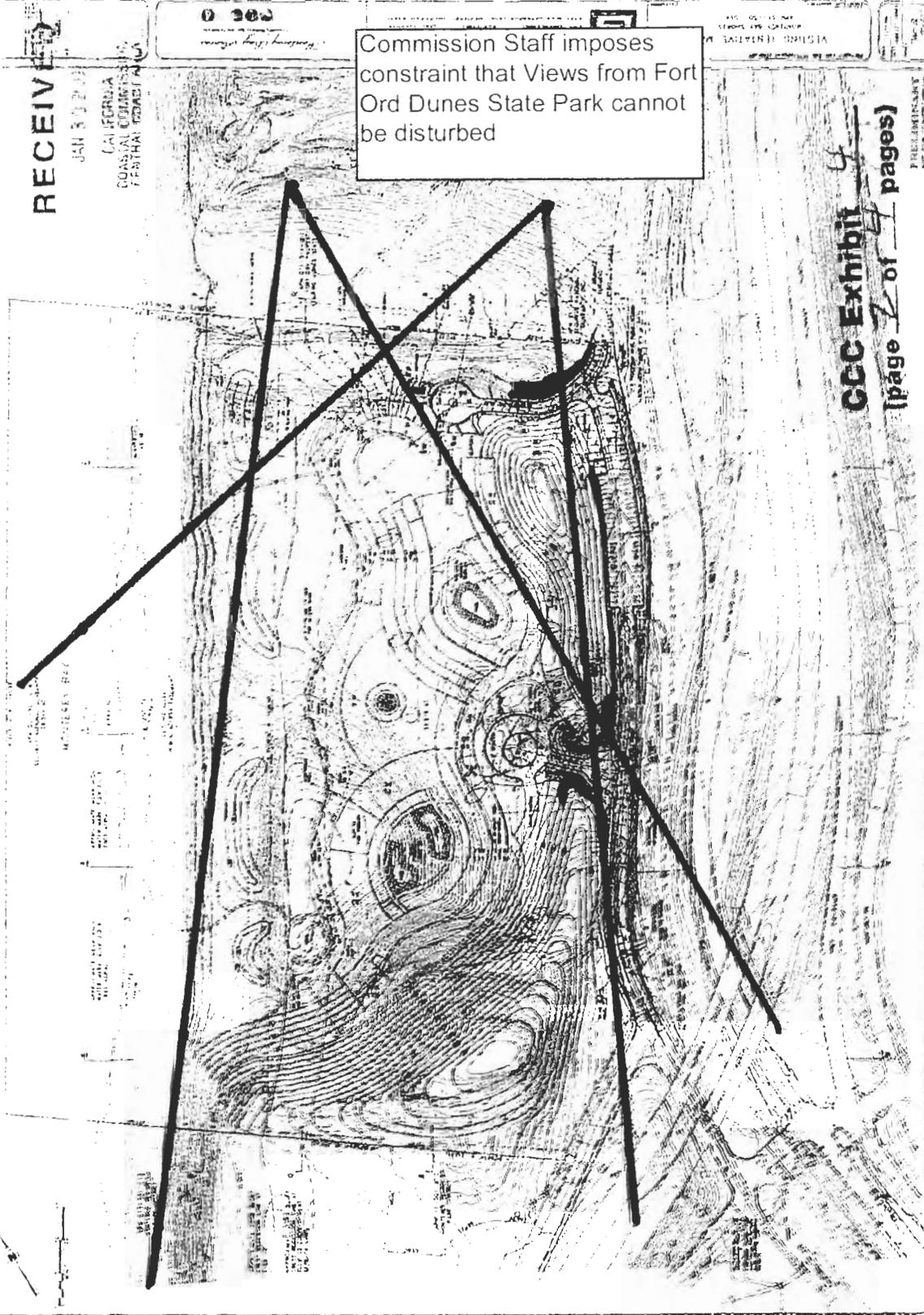
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CALIFORNIA  
COASTAL COMMISSION  
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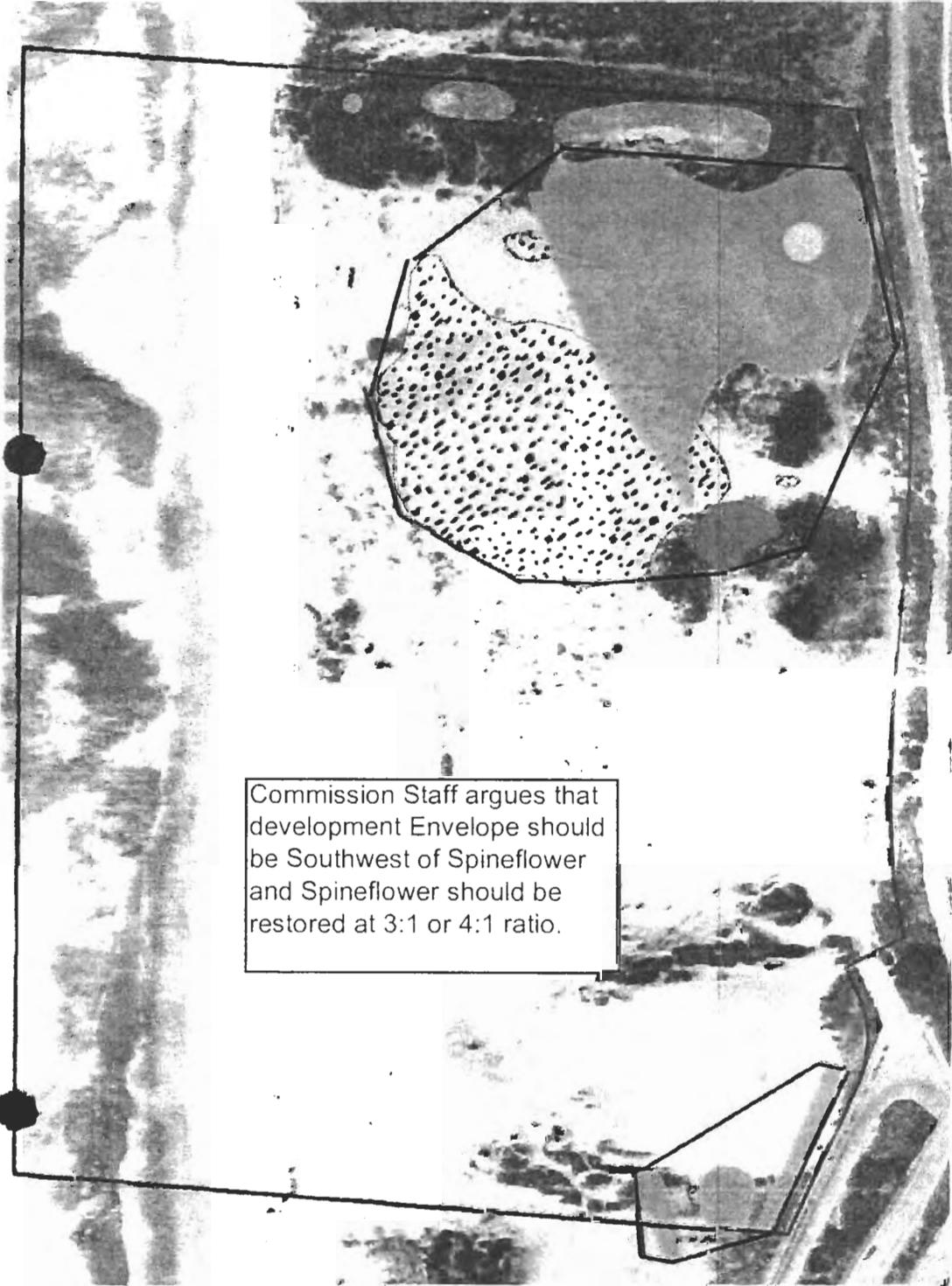
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Commission Staff imposes  
constraint that Views from Fort  
Ord Dunes State Park cannot  
be disturbed



CCC Exhibit 4  
(page 2 of 4 pages)

PRELIMINARY  
NOT TO BE CONSIDERED



**LEGEND**

- Seacliff Buckwheat 2000
- Seacliff Buckwheat 2008
- High Density Monterey Spineflower 2000
- Low Density Monterey Spineflower 2000
- High Density Monterey Spineflower 2008
- Medium Density Monterey Spineflower 2008
- Low Density Monterey Spineflower 2008

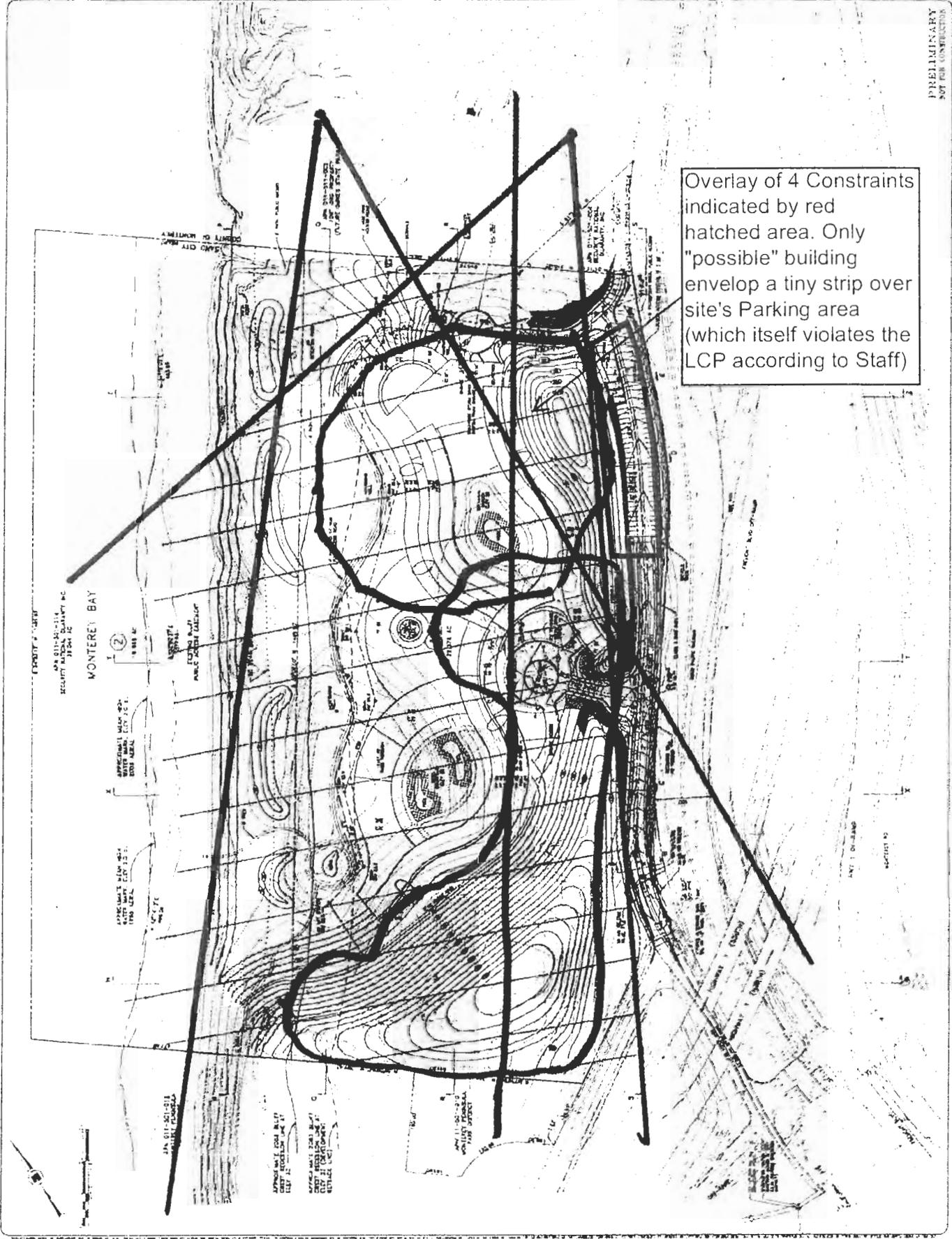


Source: EMC Planning Group, Inc. 2008; Zander Associates 2000; Foster Engineers 2008; [unclear] 2007

Figure 2

**Change in Distribution of Special Status Plant Species, 2000 - 2008**

Monterey Bay Shores Botanical Survey Update, Sand City, California  
 Exhibit 35  
 A-3-SNC-98-114, Monterey Bay Shores Ecoresort  
 Monterey Spineflower Habitat (maximum convex polygon)  
 Page 1 of 1



Overlay of 4 Constraints indicated by red hatched area. Only "possible" building envelop a tiny strip over site's Parking area (which itself violates the LCP according to Staff)

PRELIMINARY  
NOT FOR CONSTRUCTION

EXH 4  
Page 1 of 4 pages

Staff Recommendation for Total Setback (100 year economic life)  
 under various assumed future bluff retreat rates (based on historic interval in parentheses)

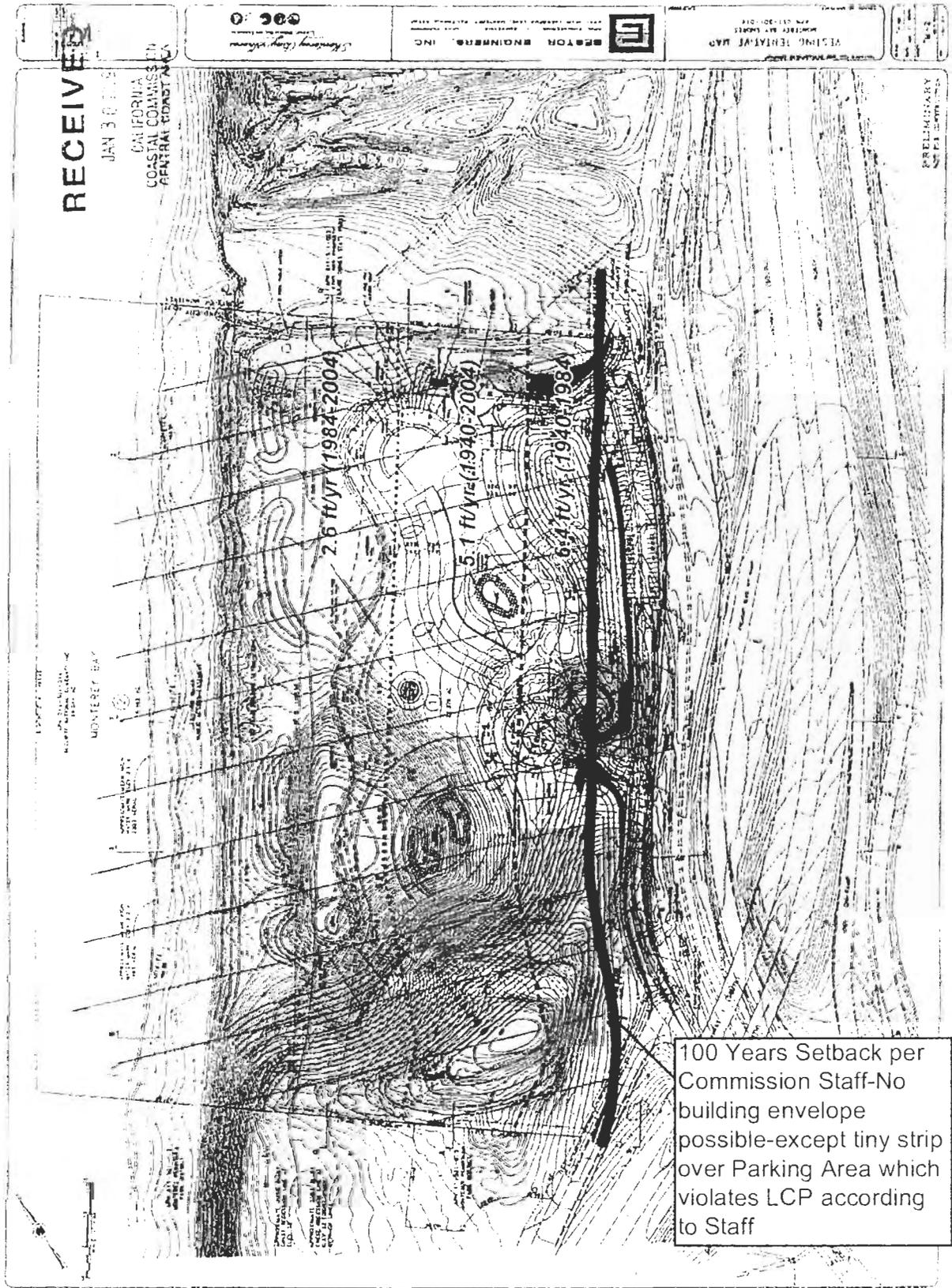


EXHIBIT 2

EXHIBIT 3



Extension of 100 Years Setback Line south established by Commission Staff on Site  
Note: Project Site has Accretion.

Monterey Bay Shores Ecoresort Site

100 Years Setback as imposed by Coastal Commission Staff

**MONTEREY BAY SHORES  
REVISED MASTER SET OF CONDITIONS OF APPROVAL**

These conditions of approval collectively constitute the conditions applicable to the modified Monterey Bay Shores Ecoresort Project ("Project"). Four separate approvals are covered by these conditions, as required by the Sand City Municipal Code and Local Coastal Program: site plan approval (SP), coastal development permit approval (CDP), vesting tentative map (VTM), planned unit development rezoning and permit (PUD). Not all conditions are conditions of each approval. After each condition, the applicable land use entitlement to which it is related is noted in parentheses.

**LAND USE**

1. All development on the site shall conform to the approved modified site plan, as revised by these conditions, with a total unit count of 341. The development shall be generally consistent with the following unit counts: a 161-room hotel, 88 visitor serving condominium units (in a rental pool), 92 residential condominium units, auxiliary facilities including a reception lobby, a restaurant, conference rooms, wellness spa center, wine cellar, and other commercial auxiliary facilities, open space, public access trails and recreation area, and 23 acres of habitat restoration which includes stabilized sand dune habitat, foredune habitat, secondary dune habitat and living roofs. The site plan and distribution of units is attached hereto and incorporated herein by this reference. A Final Site Plan shall be submitted and reviewed by the Community Development Director for conformance with these conditions prior to the recordation of the final tract map. Any significant deviation from the approved site plan (except to the extent required by these conditions of approval) shall be subject to the review and approval by the City Council. Any questions of intent or interpretation of the site plan, architecture or of the conditions contained herein shall be resolved by the Community Development Director. (SP, CDP, VTM, PUD)

2. The Final Site Plan shall include a public access easement along the northern property line to the beach which will include the proposed public vista point structures consistent with the Habitat Protection Plan dated October 2008 (HPP) and Access, Signage and Lighting Plan dated October 2008 (ASLP). The public access easement shall have a minimum width of five (5) feet. The purpose of this public access easement will be to allow pedestrian access from the public parking area to the vista point on the bluff, recreation area and the lower beach consistent with the Sand City LCP and the Coastal Act policies calling for maximum public access consistent with public safety needs, the rights of private property and natural resource protection. An irrevocable dedication shall be required for all public access easements, the public parking area and conservation easements which shall be recorded against title to the property with the Monterey County Recorder. The public access, the public parking area and conservation easements shall be shown on the final tract map prior to recordation. In addition, a public access easement for the improvement of a Class II bike path shall be required along Sand Dunes Drive on the site's eastern boundary. (VTM, SP, CDP)

3. Construction of the public vista point located at the north-west end of the project site and access thereto from the Sand Dunes Drive extension and the parking area shall occur during the first phase of construction, if it is deemed safe to do so, as part of the initial building permit for the project. The public vista point shall include a minimum of two benches and a protective railings consistent with the ASLP. Associated public facilities may be constructed with later phases, but must be installed prior to occupancy of the hotel. (CDP, POD)

4. Final design of the public vista point structure shall be reviewed and approved by the Design Review Committee (DRC) prior to installation to insure consistency with the ASLP. The design and materials shall be appropriate for the coastal climate and natural setting and compatible with the project architecture and view corridor. (CDP)

5. Prior to the approval of the final grading, drainage, and erosion control plan, a Final Irrigation Plan which is consistent with the Landscape Plan (2008), ASLP, HPP and the Storm Water Pollution Prevention Plan dated July 2008 (SWPPP) shall be reviewed and approved by the Design Review Committee (DRC). The Final Landscape Plan and Irrigation Plan shall (a) be in accordance with Section 18.62.050 of the Municipal Code; (b) utilize native non-invasive coastal plants to the extent feasible; and (c) provide for the use of drought-tolerant plants in accordance with Chapter 15.12 of the Municipal Code. Prior to the issuance of a certificate of occupancy, landscaping shall be installed, or otherwise secured by a form of surety acceptable to the City Attorney. All landscaping is to be maintained pursuant to a maintenance agreement subject to review and approval by the Community Development Director and City Attorney. (SP, CDP, VTM)

6. All signage within the project shall be consistent with the ASLP, October 2008, and in accordance with a uniform sign program prepared for the project, which shall be reviewed and approved by the Design Review Committee (DRC) prior to sign installation. One, indirectly lighted bi-directional site identification sign located off the interchange at the resort property entrance and two indirectly lighted signs located at the entry to the resort (on both sides of the round-about) shall be allowed at the project entrance and designed to be visible from Highway 1. The uniform sign program shall be consistent with the provisions of Chapter 18.66 of the Municipal Code. Building permits shall be obtained for all signs prior to installation. Following sign program approval by the DRC, all sign permits shall be issued administratively provided the signs are consistent with said sign program. Commercial uses customarily appurtenant to a resort development, including a restaurant, bar, conference facilities, wine cellar and wellness spa center as described on the site plan, are hereby permitted by approval of the Coastal Development Permit for this project. (SP, CDP, PUD)

7. The Final Lighting Plan and Management Program consistent with the ACLP and HPP submitted to the City of Sand City as part of the Approval Package, shall be submitted and

approved by the Community Development Department (CDD) prior to the issuance of any building permits for the project. The CDD shall confirm that the lighting is directed on-site and that it does not create glare. The CDD shall also confirm that the Lighting Plan and Management Program meets the requirements of the Habitat Protection Plan (HPP) for the project site.. (CDP)

8. Final architectural plans shall be submitted and approved by the Design Review Committee (DRC) prior to the issuance of building permits for each phase of the project. Architecture shall conform to the design plans submitted to the City of Sand City as part of the revised Approval Package and shall be reviewed for final approval by the DRC and included on contract drawings of the building permit plans. (CDP, PUD)

9. Final building materials and colors, consistent with architectural plans and designs submitted for the Approval Package, shall be submitted and approved by the Design Review Committee (DRC) prior to the issuance of any building permits for the project. All colors shall be earthtone to blend in with the dune environment consistent with the material/color board submitted to the City of Sand City as part of the revised Approval Package. The roof material, however, is approved as a living roof consistent with the Landscaping Plan and listed plants in the Plant Communities plan, except over the reception area, and where appropriate the installation of solar hot water, photovoltaics panels and lateral wind turbines on the roofs. (CDP, PUD)

10. Dedication of the street right-of-way of Sand Dunes Drive to the southerly edge of the designated parking area as shown on the revised site plan submitted to the City of Sand City as part of the Approval Package shall be required. Said dedication shall be shown on the final tract map prior to recordation and shall provide for the bike path as shown on final site plan. A public parking easement consistent with the revised site plan and VTM shall be recorded against title to the property with the Monterey County Recorder. (VTM, CDP)

11. The developer, or any successor in interest, shall pay the Sand City Redevelopment Agency a housing in lieu fee to be earmarked for the provision of low-to-moderate income housing within the City. Said fee shall be an amount of \$6,300 per each non-visitor serving residential unit or non-hotel unit, that is, for each of the 92 residential condominiums as shown on the final site plan, and may be secured by a surety bond until sale of each residential unit(s), subject to review and approval by the City Attorney. (VTM, CDP)

12. A property owner's association shall be formed with documentation subject to the approval of the City Attorney that assigns maintenance responsibilities for all on-site, private improvements. (VTM, CDP)

13. Each approval, and the conditions applicable to each approval, shall run with the land and be binding upon and inure to the benefit of all successors in interest to the property or

any portion of the property and all assignees of the property owner to the extent applicable to the relevant portion of the property. (SP, CDP, VTM, RID)

14. Covenants, conditions and restrictions (CC&Rs) for the condominium, and visitor serving residential units, shall be submitted to the City for review and approval prior to building permit issuance for these project components. The CC&Rs shall be recorded against title to the property. (VTM, CDP)

- a. The CC&Rs shall provide for the establishment, operation, management, use, repair and maintenance of all common areas and facilities, including all structures and landscaping.
- b. The CC&Rs shall require 24-hour on-site management of the property, including the beach area. They shall also include provisions for a retained biological steward, to be funded with the hotel operations consistent with the HPP and the Monterey Bay Shores Environmental Trust for the purpose of managing the snowy plover in breeding season and other habitat areas on the property.
- c. The CC&Rs shall limit owner-occupancy of individual visitor-serving units to the limits established in the Sand City Local Coastal Plan, as amended by LCP Amendment 97-02.
- d. The CC&Rs shall make the City an enforcing agency thereto.

15. Visitor-serving units of the project shall be constructed prior to, or simultaneously with, the residential portion of the project as required by LCP amendment 97-02 approved and certified by the California Coastal Commission. (CDP. PIJD)

16. As part of all building permit submittal packages, certification shall be required from an acoustical engineer that interior sound levels of the building design(s) will not exceed 45 dBA (LDN - day/night average). (CDP. VIM)

17. Prior to issuance of a certificate of occupancy for the hotel component of the project, the developer shall either provide private shuttle service to the Monterey Peninsula Airport or provide for Monterey-Salinas Transit (MST) service to the site consistent with the Transportation Demand Management Plan (TDM) adopted for the project. The method of transit/paratransit service selected shall be reviewed and approved by the Community Development Director prior to recordation of the final tract map. (CDP)

18. Prior to the issuance of a certificate of occupancy for the planned restaurants, bars or other retail food facilities, approval by the Monterey County Health Department shall be required. (CDP)

19. Prior to the issuance of a certificate of occupancy for the wellness spa center, approval by the Monterey County Health Department shall be required.

(CDP)

20. Prior to the issuance of a certificate of occupancy for the swimming pool or spas, approval by the Monterey County Health Department and the City's Building Department shall be required.

(CDP)

#### GRADING, DRAINAGE AND CONSTRUCTION

21. Prior to recordation, the City Engineer and Community Development Director shall review and approve a final subdivision map which shall be in substantial conformance with the approved revised Vesting Tentative Map, as conditioned. Condominium plans may be filed in phases after recordation of the final vesting subdivision map. The final map shall include all required easements and dedications for public agency improvements, public utilities and public access/recreation.. (VTM)

22. A Preliminary Grading, Drainage and Erosion Control Plan for the site shall be submitted to and approved by the Community Development Director and City Engineer prior to recordation of the final map. A Final Grading, Drainage and Erosion Control Plan for the site shall be submitted to, and approved by the City Engineer prior to the issuance of any building/grading permit for the project, or phases thereof. Implementation of the final grading plan shall be consistent with the HPP and SWPPP submitted as part of the Approval Package for the project (CDP, VTM)

23. A final geotechnical investigation shall be submitted to, and approved by the City Engineer prior to recordation of the final map. Recommendations of the geotechnical report shall be required conditions to building permit approval for all phases of the project and a note on the final map shall include this requirement, citing that the report is on file at Sand City City Hall. (CDP, VTM)

24. Building permits are required for all buildings as well as for other structures where required by the Uniform Building Code (UBC). Prior to the issuance of building permits, plans for the specific design and construction of the building for which the permit is issued shall be approved by the City Building Official, and to the extent necessary by the City Engineer. Said plan shall, without limitation:

- a. Meet the requirements for seismic safety outlined in the UBC.
- b. Incorporate the recommendations of the geotechnical investigation and soils report for the site. (SP, CDP, VTM)

25. All construction contracts shall require watering of exposed earth surfaces in the late morning and at the end of the day; frequency of watering shall be increased if wind speeds exceed 15 miles per hour. Daily clean-up of mud and dust carried onto street surfaces by the construction vehicles shall be required during excavation and construction. The City Engineer may require the use of tarpaulins or other effective covers if necessary to minimize dust. (CDP, SP)

26. A preference to use local labor shall be established by contacting the Private Industry Council (PIC) and local builders exchanges. Local construction firms that can demonstrate an ability to perform the work required and qualify shall be notified of up-coming construction by notice through the Monterey Builders Exchange. The developer and any successors in interest agree to give consideration to construction firms that provide for using local labor, as available, on this project. (SP)

27. The project area shall be fenced, as appropriate, during construction for safety purposes and to keep out unauthorized personnel. (SP, CDP)

28. Underground parking structures shall be waterproofed, if and where needed, to the satisfaction of the City Engineer. Parking garages shall have entrances on the landward sides of the buildings, above the maximum storm wave runup elevation as shown on the site plan. (CDP, VIM)

#### VEGETATION AND WILDLIFE

29. Prior to the issuance of a Coastal Development Permit by the Coastal Commission, the property owner shall have completed a HPP approved by the City of Sand City. (VTM, CDP)

30. All conservation easements shall be identified on the final tract map. The conservation easements for dune and habitat restoration areas shall be dedicated as indicated in the HPP and ASLP and recorded against title to the property with the Monterey County Recorder. The instrument of dedication shall be in accordance with the requirements of the Sand City Local Coastal Program and shall be reviewed and approved by the City Attorney. (SP, CDP, VTM)

31. Prior to recordation of the final tract map, the owner shall have formed a non-profit organization, known as the Monterey Bay Shores Environmental Trust, for the purpose of receiving funds, holding funds, and expending funds for the Project and other local environmental projects for the protection of the western snowy plover and other listed species and for retaining biologist, on site and in the City of Sand City along the coastline. The Trust shall be funded by 1% of the net room rental revenues of the visitor serving resort (after operating expenses and debt service) and ½% Transient Occupancy Tax (TOT) generated from room rental revenues collected by the City of Sand City. The name of the Trust may be changed by the property operator. (SP, CDP, VTM)

#### TRANSPORTATION/CIRCULATION

32. Prior to issuance of any certificates of occupancy, the extension of Sand Dunes Drive and the public parking area shall be constructed by the property owner in accordance with

engineered plans approved by the City Engineer. Public utilities necessary to serve the project, including alternative energy systems, shall be sized and installed in accordance with City standards, the Seaside County Sanitation District, each of the public utilities and/or the manufacturer's specifications. (SP, CDP, VTM)

33. Prior to the construction of required improvements within the Caltrans right-of-way, an encroachment permit shall be obtained from Caltrans. (SP, CDP, VTM)

34. Prior to the recordation of the final tract map, the project owner shall prepare and provide for implementation of a trip reduction plan consistent with the transportation demand management plan (TDM) submitted by the owner in the Approval Package. Project plans shall include the installation of a Class II bike lane to link-up with Sand City's bicycle path and recreational trail, and bicycle facilities on-site, including, but not limited to bicycle lockers for hotel employees and bike racks with a minimum capacity to secure up to 50 bicycles on site. The final location of the bike path shall be shown on the final site plan. (SP, CDP, VTM)

35. Prior to the recordation of the final tract map, the developer or any successor in interest shall provide surety bond(s) or other appropriate security acceptable to the City Attorney and/or the Transportation Agency for Monterey County (TAMC), as appropriate, guaranteeing a payment of the impact fees assessed on the project by the Regional Impact Fee Nexus Study adopted by TAMC in May 2008.. (VTM, CDP)

36. If cultural resources are uncovered during site preparation or construction, work shall be halted in the immediate area of the find and the regional office of the California State Archeological Survey and the City of Sand City shall be notified so that suitable mitigation measures can be implemented, if necessary. (SP, CDP, VTM)

#### PUBLIC UTILITIES AND SERVICES

37. Prior to the recordation of the final tract map, and issuance of the Coastal Development Permit, a water distribution permit, consistent with the Monterey County Superior Court's Final Decision and Judgment adjudicating the Seaside Groundwater Basin, shall be required from the Monterey Peninsula Water Management District. (SP, CDP, VTM)

38. Prior to the issuance of a building permit for any building, all water system and supply permits shall have been issued and submitted to the City Engineer. Plans for the water system and fire protection system shall be designed and constructed in accordance with the requirements of the City's Fire Marshall and approved by the City Engineer prior to installation. In addition, prior to the commencement of construction of any building, the applicant shall

construct any portion of the water system required by the fire department. (SP, CDP, VTM)

39. Water conservation devices and ultra low flow flush toilets (1.6 gallons per flush) are required for the project and the inclusion of which shall be confirmed prior to the issuance of any certificates of occupancy. Landscape irrigation plans consistent with the Landscaping Plan shall be approved by the Community Development Department prior to installation and shall utilize water conserving components. (SP, CDP)

40. Prior to the recordation of the final tract map, sanitary sewer service facilities and all other utilities, including any water improvements related thereto, shall be installed, or bonded by an instrument of surety approved by the City Attorney. Sanitary sewer service and any requirements related thereto shall also be approved by the Seaside County Sanitation District prior to recordation. (SP, VTM, CDP)

41. Prior to issuance of building permits for any buildings, a fire protection plan, including the provision of adequate fire flows with hydrants at the required spacing, installation of sprinklers, fire equipment access, and the designation of fire lanes shall be reviewed and approved by the City's Fire Marshall. (SP, VTM)

42. Prior to the issuance of a building permit for any building, all alternative energy systems, including solar hot water, photovoltaic panels, wind turbines and geothermal, shall have been submitted to the City Engineer for review and approval. (SP, CDP, VTM)

43. Beginning with the issuance of building permits for any building and continuing up to the issuance of a certificate of occupancy for the hotel and visitor serving residential units, a project specific Public Safety Mitigation Fee in the amount of \$75,000 per year (pro-rated for partial year) shall be paid by the developer to the City to cover the increased costs of police services and road maintenance for a two-year period between building permits issuance for this project and generation of sufficient sales taxes and Transient Occupancy Taxes (TOT) to cover these costs after full implementation of the project. The developer and any successors in interest shall provide security during project construction. (CDP)

44. New utility lines and extensions, including lines serving as part of the geothermal unit, shall be placed underground. Where transformers must be pad-mounted above ground, they shall be located away from the general public view, or shall be effectively concealed by a screening fence and landscaping of a design approved by the utility and the Community Development Department. (SP, CDP, VTM)

45. Habitat and open space areas shall be maintained on a regular basis, as provided for in the HPP and ASLP. (CDP)

46. Easements for all public improvements including sanitary sewers, water mains and other public utilities shall be identified and offered for dedication on the final tract

map. The location and width of each easement shall be subject to the approval of the applicable public agency, public utility, and the City Engineer. (VTM)

47. A recycling program shall be included as part of the overall property owners maintenance agreement or CC&R's . Said program shall include a location or locations where recyclable materials can be deposited within trash collection areas. Said program shall be approved by the Community Development Director prior to issuance of any certificate of occupancy. A "Construction Material Recycling Program" consistent with US Green Building Council guidelines and the plan proposed by the owner in the Approval Package shall be submitted by the applicant to the Community Development Director for review and approval, which shall outline the method for the recycling of excess materials used during the construction phase of the project. This Construction Material Recycling Program shall be approved by the Community Development Director prior to the issuance of a building permit. (SP, CDP)

48. Prior to the issuance of a building permit for any building, all gray water recycling systems and water harvesting systems shall be submitted to the City Engineer and the Monterey County Health Department for approval. (SP, CDP, VTM)

49. Prior to recordation of the final tract map, all construction plans for civil and public infrastructure improvements, e.g., water, sewer, roads, parking and drainage, shall be approved by the City Engineer and all said improvements not completed shall be bonded at the rate of 125% of the Engineer's Estimate, as approved and/or prepared by the City Engineer.. All construction plans shall be in accordance with the subdivision improvement agreement. (VTM)

#### RECIPROCAL EASEMENTS AND COVENANTS

50. Prior to issuance of building permit(s), the property owner shall execute CC&R's and/or reciprocal easement agreements for access, parking, utilities, landscaping, security and maintenance as appropriate, among the parcels shown on the approved tentative map, as conditioned. The instruments shall be subject to review and approval by the City Attorney. (SP, CDP, VTM)

#### MONITORING PROGRAM

51. The mitigation measures contained in the Mitigation Monitoring Program and the HPP are hereby incorporated in the Conditions of Approval. (SP, CDP, VTM)

#### INDEMNIFICATION

52. The applicant agrees as a condition of approval of the permits for the Project to hold harmless, defend and indemnify the City of Sand City and its officials at the applicant's sole expense against any action brought as a result of the approval of the permits for the

Project or the certification of the Environmental Impact Report for the Project. The applicant will reimburse the City for any court costs and attorney's fees which the City may be required by a court to pay as a result of such action. The City may, at its sole discretion, participate in the defense of any such action; but such participation shall not relieve applicant of its obligations under this condition. An indemnification agreement incorporating the provisions of this condition shall be recorded upon demand of the City Attorney or prior to the issuance of building permits for the Project, whichever occurs first. (SP, CDP, VTM, PUD)

#### PLANNED UNIT DEVELOPMENT

53. The applicant shall make a request and obtain approval of a Planned Unit Development ordinance consistent with the project approvals prior to issuance of a Coastal Development Permit. (SP, CDP, VTM, PUD)

#### ACCEPTANCE

54. The approvals subject to these conditions (SP, CDP, VTM AND PUD) shall not become effective unless and until the applicant signs a copy of such approvals agreeing to accept such approvals subject to these conditions.

#### NOTICE OF RECORDED PERMIT

55. Prior to recordation of Final Map, the applicant shall record a notice stating that "this project was approved subject to the Master Set of Conditions of Approval which are on file at the Community Development Department of the City of Sand City." The form of the notice shall be approved by the City Attorney





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 E-mail: Allison.Goldsmith@doj.ca.gov  
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*State Water Resources Control Board*  
 8 *and Dorothy Rice*

**FILED**

**NOV 17 2009**

CONNIE MAZZEI  
 CLERK OF THE SUPERIOR COURT  
*[Signature]* DEPUTY

**M. PUSLEY**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF MONTEREY**

12 **MONTEREY PENINSULA WATER**  
**MANAGEMENT DISTRICT,**  
 13  
 Plaintiff and Petitioner,  
 14  
 v.  
 15  
 16 **STATE WATER RESOURCES CONTROL**  
**BOARD, Dorothy R. Rice, Executive**  
 17 **Director, SWRCB, and DOES 1**  
**THROUGH 25, inclusive,**  
 18  
 Defendants and Respondents,  
 19

Case No. M102101

**[PROPOSED] ORDER DISSOLVING STAY**

Judge: The Honorable K. Kingsley  
 Trial Date: None Set  
 Action Filed: October 27, 2009

**FILED BY FAX**

21 **CALIFORNIA-AMERICAN WATER**  
**COMPANY, PEBBLE BEACH**  
 22 **COMPANY, and DOES 26 THROUGH 100,**  
 23 **inclusive,**  
 24  
 Real Parties in Interest,  
 25

26 Respondent's Ex Parte Application to Dissolve the Stay of Administrative Decision ordered  
 27 on November 3, 2009, was filed with the Court on November 13, 2009.  
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The Court has considered the moving papers, and good cause appearing therefor,

**IT IS ORDERED** that the Order requiring Respondent State Water Resources Control

Board to stay the operation of Order WR 2009-0060, pending the outcome in the mandamus proceeding herein, ~~is dissolved~~ *Remains in effect*

*a hearing on whether the stay should be dissolved. Hearing is set for January 27, 2011 at 9:00 a.m. in #14*

Date: November 17, 2009.

*Kay T. Kingsley*  
The Honorable Kay T. Kingsley  
Judge of the Superior Court  
**KAY T. KINGSLEY**

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20235213.doc

Exhibit "6"

HARO, KASUNICH AND ASSOCIATES, INC.

CONSULTING GEOTECHNICAL & COASTAL ENGINEERS

Project No. M5613.1  
4 December 2009

SECURITY NATIONAL GUARANTY, INC.  
505 Montgomery Street, Suite 1150  
San Francisco, California 94111

Attention: Ed Ghandour

Subject: Geotechnical/Geologic and Coastal Engineering Response  
To 20 November 2009 California Coastal Commission  
Staff Report F8a-12-2009

Reference: Proposed Monterey Bay Shores Ecoresort (MBSE)  
APN 011-501-14  
Sand City, California

Dear Mr. Ghandour:

Haro, Kasunich and Associates, the project geotechnical/geologic and coastal engineers for the referenced project have been actively involved in the preliminary and tentative analysis of the proposed Monterey Bay Shores Ecoresort (MBSE) site since 1989. We have observed and evaluated coastal processes in southern Monterey Bay since 1978. We have worked with the City of Sand City since 1990 and completed a report entitled Coastal Recession Evaluation for Coastline of Sand City, California dated December 2003. We have worked on numerous coastal engineering projects in south Monterey Bay and the Monterey Peninsula including the Monterey Beach Hotel, the Ocean Harbor House Condominiums, the Monterey Presidio pedestrian trail, San Carlos Beach Park coastal protection structures, the Ocean View Plaza, the City of Pacific Grove recreational trail along the top of the bluff, the Asilomar State Park parking area, numerous long term coastal projects in Pebble Beach and numerous projects along Carmel Bay. Much of our work dealt with long term evaluation of coastal recession rates including projections of erosion and recession into the future. This work has kept us abreast of current sea level rise information and application of current sea level rise information for wave runup analysis, coastal shoreline and bluff top recession as well as coastal wave forces and flooding analysis. We have interacted with the California Coastal Commission's technical staff during a number of these evaluations and have utilized the higher end Stillwater levels related to short time and long term sea level rise into the future.

Security National Guaranty, Inc.  
Project No. M5613.1  
Monterey Bay Shores  
4 December 2009  
Page 4

report and it actually indicates that sand mining volumes in the region have decreased from historical rates of 243,000 and 257,000 CY per year (Sand City = 114,000 CY + Marina = 129,000 CY in the 1970's and Marina = 143,000 CY in the 1980's) to 200,000 CY per year now from Marina only. As a result, we think this concern is unfounded. Perhaps it is appropriate for the CCC to take action to regulate present or future sand mining if it is causing coastal erosion and recession.

In any case, Orzech et. al. (2008) showed that net sand transport at Sand City is to the north, resulting in a convergence with the net southerly transport at Fort Ord. As a result, little sand accumulates against the Monterey Wharf 2 breakwater. More importantly for the proposed MBSE, this convergence indicates that an alongshore littoral drift null point exists at the coastline, where littoral drift moves both upcoast and downcoast, and therefore the MBSE site in the long term is not as affected by sand depletion as the area to the north.

#### **Accelerated Sea Level Rise and Coastal Recession**

We considered the influence of accelerating sea level rise during our analysis of recession rates. Specifically, our analysis indicated that between 7 feet and 58 feet of recession would occur at the property during the next 50 years due to accelerating sea level rise, the amount depending upon actual future sea level rise rates. We utilized the Bruun Rule, which has been used since 1962, and quantitatively balances volumes of bluff erosion with nearshore sand deposition caused by sea level rise, to derive these results. While the Bruun Rule is not applicable in many coastal environments with large littoral drift and variable bedrock cliff and foreshore geomorphology, the MBSE site is one location where it is very applicable. Minor longshore littoral transport rates, uniform bathymetry and consistent lithology and geology throughout the nearshore, beach, bluff and dune profile validate the applicability of the Bruun Rule to this location.

#### **Wave Runup and Flooding**

The CCC Staff Report indicated that Haro, Kasunich and Associates has stated that worst case wave runup elevations to 35 to 48 feet NGVD are possible in the southern Monterey Bay area. We discussed these highest runup elevations with Geoconsultants during their preliminary geologic report for the referenced property in 1987. At that time we indicated to Jeremy Wire, the author and principal geologist of that study, that in the most high energy, wave focused areas of Monterey Bay such as the Stillwell Hall area of Fort Ord, that wave runup could attain elevations to those heights during extreme storm activity. We have never projected wave runup elevations to those heights in Sand City, nor specifically at the referenced site.

In response to the tsunami elevations of 33 to 40 feet presented for the MBSE site in the Coastal Commission Staff report, we have reviewed the source of that data, and discovered that those elevations were generalized maximum runup levels for some

locations in the State of California. We have reviewed much of the current information available for Monterey Bay and Sand City. FEMA is in the process of publishing inundation maps showing zones of tsunami inundation for Santa Cruz and Monterey Counties, but those maps are not yet available. The Monterey County Office of Emergency Services published a Multi-Jurisdictional Hazard Mitigation Plan in 2007 that showed an extreme average tsunami elevation of 21 feet, NGVD. In 200 years of recorded history, 8 tsunamis have impacted the Monterey County coast. Almost all of these tsunamis resulted in runups of 11 feet or less. The projected tsunami elevation presented in the staff report is from a preliminary study addressing worst case conditions expected elsewhere in California. The Monterey County Multi-Jurisdictional Hazard Mitigation Plan uses a maximum average scenario of 21 feet of runup, which is lower than the wave runup elevations reported in our report for MBSE. Our wave runup elevations of 32 feet NGVD are based on wave runup analysis we have done along southern Monterey Bay, including specific analysis of present conditions and 50 years into the future sand dune profiles at the referenced site and at the site directly adjacent to and south of the referenced site.

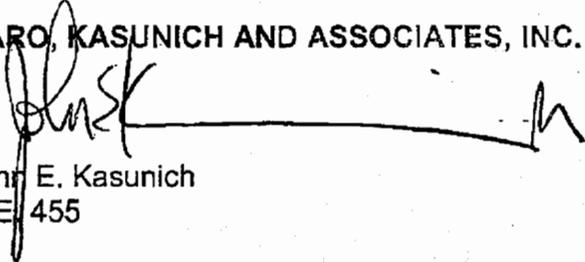
In summary, we do not believe nor can we support an average future bluff recession rate of 5.1, 5.9 or 6.4 feet per year for the next 50 years at the MBSE site. In our opinion, the basic data used by Coastal staff to determine those rates is flawed, because it relies on data from a time period when active sand mining was underway at the site. We believe the data and methodology presented in our prior reports from 1997 through 2009 is more appropriate and has a better scientific basis. Human activity related to active mining of the referenced property distorted the top of dune over long periods of time. Our review of time sequential aerial photography indicates that artificial excavation and excavation induced erosion of the dune top edge at the site makes historical recession rates calculated based on historical bluff edge positions suspect. We consider shoreline recession based analysis much more appropriate and less distorted. Ongoing sand mining in Marina does influence the sand budget downcoast of the mining activity, which includes the referenced site, but the previously discussed CRSMP indicates that a alongshore littoral drift null point exists at the coastline in the general area of the referenced site, where littoral drift moves both upcoast and downcoast, and therefore the MBSE site in the long term is not as affected by sand depletion as the area to the north. The 16 years of observation and the 14 years of survey data support this null point location. There has been negligible bluff recession at the site during that time period, which strongly suggests that the recommended CCC Staff recession rates (which predict 80 to more than 100 feet of recession should have occurred during that timeframe) are in error. The recession study done for the referenced site by HKA included reasonably conservative erosion rates based on long term historical shoreline recession, and worsening future coastal processes, as well as conservative slope stability factors of safety and reasonable sand dune slope geomorphology.

Security National Guaranty, Inc.  
Project No. M5613.1  
Monterey Bay Shores  
4 December 2009  
Page 6

If you have any questions regarding these responses, please call our office.

Very truly yours,

**HARO, KASUNICH AND ASSOCIATES, INC.**



John E. Kasunich  
G.E. 455



Mark Foxx  
C.E.G. 1493

JEK/MF/dk

Copies: 2 to Addressee

ATTACHMENT  
 Figure 27 from Hapke and Reid (2007)

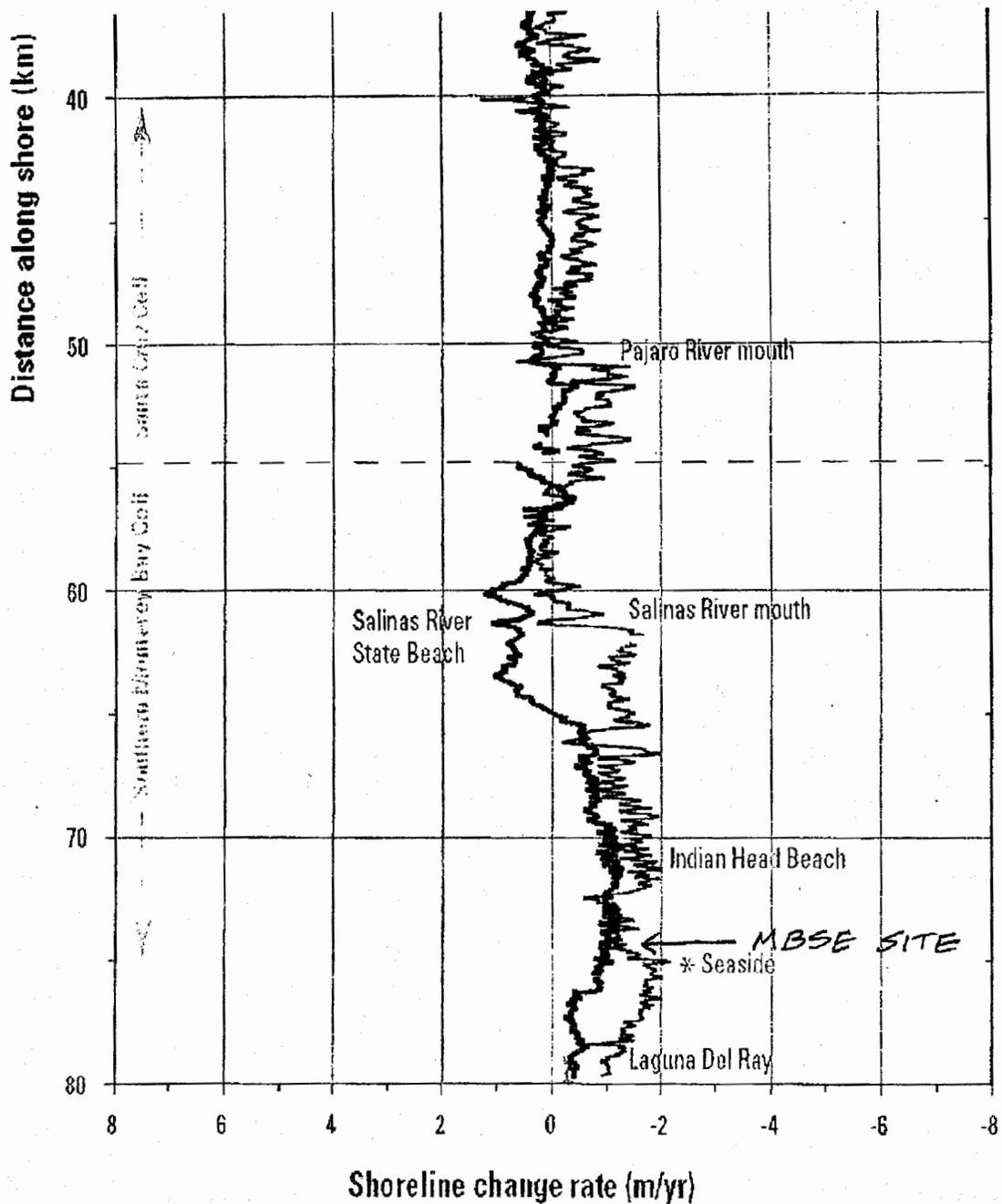


Figure 27. Shoreline change rates for the Monterey Bay region. The maximum long-term erosion rate was  $-1.3$  m/yr on Indian Head Beach near Marina. The maximum short-term erosion rate of  $-2.4$  m/yr was measured near Seaside.



Exhibit "7"



Security National Guaranty

November 5, 2009

Mr. Charles Lester  
Mr. Mike Watson  
California Coastal Commission  
725 Front Street, Ste 300  
Santa Cruz, CA 95060

Re: Monterey Bay Shores Ecoresort ("MBSE")  
A-3-SNC-98-114  
Applicant Security National Guaranty, Inc. ("SNG")  
CONTINUANCE REQUESTED by Letters 10/20/09, 10/30/09 &  
11/4/09 and in Public Hearing to Commissioners November 4, 2009

Dear Charles and Mike,

This letter further supplements our response dated May 4, 2009 to your staff report, to which you have not responded to date, some six (6) months after my letter in spite of numerous requests. Specifically, the questions you raised regarding adequacy of the impact fees imposed by TAMC, the Transportation Agency for Monterey County, on the Monterey Bay Shores Ecoresort. SNG provided you with a full response in its May 4<sup>th</sup> letter. Since then TAMC staff has written a Memorandum addressing the questions raised by you and Landwatch. A copy is attached for your reference.

Their position clearly supports the conclusions of our response, suggests that your comments and concerns are not valid and TAMC validated a long standing fee program which equitably collects funds from projects towards construction of the improvement projects, and agrees that mitigation is considered adequate for cumulative impacts. TAMC staff, the local agency in charge of local transportation issues and programs, agrees that the fee program adequately satisfies mitigation requirements and that not all funding sources need to be identified at this point. This is a long standing principle in Transportation and meets CEQA requirements.

TAMC staff further states "...it is premature to say that the Coastal Commission would not approve a permit for a project that is not currently seeking Coastal Commission review or approval".

I trust that your concerns regarding the traffic issues have been addressed and are satisfactory to issue the Coastal Development Permit. Again, I suggest we meet next week at

505 Montgomery Street, Suite 1150, San Francisco, CA 94111 p 415.874.3121 f 415.874.3001

your offices in Santa Cruz to discuss any remaining open issues and our responses of last May 4th. Sheri Damon, Esq. our new legal counsel, has also requested such a meeting and I would hope that would foster an era of collaboration. I encourage you to arrange that so that we are all informed as to the issues and can work collaboratively to resolve outstanding matters. In addition, we can apprise you of the water permit distribution status (as you are aware, water supply is not an issue) on appeal by the MPWMD after the Court ruled in favor of SNG and the need to allow SNG to resolve that issue first before going to a Public Hearing in front of the Commission in order allow the MBS Ecoresort to be reviewed by the Commission against the LCP standards as is required by the writ Court Order and in order to allow fairness and due process.

I look forward to your response and a meeting next week.

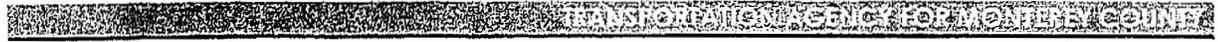
Sincerely yours,

*Ed Ghandour*

Ed Ghandour, Ph.D.  
President

cc. Sheri Damon, Esq.  
Steve Matarazzo, Sand City Administrator  
Dan Carl, Coastal Commission

Attachments: TAMC Memo (21 pages)  
MBSE Highlights



# Memorandum

To: Board of Directors  
 From: Michael Zeller, Associate Transportation Planner  
 Meeting Date: September 23, 2009  
 Subject: Regional Impact Fee Legal Opinion

### RECOMMENDED ACTION:

1. **APPROVE** agreement with Nossaman LLP to provide legal services in an amount not-to-exceed \$15,000;
2. **AUTHORIZE** the Executive Director to execute the agreement and changes to the agreement if such changes do not increase the Agency's net cost, subject to approval by Agency Counsel; and
3. **AUTHORIZE** the use of an amount not-to-exceed \$15,000 from Regional Surface Transportation Program interest account funds for the agreement.

### SUMMARY:

LandWatch and the Coastal Commission commented on the proposed Monterey Bay Shores Ecoresort, in which both questioned whether the fee program serves as adequate mitigation for cumulative transportation impacts absent additional funding sources. Staff disagrees and is seeking a legal opinion from Nossaman LLP (drafters of the Joint Powers Agreement) to the validity of mitigating cumulative impacts via the fee program in the current fiscal environment.

### FINANCIAL IMPACT:

Regional Surface Transportation Program interest account funds in amount not-to-exceed \$15,000 would be used for this agreement. The Transportation Agency is reimbursed for expenses related to administering the fee program, up to one-percent of fee revenues. The fee program is expected to generate approximately \$243 million (2007 dollars) to Year 2030.

### DISCUSSION:

In July, the City of Sand City forwarded a letter to the Transportation Agency regarding comments the city had received on the Monterey Bay Shores Ecoresort project with reference to the regional development impact fee program. The letter outlined comments received from LandWatch Monterey County and the California Coastal Commission as to the applicability of the fee program to serve as adequate mitigation for cumulative transportation impacts. Mitigating cumulative impacts is the sole purpose of the fee program and staff disagrees with these comments.

The key issues raised by these letters are:

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1. A construction schedule for the fee program projects has not been identified, as such, mitigation measures relying on payment of the regional fees do not meet California Environmental Quality Act requirements;
2. Revenues raised by the fee program are not sufficient to pay for regional fee program-funded projects without a local funding source; and
3. The Highway 1 Sand City / Seaside Widening project is not adequate mitigation since it will take too long to construct, remaining funding sources have not been identified, the project runs through sensitive habitat, and it is not clear that the Coastal Commission would approve a permit for the project.

Staff's positions on these comments are as follows:

1. Staff believes that the Board-approved Strategic Expenditure Plan, which identifies the construction schedule for near-term projects in the fee program and forecasts when fee revenues will be expended on all the projects, satisfies the first comment.
2. The fee program acts as one source of funding for the improvement projects, and relies on other federal, state, and local fund sources to fully-fund projects. Under the California Environmental Quality Act, developments are not relieved of their duty to mitigate based on the actions of other agencies (i.e. jurisdictions providing their share of a project in local fee revenues). As long as the fee program equitably collects funds and demonstrates progress towards construction of the improvement projects, the mitigation is considered adequate for cumulative impacts.
3. Staff does not believe this is a valid comment since, related to the second comment, all funding sources do not need to be identified at this point; an environmental review of the project will be conducted, with full mitigation of impacts; and it is premature to say that the Coastal Commission would not approve a permit for a project that is not currently seeking Coastal Commission review or approval.

To protect the integrity of the program from potential legal challenges that may arise from these concerns, staff is seeking to receive a legal opinion as to the applicability of the fee program to act as adequate mitigation for cumulative impacts under the California Environmental Quality Act in the absence of additional local funding sources or sales tax. The attached agreement for services is with Nossaman LLP, who was selected as sole-source for the contract due to their experience with the fee program as the developers of the Joint Powers Agreement and fee ordinance. Under the contract, Nossaman LLP would perform the following services:

- Review the case law surrounding fee programs, scheduling of improvement projects, and identification of funding sources; and
- Provide a written response as to the validity of the comments from LandWatch and Coastal Commission.

Staff requests that the Board approve the agreement for legal services.

Approved by:  Date signed: 9/23/09  
Debra L. Hale, Executive Director

Consent Agenda

Counsel Review: Yes

Attachment: 1. Letters re: Monterey Bay Shores Ecoresort  
2. Scope of Work

Web Attachment: Agreement for Services



July 8, 2009

Ms. Debbie Hale  
Executive Director  
TAMC  
55-B Plaza Circle  
Salinas, California 93901

Dear Debbie:

It is requested that the TAMC counsel review and comment on two recent critiques of the regional development impact fee as being inadequate mitigation for cumulative traffic impacts. Both of these critiques have emanated from review of a proposed coastal resort project in Sand City known as the Monterey Bay Shores Ecoresort.

The first complaint was issued by Land Watch Monterey County whereby they assert: "While the Regional Impact Fee Program includes projects identified as mitigation measures, a schedule for completion of these projects has not been identified. Implementation of these projects was dependent in part on approval of the TAMC 1/2 cent sales tax which was defeated by the voters in November. Without identification of a construction schedule for the proposed roadway projects, mitigation measures relying on payment of a regional impact fee do not meet CEQA requirements."

A similar issue was raised by Coastal Commission staff in their review of the Ecoresort project. Commission staff state: "A fee program has been implemented recently by the Joint Powers Authority for the Monterey County Regional Development Impact Fee Agency, however the revenues raised by the fee program are not sufficient to pay for the highway improvement identified without new local funding sources. The TAMC Regional Development Impact Fee Joint Powers Agency Implementation Guidelines (updated March 2009), state that the 17 regionally-significant projects identified for the impact fee program (which includes the Rte1 Sand City/Seaside widening) will cost a total of approximately \$1.18 billion and that the development fees are expected to collect \$328 million of this total. The Route 1 Sand City/Seaside widening proposal was among the transportation projected listed for funding under Monterey County's Measure Z sales tax increase that failed on the November 2008 ballot. In addition, it has been the Commission's experience that the time it takes to bring such major Highway One projects to fruition can be considerable, and thus it could be many years before any traffic relief associated with such improvements is realized."

City Hall  
1 Sylvan Park  
Sand City, CA  
93955

Administration  
(831) 394-3054

Planning  
(831) 394-6700

FAX  
(831) 394-2472

Police  
(831) 394-1451

FAX  
(831) 394-1038

Incorporated  
May 31, 1960

I have included the LandWatch letter raising their traffic impact concern as a matter of context. Similarly included are pages 95 through 97 of the Coastal Commission staff report addressing traffic concerns of the proposed project. (The entire coastal commission report can be found on their website's May 2009 meeting agenda packet)

Since the adoption of the regional traffic impact fee program, the Monterey Bay Shores Ecoresort project is one of the first, proposed major projects to be publicly reviewed and to elicit the above-stated CEQA issue; and it will not be the last. The issue of whether the regional development impact fee is adequate cumulative traffic mitigation for major development projects will continue to arise either through comment letters during the EIR process, through litigation, or both. Therefore, it would be of great assistance to address any legal issues now.

Sincerely,



Steve Matarazzo  
City Administrator

Enclosures:

City Council  
City Attorney

tamcfee.1.

LandWatch  
monterey county

Post Office Box 1876  
Salinas, CA 93902-1876  
Salinas Phone: 831-422-9390  
Monterey Phone: 831-375-3752  
Website: www.landwatch.org  
Email: landwatch@mcltu.org  
Fax: 831-422-9391



January 27, 2009

David Pendergrass, Mayor  
City of Sand City  
One Sylvan Park  
Sand City, CA 93955

Subject: Addendum for 341 Unit Monterey Bay Shores Resort

Dear Mayor and Members of the City Council:

LandWatch Monterey County has reviewed Addendum for the Monterey Bay Shores Resort. Based on our evaluation, a Subsequent Environmental Impact must be prepared in accordance with the California Environmental Quality Act.

Subsequent EIR is Required

CEQA (CEQA §21156) requires that a Subsequent EIR be prepared if:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

Substantial Changes in Project

1. The project has been redesigned to place the structures into the sand dunes. While this would initially conceal the project and protect the viewshed, the shifting nature of sand dunes and the potential for revealing portions of the structure have not been thoroughly evaluated. Further, government agencies and the public have not had an opportunity to review the studies and reports on sand dune stabilization. A Subsequent EIR is needed to address this issue.

Substantial Changes to Circumstances Under Which the Project is Being Undertaken

- 2. Global warming is a changed circumstance since the project was approved. The Addendum finds that because the revised project would produce fewer emissions than the approved project and includes several conservation measures, it would not result in significant unavoidable impacts or substantial new cumulative impacts on Greenhouse Gases (GHG). The impact on climate change must be assessed in comparison to the existing environment not another project. Additionally, the assessment is based on a

qualitative rather than a quantitative evaluation. GHG emissions must be estimated for the revised project and its impact on climate change addressed consistent with State guidelines:

3. Traffic levels of service (LOS) on roads affected by the revised project have declined since the project was approved. Many of these roads operate at LOS D and F. The Addendum finds the revised project would have new significant impacts on several road segments and intersections. The Addendum finds that, among other measures, contributions to the Regional development Impact Fee Program would reduce impacts to less than significant. While the Regional Impact Fee Program includes projects identified as mitigation measures, a schedule for completion of these projects has not been identified. Implementation of these projects was dependent in part on approval of the TAMC 1/2 cent sales tax which was defeated by the voters in November. Without identification of a construction schedule for the proposed roadway projects, mitigation measures relying on payment of a regional impact fee do not meet CEQA requirements.

#### New Information Available

4. Since the project was approved, new information regarding climate change and its impacts on coastal resources has become available. Even though the Addendum indicates that the revised project has been setback further than the approved project based on estimates of sea level rise, the public has not had an opportunity to review the new findings. This is new information that must be addressed in a Subsequent EIR.
5. Since the project was approved, the Seaside Groundwater Basin was adjudicated, and it was determined that the Basin is in overdraft. The court also determined that the project applicant (Security National) is entitled to 149 AFY from the basin. The DEIR states, "Thus, in the event that groundwater levels decline or are otherwise impacted for any reason and withdrawal reductions are mandated, non-priority users must reduce their use of the groundwater as needed, down to zero, before any of Security National's 149-acre feet of water can be reduced." (P. 66). Water demand for the revised project is estimated at 63.8 AFY, and CalAm would provide water service (p. 69). Because the revised project would use less water than the approved project, the Addendum finds the project's impact on groundwater to be less than that of the approved project. CEQA requires that the project's impact be evaluated against existing conditions, not another project. Clearly, additional withdrawal from the basin would have a significant adverse impact on groundwater supplies and water quality. Further, the impact on other water users could be significant if they would be required to reduce their water extractions to zero so this project could be served. Additionally, use of water from the Sand City desal plant is a feasible mitigation measure that should be considered. This is clearly new information that must be addressed in a Subsequent EIR.
6. State Water Resources Control Board (SWRCB) Order 95-10 required reduced pumping from the Carmel River. Because efforts by Cal-Am and MPWD have failed to achieve any significant reduction of unlawful diversions from the Carmel River since 1998, SWRCB has issued a Draft Cease and Desist Order (CDO) with a final order expected later this year. Project impacts on the environment and existing water users must be

considered in a Subsequent EIR in light of a final CDO.

7. Finding #21 of the staff report (p. 217) states, "A key change (since the original application) is water service by CAW via SNG's adjudicated water rights rather than service by onsite shallow wells." This is a significant change that should be analyzed in a Subsequent EIR.
8. A new water supply from the pending Sand City desalination project is a feasible mitigation measure that should be considered. This is clearly new information that must be addressed in a Subsequent EIR.
9. The project would use graywater and stormwater runoff to supplement its water supply (p. 69). Graywater is currently not permitted to be used in Monterey County. This is new information that must be addressed in a Subsequent EIR.
10. The FEIR for the project was certified in 1998. This is the same year the California Air Resources Board identified particulate matter from diesel-fueled engines as a toxic air contaminant. The impact of diesel exhaust emissions on public health from the construction phase of the project should be identified. It is critically important to address diesel exhaust emissions from the over 10,000 truck trips needed to haul 420,000 cubic yards of sand off-site.

We look forward to reviewing the Subsequent EIR. Thank you for the opportunity to review the document.

Sincerely,



Chris Fitz, Executive Director  
LandWatch Monterey County

# LandWatch

monterey county

Post Office Box 1876  
Salinas, CA 93902-1876  
Salinas Phone: 831-422-9390  
Monterey Phone: 831-375-3752  
Website: www.landwatch.org  
Email: landwatch@mchw.org  
Fax: 831-422-9391



January 27, 2009

Kristi Markey, Chair  
MPWMD Board of Directors  
P.O. Box 85  
Monterey, CA 93942

Subject: 341 Unit Monterey Bay Shores Resort

Dear Chair and Members of the Board of Directors:

LandWatch Monterey County has reviewed the staff report and Addendum for the Monterey Bay Shores Resort. Based on our evaluation, a Subsequent Environmental Impact must be prepared in accordance with the California Environmental Quality Act (CEQA). Requiring additional environmental review of water supply, water quality and hydrology issues is within the purview of the Monterey Peninsula Water Management District which must rely on an adequate environmental document to take discretionary action on the proposed project. Our specific comments follow:

### Role of MPWMD as a Responsible Agency

CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible (CEQA Guidelines §15021). The Guidelines require a responsible agency to consider the environmental documents prepared by the lead agency and to reach its own conclusions on whether and how to approve the project (CEQA Guidelines §15096). Responsible agencies may refuse to approve a project to avoid direct or indirect effects of that part of the project which the Responsible Agency is required to act upon (CEQA Guidelines, §15042).

CEQA requires that each responsible agency certify that its decision making body reviews and considers the information contained in the EIR [CEQA Guidelines §15050(b)]. Further, the Guidelines require a responsible agency to consider an addendum with the final EIR prior to making a decision on the project [CEQA Guidelines §15164 (d)]. To our knowledge, only a Revised Draft Addendum has been provided to the District Board, and the Board has not considered the FEIR.

### Subsequent EIR is Required

CEQA (CEQA §21166) requires the preparation of a Subsequent EIR if:

*(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.*

*(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.*

*(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.*

#### Substantial Changes to Circumstances Under Which the Project is Being Undertaken and New Information Available

The FEIR for the project was certified in 1998, more than 10 years ago. Since that time, substantial changes to the circumstances of the project have arisen and new information is available making the analysis of the Addendum insufficient and requiring a subsequent EIR in order to comply with CEQA. The following circumstances and new information require new analysis:

1. State Water Resources Control Board (SWRCB) Order 95-10 required reduced pumping from the Carmel River. Because efforts by Cal-Am and MPWD have failed to achieve any significant reduction of unlawful diversions from the Carmel River since 1998, SWRCB has issued a Draft Cease and Desist Order (CDO) with a final order expected later this year. The issuance of the Draft CDO alone is a new circumstance requiring a new EIR and project impacts on the environment and existing water users must be considered in a Subsequent EIR in light of a final CDO.
2. Since the project was approved, the Seaside Groundwater Basin was adjudicated, and it was determined that the Basin is in overdraft. The court also determined that the project applicant (Security National) is entitled to 149 AFY from the basin. The DEIR states that water demand for the revised project is estimated at 63.8 AFY, and CalAm would provide water service (p. 69). Because the revised project would use less water than the approved project, the Addendum finds the project's impact on groundwater to be less than that of the approved project. CEQA requires that the project's impact be evaluated against existing conditions, not another project. Clearly, additional withdrawal from the basin would have a significant adverse impact on groundwater supplies and water quality. Further, the impact on other water users could be significant if they would be required to reduce their water extractions so that this project could be served. This potential impact requires a Subsequent EIR.
3. Finding #21 of the staff report (p. 217) states, "A key change (since the original application) is water service by CAW via SNG's adjudicated water rights rather than service by onsite shallow wells." This is a significant change that should be analyzed in a Subsequent EIR.
4. A new water supply from the pending Sand City desalination project is a feasible mitigation measure that should be considered. This is clearly new information

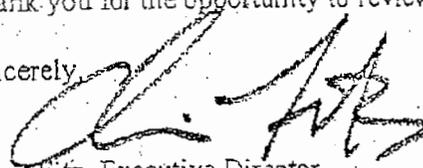
that must be addressed in a Subsequent EIR.

5. The project would use graywater and stormwater runoff to supplement its water supply (p. 69). Graywater is currently not permitted to be used in Monterey County. This is new information that must be addressed in a Subsequent EIR.

In conclusion, MPWMD should take no action on the Monterey Bay shores Resort water permit until a Subsequent EIR has been prepared, re-circulated, and MPWMD has had and opportunity to review the new EIR and the public comments on that new document.

Thank you for the opportunity to review the document.

Sincerely,



Chris Fitz, Executive Director  
LandWatch Monterey County

cc: City of Sand City

lower for most of the stretch of highway fronting the site, and at levels D and E for certain segments.<sup>93</sup> When traffic volumes associated with existing approved, but not yet constructed, projects in the vicinity are added in, Highway One traffic is even worse, reaching LOS level F for northbound evening peak trips approaching the site from the Monterey side and LOS level E for southbound morning peak trips towards the site (volumes of 4,513 and 4,053 respectively).<sup>94</sup> Similar traffic congestion is found at many of the interchanges in the near vicinity, including in relation to approved projects not yet constructed, where most of the intersections in the area are at LOS level C or worse, and several intersections rate an LOS of D, E, or F at peak traffic times.<sup>95</sup> In terms of the primary intersection in relation to the subject site, where the Fremont Boulevard off and on ramps to Highway One are located, this intersection currently operates at LOS D and F during peak times, and operates at level F when approved projects not yet constructed are added.<sup>96</sup>

Thus, based on peak time level of service calculations, Highway One and surface street intersections through which traffic directed to the project site must move are currently heavily impacted by too much traffic, much of it to unacceptable levels as determined by Caltrans.<sup>97</sup> In other words, the circulation system in the immediate project area, including Highway One, is inadequate. It is within this degraded traffic context that the proposed project must be understood.

### 3. Project Traffic Inconsistent with LCP

The proposed project is estimated to add 2,032 daily trips to the traffic mix, including 272 trips during the peak traffic times.<sup>98</sup> These trips would increase traffic on Highway One, including during peak use periods, and would likewise increase traffic along local streets and intersections in the area, including the primary Fremont Street/Highway One off and on ramp intersection. The Applicant indicates that such trips can be reduced by 15% by adopting transportation demand management (TDM) programs.<sup>99</sup>

The LCP requires that there be adequate circulation and that the project not contribute to traffic congestion. As described above, the existing circulation system is inadequate. In addition, the proposed project will add traffic to already congested Highway One, and to already congested local roads and intersections. Thus, as proposed, there is inadequate circulation capacity available at certain times to satisfy the proposed project needs. The project would contribute 85% of the projected traffic to this mix, thus creating additional traffic congestion, even if the Applicant's TDM programs were 100%

<sup>93</sup> Southbound AM and northbound PM trips (Draft EIR Addendum, p. 95). Per the Addendum, Highway LOS ranges from A (free flow speeds) to F (unacceptable delays) where level C is generally considered average traffic (i.e., average delays).

<sup>94</sup> Id (p.95).

<sup>95</sup> Id (p.94). Intersection LOS uses a similar rating methodology as highway LOS, ranging from little/no delay (A) to unacceptable (F).

<sup>96</sup> Id (p.94).

<sup>97</sup> As indicated in the Draft Addendum document, Caltrans indicates that a significant impact in San Diego would occur if the level of service D threshold is exceeded due to project traffic on a roadway segment.

<sup>98</sup> Id (p.98-99).

<sup>99</sup> See letter from Applicant to Commission staff dated October 17, 2008. Such programs are generally designed to reduce trips through promoting carpooling, vanpooling, transit, walking and bicycling, including in relation to use of the adjacent regional recreational trail.



successful. As such, the proposed project is inconsistent with LUP Policies 6.4.10 and 6.4.24, and IP Section 3.2.

Other than the TDM programs identified, the proposed project does not include mitigation to address traffic congestion and thus these LCP inconsistencies. The City's draft Addendum does recommend that the Applicant contribute an as yet to be determined fair share contribution to the Transportation Agency of Monterey County (TAMC) regional development impact fee program,<sup>100</sup> but such mitigation is not currently part of the project mitigation and has not yet been adopted by the City.<sup>101</sup> In addition, the primary improvements cited by the Addendum to be implemented under the fee program to address traffic congestion involve widening Highway One south of the Fremont Boulevard interchange, and modifying the Fremont Boulevard on and off ramp intersection itself. The Addendum indicates that Caltrans has completed a study report for such improvements,<sup>102</sup> however, they do not have funds programmed, have not received coastal permits, and their future construction, if approved, is many years away.

Specifically, although intersection improvements east of the Highway could likely be accomplished in this already developed area to help ease traffic without undue resource impacts, it is not clear that the Highway widening identified could be so completed. In fact, the existing Highway cuts through historic dune areas, and is adjacent to existing dune resources, and it is not clear that widening could be achieved without impacting such resources. Likewise, it does not appear that such resource impacts could be found consistent with applicable LCP and Coastal Act<sup>103</sup> policies protecting these resources. Thus, even if it were part of the project and/or part of a final CEQA mitigation package, it is not clear that the impact fee traffic relief identified can even be achieved.

Further, as mentioned above, a fee program has been implemented recently by the Joint Powers Authority for the Monterey County Regional Development Impact Fee Agency, however the revenues raised by the fee program are not sufficient to pay for the highway improvement identified without new local funding sources. The TAMC Regional Development Impact Fee Joint Powers Agency Implementation Guidelines (updated March 2009) state that the 17 regionally-significant projects identified for the impact fee program (which includes the Rte 1 Sand City/Seaside widening) will cost a total of approximately \$1.18 billion and that the development fees are expected to collect \$328 million of this total. The Route 1 Sand City/Seaside widening proposal was among the transportation projects listed for funding under Monterey County's Measure Z sales tax increase that failed on the November 2008 ballot. In addition, it has been the Commission's experience that the time it takes to bring such

<sup>100</sup> And put in a signal at the California Avenue/Playa Avenue intersection.

<sup>101</sup> And, as indicated in the water supply findings previously, and the CEQA findings that follow, additional CEQA work will be necessary to address potential project impacts. As a result, the degree to which the Draft Addendum mitigation measures can be relied upon even if it were to be certified by the City is unclear.

<sup>102</sup> Id (p.100)

<sup>103</sup> Neither the City of Seaside nor the City of Monterey downcoast of Sand City have certified LCPs, and thus the standard of review for development in these jurisdictions is the Coastal Act.



California Coastal Commission

major Highway One projects to fruition can be considerable, and thus it could be many years before any traffic relief associated with such improvements is realized. In this case, Caltrans indicates that the proposed project may be pursued sometime between 2017-2024, but this estimate does not account for the balance of funding, which is currently unavailable. Without the balance of funding, the projects could be in the future planning stages indefinitely. Given the natural resources concerns, the fact that the funding does not exist, the mechanism for raising the funds was defeated at the ballot box, and that participation in the fee program has not been required of the Applicant, there is no reasonable plan to mitigate traffic impacts and no reasonable expectation that traffic mitigation would be implemented.

Furthermore, given the existing traffic problems identified, it appears that congestion relief is necessary, whether the proposed project were to occur or not, and it is not clear that the traffic fixes proposed now to address existing congestion can or should be countenanced with respect to addressing traffic impacts for this specific project. In other words, as yet un-permitted traffic mitigation strategies (including multi-modal transportation alternatives, potential highway widenings, etc.) to address current problems cannot be used to offset project contributions on top of current problems.

In short, the project would generate significant traffic that would further tax an overburdened and currently recognized as inadequate circulation system, contributing to traffic congestion. The potential mitigation proposed by the City (major Highway widening and intersection improvements through a fair share contribution) to address this traffic impact is not part of the proposed project, is not part of a final CEQA mitigation package otherwise, is not permitted, raises significant LCP and Coastal Act issues, is many years away, is already proposed to address existing traffic deficiencies, and cannot adequately resolve the LCP inconsistencies identified above.

#### 4. Parking

The LCP requires 830 parking spaces to be provided at the site, including 76 spaces for public coastal access parking.<sup>104</sup> The proposed project would provide 841 parking spaces, including 79 spaces identified for public coastal access parking. Thus, in terms of spaces provided, the project meets the LCP's minimum thresholds.<sup>105</sup> There is little to indicate that the project would have unusually large parking needs that haven't been addressed, and thus it meets the LCP's requirement that there be adequate parking.

#### 5. Conclusion

<sup>104</sup> Local Coastal Program Implementation Plan parking requirements are based on the number of units identified by the Applicant. As noted previously, the Applicant has also described the project in terms of "modules", each of which appear to be the same size. Although unit counts to module counts are the same for the hotel component of the proposed project (i.e., there are 160 hotel units that are made up of 160 modules), the other 180 units are made up of 450 modules. Thus, to the extent the modules are intended to be used as separate units and/or are intended to eventually be broken up into separate units, the site would have a severe deficit of parking spaces. The Commission's parking evaluation, however, takes the Applicant's unit counts to be the number of separate units that are proposed, and the modules simply as a space allotment tool.

<sup>105</sup> As distinguished here in terms of parking needs and not the degree to which parking spaces result in other resource issues, particularly in terms of the dune landforms and public views which are discussed in the preceding public viewshed findings and not here.





Regional Transportation Planning Agency • Congestion Management Planning  
Local Transportation Commission • Monterey County Service Authority for Freeways & Expressways

July 24, 2009

Mr. Charles Lester  
Senior Deputy Director  
California Coastal Commission  
725 Front Street, Suite 300  
Santa Cruz, California 95060-4508

**SUBJECT: Monterey Bay Shores Ecoresort Appeal Staff Report**

Dear Mr. Lester:

The Transportation Agency for Monterey County is the Regional Transportation Planning Agency and Congestion Management Agency for Monterey County. Transportation Agency staff has received and reviewed comments by Coastal Commission staff related to the Regional Development Impact Fee program in the April 24, 2009 Appeal Staff Report regarding the Monterey Bay Shores Ecoresort and would like to offer several points of clarification:

1. The Regional Development Impact Fee program went into effect on August 27, 2008 with all Monterey County jurisdictions, including the City of Sand City. All jurisdictions adopted a Joint Powers Agreement to assess fees on all new development. As such, the Monterey Bay Shores Ecoresort, were it to be permitted, would be required to contribute a fair-share payment in Regional Development Impact Fees.
2. The Regional Development Impact Fee program collects fees from all new development in Monterey County as mitigation for cumulative impacts to the regional transportation system. New development, through the environmental review process, must still address project-specific impacts as a separate matter through other mitigation measures. The California Department of Transportation contributed in the development of the regional fee program and has certified that it is an adequate mechanism for mitigating cumulative transportation impacts (see enclosed letter).
3. As per the Mitigation Fee Act, impact fee programs can only collect fair-share payments related to the net increase in impacts that a given development will generate. This does not cover existing deficiencies, which must be funded through other means such as a local sales tax or State or Federal funding programs. The State Route 1 Widening project referenced in the Appeal Staff Report is listed in the Regional Development Impact Fee program with a total project cost of \$53,000,000;

July 24, 2009

only \$4.7 million of which is funded through the fee program. This is the portion of the project that is attributable to new growth and that the Monterey Bay Shores Ecoresort would be required to contribute to as mitigation for cumulative impacts.

4. Regardless of the funding status of an identified mitigation project, new development is still required to mitigate its cumulative impacts under the California Environmental Quality Act. The Regional Development Impact Fee Program is the adopted and accepted mechanism for mitigating cumulative transportation impacts in Monterey County. The actions of other agencies, jurisdictions or developments have no bearing on a given development's duty to mitigate through the regional fee program.
5. The Transportation Agency has prepared a draft Strategic Expenditure Plan to prioritize funding and identify construction schedules of all the improvement projects contained in the Regional Development Impact Fee program. The draft plan, a requirement of the Joint Powers Agreement, is scheduled for adoption by our Board at the August 26, 2009 meeting.
6. All of the improvement projects contained in the Regional Development Impact Fee program will undergo an environmental review process to ensure consistency with the California Environmental Quality Act and, as appropriate, Coastal Acts and Local Coastal Plans. All improvement projects will be required to mitigate impacts to a less than significant level.

- With regards to State Route 1 widening, the staff report states:

*"Specifically, although intersection improvements east of the Highway could likely be accomplished in this already developed area to help ease traffic without undue resource impacts, it is not clear that the Highway widening identified could be so completed. In fact, the existing Highway cuts through historic dune areas, and is adjacent to existing dune resources, and it is not clear that widening could be achieved without impacting such resources. Likewise, it does not appear that such resource impacts could be found consistent with applicable LCP and Coastal Act 103 policies protecting these resources. Thus, even if it were part of the project and/or part of a final CEQA mitigation package, it is not clear that the impact fee traffic relief identified can even be achieved."*

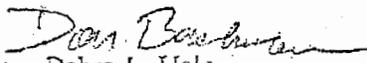
The Project Study Report completed for the State Route 1 widening project shows several alternatives for the design of the project, including converting the median to a lane of traffic to reduce the amount right-of-way necessary. Therefore, it is not a given that the widening project would involve the take of historic dunes or sensitive habitat to a level that would be inconsistent with the Coastal Act or Local Coastal Plans after mitigation. Without a proper environmental review, it would be premature to base another project's finding on that premise.

July 24, 2009

- Our agency has also been in discussion with the City of Seaside regarding the possibility of using a portion of the \$4.7 million in regional fee funding for the State Route 1 widening project for the Monterey Branch Line. The Monterey Branch Line's proposed 16-mile light-rail or bus rapid transit service will connect to the planned Caltrain service in Castroville and also provide local transit alternatives with stations in Monterey, Seaside, Sand City, Marina/California State University Monterey Bay, and Castroville. Both projects serve the same corridor through Sand City and Seaside and would alleviate congestion to mainline State Route 1. A development that has cumulative impacts to State Route 1 could also consider contributing to the Branch Line project as part of its mitigations.

Thank you for the opportunity to review this document. If you have any questions, please contact Michael Zeller of my staff at (831) 775-0903.

Sincerely,

  
Debra L. Hale  
Executive Director

CC: Dave Murray, California Department of Transportation, District 5  
Steve Matarazzo, City of Sand City

Enclosure: February 21, 2008 letter from Richard Krumholz, Caltrans, to Debra L. Hale, Transportation Agency, re: Regional Development Impact Fee Program

DEPARTMENT OF TRANSPORTATION

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<http://www.dot.gov/dis05>



*First your project  
then energy efficient*

February 21, 2008

FEB 25 2008

Debbie Hale, Executive Director  
Transportation Agency for Monterey County (TAMC)  
55-B Plaza Circle  
Salinas, CA 93901-2902

Dear Ms. Hale:

REGIONAL DEVELOPMENT IMPACT FEE PROGRAM

This letter is to express support for the proposed TAMC Regional Development Impact Fee program. The California Department of Transportation (Caltrans) commends your leadership in initiating and directing this collaborative countywide effort. It is widely recognized that existing transportation funding sources are insufficient to address growth-related congestion and that alternative funding sources are necessary to address transportation needs of the future. We are gratified that the jurisdictions within Monterey County understand this and are ready to move this effort forward.

In regions of the state where regional impact fee programs are in place, Caltrans considers the collection and application of fees for impacts of new development as sufficient to mitigate cumulative impacts to the State Highway System (SHS) under the California Environmental Quality Act (CEQA). In these circumstances, Caltrans' subsequent review of individual development proposals focuses on project-specific impacts and related mitigation. The benefits of implementing such a program include adding a measure of predictability in the process and streamlining CEQA review.

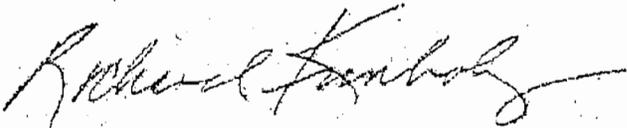
In the case of Monterey County, the implementation of the Regional Development Impact Fee program as identified in Table 6 of the January 2008 Nexus Study Update Draft (Zonal Distribution for Fee Program Projects) (enclosed) is considered sufficient to mitigate cumulative impacts of new development to the SHS. We ask to re-evaluate the program if any modifications are proposed so that we may determine whether it would continue to meet this burden under CEQA.

*State of California Department of Transportation*

Debbie Hale  
February 21, 2008  
Page 2

I would like to thank TAMC staff for their hard work in developing a comprehensive regional development impact fee program. I look forward to working with you along with the cities and county in implementing this program. If you have any questions or concerns, please contact David Murray at (805) 549-3168.

Sincerely,



RICHARD KRUMHOLZ  
District Director

Enclosure:



Agreement for Professional Services between the Transportation Agency and Nossaman LLP  
Page 8 of 9

**EXHIBIT A**  
**Scope of Work**

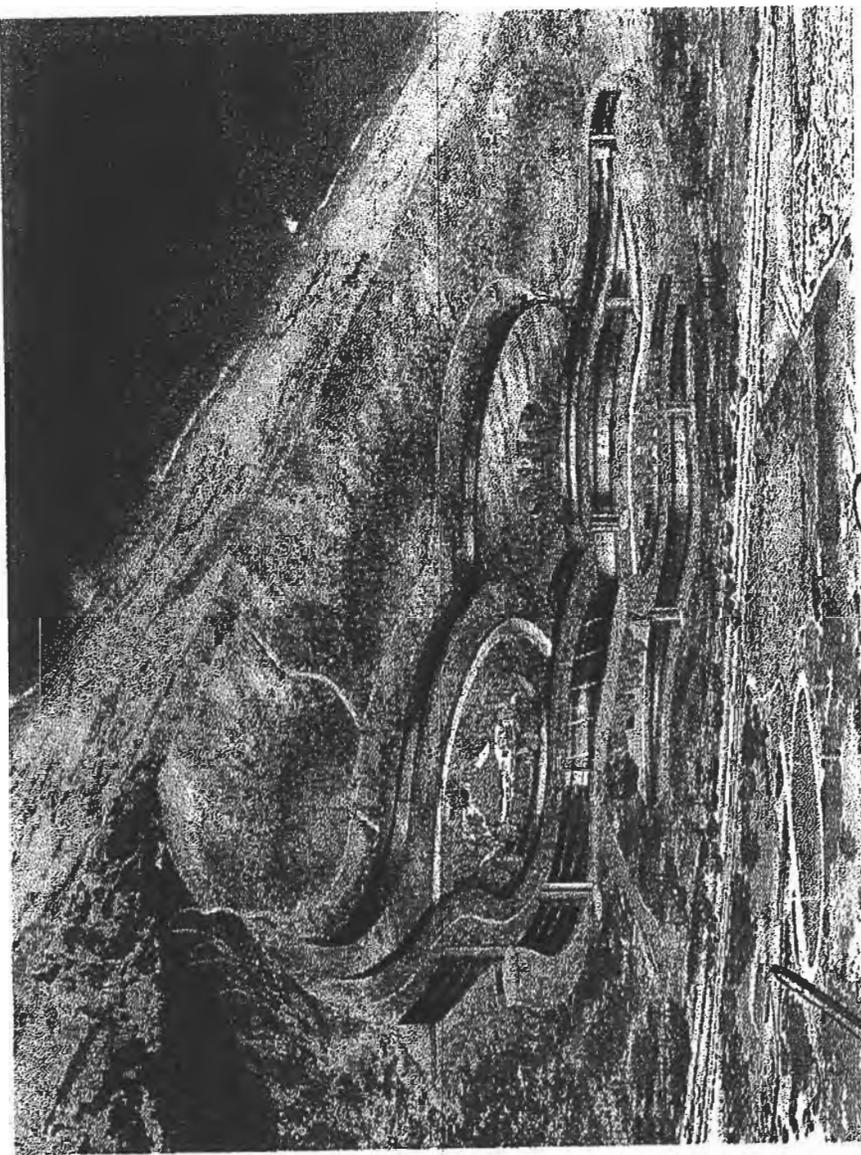
TAMC seeks the technical expertise of Nossaman LLP in the following tasks:

Task: Provide a written legal opinion as to the applicability of using the regional development impact fee program as mitigation for cumulative transportation impacts, absent additional funding sources:

- a) Review the case law surrounding fee programs, scheduling of improvement projects, and identification of funding sources;
- b) Review the comments from LandWatch Monterey County and California Coastal Commission on the Monterey Bay Shores Ecoresort, in relation to the regional development impact fees; and
- c) Provide a written legal opinion regarding the content of the comments from LandWatch Monterey County and California Coastal Commission.

# Monterey Bay Shores

*Ecoresort, Wellness Spa, and Residences*



- Visionary and Sustainable Design
- Restorative Approach to Degraded Site by Improving Biodiversity, Habitat & Dune Restoration
- Respect for Monterey Bay National Marine Sanctuary
- Large Setbacks Provide Buffer for Habitat & Natural Coastal Processes

- Living Roofs Support Native Species
- Up to 500 Green Jobs
- Water Conservation and Graywater Reuse
- Over 50% Reduction in Carbon Footprint
- 30% Renewable Energy Sources
- Beach and Dune Trails
- Public Access and Parking
- Botanical and Herbal Gardens
- Panoramic Views of Monterey Bay
- Holistic Lifestyle and Wellness Spa that Teach & Inspire
- Sustainable Green Dining
- Connection to Regional Bike Path
- Access to World Class Activities on Monterey Peninsula
- Giving Back to the Community by Funding Local Environmental Projects
- Alternative Energy Transportation Systems

## The Ecoresort and Its Experience

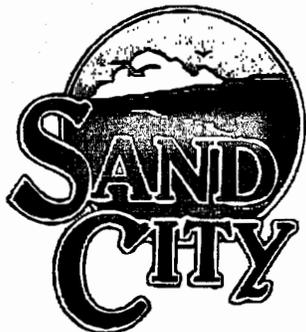
STEWARD OF THE COAST



RESPECT • RESTORE • RENEW



*Fja*



**RECEIVED**

December 8, 2009

DEC 08 2009

California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, California 94105

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

**SUBJECT: REQUEST FOR CONTINUANCE OF PUBLIC HEARING  
REGARDING THE MONTEREY BAY SHORES ECORESORT**

Dear Commissioners:

The City of Sand City hereby requests a continuance of the public hearing regarding the Monterey Bay Shores Ecoresort for reasons detailed below. The City Council believes it has a well-established working relationship with the Coastal Commission and your staff based on recent approvals of its General Plan (2004), unanimous approvals of its desalination facility (2005, 2007, 2008), permit approval allowing a regional landfill remediation (1996), approval of its regional bike path connection (1996, 2006) and Local Coastal Program amendments resulting from the "Coastal Peace Accord" of 1996. The Coastal Peace Accord process was specifically commissioned by then Senate Majority Whip, Henry Mello. The City has also carefully followed the advice of a Periodic Review of its certified Local Coastal Program ("LCP") by engaging park agencies to purchase properties within our coastal zone in exchange for limited, acceptable development. Toward that end, we have decided to concentrate development in only two building envelopes west of Highway One as suggested in the 1990 Periodic Review, thereby reserving up to 75% of the coastal zone to remain in open space use, even though the LCP sanctions much more development.

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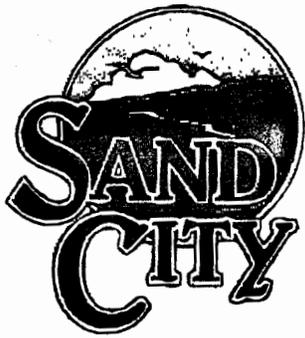
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Incorporated  
May 31, 1960

The Monterey Bay Shores Ecoresort ("MBSE") proposal scheduled for review on December 11, 2009 is within one of two development envelopes envisioned in the 1996 Memorandum of Understanding ("MOU"), made by and among the City, the California Department of Parks and Recreation ("CPDR") and the Monterey Peninsula Regional Park District ("MPRPD"). (Coastal Commission staff was also a part of the year long meetings leading up to the MOU.) The City believes the MBSE is wholly consistent with the LCP and is the most environmentally sensitive coastal resort to be proposed any place along California's coastal zone. Your staff disagrees with that conclusion. The staff report raises several concerns about the project as proposed. The City respectfully requests a series of meetings with coastal staff to determine if we can find common ground after adhering to our LCP, the 1996 MOU and recommendations of the Commission's own 1990 Periodic Review.

Page two of the staff report related to the Monterey Bay Shores Ecoresort states: "The applicant proposes to develop a 341-unit mixed use residential and visitor serving resort facility seaward of Highway One in the City of Sand City in Monterey County." Thus begins the narrative of a 123-page staff report which then proceeds



to explain why that kind of development in Sand City does not even come close to meeting the standards of the City's certified Local Coastal Program (LCP). If this were the case, it would be legitimate to ask why a developer and the City would spend so much time and effort to develop a project of this magnitude knowing that it violates policies of the certified LCP.

The LCP designates the Monterey Bay Shores Ecoresort property for up to 650 units of mixed housing and visitor-serving uses and public recreational uses. This land use designation is recognized as a "maximum", subject to environmental constraints and view protection policies within the LCP. Notwithstanding the LCP land use designation for the project site, your staff recommends that the density for development on the project site be reduced to zero. (See: Exhibit 41 to the November 20, 2009 Appeal Staff Report.) Staff's recommendation is not consistent with LCP policies or the Commission 1990 Periodic Review of the LCP.

Sand City's LCP was certified in 1984. At that time, land uses within the coastal zone of the city consisted of two sand-mining operations, an abandoned regional dump, a private corporation yard and concrete batch plant and a regional sewage treatment plant. In order to provide an economic incentive to "clean-up" that kind of assortment of visually obtrusive and environmentally damaging land use, the City, in coordination with the Commission and your staff, approved a land use plan that allowed more than 2,500 units of residential, hotel and other visitor serving uses in the coastal zone of the City.

On September 21, 1990, the Coastal Commission presented a "Staff Recommendation: Report to the City of Sand City on the Implementation of its Local Coastal Program", one of less than a handful of "periodic reviews" of local LCPs required by the Coastal Act. Page 120 of that review is particularly instructive. It states, in part: "In order to implement the LCP in a manner consistent with the Coastal Act, project approvals must be for less intensity than the permitted maximums, and in some cases, possibly much less. Deriving the exact figures is beyond the scope of this report; they should be set by the development review process. Enunciating such an approach in the LCP would be helpful, given the **current emphasis of its text on accommodating development.**" (Emphasis added). Other approaches discussed in the Periodic Review talk about preserving open space through public acquisition, or clustering development with contiguous open space. At the time of the Periodic Review, Coastal Commission staff was very concerned with the regional "landfill" (actually an abandoned "dump" without the careful management of today's landfills) and wanted that site "abated". Its first recommendation under page 120 was that "the City should continue efforts with all potential parties to abate the landfill. It should be explicit City policy that landfill clean-up should be implemented as soon as possible." Subsequently, the City cooperated with the MPRPD to remediate that site. The site is now exclusively devoted to open space use.

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The City has continued to cooperate with the Commission, MPRPD and CDPR to implement the LCP in a manner consistent with the Commission's Periodic Review. In 1996, after several meetings among the City, Commission staff, CDPR and MPRPD, a Memorandum of Understanding regarding implementation of the LCP was created (known locally as the "1996 Coastal Peace Accord"). Under the terms of the 1996 MOU, the City agreed to foster implementation of the LCP in a way which would result in at least 75% of the Sand City coastline being exclusively dedicated to open space use. The MOU recognizes two building envelopes along the coastline in Sand City, while supporting public acquisition of open space everywhere else. Since the 1990s, CDPR, MPRPD and other open space agencies have acquired title to most of the land along Sand City's coastline south of Tioga Avenue and a substantial portion north of Tioga Avenue. This type of cooperation is consistent with policy recommended on page 119 of the Periodic Review where it is suggested that the City attempt to "cluster development" along one-half of the City's coastline as a better way to address Coastal Act policies. (See Exhibit "A", attached.)

With the 1996 Memorandum of Understanding in hand, Security National Guaranty, Inc. ("SNG"), owner of one of the two sites along Sand City's coastline designated for future development in the 1996 MOU, made application to the City to amend its LCP to combine in a single location on the site a variety of uses then allowed in different areas of the site. The amendment to the LCP was approved by the City Council and certified by a unanimous vote of the Coastal Commission. (See Exhibit "B", attached.)

In 1998, the City completed a link to the regional bike trail along the coastal section of Sand City addressed in the MOU at significant administrative cost to the City. The City prepared and certified an Environmental Impact Report for the bike trail project. The project and its EIR were coordinated with several agencies including three Peninsula Cities, the Coastal Commission, the U.S. Fish & Wildlife Service and Caltrans. In that year Caltrans awarded the City the "excellence in transportation award". The Caltrans representative delivering the award to the City Council stated that she couldn't believe so many agencies could be coordinated and reach agreement in such a limited amount of time.

In 2000, on appeal, SNG was denied a coastal development permit to construct a 495-unit project on the subject property, a project the city believed was consistent with the LCP designation of 650 units and its "emphasis on accommodating development", as stated in the Periodic Review.

Following an appellate court decision requiring reconsideration of the Coastal Commission's decision, and after conferring with the City, SNG proposed a project that is much more environmentally sensitive for the site. The density of the project has been lowered to a total unit count of 341, again meeting the suggested recommendations of the 1990 Periodic Review by being "much less" than the LCP maximums (almost 48% less).

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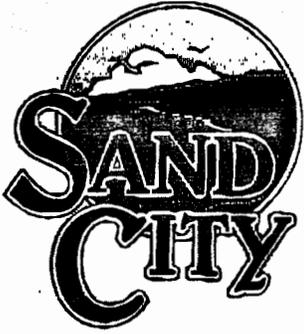
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The City believes the Monterey Bay Shores Ecoresort project is consistent with the LCP. Moreover, the City believes the project is consistent with the 1990 Periodic Review and the 1996 MOU concerning future implementation of LCP policies. The City does not believe the constraints map presented as Exhibit 41 in your staff report accurately reflects LCP policies, the suggestions contained in the 1990 Periodic Review or the 1996 MOU. Indeed, as that Exhibit clearly shows, your staff believes that there is no area suitable for any development on the SNG site. This conclusion greatly concerns the City and its Redevelopment Agency which owns a large part of the other site along the coastline in Sand City where future development could be allowed. Unlike the policies found in the LCP and standards for future development established by the 1990 Periodic Review and the 1996 MOU, the standards suggested by staff in its report could also prohibit any future development on the site now owned by the Sand City Redevelopment Agency. The City again requests that action on the SNG application be continued to allow the City and your staff time to address fundamental policy issues with the LCP, the Periodic Review and the 1996 MOU.

The City offers the following analysis on the key issues contained in the staff report regarding the SNG application.

1. Inadequate Water Supply.

The staff report recommends denial of the project because the applicant does not have a water permit from the Monterey Peninsula Water Management District ("MPWMD"). Commission staff conservatively estimate that the SNG project will consume 71 acre feet of water on an annual basis. The applicant has an adjudicated right to take 149 acre feet of water from the Seaside Groundwater Basin on an annual basis for its use on the project site. (*California American Water Company v. Seaside, et al (2006) Superior Court, Monterey, No. M66343.*) The applicant proposes to enter into an agreement with the local municipal water purveyor, California American Water Company ("CalAm"), whereby the water would be drawn from the Basin by a CalAm well inland of the project site and delivered to the project site through CalAm pipelines. This arrangement requires a "distribution permit" from the MPWMD. A bare majority of the MPWMD Board decided that because water drawn from the Basin could be mixed with water drawn from the Carmel River aquifer in CalAm's storage tanks, an Environmental Impact Report was required before it would act to approve the distribution permit. The applicant successfully challenged the District's decision before the Judge who rendered the 2006 decision adjudicating the Basin. MPWMD has appealed that ruling.

The City and the applicant are confident that the California Court of Appeal will uphold Judge Randall's ruling. However, a final decision from the Court

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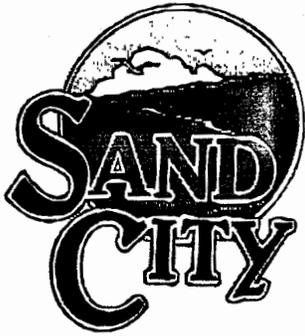
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of Appeals is not expected until sometime next year. Any hearing on the merits of the project before the Commission should be postponed until after the Court's decision.

## 2. Safety From Coastal Hazards Not Assured

The staff report recommends using a coastal erosion setback standard and methodology that is well in excess of the 50-year standard established in the City's LCP. Due to Sand City's narrow coast line, reasonable erosion rates and the adjacency of Highway One, the 50 year standard was reconfirmed in the 2008 Association of Monterey Bay Area Governments (AMBAG) Coastal Regional Sediment Management Plan (CRSMP), sponsored by the National Oceanic and Atmospheric Administration (NOAA). The CRSMP has been endorsed by all local jurisdictions within the region. City of Sand City has continuously supported the 50 year standard due to other highly valuable public investments already being within the Sand City coastal zone, which may ultimately need protection, including, a regional sewer force main serving all of the Monterey Peninsula, a regional bike path and public beach area. The City believes that Monterey Peninsula residents do not want to witness our beaches eroded to the point where coastal armoring begins at Highway One, similar to the Highway 101 experience through Ventura County.

The City has also commissioned well-respected coastal engineers, Haro-Kasunich and Associates (HKA), to determine the methodology for adequate coastal erosion setback, which was used for the proposed project. This methodology has been accepted by the Commission on a previous development project within Sand City and others along Monterey Bay. Based on that methodology, which is very conservative and includes a sea level rise factor, the current development proposal well exceeds the 50-year standard.

## 3. Visual Resources

As stated in the 1990 Periodic Review, the emphasis of the LCP is to accommodate development within the context of required Coastal Act policies. Therefore, for this project site, and others along the coast, it is recognized that "to accommodate development" mapped view corridors along Highway One were to be considered as protecting public views. This policy is reinforced by more recent Coastal Commission action when it approved the City's link to the regional recreation trail. For example, page 42 of the City's certified LCP states in part: "The dunes west of State Highway One are in a severely disturbed state. Due to human uses over time, the original dune landform in this area is generally absent." Page 22 of the LCP states in part: "It is recognized that the slope stabilization and replanting areas required for purposes of bike path construction may be disturbed by future development;

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May 31, 1960



and bike path viewsheds will be subject to encroachment that may result from future public or private development. **The public viewsheds that will, in part, define future development envelopes are those viewsheds from Highway One as these viewsheds are recognized by the certified Sand City Local Coastal program, as may be amended from time-to-time, and not the viewshed from the bicycle path.** (Emphasis added.) Policy 5.3.9 of the LCP states: "New development should to the extent feasible, soften the visual appearance of major buildings and parking areas from view of Highway One."

Contrary to the above LCP statements and policies, the staff report recommends using other vista points to evaluate view impacts of the development and further states that natural landform disturbance is not minimized by the proposed development. There is no way that land form disturbance can be minimized based on providing a reasonably sized project on the project site - although the present application does a very good job in disguising the project from view while still retaining the dune forms of the property. The proposed project design in this respect is consistent with Policy 5.3.9 as stated above. The City believes the project also conforms with the view protection corridors established in the certified LCP. (See Exhibit D, attached.) The City respectfully requests additional time to meet with the coastal staff and applicant to further address project design as it relates to public views.

#### 4. Traffic Impact

The MBSE staff report states that "it is possible that the identified traffic and circulation deficiencies associated with the proposed project could be addressed through the imposition of conditions, if further traffic analysis were done to determine appropriate project-specific mitigations, and the impact of well-designed TDM programs, enhancement of transit services and other such mitigations. However, since the project is deficient in other more fundamental ways, those measures have not been determined here."

The City has requested further legal analysis through the Transportation Agency of Monterey County (TAMC) to ensure that there is adequate project mitigation for cumulative traffic impacts given the fact that future partial funding of traffic improvements is in jeopardy given the recent failure of a sales tax initiative on the ballot. The City is similarly concerned with this aspect of project mitigation but we feel confident that this issue can be addressed with an appropriate "condition of approval". The TAMC legal analysis of this issue is not expected until early next year. We reiterate our request for continuance of the public hearing until that information is available for analysis.

City Hall  
1 Sylvan Park,  
Sand City, CA  
93955

Administration  
(831) 394-3054

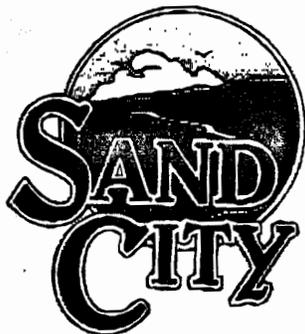
Planning  
(831) 394-6700

FAX  
(831) 394-2472

Police  
(831) 394-1451

FAX  
(831) 394-1038

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5. Public Access and Recreation

The staff report on this issue is similar in tone to that of traffic impact stating in part that "it is possible that deficiencies could be addressed through the imposition of conditions, but since the project is deficient in other more fundamental ways, those measures have not been determined here." Again, the City respectfully requests time to meet with Coastal staff to determine those measures, along with the applicant, pending resolution of the more fundamental issues addressed elsewhere in this letter.

6. Natural Resources

This section of the staff report largely deals with sensitive plant and animal species issues. Based on a letter from the U.S. Fish & Wildlife Service (USFWS) last year, (see Exhibit D) it appeared to city staff that the applicant's habitat protection plan ("HPP") as required by the LCP was sufficient to address those issues. However, following your Commission's receipt of recent correspondence from the USFWS, the City would like to meet with the USFWS and Commission staff to insure that the HPP meets LCP standards and addresses any remaining USFWS issues. We have not had the opportunity to do this.

CONCLUSION

The LCP is replete with language which makes it clear that visitor serving commercial uses are a preferred use along the Sand City coastline. For example, on page 28 of the Land Use Plan (LUP) it states: "The availability of land in Sand City can help meet regional visitor serving demands. Nearly half of the lands west of State Highway One are vacant. This presents many opportunities for visitor-serving commercial and recreational uses." Regarding natural resource protection, the LUP, on page 17 states: "Resource protection involves sand dune management programs. The dune areas in Sand City west of Highway One are in a severely disturbed state. They have been destroyed by human uses over a long period of time. The majority of these dunes are active, characterized by shifting sand and containing no vegetation. Where dunes are stabilized with vegetation, non-native species are dominant. These sand dune areas do not present constraints to future access way development, unless dune stabilization or restoration programs are implemented".

The LUP recognizes that the Sand City coastline is located in an existing urban area, and as a direct result of its historic use for sand mining and other industrial uses, the coastline is sorely in need of redevelopment. It therefore emphasizes a specific policy in the Coastal Act to support the large number of housing units and coastal resort units allowed under the LCP. On page 85 of the LUP it states: "With regard to the Coastal Act as the standard of approval, denial and suggested modifications for

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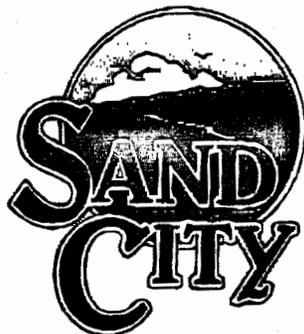
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this LUP and resolution of conflicts between Coastal Act Policies, as described in Section 30007.5, the Sand City LUP is promoting the policy which states: The legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The legislature therefore declares that in carrying out the provisions of this division, such conflicts can be resolved in a manner, which on balance is the most protective of significant coastal resources. In this context, the legislature declares that broader policies, which for example, serve to concentrate development in close proximity to urban and employment centers, may be more protective overall, than specific wildlife habitat and other similar resource policies. (Emphasis added.)

Since the time of the 1990 Periodic Review, the City has fostered LCP implementation in a manner which reduces the amount of development allowed under the LUP but continues to encourage visitor-serving land uses on carefully selected sites. Most recently, the City encouraged SNG to propose the environmentally-sensitive project now before you for review.

Please continue the public hearing of the Monterey Bay Shores Ecoresort to allow the City representatives time to find common ground with your staff regarding the future use of this site. The City believes it can continue to work cooperatively with your staff to implement the State's Coastal Act policies.

Sincerely,

David K. Pendergrass, Mayor  
City of Sand City

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c: City Council  
Ed Ghandour, SNG, Inc.  
Dr. Charles Lester, Coastal Commission

ATTACHMENTS:

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May 31, 1960

Clustered Shoreline Development Alternative: A related alternative approach to planning for west of the freeway would be clustering development to achieve substantial contiguous open space, for example, along one-half the City's coastline. Areas of open space could be the southern half of the City, the northern half, the middle, or possibly two areas, such as the northern and southern quarters. If located at an end of the City, the open space reserve could be connected to parks or preserves in an adjacent jurisdiction. Such large tracts of open space would result in non-fragmented view protection, significant habitat enhancement, and substantial recreational opportunities. The remaining sites would still have to provide for shoreline setbacks, habitat reserves, and visual protection, but could develop at urban densities, albeit reduced from the LCP's maximums.

Fulfilling this objective, once an appropriate open space area was identified, would likely involve public acquisitions and possibly transfers of development credits. The amount of public funding available and the potential for transfers of development credits would determine the amount of open space possible to preserve. For example, if the goal was for the southern half of the City's shoreline to remain in open space, Monterey Sand Company could cluster development on the northern half of its site (located in the center of the City's shoreline), or be compensated for part of its land, or possibly be allowed additional development potential on property it owns inland of the freeway, through a transfer program. Calabrese (Sterling Center site) and the individual private lot owners south of Tioga Avenue with developable parcels would have to be compensated. Possible sources could be State Park or Regional Park funds, Monterey County Measure B funds, and/or proceeds from the sale of the State Parks Foundation half interest in their site (co-owned by DeZonia; proposed Sands of Monterey site).

Utilizing a transfer of development credit program, by increasing permitted densities on some sites in return for leaving other sites open, could be used to achieve the objective of contiguous open space. This is a more complicated method, which would likely entail involving a third party, such as the Coastal Conservancy, with the authority to purchase, hold, and sell property for specific public and planning purposes. Special authorization may be needed if transfers were to involve land outside of the coastal zone, which may be the only locations capable of supporting the increased density (e.g., into Sand City inland of the freeway).

#### Conclusions

Sand City is generally implementing its LCP's stated permitted land use and density provisions as intended. The uses and locations reflect Coastal Act priorities; the stated intensities appear too great to allow Coastal Act objectives to be fulfilled. Density bonus provisions are subject to interpretation and may be obsolete.

Since development, and hence, associated removal of the old landfill site has yet to occur, it is appropriate to continue aggressively seeking other means of implementing the required clean-up.

**CITY OF SAND CITY****RESOLUTION SC 97-59, 1997****RESOLUTION OF THE SAND CITY COUNCIL APPROVING A LOCAL COASTAL PROGRAM (LCP) AMENDMENT 97-02 AND ITS RELATED SUGGESTED MODIFICATIONS BY THE CALIFORNIA COASTAL COMMISSION**

**WHEREAS**, the City Council has held duly noticed public hearings on this matter on April 1, 1997, April 15, 1997 and July 1, 1997; and

**WHEREAS**, the City has provided a 42-day notice of the LCP Amendment prior to the public hearing, in accordance with City regulations and the requirements of the California Coastal Act and related coastal administrative regulations; and

**WHEREAS**, the City has prepared an Environmental Initial Study and filed a Negative Declaration in accordance with the requirements of the California Environmental Quality Act (CEQA) for the LCP Amendment and has determined that the proposed LCP Land Use Plan amendments and the Implementation Plan Amendments will not have a significant effect on the environment; and

**WHEREAS**, future development on the subject property will be subject to a project-specific environmental review in the form of an Environmental Impact Report that will address environmental impacts which would result from such a development project; and

**WHEREAS**, the California Coastal Commission, on June 11, 1997, approved the subject LCP Amendments subject to suggested modifications which are contained in exhibit A, attached hereto, and incorporated herein by this reference; and

**WHEREAS**, the City Council, at a duly-noticed public hearing on July 1, 1997, has reviewed the suggested modifications and finds them to be acceptable revisions to the previously submitted LCP Amendment package; and

**WHEREAS**, the LCP Amendments will provide for future development on the subject site to be designed in a comprehensive manner by allowing the land use designations to be mixed while maintaining permitted uses and densities currently contained in the LCP.

**NOW, THEREFORE, BE IT RESOLVED**, that the City Council of the City of Sand City does hereby:

1. Find the proposed LCP amendments, with the suggested modifications, are consistent with the City's Local Coastal Program and Chapter 3 of the Coastal Act as previously stated under Resolution No. SC 97-31.

**EXHIBIT B**

Sand City Resolution No. SC 97-59 (1997)

- 2. Adopt the proposed LCP amendments to the LCP Land Use Plan and Implementation Plan as modified by the California Coastal Commission and as illustrated in Exhibit A, attached hereto and incorporated herein by this reference.
- 3. Introduce for first reading the attached zoning ordinance amendment (LCP Implementation Plan amendments related to LCP 97-02).

PASSED AND ADOPTED by the Sand City Council this 1st day of July, 1997 by the following vote:

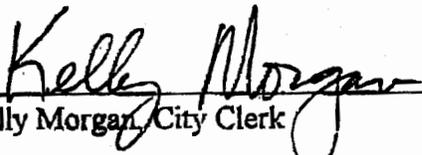
AYES: Councilmembers Blackwelder, Kline, Hubler, Lewis, Pendergrass

NOES: None

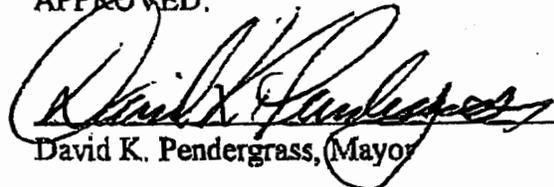
ABSENT: None

ABSTAIN: None

ATTEST:

  
 \_\_\_\_\_  
 Kelly Morgan, City Clerk

APPROVED:

  
 \_\_\_\_\_  
 David K. Pendergrass, Mayor

# RESOLUTION 97-59 EXHIBIT A

## D. APPROVAL OF IMPLEMENTATION PLAN AMENDMENT # 2-97 IF MODIFIED AS SUGGESTED

### MOTION IV:

"I move that the Commission certify amendment # 2-97 to the Implementation portion of the Sand City Local Coastal Program if modified as suggested."

Staff recommends a YES vote which would approve the amendment as modified. An affirmative vote by a majority of the Commissioners present is needed to uphold the motion.

### RESOLUTION IV:

The Commission hereby certifies amendment # 2-97 to the Implementation Plan of the Sand City Local Coastal Program according to the suggested modifications, for the specific reasons discussed in the findings of this staff report, on the grounds that, as modified, the amendment conforms with, and is adequate to carry out, the certified Land Use Plan.

#### IV. Text of the Proposed Amendments

The complete text of the proposed amendments, as submitted by the City, are attached as Exhibit 9. For a summary of the proposed amendment, please refer to page 1 of this staff report.

#### V. Suggested Modifications

In order to maintain conformance between the Sand City LUP and the Coastal Act, and to ensure that the Implementation Plan conforms with, and is adequate to carry out the LUP as amended, the proposed amendment is suggested to be modified as follows. The basis for the following suggested modifications is specifically described in the following findings of this report. Additions to the proposed amendment are identified with underlines, deletions with ~~strike-throughs~~.

##### A. Suggested Modifications to the Proposed LUP Amendments:

Staff Note: For the entire text of the LUP Policies affected by the proposed amendment, please refer to Exhibit 8.

#### 1. LUP SECTION 6.0 LAND USE AND DEVELOPMENT

##### 6.4 LCP Policies

6.4 1 Land Uses. Establish the following land use designations in the coastal zone, as defined below and shown on the Land Use Plan Map in Figure 11 (attached as Exhibit 4) and area south of Bay Avenue detailed in Figures 12 and 13. For the portion of Assessor's Parcel Number (APN) 011-501-014 other than the 7.44 acre Public Recreation Area designated on the Land Use Map, allow permitted land use designations as shown on the Land Use Plan Map to be

intermixed, subject to an overall development plan for the entire parcel, in unit densities that do not exceed the maximum visitor serving and residential density limits established by the amount of acreage illustrated on the Land Use Plan Map and as indicated below:

**Visitor-Serving Commercial**

17 acres, 375 unit hotel/vacation club/timeshare (maximum), other visitor serving commercial uses shall be limited to the maximum densities identified by Appendix F. Accessory commercial uses, as permitted in the Zoning Ordinance, and are allowed subject to Planned Unit Development (PUD) approval.

**Visitor-Serving Residential**

4 acres, 100 units (maximum) at a maximum density of 25 units per acre.

**Medium Density Residential**

7 acres, 175 units (maximum) at a maximum density of 25 units per acre. A minimum of 2.7 visitor serving units (i.e., hotel or visitor serving residential) must be provided for every residential unit to be developed, and must be in operation prior to the development of the residential units or available for transient occupancy use concurrent with the occupancy of the residences.

**Public Recreation**

7.44 acres. In addition to this area, public recreation uses may also be located within the other land use designations for the site.

The described densities, both above and below, represent a maximum. As required by applicable policies of the LCP, permitted development intensities shall be limited to those which adequately address constraints including, but not limited to, public access and recreation needs (including adequate public access and recreation facilities inland of the 50-year erosion setback line); natural hazards; dune habitats and their appropriate buffers; and natural landforms and views to the Bay.

- a. Coastal-Dependent Industrial. [not affected by the proposed amendment]
- b. Visitor-Serving Commercial: Allow hotels, motels, vacation clubs/timeshares, public recreation areas, accessory shops (including gift shops, travel agencies, beauty shops, health spas), food service establishments, service stations, recreational retail shops and services, campgrounds, recreational vehicle parks, and other recreational facilities operated as a business and open to the general public for a fee. Vacation clubs/timeshares are defined as accommodation facilities with guest or owner stays limited to not more than 29 consecutive days, and not more than a total of 84 days in each calendar year. The hotel/motel/vacation club/timeshare uses shall be consistent with

hotel/motel density limits presented in Policy 6.4.4.(e). All other visitor-serving commercial uses shall be accessory and customarily incidental to hotel use, and shall not exceed the maximum amount of square footage identified by Appendix F. On the portion of APN 011-501-014 where other non-public recreational uses are allowed on a the parcel under the Visitor-Serving Residential and Residential Medium Density designations, those uses may be intermixed subject to an overall site development plan for the entire parcel such that the proportion of visitor-serving uses relative to the specific acreage in the LCP Land Use Plan is not increased decreased.

(the remainder of Policy 6 4 1 (b) is unaffected by the proposed amendment.)

- c. Visitor-Serving Residential, Low Density. (unaffected by the proposed amendment)
- d. Visitor-Serving Residential, Medium Density. Allow clustered multifamily residential uses, with a rental pool, at medium density, and public recreational uses. For APN 011-501-014, allow all permitted uses in the Visitor-Serving Residential, Medium Density designation on the assessor's parcel carrying this designation, to be intermixed with other types of units or uses allowed on the parcel under the Visitor-Serving Commercial and Residential Medium Density designations, subject to an overall site development plan for the entire parcel, such that the proportion of residential uses relative to the specified acreage in the LCP Land Use Plan is not increased. All of the units permitted in this designation shall be established on time increments and shall be available to the general public through a rental pool program, at all times for rental or purchase on a short term (one month or less) basis. All owners and renters of visitor-serving residential units shall be limited to a maximum stay of 29 consecutive days and 90 days in a year with the following exception:
- Units may be constructed as fee-simple specifically to accommodate the Transfer of Density Credit Program established in this Plan, as deemed necessary and feasible by the City of Sand City.
- e. Residential, Medium Density. Allow clustered multifamily residential uses at medium density, and public recreation areas. For APN 011-501-014, allow all permitted uses in the medium density designation, or on the assessor's parcel carrying this designation, to be intermixed with other types of units or uses allowed on the parcel under the Visitor-Serving Commercial and Visitor-Serving Residential designations, subject to an overall site development plan for the entire parcel, such that the proportion of residential uses relative to the specified acreage in the LCP Land Use Plan is not increased, but encourage clustered multi-family attached structures at medium density. If intermixed with visitor serving uses, a minimum of 2.7 visitor serving units must be provided for every

residential unit to be developed, and must be in operation prior to the development of the residential units or available for transient occupancy use concurrent with the occupancy of the residences.

[The remainder of Policy 6.4.1.b. is unaffected by the proposed amendment]

- 2. Modified Figure 11, LCP Land Use Map (attached as Exhibit 5): no suggested modifications, except for clarity's sake the asterisk indicating potential mixed use could also be applied to the Visitor-Serving Residential and Residential Medium Density designations on APN 011-501-014

**B. Suggested Modifications to the Proposed Implementation Plan Amendments:**

Staff Note. For the complete text of the Implementation Plan components affected by the proposed amendment, please refer to Exhibit 8.

- 1. Coastal Zone Residential, Medium Density Regulations

Purpose. ... [unaffected by proposed amendment]

Permitted uses, subject to Coastal Development Permit approval.

- (a) Clustered multiple family attached structures at medium density, subject to application and approval of Planned Unit Development (P.U.D.) application and approval, and public recreation areas. For APN 011-501-014 allow all permitted uses in the medium density designation, ~~on the assessor's parcel carrying this designation,~~ to be intermixed with other types of units or uses allowed on the parcel under the Visitor Serving Commercial and Visitor Serving Residential zoning designations, subject to an overall site development plan for the entire parcel, such that the proportion of residential uses relative to the specified acreage in the LCP Land Use Plan is not increased, but encourage clustered multifamily attached structures at medium density

For Assessor's Parcel Number (APN) 011-501-014 Medium Density Residential development shall not exceed 175 units at a maximum of 25 units per acre on 7 acres.

- (b) Duplex units,
- (c) Modular and mobile homes
- (d) Single-family dwellings;
- (e) Public uses within development projects such as picnic areas, wind shelters, promenades or other indoor public recreational area uses where outdoor recreation may not be favorable.

Height Regulations. [unaffected by the proposed amendment]

Minimum Requirements [unaffected by proposed amendment]

Other required conditions. [unaffected by proposed amendment]

2. Coastal Zone Visitor Serving Commercial Regulations

Purpose. [unaffected by proposed amendment]

Permitted uses, subject to Coastal Development Permit approval

- (a) Hotels, motels, vacation clubs/timeshares, public recreation areas, and accessory shops (such as gift shops, travel agencies, beauty shops, etc.) and any other visitor-serving use as determined by the City Council to serve the purpose of this district. Vacation clubs/timeshares are defined as accommodations facilities with guest or owner stays limited to not more than 29 consecutive days, and not more than a total of 84 days in each calendar year. For projects involving the development of vacation clubs/timeshares, the property owner shall be required to record a deed restriction, prior to the issuance of a coastal development permit, indicating the length of stay limitations and that the project is a visitor-serving use available to the general public through a rental pool program when not in use by vacation club/timeshare owners or members. For APN 011-501-014, where other non-public recreational uses are allowed on a parcel, those uses under the Visitor Serving Residential and Residential Medium Density zoning designations may be intermixed, subject to an overall site development plan for the entire parcel, such that the proportion of visitor-serving uses relative to the specified acreage in the LCP Land Use Plan is not increased decreased.

For Assessor's Parcel Number (APN) 011-501-014 Visitor-Serving Commercial development shall not exceed a maximum of 375 hotel/vacation club/timeshare units on 17 acres. All other visitor-serving commercial uses shall be limited according to the water allocation presented in Appendix F of the LUP.

[The remainder of these regulations are unaffected by the proposed amendment]

3. Coastal Zone Visitor Serving Residential, Medium Density Regulations

Purpose. [unaffected by proposed amendment]

Permitted uses, subject to Coastal Development Permit approval

- (a) Clustered multiple family structures, with a rental pool, at medium density, subject to Planned Unit Development (P.U.D.) application and approval, and public recreation areas. For APN 011-501-014, allow all permitted uses in the Visitor-Serving Residential Medium Density designation on the assessor's parcel carrying this designation, to be intermixed with other types of units or uses permitted on the parcel under the Visitor Serving Commercial and Residential Medium Density zoning designations, subject to an overall site development plan for the entire parcel, such that the

proportion of residential uses relative to the specified acreage in the LCP Land Use Plan is not increased.

For Assessor's Parcel Number (APN) 011-501-014 Visitor-Serving Residential, Medium Density development shall not exceed 100 units (maximum) at a maximum density of 25 units per acre on 4 acres

[The remainder of the Coastal Zone Visitor Serving Residential, Medium Density regulations are unaffected by the proposed amendment]

4. Revisions to Figure 4, the Zoning Map (attached as Exhibit 7): no suggested modifications, except as recommended above for the Land Use Map

## VI. Recommended Findings

The Commission finds and declares the following with regard to Sand City LCP Amendment No 2-97:

### A. Coastal Act Conformance (for the LUP Amendment) and LUP Consistency (for the IP Amendment)

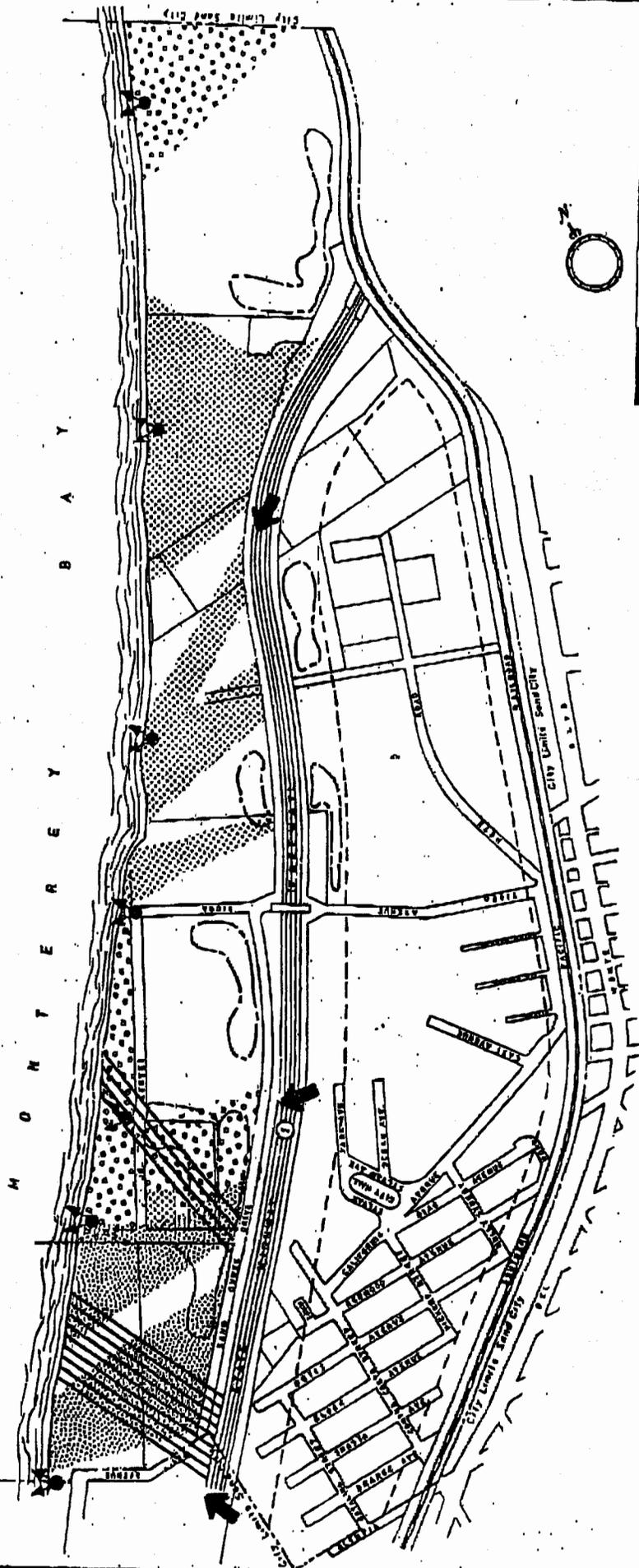
The subject amendment proposes to allow for the mixing of land uses currently allowed on the northernmost parcel of the City west of Highway One (former "Lonestar" parcel). As shown on the certified Land Use Map (Exhibit 4) and Zoning Map (Exhibit 5), the following four land use types are allowed within limited areas of this parcel: public recreation, visitor-serving commercial, visitor serving residential (medium density), and residential (medium density). The Certified LCP does not explain why these uses have been isolated in the particular locations identified by the Land Use Plan and Zoning Maps.

As stated in the amendment submittal, the City of Sand City favors the proposed intermixing of land use on the basis that it "will allow more creative site planning than that which could be required should a site planner follow the linear boundaries of each land use category as illustrated on the land use plan." The city believes that the intermixing of uses, in concert with the required "planned unit development" (PUD) review process, will allow for the development process to better address issues such as site constraints and marketability.

While the types of uses allowed on the Lonestar parcel will not change (all of which are considered Coastal Act priority uses with the exception of the medium density residential), the following Coastal Act issues are raised by the intermixing of land uses: the protection of public access and recreation opportunities; insuring that if both residential and visitor-serving development are allowed to be intermixed on the parcel, the proportion of visitor serving use anticipated by the certified LCP will still be provided; and, maintaining appropriate limits to development intensities to protect coastal resources. These issues are analyzed in detail in the following findings.

Overall, the Sand City LCP contains standards intended to ensure that new development appropriately protects environmentally sensitive habitat areas, visual resources, and is

SAND CITY SHORELINE



VIEW CORRIDORS NW-A/M-B SOUTH OF BAY AVENUE

VIEW CORRIDORS SW-A/SW-B SOUTH OF BAY AVENUE

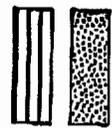
VISTA POINTS

OPEN VIEW CORRIDORS

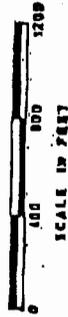
VIEW CORRIDORS OVER DEVELOPMENT

DUNE PRESERVATION, STABILIZATION & RESTORATION AREAS

KEY COSTAL OVERVIEWS



Note: For more detail south of Bay Avenue, refer to Figure 12



SAND CITY LCP LAND USE PLAN

VISUAL RESOURCES

Figure 9

EXHIBIT C

Generalized Views from Hwy. 1 and Vistas



## United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Ventura Fish and Wildlife Office  
2493 Portola Road, Suite B  
Ventura, California 93003



IN REPLY REFER TO:  
81440-2009-B-0044

November 12, 2008

Ed Ghandour  
Security National Guaranty  
505 Montgomery Street, Suite 1150  
San Francisco, California 94111

Subject: Monterey Bay Shores Eco-Resort, Sand City, Monterey County, California

Dear Mr. Ghandour:

In recent months, you have provided us with information on revisions to the subject project (which was previously proposed in 1998). On July 16, 2008, you visited our office to present an overview of the design changes you have made to your project. On August 18, 2008, we received a copy of a draft addendum to the final environmental impact report. On October 16, 2008, and October 27, 2008, we received draft and final copies of a "habitat protection plan (HPP)." The proposed project consists of construction of a 161 room hotel, 180 condominium units, conference facilities, a restaurant, a spa, public access, and parking. These facilities would be constructed on a 39-acre ocean-front parcel in Sand City, California.

We appreciate your efforts to keep us informed regarding your planning for the subject project. While we have not been able to review the documents thoroughly, we note that the number of visitor serving units has been reduced, the setback from the high tide line has been increased, and water and power use have been reduced relative to the previous version of the project.

The project site includes known occupied habitat for the federally endangered Smith's blue butterfly (*Euphilotes enoptes smithi*) and the federally threatened western snowy plover (*Charadrius alexandrinus nivosus*) and Monterey spineflower (*Chorizanthe pungens* var. *pungens*). All of these species have been documented in recent surveys, including nesting western snowy plovers during the 2008 breeding season.

The HPP describes a program to avoid, minimize, and mitigate potential impacts to federally listed and other special status species. The HPP outlines biological goals that would avoid and minimize impacts to listed species; regulate construction activities; and provide, preserve, restore, manage, and maintain habitat. The project is expected to avoid the buckwheat host plants for the Smith's blue butterfly; regardless, host plants would be included in revegetation efforts. The HPP also describes provisions in the design to re-establish Monterey spineflower in areas where it would be removed by grading. In addition, a program for providing, protecting, and managing habitat for western snowy plovers is outlined including provisions for adaptive management to adjust to nesting plovers when they may occur on the property.

EXHIBIT D

117

Ed Ghandour

2

A commitment to fund and implement the actions described in the HPP would help ensure that potential impacts from the proposed project are avoided or minimized. The changes to the project design and proposed management actions may offer benefits to listed species on the project site. We are available to discuss this project further as you continue to seek the necessary regulatory approvals. If you have any questions, please contact me at (805) 644-1766, extension 320.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Pereksta', with a long horizontal line extending to the right.

David M. Pereksta  
Assistant Field Supervisor

F8a

**Paul. B. Bruno, CPA**  
114 Via Del Milagro, Monterey, CA 93940

December 4, 2009

**RECEIVED**

Commissioner Bonnie Neely, Chair  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105

DEC 08 2009

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

REF: Monterey Bay Shores Ecoresort ("MBSE")  
A-3-SNC-98-114  
Applicant Security National Guaranty, Inc. ("SNG")  
Closed Session Date: Wednesday, December 9th, 2009

Dear Chair Neely,

I am writing with regard to SNG's Monterey Bay Shores Ecoresort Project. I respectfully request that the Commission grant a continuance at the December 09 closed session.

I serve as Vice Chairman of the Seaside Groundwater Basin Watermaster. The Watermaster is responsible for administering the adjudicated basin. SNG has a 149 acre foot Alternative Producer Allocation, a priority water right in the basin. Because of this, I spoke in favor of SNG's water distribution permit before the Monterey Peninsula Water Management District (MPWMD). I also filed a Joinder when the matter went before Judge Randall.

In no uncertain terms, Judge Randall found that the MPWMD had improperly withheld its approval of SNG's water distribution permit. The MPWMD is a party to adjudication and is bound by the Amended Decision. The Court has reserved jurisdiction over the interpretation, enforcement, and implementation of the Amended Decision. Unfortunately, the MPWMD has chosen to further delay the MBSE project by appealing Judge Randall's decision.

In all fairness to the applicant and to those who support the project, the Commission should grant a continuance. Inasmuch as the Sixth District Court of Appeals has yet to rule on the water distribution permit issues, Staff cannot adequately assess the water availability issue. They must wait until such time as the water distribution permit issue is resolved.

I request that the Commission postpone its consideration of the SNG application this December and reschedule to a date which is at least 60 days from the final determination on the water distribution permit issue.

Thank you for your favorable consideration of this request.

Sincerely,



Paul B. Bruno, CPA

Amy Ullman Fsq  
107 West 36th Ave  
San Mateo Ca 94403

Dec 3, 2009

To:  
Chair Bonnie Neely  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, Ca 94105

Ref: Monterey Bay Shores Eco Resort  
Permit #. A-3-SNC-98-114  
Hearing Date: December 11, 2009

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DEC 08 2009

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

Dear Commissioner,

My letter is in regards to the Monterey Bay Shores Ecoresort. The applicant is still working on getting a water permit. As a result, I urge you to give him a continuance until the Applicant has obtained that permit. I have learned to respect this project which does so many great things for the coast and the environment. I like the green features that are included in the design. This is really what I can support in California on the coast.

I ask that you continue the hearing.

Respectfully,  
Amy Ullman  
Amy Ullman

F89

rana creek



35351 E. Carmel Valley Rd.  
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December 2, 2009

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Commissioner Bonnie Neely, Chair  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

REF: Monterey Bay Shores Ecoresort ("MBSE")  
A-3-SNC-98-114  
Applicant Security National Guaranty, Inc. ("SNG")  
Closed Session Date: Wednesday, December 9th, 2009

Dear Chair Neely,

It is my pleasure to write a letter of support for the Monterey Bay Shores Ecoresort planned on the coast of the Monterey Peninsula. This proposal demonstrates how one can make a difference by utilizing visionary and sustainable design approach and applying it to a development. The ecological and sustainable features of the Ecoresort are very impressive, as are the minimal environmental impacts and protection of coastal resources. Look at the habitat and dune restoration features, the creation of new habitat for the western snowy plover. Or, the water conservation features which are cutting edge. At a time of scarce water resources, that is a very welcome change. I am particularly impressed with the design that "fits" into the dunes and protects viewshed from Highway 1 and across the Monterey Bay in Monterey and Pacific Grove. Most importantly, we need beach and public access for the public as well as more visitor serving accommodations.

The stewardship that the development team has demonstrated exceeds the standards of the Coastal Act and is a welcome change to the traditional type of design. By incorporating the precious "five elements" of planet earth, earth, water, air, sun and energy, this proposal rises above all others, it sets a threshold, and makes a difference.

The Monterey Bay Shores Ecoresort deserves a continuance until the final determination on the water distribution permit to ensure a fair process.

Thank you,

Marta Kephart

COO



rana creek

FLa

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December 2, 2009

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CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

Commissioner Bonnie Neely, Chair  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105

REF: Monterey Bay Shores Ecoresort ("MBSE")  
A-3-SNC-98-114  
Applicant Security National Guaranty, Inc. ("SNG")  
Closed Session Date: Wednesday, December 9th, 2009

Dear Chair Neely,

I am writing to provide my continued support of the Monterey Bay Shores Ecoresort Project and encourage the Commission to consider granting a continuance at the December 09 closed session.

In all fairness to the applicant and to those who support the project, the Sixth District Court of Appeals has not ruled on the water distribution permit issues. Staff cannot adequately assess the water availability issue until such time as the water distribution permit is resolved.

I request that the Commission postpone its consideration of the SNG application this December and reschedule to a date which is at least 60 days from the final determination on the water distribution permit issue.

Thank you for your consideration.

Sincerely,

Paul Kephart  
President, Rana Creek

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CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA



**SIERRA  
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December 7, 2009

F8a

Mr. Charles Lester  
Mr. Mike Watson  
California Coastal Commission  
725 Front Street, Suite 300  
Santa Cruz, California 95060

Dear Charles and Mike,

**SUBJECT:** Scientific/technical review of multiple environmental documents for Monterey Bay Shores Ecoresort, Sand City, California, regarding building site set-backs.

I write this letter as an expert in coastal processes. I have a PhD in Coastal Engineering from the University of Florida. I am a Distinguished Emeritus Professor at the Naval Postgraduate School. I have studied the shoreline of southern Monterey Bay for over forty years. I am nationally and internationally recognized for performing field research throughout the world. I have written over eighty peer reviewed scientific journal articles on nearshore wave, current, and sediment processes. I was accorded the International Coastal Engineering Award in 2007 for my accomplishments, the highest award in my profession.

#### **Set-back of Monterey Bay Shores Eco-resort**

The set-back lines for the Monterey Bay Shores Ecoresort building site (either 50 or 75 year) are underestimated. The erosion rates presented in the Regional Sediment Management Plan for southern Monterey Bay based on peer reviewed scientific papers range 2.7 feet/year for the period 1984-2004 (Thornton, et al., 2006) to 3.9- 6.4 feet/year for the period 1970-2002 (Hapke et al., 2006). This suggests that the value of 2.4 feet/year adopted by developer for this proposed project based on estimates by Haro et al., 2003 underestimates the erosion rate and, hence, the set-back. Using the historical erosion rates of Thornton, et al. (2006) and Hapke et al. (2006) suggest the proposed building site is in a hazard zone.

In addition to historical erosion rates, erosion is expected to increase owing to sea level rise. The projected set-back at this site taking into account historical and projected future erosion rates, run-up based on wave climatology and LIDAR measured morphology, and

increased sea-level rise due to climate change are provided in Pacific Institute (2009) and Phillip Williams (2008). These reports show that the building site is inside the hazard zone for the 50 year economic-life set-back (Phillip Williams, 2008) and certainly well inside the 90 year hazard zone projection (Pacific Institute, 2009). Therefore, based on published historical erosion rates and erosion rates incorporating sea-level rise, the proposed Monterey Bay Shores Ecoresort building set-back is within a hazard zone.

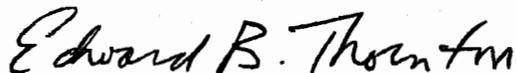
### **Economic Life**

The proposed development uses a 50 year economic life as required by the Sand City LCP. The Sand City LCP was written in 1978 and was one of the first LCP's adopted in the State of California. The LCP's are required to be updated every 5 years, which has not occurred. Using a 50 year economic life is outdated and unrealistic either in terms of the economics of the project and the actual planning for such a project. The project should more properly use a 100 year economic life for project planning and this should be required.

### **Responses to SNG letters**

I have previously responded to the SNG letter dated May 4, 2009 regarding Monterey Bay Shores Ecoresort (MBSE) A-3-SNC-98-114 in a letter to the Coastal Commission dated 5 May 2009 that is attached. I have read over the SNG letter date December 4, 2009 with regard to erosion and set-backs and find this letter mostly to be a rehash of statements made in the earlier letter. Therefore, my letter dated 5 May 2009 is sufficient response.

Very truly yours,



Edward B. Thornton, PhD  
Member of the Executive Committee, Ventana Chapter of the Sierra Club  
PO Box 8613,  
Monterey, California 93943  
[thornton@nps.edu](mailto:thornton@nps.edu)  
831-224-4178

### **References:**

Hapke, C.J., Reid, D., Richmond, B.M., Ruggiero, P. and List, J., 2006. National Assessment of Shoreline Change Part 3: Historical Shoreline Change and Associated Coastal Land Loss Along Sandy Shorelines of the California Coast. *U.S. Geological Survey Open-File Report 2006-1219*, 72p.

Haro, Kasunich and Associates, Inc, 2003, Coastal Recession Evaluation for Coastline of Sand City, California, Report Prepared for the City of Sand City, California, pp 17.

Pacific Institute, 2009, The Impacts of Sea-Level Rise on the California Coast, pp 101  
[http://www.pacinst.org/reports/sea\\_level\\_rise/report.pdf](http://www.pacinst.org/reports/sea_level_rise/report.pdf)

Phillip Williams and Associates, 2008, Sea-Level Rise Coast Erosion Mapping. San Francisco, California.

Thornton, E.B., Sallenger, A., Conforto Sesto, J., Egley, L., McGee, T. and Parsons, R., 2006. Sand mining impacts on long-term dune erosion in southern Monterey Bay. *Marine Geology*, 229, 45-58.



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## MONTEREY DUNES COALITION

PO Box 8613

Monterey, California 93943

Email: [thornton@nps.edu](mailto:thornton@nps.edu)

May 5, 2009

Charles Lester and Mike Watson, California Coastal Commission,  
[mwatson@coastal.ca.gov](mailto:mwatson@coastal.ca.gov)

SUBJECT: Review of SNG letter dated May 4, 2009 regarding Monterey Bay Shores  
Ecoresort (MBSE) A-3-SNC-98-114

Dear Sirs,

Enclosed are my replies to statements made by Mr. Ed Ghandour in his letter from SNG (referred to below as the SNG letter) dated May 4, 2009 to Charles Lester and Mike Watson regarding the Monterey Bay Shores Ecoresort (MBSE). I write this letter as I am concerned about the large number of misinterpretation and gross distortions in the SNG letter. I concur with the CCC Staff in their statements regarding economic life, sea level rise and run-up, however, I limit my letter primarily to replying to only the most egregious statements made by Mr. Ghandour regarding publications and reports in which I was involved and have first hand knowledge. I was the first author on the paper often referred to as Thornton et.al. (2006) or simply the Thornton Report, I was a primary author on the Phillips Williams and Associates (2008) report regarding beach and dune erosion in southern Monterey Bay, and I was a peer reviewer of the Hapke et.al. (2007) report on shoreline erosion. In the review below, I refer to specific paragraphs within the letter.

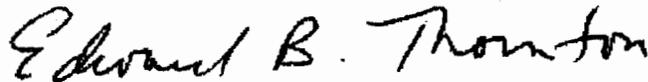
First paragraph on page 12, the SNG letter incorrectly states that the PWA report indicates that the "MBSE Project is within a null zone, that is an area of shoreline accretion". There is no statement in the PWA Report that any shoreline south of the Salinas River is accreting, to the contrary the shoreline has been and continues to be one of the most erosive shorelines in California. The annual erosion rate used by the applicant of 2.4 feet is not a conservative estimate as I stated in my earlier letter to the CCC dated February 28, 2009 (attached).

Second paragraph on page 12, the SNG letter incorrectly states that neither Thornton et.al. (2006) or Hapke and Reid (2007) provide site-specific data for the MBSE Project site. Thornton et.al. (2006) provides longterm data exactly at the MBSE site and short-term erosion rates of 2.6 ft per yr 0.5 miles north and 2.7 ft per year 0.7 miles to the south. Hapke and Reid (2007) has continuous cliff retreat rates south of Marina and finds that Sand City has the highest retreat rate along this reach of shoreline (Fig. 23). Additionally, Hapke et.al. (2006) has site specific erosion rates for the MBSE site as given in the CCC Staff Report.

The next two paragraphs on pages 12 and 13 discuss the past closure of sand mines at Monterey and Sand City and future potential impacts of ongoing at Marian. Contrary to the SNG letter and the CRSMP, total sand mining in southern Monterey Bay has remained essential constant since the 1970's at about 200,000 cubic yards/year. A conclusion of the PWA Report was that the continued mining at Marina impacts all of southern Monterey Bay. I concur with the CCC Staff report that the Marina mining will exacerbate the erosion at the MBSE site.

On pages 13 and 14 under Additional Concerns, the two paragraphs address concerns about utilization of the Bruun Rule and sea level rise. In reviewing HRA, I found they were nonconservative in their application of this rule by understating the depth of closure used to calculate the equilibrium profile, which means I find that they underestimated the additional erosion owing to this approach. Regarding sea level rise, I am in accord with the CCC Staff report. The SNG letter sites Commission approval of the Ocean View Plaza in Monterey. I was the consultant for the applicant of that project. The Ocean View Plaza is in a much more wave sheltered site than MBSE, so that the expected wave run-up will be greater for the MBSE site. Additionally, the CCC *required* the applicant to use a 3 feet sea level rise for their 100 year run-up calculations. It should also be pointed out that less than 6 miles south of the MBSE site a 100 year project life is used, which is a more realistic and practical economic life for a project in my estimation.

Very truly yours,



Edward B. Thornton, PhD, President, Monterey Bay Dunes Coalition  
A coalition of members of the Sierra Club, Audubon Society and California Native Plants

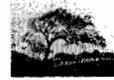
References:

- Hapke, C.J., Reid, D., Richmond, B.M., Ruggiero, P. and List, J., 2006. National Assessment of Shoreline Change Part 3: Historical Shoreline Change and Associated Coastal Land Loss Along Sandy Shorelines of the California Coast. *U.S. Geological Survey Open-File Report 2006-1219*, 72p.
- Hapke, C.J., and D. Reid, 2007. National Assessment of Shoreline Change Part 4: Historical Coastal Cliff Retreat along the California Coast. *U.S. Geological Survey Open-File Report 2007-1133*, 51p.
- Haro, Kasunich and Associates, Inc, 2003, Coastal Recession Evaluation for Coastline of Sand City, California, Prepared for the City of Sand City, California, pp 17.
- Phillip Williams and Associates, 2008, Coastal Regional Sediment Management Plan for Southern Monterey Bay, 278 pp.
- Thornton, E.B., Sallenger, A., Conforto Sesto, J., Egley, L., McGee, T. and Parsons, R., 2006. Sand mining impacts on long-term dune erosion in southern Monterey Bay. *Marine Geology*, 229, 45-58.

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**CALIFORNIA  
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CENTRAL COAST AREA**



**LandWatch**  
monterey county

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December 7, 2009

California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

California Coastal Commission  
Central Coast District Office  
725 Front Street, Suite 300  
Santa Cruz, CA 95060

Mike Watson [mwatson@coastal.ca.gov](mailto:mwatson@coastal.ca.gov)

Charles Lester [clester@coastal.ca.gov](mailto:clester@coastal.ca.gov)

RE: Monterey Bay Shores Project, Sand City  
Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)

Dear Chair Neely and Commissioners:

LandWatch Monterey County appreciates receiving a copy of the staff report for the Monterey Bay Shores project and would like to commend the staff for the careful analysis of the project's inconsistency with the Coastal Act and the Sand City LCP. This 341-unit complex, now known as the "Ecoresort," would be located on 32 acres of Sand City's dunes on the Monterey Bay. The environmental impact report (EIR) was issued by Sand City in 1997. The project has since been redesigned. Sand City issued an addendum to the EIR in 2008 and again approved the project. There are several problems:

First, the original EIR is 11 years old. CEQA (CEQA §21166) requires the preparation of a Subsequent EIR if:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.*
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.*
- (c) New information, which was **not known** and could not have been known at the time the environmental impact report was certified as complete, becomes available.*

Substantial Changes to Circumstances Under Which the Project is Being Undertaken and  
New Information Available

The analysis of the 1998 EIR Addendum is insufficient and requires a subsequent EIR in order to comply with CEQA. The following circumstances and new information require new analysis:

1. State Water Resources Control Board (SWRCB) Order 95-10 required reduced pumping from the Carmel River. Because efforts by Cal-Am and MPWD have failed to achieve any significant reduction of unlawful diversions from the Carmel River since 1998, SWRCB has issued a Draft Cease and Desist Order (CDO) with a final order expected later this year. **The issuance of the Draft CDO alone is a new circumstance requiring a new EIR and project impacts on the environment and existing water users must be considered in a Subsequent EIR in light of a final CDO.**
2. Since the project was approved, the Seaside Groundwater Basin was adjudicated, and it was determined that the Basin is in overdraft. The court also determined that the project applicant (Security National) is entitled to 149 AFY from the basin. The DEIR states that water demand for the revised project is estimated at 63.8 AFY, and CalAm would provide water service. Because the revised project would use less water than the approved project, the Addendum finds the project's impact on groundwater to be less than that of the approved project. **CEQA requires that the project's impact be evaluated against existing conditions, not another project.** Clearly, additional withdrawal from the basin would have a significant adverse impact on groundwater supplies and water quality. **Further, the impact on other water users could be significant if they would be required to reduce their water extractions so that this project could be served. This potential impact requires a Subsequent EIR.**
3. **Sand Dunes and sand removal.** The redesign places structures into the sand dunes to conceal the project and protect views from Highway 1. However, the shifting sand and the potential for revealing portions of the structure have not been evaluated. Also, government agencies and the public have not had an opportunity to review the studies on dune stabilization. Also, the project requires removal of 420,000 cubic yards of sand. The destination of the sand could have adverse affects on water resources or other public trust resources the District must protect. Because the destination of the sand is not identified with certainty in the addendum, this issue should also be addressed in a Subsequent EIR.
4. **Air quality.** Since the original EIR was approved, the California Air Resources Board identified particulate matter from diesel-fueled engines as a toxic air contaminant. Diesel exhaust emissions from more than 10,000 truck trips needed to haul 420,000 yards of sand off-site must be addressed.
5. **Traffic.** Levels of service on roads affected by the project have declined since original project approval. While the addendum finds the project would have significant impacts on roadways, the public has not had a chance to comment.
6. **Climate change.** New information on climate change and its impacts on coastal resources have become available. While the addendum finds that the revised project has

been set back further than the original project based on estimates of sea level rise, the public has not had an opportunity to evaluate this new finding.

7. **Erosion.** The Association of Monterey Bay Governments issued a report in 2008 on bay coastal erosion and sediment management, describing problems of rapid erosion. This new report has not been considered. Additional environmental review is clearly required before there are further agency considerations.

LandWatch supports the Coastal Commission staff's recommendation and agrees that the project is fundamentally inconsistent with Sand City LCP policies regarding protection of significant public views; protection of dunes and sensitive natural resources; safety from coastal hazards; identification of adequate water supply; and traffic and circulation.

Thank you for the opportunity to comment on this project application.

Sincerely,

//s//

Amy L. White, Executive Director  
LandWatch Monterey County

F8a



SANTA CRUZ COUNTY GROUP

-----Of The Ventana Chapter-----  
P.O. Box 604, Santa Cruz, CA 95061 ▪ phone (831) 426-4453  
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DEC 08 2009

December 7, 2009

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

California Coastal Commission  
725 Front Street, Suite 300,  
Santa Cruz, CA 95060

**RE: Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.) Application of SNG Development Co. to be heard December 11, 2009 in San Francisco, CA -- FRIDAY – ITEM 8 a**

The Santa Cruz Group of the Sierra Club is in support of the California Coastal Committee staff report recommending denial of the above referenced project.

The current project consists of 341 hotel/condo/residential units and is proposed to be built into the dunes of Sand City in Monterey County. The plans are to construct approximately 360,000 sq.ft. mixed-use residential and visitor serving development (Monterey Bay Shores Resort) including 160 hotel rooms, 180 condominium units (92 residential, 46 visitor-serving residential, and 42 visitor-serving units), restaurant, conference center, spa, 3 swimming pools, surface and underground parking for 841 vehicles, public and private access trails, dune/habitat restoration, and related infrastructure (including water, sewer, stormwater systems, and various energy reduction technologies (solar, wind, geothermal, etc.) This project will require 695,000 cubic yards of grading (and 418,000 cubic yards of sand disposal) in sand dunes west of Highway One. This current plan is actually a resurrected project from the late '90s. Previously, it was a 495 unit hotel/condo/residential development and was denied by the Coastal Commission in 2000.

The Group opposes this project on several grounds including the fact that it does not have a water distribution permit issued by the granting agency, the Monterey Peninsula Water Management District and is not likely to receive one any time soon. There are several lawsuits pending on the over drafting of the Carmel River including one brought under the Endangered Species Act by National Sierra Club.

We believe this 'eco'- resort if constructed, would be one of the largest resorts ever built in the California coastal zone, and would be located directly on top of some of the rarest, most environmental sensitive sand dunes left in the world.

Thank you for consideration of our request.

Sincerely,

Aldo Giacchino, Chair  
Sierra Club-Santa Cruz County Group

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CENTRAL COAST AREA**

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*F8a*



**COASTKEEPER®**  
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December 3, 2009

California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219  
FAX (415) 904-5400

Item F.8.a

Cc: Charles Lester and Mike Watson, Central Coast District Office  
FAX (831) 427-4877

RE: Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)  
Item Friday 8a for the California Coastal Commission hearing December 11<sup>th</sup>, 2009

*Via facsimile*

Dear Chair Neely and Commissioners,

I am writing to you on behalf of the Monterey Coastkeeper in regards to the proposed CDP for SNG Development Company to build the Monterey Bay Shores Resort. Monterey Coastkeeper is a program of The Otter Project, a nonprofit environmental organization dedicated to the protection of the water, watersheds and wildlife of the Central Coast.

Monterey Coastkeeper concurs with Staff's findings and agrees that the project as proposed is fundamentally inconsistent with Sand City LCP policies regarding protection of significant public views; protection of dunes and sensitive natural resources; safety from coastal hazards; identification of adequate water supply; and traffic and circulation.

The Monterey Coastkeeper has been active over the past year arguing in opposition to the development of the Monterey Bay Shores Resort. We are sorry we have a conflict for this hearing date. Put simply, we believe this site should not be developed. The site is on the west side of Highway 1 along a relatively undeveloped, undisturbed, unobstructed stretch of coast.

The project proponent argues that the site will be restored by this resort development. It is impossible for us to believe that construction of a 370 unit hotel constitutes restoration. The proponent argues that the "green"/LEED certified proposed building plan is justification to build. An efficient building on an inappropriate site is still inappropriate in our eyes.



The project has no current EIR. The Monterey Peninsula Water Management District has found the EIR lacking and has asked for a new EIR. The project proponent believes an addendum, prepared a decade after the first EIR, constitutes a new EIR. The decade old EIR analyzes water pumped from beach wells. An interim plan proposed that water be supplied by the Sand City Desal Plant. In the new addendum, it is proposed that water be supplied by Cal Am wells interconnected between the Seaside and Carmel River aquifers. These three alternatives are perfect examples of the very purpose of an EIR, to transparently compare alternatives. Finally, an EIR is a process as well as a "report." A decade old process is insufficient.

Impacts to our water supply are critically important to the people of the Monterey Peninsula. Our water is interconnected and it is impossible to guarantee that water delivered by CalAm will not come from the Carmel River aquifer. The project proponent maintains that his property carries a sufficient adjudicated water right to supply the proposed resort. What we as Monterey residents understand is that the entire system is interconnected and overdrawn. There is no water for a major new resort on the Monterey Peninsula.

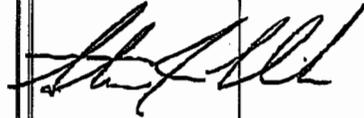
Impacts to endangered species have been vastly understated. Snowy Plover, Smiths Blue Butterfly, and Monterey Spineflower are special status species occurring on the property. The proponent maintains that they will move Spineflower and will plant new butterfly host plants. The project site is immediately north and under the Big Dune (aka Scribble Hill) in Sand City – a sand blasted, high wave and wind energy site. When a large portion of the site is hardened by development, we have no idea where or if pockets of habitat will exist.

The dynamic nature of this site also casts doubt on what the ultimate viewshed from Highway 1 will look like. The proponent maintains they will tastefully and unobtrusively sculpt their 370 unit resort structure into the dunes. As mentioned above, the site has very high wind and wave energy: Hardening the dunes through construction will likely result in a building sitting atop the bluff, conspicuous to Highway 1. Regardless of the view from Highway 1, the residents of Monterey and Pacific Grove will look across open water at the beach hotel – a view that must also be considered.

We believe the Monterey Bay Shores Resort is a seawall waiting to happen. At the proponent's open houses he maintains his site is actually accreting – the beach is building. The beach to the north and south of this site are quickly eroding, if this site were building it would be a new peninsula – the proponent's claims do not pass the straight face test. In the EIR addendum, the proponent uses a minimal erosion figure in comparison to his 'neighbor's' actual experience. Stilwell Hall was to the north of the site, the Monterey Beach Hotel is to the south. Stilwell Hall (setback nearly 400 feet from the bluff when it was built ~65 years ago) is gone; the Beach Hotel has a seawall. This project is built into the bluff so close to the shore that a stairway leads onto the beach. Miraculously, the developer's consultants say the Resort won't fall into the sea for at least 50 years. Given global warming and sea level rise, we're very skeptical. Our skeptical view is shared by coastal erosion experts.

We believe that for so many reasons the Monterey Bay Shores Resort is a terribly inappropriate development for our coast. While we can complement the architecture and water-wise features, the site is simply unsuitable. We urge the Commission to follow the staff recommendation and deny the permit.

Sincerely,



Steve Shimek  
Monterey Coastkeeper



Fla

**Michael Watson**

**From:** rita [puffin@mbay.net]  
**Sent:** Friday, December 04, 2009 4:06 PM  
**To:** Michael Watson; Charles Lester  
**Subject:** Sierra Club comments re SNG for 12.11 hearing  
**Attachments:** SNG report for CCC 2.09 Baye.pdf



**SIERRA  
CLUB**  
FOUNDED 1892

Dear Chair Bonnie Neely and members of the California Coastal Commission:

Attached are comments from the Sierra Club regarding **Application No. A-3-SNC-98-114 (SNG Development Co., Monterey County)** to be heard at the CCC hearing in San Francisco on Friday, December 11, 2009.

The Sierra Club is opposed to this project for several reasons included in the attached comments prepared by botanist and coastal ecologist, Peter Baye, Ph.D.

The Club also supports the outstanding work of the Coastal Commission staff in their report and findings on the project as posted on the CCC website.

We request for denial of the project on scientific grounds as well as the fact that this project does not have a water distribution permit as required by law not is not likely to receive one in the near future. Monterey County has a severe water shortage, the Carmel River aquifer has been in over draft for a dozen years and there are currently several lawsuits making there way though the courts over our dwindling water supply.

Thank you for your consideration of our request.

Sincerely,

Rita Dalessio  
Ventana Chapter Chair

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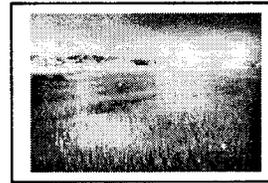
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**CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA**



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**MEMORANDUM**

**TO:** Mike Watson, California Coastal Commission, [mwatson@coastal.ca.gov](mailto:mwatson@coastal.ca.gov)

**SUBJECT:** Scientific/technical peer review of multiple environmental documents for Monterey Bay Shores Ecoresort, Sand City, California

**DATE:** 24 February 2009

Via e-mail

**1. Purpose:** I am submitting the following technical review of the Monterey Bay Shores Ecoresort (Ghandour/SNG project, Sand City, State Clearinghouse # 97091005) Revised Draft Addendum for the 1998 Final Environmental Impact Report, and supporting environmental documents, on behalf of the Ventana Chapter of the Sierra Club (contact: Rita Dalessio, [puffin@mbay.net](mailto:puffin@mbay.net)). The scope of my review focuses on critical review of the assumptions and conclusions of environmental impact assessments related to dune and dune habitats, ecological and geomorphic processes, vegetation, and special-status species, and the technical feasibility and suitability of proposed beach/dune restoration and management plans. The opinions and technical arguments in my comments reflect my independent professional views only.

**2. Qualifications:** My qualifications for expert comments on environmental planning, regulation, and assessment of coastal dunes are as follows. My Ph.D. dissertation concerned coastal dune vegetation and its response to sand deposition, and I have studied coastal dunes in the Atlantic and Pacific North American coasts since 1974. My principal professional experience in California has been with conservation planning for coastal habitats and ecosystems, and recovery planning for endangered coastal species. I was a contributing author for sections of the Recovery Plan for Seven Coastal Plants and Myrtle's Silverspot Butterfly (1998) prepared by the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office. My contributions included technical background information on California coastal dune systems, and specific recovery recommendations for federally listed Central Coast dune plants, including Monterey spineflower (*Chorizanthe pungens* ssp. *pungens*). I was the lead author for the Service's Recovery Plan for Coastal Plants of the Northern San Francisco Peninsula (2002), which featured coastal dune species. I have conducted independent field investigations of coastal dune and wetland systems in central and northern California, including geomorphologic, hydrologic, and ecological conditions throughout the 1990s to the present. I serve on the scientific review panel (with Andrea Pickart and Pete Connors) for the planning of the Bodega Dunes Restoration Project, managed jointly California State Parks/University of California Bodega Marine Laboratory (currently the largest coastal dune restoration project in California). I am also a technical advisor/subconsultant for multiple federal dune restoration projects managed by the National Parks Service, Presidio Trust,

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and Point Reyes National Seashore in the San Francisco Bay area (Muir Beach, Presidio, Abbott's Lagoon). I was co-author of a recent habitat management plan for Laguna Creek Lagoon's barrier beach and wetland complex (California State Parks) in Santa Cruz, which supports a wintering population of western snowy plovers. I have been an active member of the Dunes/Coastal Habitat Guild of the California chapter of the Society of Ecological Restoration (SERCAL) since it formed in the early 1990s, and have led field trips and presentations for the Guild. I also served as senior scientific and regulatory staff of the U.S. Army Corps of Engineers, San Francisco District, where I managed Environmental Impact Statements/Reports, and conducted endangered species consultations (including western snowy plovers). My resume is available on request.

**3. Scope of review:** I have reviewed the following documents from the California Coastal Commission files, obtained through the Ventana Chapter of the Sierra Club:

City of Sand City 2008. Monterey Bay Shores Resort, Revised Draft Addendum to the Final Environmental Impact Report, October 2008.

EMC Planning Group, Inc. 2008. Habitat protection plan, Monterey Bay Shores Eco-Resort, Sand City, California. Prepared for Security National Guaranty (SNG). October 2008.

EMC Planning Group, Inc. 2008. Monterey Bay Shores Botanical Survey Update Results. Letter report, May 12, 2008.

Ghandour, E. 2008. Monterey Bay Shores Ecoresort, Wellness Spa, and Residences, Supplemental Documents (Volume 1). Oversize SNG and subconsultant design documents; Coastal Commission, Central Coast Area file, August 13, 2008.

Haro, Kasinich & Associates, Inc. 2003. Coastal Recession Evaluation for Coastline of Sand City, California. Prepared for City of Sand City, California. Project No. M8211.

Haro, Kasinich & Associates, Inc. 2009. Coastal and Geotechnical Hazards, Monterey Bay shores resort, Sand City, Monterey County, California. Memorandum, February 3, 2009.  
Moffett and Nichol, Engineers. 1989. City of Sand City Shore Erosion Study – Final. December 1989. Prepared for the City of Sand City and the Task Force Advisory Committee. Project No. 2622.

Ilse, J. 2008. Review of potential impacts to Offsite Biological Resources of Monterey Bay shores Eco-Resort, Sand City, California. Memorandum, October 16, 2008.

Neuman, K. and G. Page. 2008. Western Snowy Plovers at Sand City, April-July 2006. Report, PRBO Conservation Science, Petaluma, CA.

Page, G. J.C. Warriner, J.S. Warriner, C. Eyster, K. Neumann, J. Erbes, D. Dixon, and A. Palkovic. 2007. Nesting of the snowy plover at Monterey Bay and on beaches of Northern Santa Cruz County, California, in 2007. PRBO Publication # 1950, November 2007.

Zander Associates. 2007. Western snowy plovers, Sand City shoreline. Letter report to Steve Matarazzo, City of Sand City, September 12, 2007.

Zander Associates. 2008. Biotic Assessment, Monterey Bay Shores EIR Addendum, Sand City. Letter report, June 18, 2008

#### 4. Summary of findings and conclusions:

**4.1 Monterey spineflower:** The proposed mitigation to compensate for destruction of existing 3.4 acres of occupied habitat of federally listed Monterey spineflower is wholly infeasible because (a) the only explicit location of the landscape unit proposed to support this species is “restored fore dune bluff” (*sic*), as shown on p. 22 of the sheet titled “Monterey Bay Shores: Elements and Experiences” (Ghandour 2008), an inherently unstable erosional/depositional habitat type (due to its backshore position) that does not support persistent populations of this stable backdune gap-colonizing annual species; (b) the Habitat Protection Plan (HPP) provides for no long-term (>5 hr) sustained feasible management methods for prevalent invasive species that threaten this species; (c) the HPP fails to specify any ecologically meaningful, objective restoration criteria for soil conditions, population ranges, dominant vegetation, vegetation dynamic processes, long-term vegetation trends, or acreages essential to Monterey spineflower management.

The Addendum conclusion that mitigation will reestablish Monterey spineflower at a 1:1 ratio is unsupported by any reasonable scientific interpretation of technical details in the HPP proposal or design documents.

**4.2 Western snowy plover impacts and mitigation:** The Addendum and HPP fail to address threats and biologically significant indirect and cumulative impacts to the western snowy plover that are clearly identified or emphasized in the U.S. Fish and Wildlife Service’s final (2007) recovery plans for this species, which provides the primary federal ESA conservation guidance for this federally listed species. The HPP fails to address indirect impacts due to increased predator attraction and food resources (especially for corvids, gulls, red fox). The proposed 2-acre plover protection area fails to address indirect or direct impacts to nesting or foraging plovers due to increased resort-based visitor disturbance in the vicinity of the proposed resort and adjacent Fort Ord beaches. The addendum addresses only critical habitat designation (which is related to Section 7 consultation and “take” provisions of ESA, not recovery), which is not relevant to assessment of threats, impacts, and recovery. The Addendum discussion appears to confuse ESA “take” with the totality of direct, indirect, and cumulative biological impacts and mitigation required for assessment under CEQA. The Addendum ignores the recovery plan’s goal of increasing breeding success of this species in each part of its range, including all of Monterey Bay, and understates the significance of the project’s impacts on recovery. The Addendum erroneously interprets older monitoring data as evidence that “the plover has consistently migrated its nesting activity 16 miles north to Moss Landing since the mid-1990s”, and contradicts recent (2007) and current (2008) PRBO monitoring data. The Addendum uses these fallacies to support an unsound argument that project impacts to the plover are not biologically significant. The HPP fails to provide the federal scientific oversight, scientific peer-review, and enforceability mechanisms of an HCP, but the Addendum erroneously argues that the “revised [HPP] strategy is equivalent to the previous [HCP] strategy”. The creation of a dependent non-profit (tax-exempt?) environmental trust by the owners of the for-profit resort to manage and enforce the HPP is highly questionable because of potential conflicts of interest and financial self-dealing.

In view of the 2007 recovery plan, and the 2008 breeding survey results reported by Neuman and Page (PRBO), which revealed four western snowy plover nests and one additional brood in the Sand City study area (most clustered in the vicinity of the project site, the location of

future resort-based visitor disturbance), the Addendum's conclusions about less-than-significant western snowy plover impacts are not supported by reasonable scientific interpretation of evidence and authoritative federal conservation guidance.

**4.3 Other special-status species impacts:** Neither the Addendum nor HPP provides any current or recent, relevant survey information or biological impact assessment for the following special-status (concern) rare wildlife species identified in the USFWS recovery plan for seven coastal plants and Myrtle's Silverspot butterfly (1998), each of which may potentially occur in coastal foredune/beach/mobile dune habitats in Monterey Bay: Monterey dunes scorpion (*Pauroctonus maritimus*), Globose dune beetle (*Coelus globosus*), and sandy beach dune beetle (*Cicendela hirtocollis gravida*). The omission of these species from evaluation is unexplained. Furthermore, neither the Addendum nor HPP contain any site-specific survey information for the black legless lizard (*Anniella pulchra nigra*) after 1987 (a significant 22 year survey data gap), despite the likely presence of source populations in adjacent Fort Ord dune scrub within feasible dispersal distance of the site, and the presence of potentially suitable habitat on site. These omissions indicate the possibility of unmitigated significant impacts to special-status wildlife species.

**4.4 Feasibility of HPP dune restoration:** The project fails to analyze the long-term loss in coastal dune habitat caused by the combination of the development infrastructure footprint, and marine transgression (long-term shoreline retreat; "coastal squeeze"). The project footprint, notwithstanding the largely ornamental rooftop gardens with native vegetation, displaces most of the transgressive platform for regeneration of coastal dunes as the coastal bluffs retreat in response to accelerated sea level rise. The HPP fails to include dune restoration and management techniques, methods, and specifications at even a conceptual level: there are no substrate texture specifications, estimated rates of sand transport (erosion/accretion), species-specific planting densities, offsite or on-site transplant stock specifications, planting sequence or phasing, growth or survivorship criteria, long-term invasive species management, reference sites or conceptual models for vegetation objectives, quantitative or semi-quantitative vegetation or species objectives, or long-term vegetation goals. The HPP lacks any indication of due diligence in consulting standard published scientific references on coastal dune restoration, or regional California expertise. The HPP exhibits the scientific rigor of a landscape architect's planting plan. It provides no basis for expecting effective long-term restoration or rehabilitation of native coastal dune communities, or adequate mitigation in a CEQA or Coastal Act context.

**4.5 Coastal recession and dune stabilization.** The discussion and analysis of "coastal recession" (shoreline retreat) as an incompatible hazard for resort development appears to have omitted analysis of potential significant impacts to and by dune sand transport linked to episodic marine (storm wave) erosion of the coastal bluff scarp, and associated blowout and eolian sand transport processes. Dune blowout formation and deposition of tongue dunes and small parabolic dunes are well-documented historic and modern geomorphic processes and landforms associated with the southern Monterey Bay coastal bluff and dune sheet. The 1989 erosion study expressly indicated bluff erosion processes independent of waves and shoreline position (p. A-7), and estimated potential net onshore eolian sand transport rates ranging from approximately 3,000 to 25,000 cubic yards per year in Sand City (p. B-17). Paradoxically, all discussion of "set-back" distances since the 1989 erosion report are linked to position of the bluff or high water line, rather than the zone of active blowout erosion and eolian sand

deposition that occurs well landward of it. The environmental consequences of perpetual blowout stabilization and sand removal have not been addressed in the Addendum or geotechnical reports. There is no native vegetation type that can fully stabilize a foredune faced with strong net onshore transport of sand from dry fetch across either an erosional bluff scarp or wide beach backshore, or both. The layout of the “eco-resort” infrastructure and graywater/stormwater detention ponds appears to conflict with the likely zone of dune transgression associated with the existing bluff crest or “restored foredune” grade. Contours of the “restored” foredune appear to increase topographic steering and flow acceleration of onshore winds, intensifying potential local wind scour and sand deposition behind the bluff crest. As the beach recovers from sand mining, the risk of increased foredune mobility should be expected to increase over time.

## 5. Discussion

### 5.1 Monterey spineflower impacts and mitigation

Monterey spineflower (*Chorizanthe pungens* ssp. *pungens*) is a prostrate annual forb that inhabits vegetation gaps, inactive blowouts and deflation sand surfaces with sparse vegetation, and sparse ground layer vegetation within dune scrub assemblages of stabilized Holocene and older Pleistocene dunes (paleodunes) of Monterey Bay. *C. pungens* is not a pioneer foredune plant that completes its life-cycle within active depositional beach and foredune environments, in contrast with typical strand species (e.g., *Atriplex leucophylla*, *Cakile maritima*). It may occur only incidentally in coastal bluffs or foredunes where scarp erosion (slumping, gravitational slope processes) transport of seed from older, stable dune scrub causes local dispersal into bluff slopes or foredunes. *C. pungens* seedlings and mature plants are relatively intolerant of sand accretion, and have no specialized morphological adaptations (such as rapid shoot elongation responses) to cope with typical rates of sand accretion that occur in foredunes.

The Addendum concedes that the extent of *C. pungens* at the project site has increased since the FEIR was completed, but it argues that the original mitigation measures still apply and still reduce project impacts to a less-than-significant level. This argument is repeated in the “Biotic Assessment” letter of Zander Associates (2008) and the Ilse “Review of Potential Impacts” memorandum to SNG (2008). This conclusion must depend on the feasibility of re-establishing an equivalent or superior replacement population of *C. pungens* in suitable, sustainable long-term conditions – i.e., feasible and successful restoration of *C. pungens* population and habitat. The limited amount of planning information *C. pungens* reintroduction/restoration in the Habitat Protection Plan and project design drawings that represent the location of *C. pungens* habitat, however, indicate a very high risk of restoration and post-transplant population failure.

The most significant constraint on *C. pungens* reintroduction/restoration feasibility is the designated location of habitat, shown on p. 22 of the sheet titled “Monterey Bay Shores: Elements and Experiences” (Ghandour 2008). The HPP itself appears to contain no conceptual or other restoration design figures indicating the specific location (boundary or zone) and extent of seeded future *C. pungens* population. The HPP merely states (p. 4-26) that a “minimum 1,000 propagules” in “several areas of bare sand that totals 3.4 acres” will be harvested and sown, followed by 5 years minimum monitoring. Identification of the the location of the full 3.4 acres of *C. pungens* is apparently undocumented, but the 2008 SNG Supplemental Documents (p. 22,

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"Monterey Bay Shores: Elements and Experiences" specifically accounts for "Monterey Spineflower (1.4 acres)" within a landscape unit labeled "Restored Fore Dune Bluff" (sic), immediately seaward of "Restored Low Barchan Dunes". This appears to indicate that 41% of the required 1:1 mitigation for endangered Monterey spineflower would be located in an unstable coastal bluff scarp (strand habitat), exposed to sand accretion rates and wave erosion rates typical for coastal bluffs in southern Monterey Bay. This is not suitable or feasible habitat for a persistent restored population of *C. pungens*. *C. pungens* occurs in stable scrub dune assemblages with sparse ground layer vegetation and litter deposits, and negligible rates of sand accretion. It is likely to be excluded by significant rates of sand accretion (pulsed episodes exceeding 5-10 cm/deposition event) in foredunes and bluff slopes.

*C. pungens* is likely to be excluded also by significant accretion of plant litter beneath dense dune scrub canopies in artificially stabilized dune scrub assemblages. The HPP refers to revegetation techniques including retention of dead iceplant "mulch" (p. 4-10), artificial irrigation up to 3 years (p. 4-7, 4-8), and fertilizer application (p. 4-7). These techniques, problematic and largely misapplied to coastal dune restoration projects where potential mixed substrate types occur, are likely to facilitate excessive size and canopy density of planted dune scrub, and facilitate excessive invasion by non-native weeds (Pickart and Sawyer 1998). The overall effect of fertilized, irrigated, organically-enriched soil in a dune environment would be to support an ephemeral (single growing season) "flush" of robust annuals (including *C. pungens*) and planted shrubs/perennials, followed by a trend of woody/perennial canopy suppression of ground-layer native annuals. Neither the HPP nor any other supporting environmental documents cites any applied scientific literature on coastal California dune restoration, or any expert consultation, to support its methodology or design for achieving *C. pungens* and dune scrub restoration objectives. The approach described is, in my professional opinion, superficial and deeply defective in both research and formulation. Dune revegetation actions described within the project area are likely to result in vegetation types that support few or no substantial, persistent populations of *C. pungens*.

The proposed sowing density of "minimum 1000 propagules" of *C. pungens* distributed over 3.4 acres (p. 4-26 HPP) is an incredibly low 0.0067 (dry fruits/seeds) per square foot. Successful seeding of native dune annuals, particularly where weed competition or erosion/accretion rates may constrain emergence success, requires very high sowing rates. The HPP does not account for reasonable methods harvest, storage, sowing, seasonal timing, or post-sowing stabilization of *C. pungens* seed. The HPP does not provide for review or approval of restoration/reintroduction methods by either State or Federal resource agencies responsible for this endangered species, nor qualified scientific experts in coastal dune plant ecology and restoration.

The HPP coverage of *C. pungens* reintroduction/restoration measures fails to include basic and essential planning feasibility information and criteria for restoration of any dune annual, such as suitable substrate ("soil") analysis, existing and forecast sand accretion rates in relation to topographic position, objective targets for population size (range) or trends, local vegetation succession (native plant competition) predictions, vegetation gap dynamics and patterns, long-term invasive non-native plant trends and management, boundaries of managed areas, or acreages essential to Monterey spineflower management.

The overall long-term feasibility of establishing a viable population of *C. pungens* in the so-called restored" dunes of the project site (seaward of the developed resort footprint) in the current

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project plan appears to be very low. Bluff retreat and associated bluff-top dune blowout and active dune transgression will replace stable dune scrub habitats with bluff-top dune zone that would become too geomorphically dynamic to sustain a natural population of *C. pungens* through the 21<sup>st</sup> century. The current (2008) proposed *C. pungens* mitigation measures are not adequate to offset impacts to existing endangered plants on the site, and indeed indicate a likelihood of population failure over time. This represents a significant change in the conditions evaluated by the FEIR.

## 5.2 Western snowy plover impacts and mitigation

The Addendum and HPP fail to address threats and biologically significant indirect and cumulative impacts to the western snowy plover that are clearly identified or emphasized in the U.S. Fish and Wildlife Service's final (2007) recovery plans for this species, which provides the primary federal ESA conservation guidance for this federally listed species. The Addendum stresses (and misinterprets) the findings of the 2005 critical habitat listing for the western snowy plover (plover), yet ignores the explicit scientific findings and guidance of the final recovery plan. "Critical habitat" designations are not rankings of recovery priority. "Critical habitat" is a legal determination that extends Section 7 ESA (interagency consultation) "may affect" triggers for formal consultation, and Section 9 "take" prohibitions for wildlife, to geographic areas that may or may not be occupied by a listed species at the time of a potential impact. In contrast, recovery plans (Section 4 ESA) establish the "master plan" for federal conservation priorities of a listed species, and also provide the primary federal scientific guidance for assessment of threats, impacts, and conservation measures. The Addendum appears make unjustified interpretations about the meaning of the plover's critical habitat designation, while arbitrarily ignoring the explicit guidance of the recovery plan (available to Addendum preparers in 2007) where it is pertinent to revised assessment of project impacts and mitigation. Moreover, the Addendum appears to disregard or trivialize recent and current (2007-2008) plover data from Sand City and Monterey Bay (also fully available to Addendum preparers) when it conflicts with its tenuous interpretations about the biological significance of project impacts. I am concerned that the Addendum's treatment of plover impact "significance" reflects substantial bias or ignorance. The same selective omission of the recovery plan appears in the HPP.

The Addendum discussion appears to confuse ESA "take" with the totality of direct, indirect, and cumulative biological impacts and mitigation required for assessment under CEQA. Significant CEQA biological impacts to plovers are not limited to the federal legal threshold of "take". The USFWS recovery plan (2007) comprehensively explains the scope of threats and modes of direct, indirect, and cumulative biological impacts to plover, but this guidance is not addressed in the Addendum or HPP. The Addendum ignores the recovery plan's goal of increasing breeding success of this species in each part of its range, including all of Monterey Bay, and understates the significance of the project's impacts on recovery. The Addendum erroneously argues, by selective citation of regional plover breeding data, that

...because the site is not designated plover critical habitat, because the on-site nesting activity has diminished since 1998, and because the plover has consistently migrated its nesting activity 16 miles north to Moss Landing since the mid-1990s, the ecoresort construction or operation is not expected to result in "take" of the plover (Addendum p. 52)

The errors in this argument and its premises are as follows:

a. The designation of critical habitat is not an indication of recovery priority, but a legal determination of where Section 7 obligations and Section 9 prohibitions will apply even when the area is unoccupied by the listed species. The final recovery plan is the primary authority on biological importance of geographic range and site location factors to species recovery. The site falls within mapped snowy plover areas of Monterey Bay that apply to recovery recommendations.

b. Contrary to the assertions of the Addendum, the most recent PRBO data (2008) report 4 plover nests and one additional brood in the Sand Study area, most of which are clustered around the vicinity (or actual location) of the project site (Figure 1, Neuman and Page 2008). The survey authors report high hatch rates but low fledge rates (initial breeding success, poor juvenile survivorship) in the study area, citing avian predation, human disturbance, dogs as likely causes of low nest success, rather than inherent site suitability factors. The results were reported directly to Sand City. PRBO evaluated the 2008 Sand City plover breeding survey results as “encouraging signs for plover recovery in the area”, with a caveat about crows (predators) and levels of humans disturbance (“substantially higher in Sand City than those reported for other Monterey Bay beaches”) as likely limiting factors for fledging (juvenile survival).

c. The Monterey Bay regional plover nesting report (Page et al. 2007) does not assert or support the “migration of nesting activity” to Moss Landing since the mid-1990s. The report concludes that hatch rates are similar in Moss Landing salt ponds and Monterey Bay beaches in 2007, and of fledging chicks, 203 were on Monterey Beaches versus only 27 in the salt ponds in 2007. The report indicates a continuing decline in breeding success, not a “migration of nesting activity northward”. The report did not cover the 2008 Sand City breeding survey results, but the 4 Sand City nests (in unmanaged habitat) represent 15% of the nesting rate of the CDFG salt ponds that are actively and intensively managed for plover breeding.

d. As indicated above, federal legal “take” is not the applicable threshold for significant impacts to plovers in a CEQA context. All plover foraging, nesting, fledging, predator refuge/cover, predation risk factors, and escape habitat functions are applicable in a CEQA context.

In contrast with the Addendum’s conclusion that the critical habitat designation suggests the site is unimportant for breeding, the recovery plan expressly states:

A key component of recovering western snowy plovers is to ensure that population increases are distributed throughout the species’ Pacific coast range. In order to achieve this, management goals (Appendix B) and needed management actions (Appendix C) have been determined for 155 sites distributed along the coasts of southern Washington, Oregon, and California.

Sand City beaches lie within mapped snowy plover areas of the recovery plan.

The projects' most significant potential impacts on breeding plovers in the "effects area" of the project are likely to be indirect, mediated by influences on predators (predator attraction, predator cues, predator activity), and visitor disturbances of breeding plovers. The recovery plan (pp. 149-150) states that coastal development that destroys or modifies habitat (listing factor A) also results in increased disturbance from recreational activities (listing factor E) and in increased predator populations (listing factor C). The recovery plan lists threats that apply to the current project (p. 152), noting those that were originally identified in listing with an asterisk (\*): increased populations of native predators due to human influences; predator attractants\*; disturbance by pedestrians\*, dogs\*; increased coastal access to beaches; litter, garbage & debris.

The "plover mitigation program" cited in the Addendum is a sketchy bullet list of 11 conservation items aimed at the plover (p. 3-7), followed by sketchy description and no technical implementation (other than deferred professional discretion or consultations of the "retained biologist") on pp. 4-14 to 4-16).

The HPP fails to address indirect impacts due to increased predator attraction and food resources (especially for corvids, gulls, red fox). The "predator management plan" (p. 4-16 HPP) is proposed for future development, and does not appear to expressly include in its scope prevention of predator attraction by food and garbage management within the resort. The scope of the plan appears to focus only on protection of "plovers nesting *on the site*" from predation "to the extent feasible" (p. 4-16), and fails to address indirect impacts of resort-based increased predator activity on adjacent areas (Fort Ord beaches). The plover recovery plan (p. 54) discusses the following indirect and landscape-level cumulative impacts on predation:

Predation, while predominantly a natural phenomenon, is exacerbated through the introduction of nonnative predators and unintentional human encouragement of larger populations of native predators. Elevated predation pressures result from landscape-level alterations in coastal dune habitats which, in turn, now support increased predator populations within the immediate vicinity of nesting habitat for western snowy plovers.

In addition the 2007 recovery plan identifies the following impacts that are directly relevant to the analysis of project impacts, but were not analyzed in the Addendum or HPP:

p. 58 [nest selection, roost site selection] Concentrations of people may deter western snowy plovers and other shorebirds from using otherwise suitable habitats.

p. 59 [foraging impacts] Recreational activities that occur in the wet sand area (e.g., sand sailing) can adversely affect western snowy plovers when they disturb plover adults or broods, which feed at the edge of the surf along the wrack line.

p. 61 [flushing] The disturbance types that caused incubating western snowy plovers to flush from their nests most frequently were joggers and walkers, followed by joggers or walkers with dogs off leash, and stationary visitors

p. 63 [dogs] Dogs on beaches can pose a serious threat to western snowy plovers during both the breeding and nonbreeding seasons. Unleashed pets, primarily dogs, sometimes chase western snowy plovers and destroy nests. Repeated disturbances by dogs can interrupt brooding, incubating, and foraging behavior of adult western snowy plovers and cause chicks to become separated from their parents.

p. 65 [energetics and disturbance] When shorebirds are flushed, they must spend more energy on vigilance and avoidance behaviors at the expense of foraging and resting activity.

p. 72 [coastal access] Expanding public access to the coast (e.g., State Coastal Trails) for recreation (e.g., walking, hiking, biking) may adversely affect western snowy plovers and their breeding or wintering habitat. Expanded coastal access brings significantly greater numbers of people to the beach and other coastal habitats, exacerbating potential conflicts between human recreational activities and western snowy plover habitat needs (see Pedestrian section).

p. 76 [litter, garbage, and debris] Placement of litter, garbage, and debris in the coastal ecosystem can result in direct harm to western snowy plovers and degradation of their habitats. Litter and garbage feed predators and encourage their habitation at higher levels than would otherwise occur along the coast, making predators a greater threat to western snowy plovers.

The proposed 2-acre plover protection area fails to address these indirect or direct impacts to nesting or foraging plovers due to increased resort-based visitor disturbance in the vicinity of the proposed resort and adjacent Fort Ord beaches. In a CEQA context, the HPP impermissibly defers preparation of an enforceable mitigation plan to protect western snowy plovers from direct, indirect, and cumulative impacts of the proposed resort, including plovers on adjacent Ford Ord beaches affected by potentially elevated predation pressures emanating from the resort.

The Addendum, following the the HPP, argues (p. 53) that the substitution of the HPP for an HCP “is unlikely to result in an increase impact to the plover” and the revised strategy is equivalent to the previous strategy. This argument is not credible for the following reasons. First, the HPP provisions for snowy plovers do not correspond to management guidance from the recovery plan. Second, the HPP lacks substantive, enforceable technical specifications, and impermissibly defers essential planning actions to future discretion of an unspecified biologist, or future planning. Third, the HPP provides no criteria or standards for unspecified plan elements to meet. Fourth, and perhaps most importantly, the HPP fails to provide the federal scientific oversight, scientific peer-review, and enforceability mechanisms of an HCP. The proposed funding mechanism (apparently unprecedented) for the HPP implementation exacerbates questions of scientific integrity and enforceability of the plover mitigation: The creation of a dependent non-profit (tax-exempt?) environmental trust by the owners of the for-profit resort to manage and enforce the HPP is highly questionable because of potential conflicts of interest and financial self-dealing. The failure of the HPP to include rigorous independent scientific review by recognized regional western snowy plover experts and resource agencies with jurisdiction and expertise (USFWS, CDFG and plover recovery team members) is a grievous deficiency in its acceptability as mitigation.

In view of the 2007 recovery plan, and the 2008 breeding survey results reported by Neuman and Page (PRBO), which revealed four western snowy plover nests and one additional brood in the Sand City study area (most clustered in the vicinity of the project site, the location of future resort-based visitor disturbance), the Addendum’s conclusions about less-than-significant western snowy plover impacts are not supported by reasonable scientific interpretation of evidence and authoritative federal conservation guidance.

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### **5.3 Omissions or deficiencies in assessment and mitigation of other special-status species impacts**

The original FEIR Addendum fails to assess three species that may occur in Monterey Bay dunes, and were identified as species of concern by the U.S. Fish and Wildlife Service (1998), even though the recovery plan and its draft were already published by 1998. Neither the Addendum, HPP, nor other supporting documents such as the Zander "biotic assessment" address the following invertebrates native to central coast dunes in the project vicinity:

Monterey dunes scorpion (*Pauroctonus maritimus*)  
Globose dune beetle (*Coelus globosus*)  
Sandy beach dune beetle (*Cicendela hirtocollis gravida*)

Black legless lizard (*Anniella pulchra nigra*) surveys were cited for the project site no more recently than 1987, more than 20 years ago. This special-status species of concern is likely to occur in dune scrub habitats of adjacent Fort Ord dunes, within reasonable, feasible dispersal distance of the project site. No federal or state resource agencies with jurisdiction over wildlife, in my professional experience and opinion, would accept 20+ year old survey data as adequate to conclude "non-presence" of a sensitive species if potentially suitable habitat existed on a site, and occurred next to likely source populations and dispersal vectors. In the last 20 years, many years of above-average rainfall occurred and likely contributed to increased production of leaf litter and invertebrate prey bases of this species, increasing its likelihood of occurrence in vegetated dunes on the project site.

The Addendum lacks any reasonable, objective basis for concluding that the project would not have potential significant impacts to these species in the absence of valid, current survey data and habitat assessments.

### **5.4 Feasibility of Habitat Protection Plan and project design of dune habitat restoration**

The Addendum and project documents fail to analyze the long-term loss in coastal dune habitat caused by the (cumulative project effect) the interaction of the development infrastructure footprint, and marine transgression (long-term shoreline retreat; "coastal squeeze"). The project footprint (notwithstanding the largely ornamental rooftop gardens with native vegetation) displaces most of the transgressive platform for potential regeneration of coastal dunes as the coastal bluffs retreat in response to accelerated sea level rise. As the bluff crest position retreats, the physical space available for coastal dunes to develop will be eliminated. This is likely to occur in a matter of decades based on forecast "average" rates of bluff retreat according to the HKA erosion reports, but even the HKA 2003 report indicated that because of "extreme susceptibility of the soils to erosion, a single severe ocean storm has the potential to cause 50 feet of bluff recession anywhere on this section of coastline" (HKA 2003, p. 7). Most coastal erosion occurs in El Nino Southern Oscillation storm pulses rather than incremental recession, and the intensity and frequency of extreme storm wave processes on the U.S. west coast is increasing over decades, independently of eustatic sea level rise (Allan and Komar 2006). This indicates the need for a probabilistic assessment of storm-driven bluff retreat positions that could effectively eliminate the space available for restored or regenerated dune habitats seaward of the developed resort footprint.

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The HPP fails to include standard dune restoration and management techniques, methods, and specifications (Pickart and Sawyer 1998) at even a conceptual level. Neither the HPP nor any other supporting environmental documents cite any applied scientific literature on coastal California dune restoration, or any expert consultation, to support its methodology or design for achieving dune scrub restoration objectives. The HPP dune restoration plans fail to cite substrate texture specifications, estimated rates of sand transport (erosion/accretion), species-specific planting densities, offsite or on-site transplant stock specifications, planting sequence or phasing, growth or survivorship criteria, long-term invasive species management, quality control criteria, reference sites or conceptual models for vegetation objectives, quantitative or semi-quantitative vegetation or species objectives, or long-term vegetation goals. The HPP lacks any indication of due diligence in consulting standard published scientific references on coastal dune restoration, or regional California expertise. The HPP exhibits the scientific rigor of a landscape architect's planting plan. It provides no basis for expecting effective long-term restoration or rehabilitation of native coastal dune communities, or adequate mitigation in a CEQA or Coastal Act context.

### 5.5 Coastal recession and dune stabilization

The discussion and analysis of "coastal recession" (shoreline retreat) as an incompatible hazard for resort development appears to have omitted analysis of potential significant impacts to and by dune sand transport linked to episodic marine (storm wave) erosion of the coastal bluff scarp, and associated blowout and eolian sand transport processes. Dune blowout formation and deposition of tongue dunes and small parabolic dunes are well-documented historic and modern geomorphic processes and landforms associated with the original southern Monterey Bay coastal bluff (marine scarp erosion) and perched dune sheet (Cooper 1967). The influence of this coastal ecological/geomorphic process may precede or eclipse marine erosion processes studied in the shoreline recession analysis.

The dune restoration and endangered plant mitigation measures of the project appear not to address the formation of naturally mobile dune features derived deflation of wave-cut bluff scarps and dune heads, processes that are controlled by rates of sand transport upwind of bluff crest/foredune vegetation. Active dunes fed by active, rapid deflation of marine scarps cannot readily be stabilized by planting native California dune species downwind. This results in the natural characteristic condition of frequent blowouts, mobile tongue dunes, and incipient parabolic dunes in various stages of vegetation succession in southern Monterey Bay (Cooper 1967). Cooper (1967) reported comparable rates of migration of active unvegetated coastal dunes in San Mateo County (derived from smaller sand sources) during the dry season up to 5.6 cm/day, or over 6 m in 4 months. Cooper described the landward encroachment of mobile blowout-derived dunes at the bluff crest as "the most conspicuous contemporary activity in the Flandrian [Holocene] dune belt" (p. 63). It is remarkable, therefore, that the rate, pattern and magnitude of this process were not accounted for in dune restoration plans for the project, or impact assessments in the Addendum.

The "wetlands" described without explicit spatial reference in the HPP appear to be shown on Bestor Engineering sheet TM-2, "retention pond" (pp. 22 and 40, SNG supplemental documents 2008). They are located landward of a "barchanoid" (misnomer; barchan dunes are intrinsically unvegetated) dune, and downwind (SE of dominant NW winds) of troughs or gap in the foredune/bluff crest topography established by constructed "dunes" and antecedent topography.

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Gaps in foredune crests cause topographic steering of onshore and alongshore winds, as well as flow acceleration that concentrates dune sand transport pathways (Walker et al. 2006). Contours of the "restored" foredune appear to increase topographic steering and flow acceleration of onshore winds, intensifying potential local wind scour and sand deposition behind the bluff crest. The layout of the "eco-resort" infrastructure and graywater/stormwater detention ponds appears to conflict with the likely zone of dune transgression associated with the existing bluff crest or "restored foredune" grade. In other words, the constructed "restored" dune topography in back of the "set-back" bluff appears to aim dune transgression directly at constructed wetlands/detention ponds, monitoring wells, lift stations, fire access roads, and infrastructure shown in sheet TM-2. As the beach recovers from sand mining, the risk of increased foredune mobility should be expected to increase over time.

The contradiction implicit in design and the morphology, pattern, rate, and scale of natural sand transport and the landscape design on sheet TM-2 is evident on p. 7 of the supplemental document package, as shown in the photograph captioned, "Example of relatively intact dune system north of the proposed site", which shows mobile dune tongues extending landward from the bluff crest by a distance exceeding the width of the dry high tide backshore beach zone. It is notable that the "natural Monterey Bay Dune Formation" shown on this sheet erroneously represents purely unvegetated dune forms (barchans, barchanoid ridges, transverse dunes) that do not occur in the historic Monterey Bay dune field, which is dominated by parabolic dunes (Cooper 1967). In short, long before "bluff crest recession" directly affects the proposed development, the bluff-tied blowout dune processes would indirectly influence a wide zone of constructed features. The significant environmental consequences of perpetual blowout stabilization and sand removal in the proposed developed landscape have not been addressed in the Addendum or geotechnical reports.

The omission of analysis of bluff-linked dune activity is difficult to understand because the 1989 erosion study expressly indicated bluff erosion processes independent of waves and shoreline position (p. A-7), and estimated potential net onshore eolian sand transport rates ranging from approximately 3,000 to 25,000 cubic yards per year in Sand City (p. B-17). Paradoxically, all discussion of "set-back" distances since the 1989 erosion report are linked to position of the bluff or high water line, rather than the zone of active blowout erosion and eolian sand deposition that occurs well landward of it. There is no native vegetation type that can fully stabilize a foredune faced with strong net onshore transport of sand from dry fetch across either a bluff scarp, a wide beach backshore, or both.

The failure to design the project compatibly with foreseeable natural mobile dune processes linked to bluff retreat is ironic for a self-promoted ecologically designed project, but it is a more significant issue for CEQA and the Coastal Act where it leads to significant impacts due to conflicts with endangered species mitigation, wetland management, water quality and stormwater management, and potential adverse engineered fills for coastal stabilization.

## 6. Conclusions.

The Addendum fails to identify feasible, enforceable mitigation for impacts to endangered Monterey spineflower, relying on the flawed mitigation planning of the project. The Addendum fails to account for recent and current site-specific data that indicates more nesting by western

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snowy plovers on or near the project site, and underestimates potential indirect impacts of the project on this species. The Addendum accepts incomplete and deficient mitigation for impacts to the plover. The Addendum fails to identify potentially significant impacts to several special-status wildlife species, and relies on outdated survey data for one special-status species that was previously considered in the FEIR. The project design and Addendum assessments fail to identify the environmental consequences of dune activity and transgression linked to the inevitable natural recession of the coastal bluff.

Thank you for considering my review. Please contact me if you have any questions.

Respectfully submitted,



Peter R. Baye, Ph.D.

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F8a



LEAGUE OF WOMEN VOTERS®  
OF THE MONTEREY PENINSULA

RECEIVED

December 5, 2009

DEC 07 2009

Item F.8.a

California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219  
FAX (415) 904-5400

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

Cc: Charles Lester and Mike Watson, Central Coast District Office  
FAX (831) 427-4877

**RE: Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)**  
Item Friday 8a for the California Coastal Commission hearing December 11<sup>th</sup>, 2009

*Via facsimile*

Dear Chair Neely and fellow Commissioners:

The League of Women Voters of the Monterey Peninsula recommended that a Subsequent EIR be prepared for the proposed project. Our recommendation was based on the following environmental issues:

Project Changes

The project has been redesigned to place structures into the sand dunes. While this would initially conceal the project and protect views from Highway 1, the shifting nature of sand dunes and the potential for revealing portions of the structure have not been evaluated. Also, government agencies and the public have not had an opportunity to review the studies and reports on sand dune stabilization.

Substantial Changes in the Environment

Since the project was approved, the Seaside Groundwater Basin was adjudicated and found to be overdrafted. The addendum finds the project's impact on groundwater would be less than the original project. However, CEQA requires that impacts be assessed in relationship to the existing environment, not another project. Additional withdrawals from this depleted basin must be evaluated. Also, use of water from the Sand City desalination plant that is currently being constructed should be considered as a feasible alternative to the use of groundwater.

page 1 of 2



LEAGUE OF WOMEN VOTERS®  
OF THE MONTEREY PENINSULA

State Water Resources Control Board Order 95-10 required reduced pumping from the Carmel River. Because efforts by Cal-Am and the Monterey Peninsula Water Management District have failed to achieve any significant reduction of unlawful diversions from the Carmel River since 1998, the State has issued a Draft Cease and Desist Order with a final order expected later this year. The impact on existing water users of providing scarce water resources to this major water user must be evaluated.

Since the original EIR was approved, the California Air Resources Board identified particulate matter from diesel-fueled engines as a toxic air contaminant. The impact of diesel exhaust emissions on public health from the construction of the project should be identified. It is critically important to address diesel exhaust emissions from the over 10,000 truck trips needed to haul 420,000 cubic yards of sand off-site.

Traffic Levels Of Service (LOS) on roads affected by the project have degraded since original project approval. Many of these roads operate at LOS D and F. While the Addendum finds the project would have significant impacts on roadways, the public has not had a chance to comments on an issue affecting so many residents.

New Information

Since the project was approved new information on climate change and its impacts on coastal resources have become available. While the addendum finds that the revised project has been setback further than the original project based on estimates of sea level rise, the public has not had an opportunity to review or evaluate the adequacy of this new finding.

Lacking subsequent environmental review and the findings of the Commission's staff report, we support the staff recommendation for project denial.

Thank you for the opportunity to comment on the proposed project.

Sincerely,

*Dennis Mar.*

Dennis Mar  
President, LWVMP

page 2 of 2

# California Native Plant Society *F89*

Monterey Bay Chapter

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DEC 07 2009

2 Via Milpitas  
Carmel Valley, CA 93924  
Dec. 6, 2009

California Coast Commission  
Central Coast District Office  
725 Front Street, Suite 300  
Santa Cruz, CA 95060

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

RE: A-3-SNC-98-114: Monterey Bay Shores Project, Sand City

Dear Commissioners:

The Monterey Bay Chapter of CNPS supports the staff recommendation that the extent of the changes needed to make this project consistent with all of the provisions of the Sand City LCP and the Coastal Act are too significant to be resolved by approval with conditions. We strongly support the staff recommendation for denial.

Our chapter has been opposing the various designs for this project for over ten years because all of them have violated provisions of the above plans. The current 341-unit project, despite changes to appear environmentally sensitive, continues to have severe impacts on sensitive coastal dune resources, including rare and endangered plants and animals, as well as landform change, erosion, and the hazards created by rising sea levels. Its infrastructure shortcomings include lack of a certain water supply and conflicts with traffic and circulation.

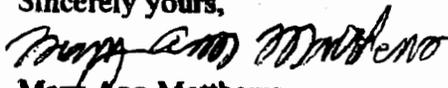
1982 an article in *California Geology*, published by the State Department of Conservation, Division of Mines and Geology, singled out the Monterey dunes as one of two examples of "extensive coastal dune complexes that are relatively rare in California." The Nature Conservancy designated the "Monterey Sand Dunes" as a "Rare Plant Ensemble" in its 1984 Element Preservation Program.

Because of the unique biological values of the Monterey Bay Dunes, our chapter has been working for decades to try to assure that an uninterrupted strip of natural, restored, and restorable dune habitat will be preserved around Monterey Bay from the city of Monterey to the end of the dunes in Santa Cruz County, a distance of some 12 miles. Our chapter worked hard for the establishment of the Monterey Bay State Seashore and we are gratified that a number of properties within that area are now being protected and restored. This project essentially removes all of the existing vegetation instead of confining development to truly degraded areas and leaving as much native habitat as possible to connect with preserved areas to the south and north.

One of our most serious concerns with this and past plans for this site is this lack of attention to the need to provide for habitat corridors for dune plants and animals. If native habitat sites are isolated from other sites along the narrow strip of dunes around the bay, they are much less likely to retain the genetic diversity enabling them to survive over the long term. Successful corridor preservation needs areas of natural habitat including the native seed bank to link to restored areas.

We urge you to consider the information provided by impartial experts on coastal erosion and biology that calls for a denial of this project.

Sincerely yours,



Mary Ann Matthews  
Conservation Chair



Dedicated to the preservation of California native flora



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**CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA**



**Surfrider  
Foundation**

*F8a*

December 3, 2009

Item **F.8.a**

California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219  
FAX (415) 904-5400

Cc: Charles Lester and Mike Watson, Central Coast District Office

**RE: Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)**  
Item Friday 8a for the California Coastal Commission hearing December 11<sup>th</sup>, 2009

Dear Chair Neely and fellow Commissioners,

I am writing to you on behalf of the Surfrider Foundation Monterey Chapter and the Surfrider Foundation membership ("Surfrider") in regards to the proposed CDP for SNG Development Company to build the Monterey Bay Shores Resort. Surfrider Foundation is a non-profit environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches through conservation, activism, research and education.

Surfrider concurs with Staff's findings and agrees that the project as proposed is fundamentally inconsistent with Sand City LCP policies regarding protection of significant public views; protection of dunes and sensitive natural resources; safety from coastal hazards; identification of adequate water supply; and traffic and circulation. Surfrider also agrees with the finding made by the Monterey Peninsula Water Management District that the project's environmental documents are inadequate, as Surfrider believes that they do not appropriately address new substantial changes in the regulatory and environmental setting, and believe this is another basis on which the Commission should deny this CDP. These non-conformities are so significant and so pervasive that no amount of conditions could be applied to create a viable project. This is a project that needs reconsidered and reevaluated at the ground level.

To compliment Staff's thorough analysis, Surfrider wishes to offer the following additional comments highlighting issues that are insurmountable and require the CDP to be denied at this time:

**-Water:** The project has **inadequate water supply**. The Monterey Peninsula Water Management District, on which former Coastal Commissioner Dave Potter sits, denied SNG and California American Water ("Cal-Am")'s joint application for a water permit that would have allowed Cal-Am to serve the proposed project by essentially transferring SNG's adjudicated (court-determined) water rights to Cal-Am. The denial was based on inadequate analysis of impacts under CEQA. Without approval of this permit, the project has no water supply.

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## Surfrider Foundation

The property owner has a legal right to 149 acre-feet of water from the Seaside Groundwater Basin, but this is "paper" water. The wells on the project site are not capable of producing potable water for the project. Further, the basin is currently being overdrafted beyond its sustainable yield (which is why it was adjudicated in 2006), so to add a new withdrawal from the basin would result in aggravation of these overdraft conditions and affect other users of the basin. Another proposed option is to truck and store water; however, if this was actually a feasible alternative, Cal-Am and every other developer in the County would already be doing this to overcome the de facto growth moratorium caused by the lack of water supply.

**-ESHA:** The entire project site is ESHA. Although the court decision rendered does not allow the Commission to apply its ESHA policies to the development, the fact remains that the site is sensitive habitat area (coastal dune habitat) which is protected explicitly and implicitly by several Sand City LCP provisions. This sensitive habitat also supports threatened and endangered species such as the Smith's blue butterfly. Legal protections afforded to inhabitant rare, threatened and/or endangered species through the state and federal Endangered Species Act still apply. Additionally, other policies in the Coastal Act (i.e. the Commission's duty to protect and restore the quality of the coastal zone environment and its natural resources (Pursuant to § 30001.5(a)) arguably would still act to protect this sensitive area.

**-Coastal Hazards and Erosion:** The project is not sited to avoid coastal hazards. Namely, the future shoreline hazards for the site (including shoreline erosion and sea level rise) have been underestimated. Staff has determined that, if the economic lifetime of the project is 75-100 years, most of the project site is unsuitable for development. The project is proposed on an actively eroding part of the coast, to be located between and on top of sand dunes that are constantly eroding and shifting. This issue raises *visual concerns* (what parts of the development will be exposed once the dunes shift?), *natural hazard concerns* (storm-wave runup, tsunamis, sea level rise, and earthquakes), and *coastal armoring* issues.

Furthermore, the setback proposed for the project relies on estimated erosion of the shoreline, whereas—from an engineering standpoint—it should also consider the erosion and movement of the dunes themselves, in and on which the project is to be located. As cited on p.41 of the staff report written in 2000 (<http://www.coastal.ca.gov/sc/A-3-SNC-98-114%20.pdf>), the project's measurement of setback is not consistent with the Sand City LCP. The LCP identifies the dune scarp (20 ft. above mean sea level), blufftop or point of maximum design storm-wave runup (30 ft. above mean sea level) as the starting point for measuring setback (--not the mean high tide line, which is what the applicant uses). The proposed grading of the dunes (to prepare for development) would considerably change the topography and likely require additional setback.

**-Traffic:** There is not adequate roadway capacity available to serve the development, nor are the impacts caused by additional traffic from the project adequately mitigated. Specifically, the project would exacerbate traffic at two intersections that currently operate at an unacceptable Level of Service standard, according to Cal-Trans' thresholds (which is also cited in the



**Surfrider  
Foundation**

Addendum to the EIR). Thus, the circulation impacts caused by the project would be inconsistent with the LCP.

**-Construction Impacts:** The EIR does not identify where the sediment removed from the project site—approximately 420,000 cubic yards of sand—will be disposed or where it might be stored in the interim before it is disposed. Impacts resulting from this have not been adequately identified, reviewed, or mitigated.

**-CEQA:** The addendum to the 1998 EIR does not appropriately address new information of substantial importance, such as the Seaside Basin adjudication, which must be addressed in a subsequent EIR; therefore, the Commission cannot find the proposed project to have no significant impact on the environment within the meaning of CEQA (per § 13096 C.C.R.). This finding is consistent with the decision made by the Monterey Peninsula Water Management District's decision to require preparation of a Subsequent EIR.

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Based upon the findings enumerated in this letter and in the Staff report, **Surfrider strongly urges the Coastal Commission to support Staff's recommendation to deny the proposed CDP for SNG Development Company.**

Sincerely,

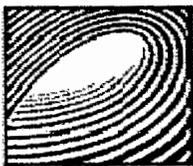
Antony Tersol, Chair  
Monterey Chapter of  
The Surfrider Foundation



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**Surfrider  
Foundation.**

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## ***Santa Cruz Chapter***

Conservation

Activism

Research

Education

**Agenda Number: F 8: a: December 11, 2009;**

**Permit Number A-3-SNC-98-114, SNG Development Company**

**Richard Ferdinand, Chair, Santa Cruz Chapter of the Surfrider Foundation: OPPOSE**

November 29, 2009

California Coastal Commission  
Central Coast District Office  
725 Front Street  
Santa Cruz, CA 95060

Dear Members of the California Coastal Commission:

The Santa Cruz Chapter of the Surfrider Foundation wishes to state our opposition to granting CCC permit Number A-3-SNC-98-114 to the SNG Development Company for construction of the SNG project commonly known as "The Monterey Bay Shores Ecoresort". We believe this proposed project is not suited to the chosen site in the sand dunes just downcoast from Fort Ord Dunes State Park.

Our reasons for opposition relate to necessary conservation of natural resources (water); protection and preservation of coastal habitat; preservation of public physical and visual access to the beach and blue water views; and failure to assure protection of new construction from natural coastal processes and coastal hazards, such as active coastal erosion and storm wave run-up and flooding.

**The Surfrider Foundation is a non-profit grassroots organization dedicated to the protection and enjoyment of our world's oceans, waves and beaches. Founded in 1984 by a handful of visionary surfers in Malibu, California, the Surfrider Foundation now maintains over 55,000 members and 80 chapters worldwide. For more information on the Surfrider Foundation, go to [www.surfrider.org](http://www.surfrider.org) For local information, go to [www.surfridersantacruz.org](http://www.surfridersantacruz.org)**

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pl

We are aware that the historical use of this site was as a sand mine until 1986, and that the Sand City Local Coastal Plan does not single-out the site as environmentally-sensitive. However, the proposed development represents a huge construction project located right on a dynamic coast, and we contend that any such construction will inevitably negatively impact the natural processes in play through a dune environment.

SNG's permit application calls for construction of approximately 360,000 square feet of mixed use residential and visitor serving development, including 160 hotel rooms, 180 condominium units, restaurant, conference center, spa, 3 swimming pools, surface and underground parking for 841 vehicles, public and private access trails, dune/habitat restoration, and related infrastructure (including water, sewer, stormwater systems, and various energy reduction technologies (solar, wind, geothermal, etc.) requiring 695,000 cubic yards of grading and 418,000 cubic yards of sand disposal in sand dunes.

Routine excavation for the structures, pipelines, etc.; leveling and grading of the roads; plus re-configuration of the dunes to allow construction and views will cause major changes in the natural processes at work in the dune habitat. The dunes are a dynamic environment and are habitat for many coastal plant, insect, bird, crustacean, and animal populations, regardless of whether the site has been "degraded" by sand mining operations almost 25 years ago.

Surfrider contends that no new coastal development of this size and nature should ever be allowed on sensitive natural habitat and on a coast which is widely-believed to be the most rapidly eroding segment of Monterey Bay. Also, we do not see adequate provision for public access to the coast across the proposed development. We believe coastal access is the right of all peoples.

We are also well-aware of the tremendous scarcity of water for consumption and all other uses in the South Bay and along the Monterey Peninsula, and we find no assurance in the project documents that necessary water will be guaranteed for either the inception of or feasible life of the project.

Likewise, we realize that the attendant increase in traffic from this project will only worsen the vehicular congestion already evident along Highway 1 and nearby local streets.

In addition, we note that scenic views of the coast from Highway 1 and the Coastal Recreation Trail will be damaged by site alterations and construction, including planned re-configuration of the sand dunes to screen and shield the structures.

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p2

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Our review of project documents as well as the California Coastal Commission's staff report on this matter reveals that we are in firm agreement with the staff recommendation to deny SNG Development Company's coastal permit at this time. The Surfrider Foundation's Santa Cruz Chapter, therefore, asks all Coastal Commissioners to vote "No" on this proposal.

For the oceans, waves and beaches,

A handwritten signature in black ink that reads "Richard Ferdinand". The signature is written in a cursive, flowing style.

Richard Ferdinand, Chair  
Santa Cruz Chapter of the Surfrider Foundation



475 Washington Street, Suite A  
 Monterey, CA 93940  
 PH 831.646.8839  
 FX 831.646.8843

831.646.8840

December 3, 2009

California Coastal Commission  
 45 Fremont Street, Suite 2000  
 San Francisco, CA 94105-2219  
 FAX (415) 904-5400

Cc: Charles Lester and Mike Watson, Central Coast District Office  
 FAX (831) 427-4877

**RE: Application No. A-3-SNC-98-114 (SNG Development Co., Monterey Co.)**  
 Item Friday 8a for the California Coastal Commission hearing December 11<sup>th</sup>, 2009

*Via facsimile*

Dear Chair Neely and Commissioners,

I am writing to you on behalf of the Monterey Coastkeeper in regards to the proposed CDP for SNG Development Company to build the Monterey Bay Shores Resort. Monterey Coastkeeper is a program of The Otter Project, a nonprofit environmental organization dedicated to the protection of the water, watersheds and wildlife of the Central Coast.

Monterey Coastkeeper concurs with Staff's findings and agrees that the project as proposed is fundamentally inconsistent with Sand City LCP policies regarding protection of significant public views; protection of dunes and sensitive natural resources; safety from coastal hazards; identification of adequate water supply; and traffic and circulation.

The Monterey Coastkeeper has been active over the past year arguing in opposition to the development of the Monterey Bay Shores Resort. We are sorry we have a conflict for this hearing date. Put simply, we believe this site should not be developed. The site is on the west side of Highway 1 along a relatively undeveloped, undisturbed, unobstructed stretch of coast.

The project proponent argues that the site will be restored by this resort development. It is impossible for us to believe that construction of a 370 unit hotel constitutes restoration. The proponent argues that the "green"/LEED certified proposed building plan is justification to build. An efficient building on an inappropriate site is still inappropriate in our eyes.

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**COASTKEEPER®**  
[www.montereycoastkeeper.org](http://www.montereycoastkeeper.org)

Item F.8.a



The project has no current EIR. The Monterey Peninsula Water Management District has found the EIR lacking and has asked for a new EIR. The project proponent believes an addendum, prepared a decade after the first EIR, constitutes a new EIR. The decade old EIR analyzes water pumped from beach wells. An interim plan proposed that water be supplied by the Sand City Desal Plant. In the new addendum, it is proposed that water be supplied by Cal Am wells interconnected between the Seaside and Carmel River aquifers. These three alternatives are perfect examples of the very purpose of an EIR, to transparently compare alternatives. Finally, an EIR is a process as well as a "report." A decade old process is insufficient.

Impacts to our water supply are critically important to the people of the Monterey Peninsula. Our water is interconnected and it is impossible to guarantee that water delivered by CalAm will not come from the Carmel River aquifer. The project proponent maintains that his property carries a sufficient adjudicated water right to supply the proposed resort. What we as Monterey residents understand is that the entire system is interconnected and overdrawn. There is no water for a major new resort on the Monterey Peninsula.

Impacts to endangered species have been vastly understated. Snowy Plover, Smiths Blue Butterfly, and Monterey Spineflower are special status species occurring on the property. The proponent maintains that they will move Spineflower and will plant new butterfly host plants. The project site is immediately north and under the Big Dune (aka Scribble Hill) in Sand City – a sand blasted, high wave and wind energy site. When a large portion of the site is hardened by development, we have no idea where or if pockets of habitat will exist.

The dynamic nature of this site also casts doubt on what the ultimate viewshed from Highway 1 will look like. The proponent maintains they will tastefully and unobtrusively sculpt their 370 unit resort structure into the dunes. As mentioned above, the site has very high wind and wave energy: Hardening the dunes through construction will likely result in a building sitting atop the bluff, conspicuous to Highway 1. Regardless of the view from Highway 1, the residents of Monterey and Pacific Grove will look across open water at the beach hotel – a view that must also be considered.

We believe the Monterey Bay Shores Resort is a seawall waiting to happen. At the proponent's open houses he maintains his site is actually accreting – the beach is building. The beach to the north and south of this site are quickly eroding, if this site were building it would be a new peninsula – the proponent's claims do not pass the straight face test. In the EIR addendum, the proponent uses a minimal erosion figure in comparison to his 'neighbor's' actual experience. Stilwell Hall was to the north of the site, the Monterey Beach Hotel is to the south. Stilwell Hall (setback nearly 400 feet from the bluff when it was built ~65 years ago ) is gone; the Beach Hotel has a seawall. This project is built into the bluff so close to the shore that a stairway leads onto the beach. Miraculously, the developer's consultants say the Resort won't fall into the sea for at least 50 years. Given global warming and sea level rise, we're very skeptical. Our skeptical view is shared by coastal erosion experts.

We believe that for so many reasons the Monterey Bay Shores Resort is a terribly inappropriate development for our coast. While we can complement the architecture and water-wise features, the site is simply unsuitable. We urge the Commission to follow the staff recommendation and deny the permit.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Shimek', written in a cursive style.

Steve Shimek  
Monterey Coastkeeper



F8a



*THE LEADING EDGE OF COASTAL ACTIVISM*

Agenda Number: F8: a; December 11, 2009;  
Permit Number A-3-SNC-98-114, SNG Development Company  
James Littlefield, Santa Cruz Chapter Director, Surfers' Environmental Alliance: OPPOSE

November 28, 2009

California Coastal Commission  
Central Coast District Office  
725 Front Street  
Santa Cruz, CA 95060

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CENTRAL COAST AREA

Honorable Coastal Commissioners:

Surfers' Environmental Alliance is writing to state our firm opposition to the coastal development proposal commonly known as "The Monterey Bay Shores Ecoresort". This development is located seaward of Highway 1, immediately downcoast of Fort Ord Dunes State Park in the city of Sand City, and it was previously rejected by the California Coastal Commission on 12-14-2000. Subsequent court actions and plan revisions still fail to make it a desirable project for the site, and we find the current proposal remains fundamentally in non-compliance with Sand City's Local Coastal Plan.

**As a preliminary matter, Surfers' Environmental Alliance (SEA) is committed to the preservation and protection of the environmental and cultural elements that are inherent to the sport of surfing. Our goals are achieved through grassroots activism, community involvement, education and humanitarian efforts. We engage in projects that strive to conserve the quality of our marine environment, preserve or enhance surf breaks, protect beach access rights, and safeguard the coastal surf zone from unnecessary development.**

Regardless of any and all "greening technologies" and environmental-friendly operational and maintenance practices, this plan remains a huge construction project sited directly on the coastal dunes that characterize this coastal section of Monterey Bay. The permit application calls for construction of approximately 360,000 square feet of mixed use residential and visitor serving development, including 160 hotel rooms, 180 condominium units, restaurant, conference center, spa, 3 swimming pools, surface and underground parking for 841 vehicles, public and private access trails, dune/habitat restoration, and related infrastructure (including water, sewer, stormwater systems, and various energy reduction technologies (solar, wind, geothermal, etc.) requiring 695,000 cubic yards of grading and 418,000 cubic yards of sand disposal in sand dunes. No new coastal development of such obviously large size should ever be permitted on sensitive coastal habitat and on a rapidly-eroding coast, regardless of the site's previous use as a sand mining facility prior to 1986. The dunes are a dynamic environment and are habitat for many coastal plant, insect, and animal populations.

SEA contends that the proposed project does not:

- provide for guaranteed necessary water supply;
- adequately address well-documented coastal hazards, including active coastal erosion and retreat and wave run-up flooding;
- provide unimpeded blue-water views from Highway 1 and the Coastal Recreation Trail. Existing views will be blocked by structural elements and dune reconfiguration;
- adequately protect coastal dune habitats;
- address inevitable negative impacts on traffic congestion along Highway 1 and local access roads;
- provide obvious paths for public coastal access. The public has an absolute right to full coastal access through this project.

On these items we are in full agreement with the Coastal Commission staff report on this matter.

Surfers' Environmental Alliance urges the California Coastal Commission to deny the SNG Development Company's permit for the Monterey Bay Shores Ecoresort. We believe it essential to our children's heritage that we preserve the natural wonders of our coastal and marine environment for their use and enjoyment.

Sincerely,

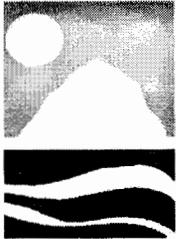


Andrew Mencinsky, Executive Director  
Surfers' Environmental Alliance



James Littlefield, Santa Cruz Chapter Director  
Surfers' Environmental Alliance

F8c



# City of Morro Bay

Morro Bay, CA 93442 • 805-772-6200

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COASTAL COMMISSION  
CENTRAL COAST AREA

December 8, 2009

California Coastal Commission  
Central Coast District Office  
725 Front Street, Suite 300  
Santa Cruz, CA 95060-4508

*Re: Hearing Item F.8.c.; Application No. 3-08-052 (Embarcadero 801 LLC, Morro Bay)*

Honorable Coastal Commissioners:

Morro Bay, with its picturesque harbor and Morro Rock, is a prime location for a conference center, easily accessible from San Francisco, San Jose and Los Angeles. Our local Chamber of Commerce has been suggesting a conference center since the 60's, and the need was confirmed in our citizen-produced 2020 Goals Report. Currently, the City does not have a facility that can accommodate over 250 people. The Chamber and local hotels have reported that they receive many requests for conference meeting space for larger groups and must turn them away for lack of adequate facilities.

As Coordinator of our successful Morro Bay Winter Bird Festival, I am acutely aware of this need. Our keynote speaker presentations for the Festival's 400 participants must be held at Morro Bay High School. While we are grateful for the space, the folding chairs, dim fluorescent lighting and limited availability schedule make this venue impossible for attracting conferences on a regular basis.

As I'm sure you are aware, Morro Bay has taken some major hits to its revenue stream with the reduced use and ultimate potential closure of the power plant and the severe restrictions on our fishing industry. We have become a community dependent on tourism as our major revenue source. For tourism to sustain our economy, we need to draw visitors mid-week and during the winter months—exactly what a conference center would do.

Recognizing that need, local business developer Burt Caldwell proposed the project being presented for your approval. After working with Coastal Commission staff, he revised the project to be even more attractive and viable, and we appreciate staff's advice and suggestions.

ADMINISTRATION  
595 Harbor Street

CITY ATTORNEY  
595 Harbor Street

FINANCE DEPARTMENT  
595 Harbor Street

FIRE DEPARTMENT  
715 Harbor Street

HARBOR DEPARTMENT  
1275 Embarcadero Road

POLICE DEPARTMENT  
870 Morro Bay Boulevard

PUBLIC SERVICES  
955 Shasta Avenue

RECREATION & PARKS  
1001 Kennedy Way

The advantages of this project to Morro Bay are many:

- The project will create new public recreational access by adding nearly 185 feet to our lateral waterfront Harborwalk in the central Embarcadero.
- The project will provide enhanced public plazas in two locations with lateral and vertical access overlooking the Bay.
- The project will provide nine desperately needed new boat slips for visiting boaters.
- The project will create the only conference main-room facility with a waterfront view for groups up to 400 people in our county, making it especially attractive for weddings and parties as well as business conferences.
- The project, without a hotel or restaurant included, will draw visitors to our *existing* hotels, restaurants and shops year round and mid-week, thereby improving the economy for our whole City.
- The project will introduce people to Morro Bay as a vacation destination. (A Southern California attendee at a recent small (150 people) conference told me that after "discovering" Morro Bay at a conference 2 years ago, she and her whole family had been back for weekend visits 4 times.)
- The project combines two waterfront lease sites that are currently under an old county lease agreement that provides minimal revenue to the City.
- The project will use green building practices with the intent to achieve Leed certification.

I agree with the statement in the staff report that the revised project "represents a truly exceptional public recreational access project, with components that will be sited and designed in such a way as to provide maximum public benefit at this important public site along Morro Bay and the Embarcadero." As such, the project can be found consistent with the Coastal Act policies discussed in that report.

Your approval of this project will fulfill a long time City goal, and provide Morro Bay with a beautiful new conference facility in the very near future.

Sincerely,



Janice Peters  
Mayor

F8c

3-0-052

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CENTRAL COAST AREA



Dec 3, 2009

Project Location  
R 801 & 833 Embrocadero  
Morro Bay - CA

To

Calif Coastal Commission

We have been home owners in  
Morro Bay since 1968.

We are certainly opposed for the  
above project

1. No parking - not sufficient  
for the type of project

The street along embrocadero is narrow  
2 lanes traffic & often times trucks  
unloading fuel & merchandise block  
the road.

At large meetings we already have:

- 1. Morro Bay Community Center
- 2. Veterans Hall
- 3. The Inn at Morro Bay

Please do not approve project  
-  
address care Gen Phelps  
160 Terra St  
Morro Bay 93442 (since 1968)

F8c

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**CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA**

December 7, 2009

Mike Watson  
Coastal Program Analyst  
California Coastal Commission  
Central Coast District Office  
725 Front Street, Suite 300  
Santa Cruz, CA 95060

RE: PUBLIC HEARING FRIDAY, DECEMBER 11, 2009  
AGENDA NUMBER 7.c, NEW APPEALS  
APPLICATION NO. 3-08-052 (EMBARCADERO 801 LLC, MORRO BAY)

Dear Mr. Watson:

Once again I wish to convey my position that the location for the proposed conference center is ill-conceived if for no other reason than it is not at all in line with the character of Morro Bay's embarcadero. Furthermore, the Commission is well aware of the parking and traffic issues such a project would create.

If City Council feels that Morro Bay needs a new Conference Center then I would respectfully suggest they find a location "above" the city. My experience with conferences has been that the attendees primarily go off campus in the evening (when most locals are at home) and spouses take day trips. A location above the city will provide much more dramatic views, adequate parking, a more serene atmosphere and allow Morro Bay to maintain its low-key flavor.

Sincerely,



Toni Cardoso  
P.O. Box 247  
Morro Bay, CA 93443

12/5/09

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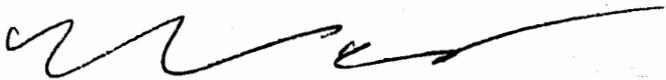
CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

Permit#: 3-08-052  
Application#: F8c  
Applicants: Embarcadero 801 LLC  
My Position: In favour  
Hearing Date: Friday Dec. 11,2009

Michael Hischier  
998 Embarcadero  
Morro Bay, Ca. 93442  
(805) 772-3904

As a Morro Bay business owner for the past 29 years, I wholeheartedly support this project. Morro Bay needs quality projects like this to keep our commercial waterfront a viable and dynamic area to conduct business. The applicant has designed a project that will enhance and compliment the existing waterfront and surrounding areas.

Respectfully,



Michael Hischier