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# W20a

Filed: 4/12/2012  
Staff: D.Robinson/L.Warren - SC/SF  
Staff Report: 7/19/2012  
Hearing Date: 8/8/2012

## CLAIM OF VESTED RIGHTS STAFF REPORT

**Claim No.:** 3-12-013-VRC

**Claimant:** Rob and Judi McCarthy

**Project Location:** Water pipelines between Avila Beach Road and the north (uphill) side of Cave Landing Road on Ontario Ridge, between Avila Beach and Pismo Beach in unincorporated San Luis Obispo County (APNs 076-231-063 and 065)

**Development Claimed:** Domestic water service from San Luis Obispo County Service Area No. 12 (CSA 12).

**Staff Recommendation:** Denial

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## SUMMARY OF STAFF RECOMMENDATION

The Applicants, Rob and Judi McCarthy, describe the development claimed to be exempt from coastal development permit (CDP) requirements as: “[d]omestic water service from San Luis Obispo County Service Area No. 12.” The Applicants assert that they are third party beneficiaries to a 1966 contract between County Service Area No. 12 (CSA 12) and the San Luis Obispo Flood Control and Water Conservation District (1966 Contract). According to the Applicants, the 1966 Contract has the effect of allowing landowners within CSA 12 who paid a special property tax to provide some funding for construction of the Lake Lopez Reservoir to obtain water from CSA 12. Determining the extent of the Applicants’ rights under the 1966 Contract or whether they have a valid water right is not “development” for which the Applicants

may obtain a vested right. To the extent that this is what they Applicants seek, staff recommends that the Commission deny their claim for a vested right.

An alternate interpretation of the Applicants' vested right claim is that they are seeking a vested right to have CSA 12 water actually delivered to APNs 076-231-063 and -065 ("the Property").<sup>1</sup> This makes sense when one understands the context within which this vested rights claim was filed. The vested rights claim is associated with an appeal of a San Luis Obispo County CDP decision that is currently pending before the Commission (Appeal Number A-3-SLO-11-061). In that appeal, the County approved a CDP for a single-family residential development on the Property and for a water line to be extended from Avila Beach Drive to the Property to serve the residential development. The question of whether such water pipeline extension is allowed outside the LCP's Urban Services Line (USL) (the Property is located outside of the USL) is a primary appeal contention. Following the filing of the appeal, the Applicant submitted this vested rights claim. Per the Applicant's request, the two hearings (i.e., for the vested rights claim and for the appeal) are both being scheduled for the same Commission meeting and are now both scheduled to be heard on August 8, 2012.

A vested rights exemption enables one who obtains all valid governmental approvals for development and performs substantial work and incurs substantial liabilities in good faith reliance on those approvals, to complete the development authorized by those approvals, even if the law changes prior to completion. A vested right does not allow any other new development to be completed without compliance with existing laws. As discussed in more detail below, the Applicants have not provided any evidence of prior government approvals to construct the pipes and other infrastructure necessary to have water delivered to the Property nor have they provided any evidence that they performed substantial work or incurred substantial liabilities in good faith reliance on any governmental approvals.

The Applicants have failed to meet their burden of proof to establish a vested right to domestic water service from CSA 12 under Coastal Act Section 30608. The Applicants have presented no evidence of governmental approvals, much less evidence that they performed substantial work or incurred substantial liabilities while undertaking the development for which they claim a vested right. Although the Applicants argue that they need not present such evidence to establish a vested right under Section 30608, they cite no persuasive authority to support this assertion. Every court analyzing whether vested rights were established under Section 30608 has considered whether necessary governmental approvals were obtained, substantial work performed, and substantial liabilities incurred in furtherance of the development claimed to be exempt from coastal permitting requirements. The Applicants have not met this burden here. The Applicants' only effort to establish this evidence is their claim that their predecessors in interest's payment of an unspecified amount of money in special property taxes to help fund the Lake Lopez Reservoir, which was a County project, establishes the necessary evidence to support their vested rights claim. Setting aside the fact that the reservoir was development undertaken by the County and that there is no evidence in the record of the amount of money contributed by the Applicants' predecessors in interest, at best this evidence *might* establish a

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<sup>1</sup> Based on the documents in the record, Commission staff cannot definitely determine whether the Applicants' property consists not only of APN 076-231-063 but also of APN 076-231-065, but a review of applicable parcel maps, and purported parcel acreage, suggests that the project spans both assessor parcels.

vested right to construct the Lake Lopez Reservoir. It is entirely irrelevant to the Applicants' claim of a vested right to receive CSA 12 water at the Property.

For all of the foregoing reasons, staff is recommending that the Applicants' vested rights claim be denied. The motion is found on page 4 below.

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## **APPENDICES**

Appendix A – Substantive File Documents

## **EXHIBITS**

Exhibit 1. McCarthy Property Location Maps

Exhibit 2. McCarthy Vested Rights Claim and Associated Letters

## I. MOTION AND RESOLUTION

Staff recommends that the Commission deny the vested rights claim. Pursuant to California Code of Regulations, Title 14, Section 13203, the Executive Director has made an initial determination that the vested rights claim (Coastal Commission file number 3-12-013-VRC) has not been substantiated. Staff therefore recommends that the claim be rejected.

### **Motion:**

*I move that the Commission determine that Vested Rights Claim 3-12-013-VRC is substantiated and that the development described in the claim does not require a Coastal Development Permit.*

Staff recommends a **NO** vote. Following the staff recommendation will result in failure of the motion and a determination by the Commission that the development described in the claim requires a coastal development permit and in the adoption of the resolution and findings set forth below. The motion passes only by an affirmative vote of a majority of the Commissioners present.

### **Resolution for Denial of Claim:**

*The Commission hereby determines that Vested Rights Claim 3-12-013-VRC is not substantiated and adopts the findings set forth below.*

## II. FINDINGS AND DECLARATIONS

### A. LEGAL AUTHORITY AND STANDARD OF REVIEW

#### **Basic Statutory Provisions**

The California Coastal Act (Coastal Act) requires that a coastal development permit (CDP) be obtained before development is undertaken in the coastal zone. Coastal Act Section 30600(a)<sup>2</sup> states in relevant part:

*. . . in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person . . . wishing to perform or undertake any development in the coastal zone, . . . shall obtain a coastal development permit.*

Coastal Act Section 30106 defines the term “development” in relevant part as:

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<sup>2</sup> The Coastal Act is at Public Resources Code sections 30000 to 30900.

*. . . the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including but not limited to, subdivision pursuant to the Subdivision Map Act ... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, ....*<sup>3</sup>

An exception to the general requirement that one obtain a CDP before undertaking development within the coastal zone is that if one has obtained a vested right to complete the development prior to enactment of the Coastal Zone Conservation Act of 1972 (the Coastal Initiative) or the Coastal Act of 1976, whichever is applicable, a permit is not required. Section 30608 of the Coastal Act states:

*No person who has obtained a vested right in a development prior to the effective date of this division or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Act of 1972 (commencing with Section 27000) shall be required to secure approval for the development pursuant to this division; provided, however, that no substantial change may be made in any such development without prior approval having been obtained under this division.*

The effective date of the division (i.e., the Coastal Act of 1976) is January 1, 1977. The Property was also subject to the permitting requirements of the Coastal Act's predecessor statute, the Coastal Zone Conservation Act of 1972, which went into effect on February 1, 1973. The Coastal Zone Conservation Act required a CDP for new development on this site occurring on or after February 1, 1973. Thus, the critical date for evaluating this Vested Rights Claim is February 1, 1973.

### **Procedural Framework**

The procedural framework for Commission consideration of a claim of vested rights is found in Sections 13200 through 13208 of Title 14 of the California Code of Regulations (CCR). These regulations require that Commission staff prepare a written recommendation for the Commission and that the Commission determine, after a public hearing, whether to acknowledge the claim. If the Commission finds that the claimant has a vested right for a specific development, the claimant is exempt from CDP requirements to complete that specific development only. However, no substantial change in any such development may be made until obtaining either a CDP or approval pursuant to another provision of the Coastal Act. If the Commission instead finds that the claimant does not have a vested right for the particular development, then the

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<sup>3</sup> The definition of development included in the Coastal Zone Conservation Act of 1972 (i.e., Proposition 20, "the Coastal Initiative"), which applied to the subject property and became effective on February 1, 1973 contains substantially the same definition of development as the Coastal Act. For purposes of this claim of vested right, the applicable language in the Coastal Initiative is: "change in the intensity of use of water, ecology related thereto, or of access thereto" (former California Public Resources Code Section 27103).

development is not exempt from CDP requirements. Per 14 CCR Section 13200, the burden of proof is on the claimant.

### **Standard of Review**

Section 30608 provides an exemption from the permit requirements of the Coastal Act if one has obtained a vested right in a development. Neither the Coastal Act nor the Commission's regulations articulate a specific standard for determining whether a person has obtained such a right. Thus, to determine whether the vested rights exemption applies, the Commission relies on the criteria for acquisition of vested rights as developed in the case law applying the Coastal Act's vested right provision, as well as in common law vested rights jurisprudence. That case law is discussed below.

"The vested rights theory is predicated upon estoppel of the governing body" (*Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 977).<sup>4</sup> Equitable estoppel may be applied against the government only where the injustice that would result from a failure to estop the government "is of sufficient dimension to justify any effect upon public interest or policy" that would result from the estoppel (*Raley*, 68 Cal.App.3d at 975).<sup>5</sup> Thus, the standard for determining the validity of a claim of vested rights requires a weighing of the injury to the regulated party from the regulation against the environmental impacts of the project (*Raley*, 68 Cal.App.3d at 976).

The seminal decision regarding vested rights under the Coastal Act is *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785.<sup>6</sup> In *Avco*, the California Supreme Court recognized the long-standing rule in California that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete that construction in accordance with the terms of the permit (*Id.* at 791). The court contrasted the affirmative approval of the proposed project through the issuance of a permit with the existence of a zoning classification, which provides no specific authorization for any given project. The court stated it is beyond question that a landowner has no vested right in existing or anticipated zoning (*Id.* at 796; accord, *Oceanic Calif., Inc. v. North Central Coast Regional Com.* (1976) 63 Cal.App.3d 357).

The acquisition of a vested right thus depends on good faith reliance by the claimant on a governmental representation that the project is fully approved and legal. The scope of a vested right is limited by the scope of the governmental representation on which the claimant relied, and which constitutes the basis of the estoppel (*Id.* at 793). One cannot rely on an approval that has

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<sup>4</sup> Quoting *Spindler Realty Corp. v. Monning*, (1966) 243 Cal.App.2d 255, 269, quoting *Anderson v. City Council*, (1964) 229 Cal.App.2d 79, 89.

<sup>5</sup> Quoting *City of Long Beach v. Mansell*, (1970) 3 Cal.3d 462, 496-97.

<sup>6</sup> The Applicants claim, without support, that *Avco* does not apply to their vested rights claim because it interpreted the narrower vested rights provision of the Coastal Zone Conservation Act. No court interpreting Section 30608 has made this distinction. To the contrary, courts interpreting Section 30608 have either explicitly cited *Avco* or otherwise relied on the test laid out in *Avco* of substantial work performed and substantial liabilities incurred in good faith reliance on governmental approvals to establish a vested right. (See, e.g., *Billings*, 103 Cal.App.3d at 735; *Tosh v. California Coastal Commission*, (1979) 99 Cal.App.3d 388, 393; *South Central Coast Regional Commission v. Pratt*, (1982) 128 Cal.App.3d 830, 841-42.)

not been given, nor can one estop the government from applying a change in the law to a project it has not in fact approved (*Id.* at 797). Therefore, the extent of the vested right is determined by the terms and conditions of the permit or approval on which the owner relied before the law that governs the project was changed or came into effect (*Id.* at 795).

There are many vested rights cases involving the Commission (or its predecessor agency). The courts have consistently focused on whether the developers had acquired all of the necessary government approvals for the work in which they claimed a vested right, satisfied all of the conditions of those permits, had begun their development before the Coastal Act (or its predecessor) took effect, and had incurred substantial liabilities in pursuit of the development.<sup>7</sup> The frequently cited standard for establishing a vested right is that the claimant had to have “performed substantial work, incurred substantial liability and shown good faith reliance upon a governmental permit” in order to acquire a vested right to complete such construction (*Tosh*, 99 Cal.App.3d at 393 (citing to *Avco* 17 Cal.3d at 791)).

Thus, the standard of review for determining the validity of this claim of vested rights can be summarized as follows:

1. The claimed development must have received all applicable governmental approvals needed to undertake the development prior to February 1, 1973. Typically this would include a building permit or other legal authorization, such as final map approval for a subdivision (*Billings*, 103 Cal.App.3d at 736).
2. The claimant must have performed substantial work and incurred substantial liabilities in good faith reliance on the governmental approval. The Commission must weigh the injury to the regulated party from the regulation against the environmental impacts of the project and ask whether such injustice would result from denial of the vested rights claim as to justify the impacts of the activity upon Coastal Act policies (*Raley*, 68 Cal.App.3d at 975-76).

As indicated above, the burden of proof is on the claimant to substantiate the claim of vested right (14 CCR Section 13200). If there are any doubts regarding the meaning or extent of the vested rights exemption, they should be resolved against the person seeking the exemption (*Urban Renewal Agency v. California Coastal Zone Conservation Commission* (1975) 15 Cal.3d 577, 588). A narrow view of vested rights should be adopted to avoid seriously impairing the government’s right to control land use policy (*Charles A. Pratt Construction Co. v. California Coastal Commission* (1982) 128 Cal.App.3d 830, 844 (citing, *Avco v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 797)). In evaluating a claimed vested right to continue a nonconforming business or activity (i.e., a use that fails to conform to current zoning laws/regulations), courts have stated that it is appropriate to “follow a strict policy against extension or expansion of those uses” (*County of San Diego v. McClurken* (1957) 37 Cal.2d 683,

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<sup>7</sup> See, e.g., *Patterson v. Central Coast Regional Commission* (1976), 58 Cal. App. 3d. 833; *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785; *Tosh v. California Coastal Commission* (1979) 99 Cal.App.3d 388; *Billings v. California Coastal Commission* (1980) 103 Cal.App.3d 729. *Halaco Engineering Co. v. South Central Coast Regional Commission* (1986), 42 Cal. 3d 52 (metal recycling).

687 (holding that a property owner had obtained a vested right to continue mining operations at a quarry that had been in continuous use for more than 50 years)).

## **B. BACKGROUND REGARDING PROPERTY**

### **Location**

The Property is located on the north (uphill) side of Cave Landing Road in the unincorporated area of Avila Beach in San Luis Obispo County (see Exhibit 1 for location maps). The Property is approximately 37 acres and lies approximately 500 feet north of a parking/access area for Pirates Cove Beach, a popular public beach access area and scenic overlook, and the jumping off point for a continuous public access trail extending to Pismo Beach. The Property is situated at an elevation of approximately 350 feet above sea level.

The Property slopes up from Cave Landing Road to the top of Ontario Ridge on the north side of the project site. The Property is located in the LCP-designated Ontario Ridge Sensitive Resource Area (SRA), within the LCP's Residential Rural land use category and the San Luis Bay Planning Area. Ontario Ridge, characterized by gently sloping hills covered in oak woodlands, chaparral and grassland habitats, separates the residential areas of Pismo Beach from the residential areas of Avila Beach and provides a scenic backdrop for both coastal areas. A majority of the surrounding land use is open space (e.g., the Sycamore Mineral Springs to the north) with a smaller percentage, on County owned land east and south of the subject property, accommodating visitor serving recreational pursuits (parking, beach and trail access). The Property is visible from Cave Landing Road and the various public access facilities thereto, as well as from Avila Beach Drive and the town of Avila Beach at certain elevations/locations.

Although there are no construction plans in the record for the required water infrastructure, the Commission estimates that the project would require approximately 2,400 linear feet of potable water pipeline to provide a connection from the nearest CSA 12 water lines (from the corner of Avila Beach Drive and Cave Landing Road) to the Property, and an additional 1,000 linear feet of pipeline to extend the lines to the proposed residential development footprint at the Property (i.e., associated with current Appeal A-3-SLO-11-061). This would require extensive grading to install the lines subsurface along Cave Landing Road and then to the proposed building site under the proposed access driveway from Cave Landing Road. Such pipeline development would thus nearly all be within the developed public roadway prism, and under a proposed private residential driveway. The direct physical impacts from such development itself would be expected to be no different from standard trenching and piping projects, requiring typical and normal construction BMPs, but public access along Cave Landing Road would be impacted for duration of such construction. Probably the most problematic impact in addition to the public access impact that would be associated with such a project is related to LCP conformance (i.e., as indicated above, whether such a pipeline is even allowed outside the USL) and the potential for both prejudicing future public service projects that extend past the USL, as well as the related potential for this and other such projects to induce inappropriate growth outside of the USL, contrary to the LCP's direction and objectives.

### **Recent County CDP Approval**

On August 26, 2010 the San Luis Obispo County Planning Commission heard an appeal of the County Planning Director's determination regarding water service to the Property. This



determination involved the use of public or community water service for the Property outside the USL, and permitting requirements for installation of infrastructure related to bringing the water to the Property as part of the proposed residential development associated with current Appeal A-3-SLO-11-061. The Planning Director determined that the property would need to be within the USL to receive community water from CSA 12, and the Applicant appealed this decision to the Planning Commission. The Planning Commission partially upheld the Applicant's appeal and made the determination that the Property, while outside the USL, is within the sphere of service of the water purveyor (CSA 12) and could receive water service without amending the General Plan maps and the LCP to include the property within the USL. The Planning Commission also determined that the Applicants needed a CDP to construct the water line infrastructure needed to obtain water at the Property, so this water line extension was included as part of the CDP application for the residential development at the Property.

On July 28, 2011, the Planning Commission approved a CDP for Rob and Judi McCarthy (the Applicants) to construct a 5,500 square-foot single-family residence and a 1,000 square-foot secondary residence above a detached 1,000 square-foot garage/workshop, along with site preparation for building pads, roads and septic systems that includes approximately 9,368 cubic yards of grading (both cut and fill), a 10,000 gallon water tank for fire suppression, and landscaping. In addition, County approval authorized the extension of water lines and utilities from Avila Beach Drive up Cave Landing Road to the project site and associated grading for the residence to receive water service from CSA 12 (as described above and as currently under appeal in A-3-SLO-11-061).

### **C. DEVELOPMENT CLAIMED AS EXEMPT FROM COASTAL ACT REQUIREMENTS**

The Applicants describe the development claimed to be exempt from CDP requirements as: “[d]omestic water service from San Luis Obispo County Service Area No. 12.” The Applicants assert that they are third party beneficiaries to a 1966 contract between CSA 12 and the San Luis Obispo Flood Control and Water Conservation District (1966 Contract). According to the Applicants, the 1966 Contract has the effect of allowing landowners within CSA 12 who paid a special property tax to provide some funding for construction of the Lake Lopez Reservoir to obtain water from CSA 12.

### **D. EVIDENCE PRESENTED BY CLAIMANT**

The sole evidence presented by the Applicants in support of their claim of a vested right is San Luis Obispo County Planning Commission Resolution No. 2011-019. This is the resolution granting a CDP for development of a single-family residence and related development on the Property that has been appealed (A-3-SLO-11-061). The Applicants have not submitted evidence of any building or other permits issued for development of the Property or water lines to the Property prior to February 1, 1973. They also have not submitted the 1966 Contract which forms the basis of their claim that they have rights as third party beneficiaries of that contract. In the absence of the 1966 Contract, the Commission has analyzed the Applicants' vested rights claim as if they are, in fact, third party beneficiaries of this contract. The Commission does not,

however, find in this report that this assertion is accurate. As discussed below, the 1996 Contract cannot form the basis for a vested rights claim exempting the Applicants from coastal permitting requirements, so it is unnecessary for the Commission to resolve whether the Applicants are third party beneficiaries under the 1966 Contract.

## **E. ANALYSIS OF CLAIM OF VESTED RIGHTS FOR WATER SERVICE.**

### **Water Rights**

In the cover letter for their vested rights claim (January Letter),<sup>8</sup> the Applicants argue that they have a vested right to water as third party beneficiaries to the 1966 Contract. The Applicants describe third party beneficiary law and summarize their interpretation of the 1966 Contract. The determination of the scope of the Applicants' rights under the 1966 Water Contract is not development, as that term is defined in the Coastal Act, and the Commission may only grant a vested right for development. Determining the scope of contractual water rights is not within the Commission's jurisdiction. In fact, Coastal Act Section 30412 identifies the State Water Resources Control Board as the appropriate authority in California for administering water rights. Thus, determining whether an Applicant has a valid water right is neither development nor within the Commission's jurisdiction, so to the extent that the Applicants are seeking a vested right to CSA 12 water based on recognition of the scope of their water rights under the 1966 Contract, such claim is hereby denied.

### **Water Delivery to the Property**

An alternate interpretation of the Applicants' vested right claim is that they are seeking a vested right to have CSA 12 water actually delivered to the Property. As described above, a vested rights exemption enables one who obtains all valid governmental approvals for development and performs substantial work and incurs substantial liabilities in good faith reliance on those approvals, to complete the development authorized by those approvals, even if the law changes prior to completion. A vested right does not allow any other new development to be completed without compliance with existing laws (*Aries*, 48 Cal.App.3d at 551 (holding that at most the developer could complete only the development already fully authorized under its existing grading permits)). As discussed in more detail below, the Applicants have not provided any evidence of prior government approvals to construct the pipes and other infrastructure necessary to have water delivered to the Property nor have they provided any evidence that they performed substantial work or incurred substantial liabilities in good faith reliance on those approvals.

### *No Prior Government Approvals*

The Applicants assert that their claim to water from CSA 12 is "development", subject to CDP requirements, and therefore to exemption as a vested right, because exercising their right to water from CSA 12 will "change the intensity of, and access to, water for the Property and in the CSA 12 service territory" (January Letter at page 2). The Commission has never found that once a permit has been properly issued for the infrastructure needed to deliver water to a property that the use of that water, in and of itself, is development requiring a permit. Under this interpretation

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<sup>8</sup> January 17, 2012 letter from Gregory W. Sanders of Nossaman to Dan Carl, District Manager of the Central Coast District of the Coastal Commission, at page 2.

of the definition of development, every time a homeowner turned on a water tap at his or her residence, it would be development requiring a CDP. Section 30106 should not be interpreted so broadly as to lead to this absurd result.

Moreover, even if one assumes that this is “development,” the Applicants cannot undertake this development – changing the intensity of use of water – until the infrastructure needed to supply the Property with water has been constructed. Thus, in order to prevail on their vested rights claim, the Applicants must show that they had all governmental approvals necessary to actually use water, which would be the point at which the intensity of use of water was changed, at the Property on February 1, 1973. They have not met this burden.

The Applicants have neither provided evidence of grading, building or other permits issued by the County that would have allowed construction of infrastructure needed to provide water to the Property as of February 1, 1973, nor have they provided evidence that no such permits were required at that time. Instead, in response to a letter from Commission staff requesting evidence of such prior approvals (March Letter), the Applicants claim that they need not provide such evidence because they are not seeking a vested right to this infrastructure or to “construct” anything at all.<sup>9</sup> As demonstrated above, however, without the infrastructure needed to transport water to the Property, the Applicants cannot undertake the “development” for which they claim a vested right. They therefore could not have undertaken this development on February 1, 1973 (because no infrastructure was in place then), nor have they given the Commission any evidence that they had the right to construct the infrastructure necessary for them to undertake this development on February 1, 1973. They therefore have not met the first test for establishing a vested right because they had not received all governmental approvals necessary to undertake the development subject to the vested rights claim, and their claim is hereby denied.

#### *Substantial Work and Substantial Liabilities*

In addition, even if the Applicants could show evidence of all governmental approvals, which they cannot, the Applicants have not demonstrated that they performed substantial work or incurred substantial liabilities in good faith reliance on such (non-existent) governmental approvals. In a footnote on page 2 of the March Letter, the Applicants claim that their predecessors in interest’s payment of special property taxes to contribute towards funding construction of the Lake Lopez Reservoir and the actual construction of this reservoir, demonstrates that they undertook substantial construction and incurred substantial liabilities entitling them to a vested right to receive CSA 12 water at the Property. The Applicants are not, however, seeking a vested right to construction of the Lake Lopez Reservoir. They also have not provided any evidence to substantiate this claim, but more fundamentally, the work and liabilities they rely on to support their claim are not even for the development for which they seek a vested right.

Even if such work and liabilities were related to their vested rights claim, neither the Applicants nor their predecessors in interest performed any work, much less substantial work, to construct development that would allow water to be delivered to the Property. The Lake Lopez Reservoir

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<sup>9</sup> March 12, 2012 letter from Gregory W. Sanders of Nossaman to Dan Carl, District Manager of the Central Coast District of the Coastal Commission, at page 3.

was a County project. The Applicants have not cited a single California case, nor is the Commission aware of one, in which the “performance of substantial work” portion of the test for a vested right for private development was met by construction undertaken by a public entity, much less construction of a large infrastructure project benefitting the public generally, such as the Lake Lopez Reservoir.

Finally, the Applicants have not shown that contributing funds through special property taxes for construction of a large public infrastructure project can constitute evidence of substantial liabilities incurred for the purpose of establishing a private vested right. The Applicants have also not established the amount of money expended by the prior owners of the Property as part of their contribution towards funding the reservoir, so the Commission cannot evaluate whether such expenditures by the prior owners constitute “substantial liabilities” under vested rights law. Thus, even if the Applicants had met the requirements of all necessary governmental approvals and substantial work performed, which they have not, the Applicants have not met their burden of proof showing that they incurred substantial liabilities in good faith reliance on a governmental permit. For this additional reason their claim of a vested right is denied.

#### ***Avco* Applies to the Applicants’ Claim**

The Applicants argue that because they are not seeking a vested right to construct anything physical, the typical vested rights analysis laid out in *Avco* does not apply to this case (March Letter at pages 2-3). First, as explained above, without physical development, the Applicants are unable to undertake the development that they claim is exempt from permitting requirements, so this vested rights claim does rely on physical development.

Second, there are in fact several cases analyzing Section 30608’s vested rights language in the context of non-physical development, and each of them applies the vested rights analysis laid out in *Avco*. For example, in *Billings* (103 Cal.App.3d at 735-36) the court held that applicants had not established a vested right to subdivide their property because they had not obtained all governmental approvals necessary to complete the subdivision. Similarly, in *South Central Coast Regional Commission v. Charles A. Pratt Construction Co., Inc.* ((1982) 128 Cal.App.3d 830, 845-46) the court held that a subdivider is entitled to a vested right under the Coastal Act only if he was entitled to final map approval under the Subdivision Map Act at the time the property became subject to Coastal Act requirements. Although these are both cases in which the development at issue, a subdivision, did not involve actually constructing anything, each court cited *Avco* for the proposition that a “vested right to complete a project arises only after the property owner has performed substantial work, incurred substantial liabilities, and has shown good faith reliance upon a governmental permit” (*Id.* at 841-42; *Billings*, 103 Cal.App.3d at 735). Thus, even if one assumes that the vested rights claim at issue here does not involve physical development, the Applicants must still establish that they obtained all necessary governmental approvals to complete the development and that they performed substantial work and incurred substantial liabilities in good faith reliance on those governmental approvals. As explained above, the Applicants have not established that they meet any of these requirements, much less all of them.

*No “Contractual” Vested Rights in Coastal Act Context*

The Applicants assert that their vested rights claim can be established solely on the basis of the 1966 Contract, without meeting the vested rights requirements laid out in *Avco*. The Applicants rely on *Monterey Sand Co. v. California Coastal Commission* ((1987) 191 Cal.App.3d 169) to support this argument. The court in *Monterey Sand* did not hold, however, that a vested rights claim could be established solely on the basis of a contractual right, in the absence of any governmental permits. In that case, Monterey Sand had obtained all state and local permits necessary for its ongoing sand dredging activities, including a lease with the State Lands Commission (SLC) (*Id.* at 173). At the time Monterey Sand entered into the lease with the SLC, the SLC had not warned it that a federal permit was also necessary for its sand dredging activities (*Id.*). The court therefore found that “[i]n these circumstances, we have little difficulty in concluding that the State’s acquiescence in Monterey Sand’s continued extraction activities with knowledge of the possible federal permit requirement estops the State from later relying on the lack of such a permit to assert Coastal Act permit jurisdiction over Monterey Sand” (*Id.* at 178). Thus, the lack of a single federal permit was excused in that case because of the SLC’s own failure to identify the need for such permit when it leased its property to Monterey Sand to dredge sand. The court emphasized multiple times the unique facts presented in *Monterey Sand*, and these facts bear no resemblance to the facts presented here. The Applicants have not presented evidence that they had any permits needed to provide water to the Property, much less that the lack of necessary permits should be excused due to prior actions or representations made by an entity representing the State of California.

Moreover, the court in *Monterey Sand* recognized that the basis for Monterey Sand’s vested rights claim was that the activity that it claimed was exempt was ongoing at the time Monterey Sand became subject to CDP requirements (*Id.* at 176). It recognized that an activity that was already underway when CDPs began to be required for development was exempt from permitting requirements, as long as the activity was “within the scope of the pre-existing authorization for use of the coastal resource in question” (*Id.* (citing *Avco*, 17 Cal.3d at 798-99)). Unlike *Monterey Sand*, the development for which the Applicants are claiming a vested right had not commenced, nor was it ongoing, on February 1, 1973. The analysis presented in *Monterey Sand* is therefore distinguishable from the facts presented here for this additional reason.

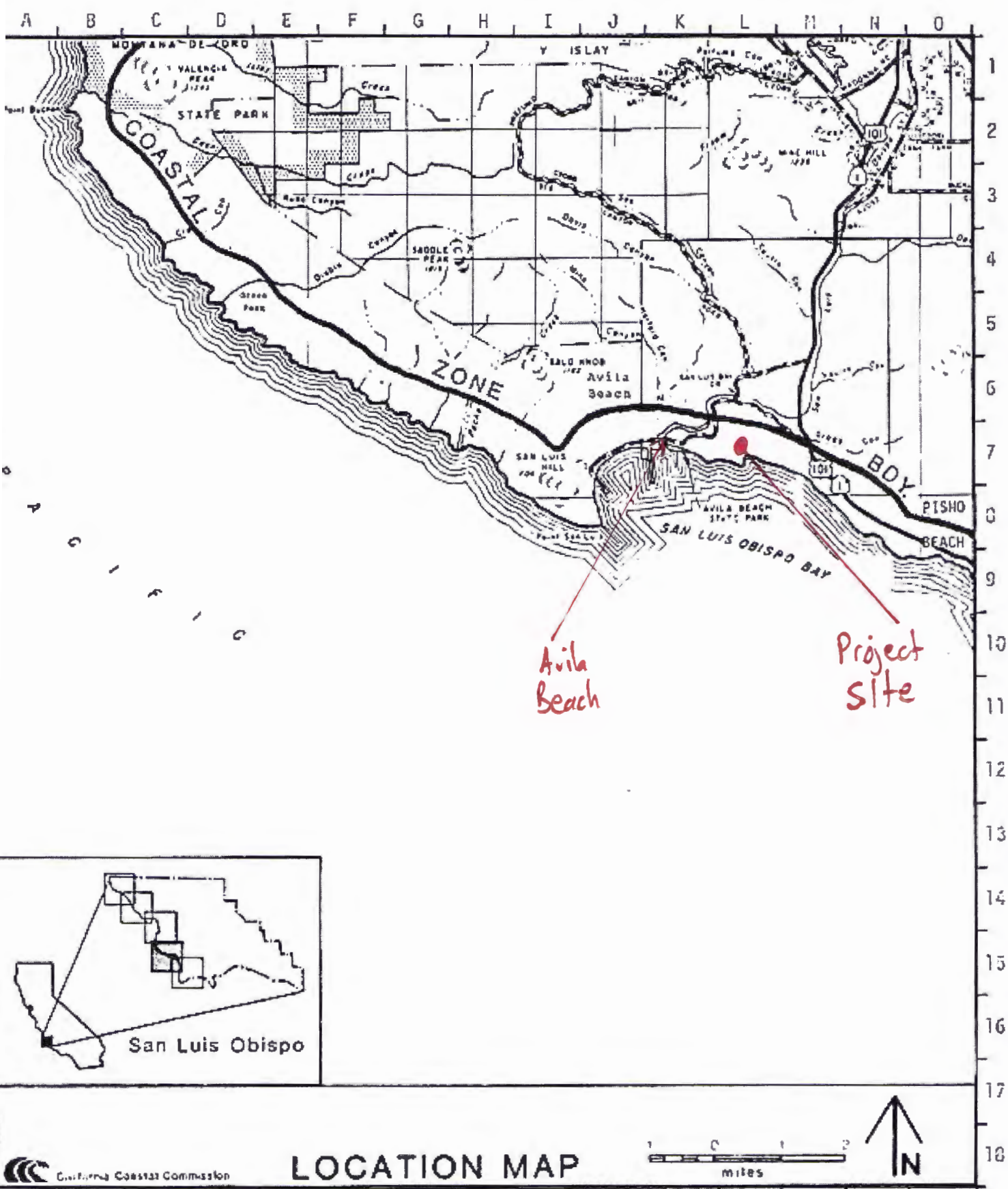
Finally, the Applicants rely on a California land use treatise (Longtin, California’s Land Use (2d ed. 1994 & 2011 supp.) § 1.92[1]) in support of their claim that one could potentially establish a vested right based on a contract. Of the eight cases cited in the relevant section in Longtin’s, however, only three of them actually analyze a vested rights claim at all. Of those three, one is *Monterey Sand*, discussed in detail above. The other two are *Davidson v. County of San Diego* (1996) 49 Cal.App.4<sup>th</sup> 639 and *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4<sup>th</sup> 534. In each of these cases, the court’s analysis of the vested rights issue is separate from its analysis of contractual rights. And in each case, the court relied on the analysis laid out in *Avco* when analyzing the vested rights claims made in those cases (*Davidson*, 49 Cal.App.4<sup>th</sup> at 646-48; *Hermosa Beach*, 86 Cal.App.4<sup>th</sup> at 552). In *Davidson*, the court found a vested right based on a specific ordinance explicitly creating vested rights (*Davidson*, 49 Cal.App.4<sup>th</sup> at 646-48). In *Hermosa Beach*, the court rejected the vested rights claim because the applicant had not obtained a CDP (or other permits) for the development for which it claimed a

vested right nor had it incurred substantial liabilities (*Hermosa Beach Stop Oil Coalition*, 86 Cal.App.4<sup>th</sup> at 552).

In addition, to the extent that “contractual” vested rights exist at all, they are based on a court requiring a local government to perform under a contract that it has entered into with a developer. The Applicants have not shown, nor has Commission staff found, a case in which a “contractual” vested right bound a governmental entity that was not a party to the contract on which the right was based. The closest case of which the Commission is aware is *Monterey Sand*, as the lease in that case was between Monterey Sand and the State Lands Commission, not the Commission. But the court in that case treated the State Lands Commission and Commission essentially as the same entity – focusing on the State attempting to use Monterey Sand’s failure to obtain a federal permit as the basis for denying a vested rights claim, when it was the State itself that failed to warn Monterey Sand of this requirement (*Monterey Sand*, 191 Cal.App.3d at 178). In any case, *Monterey Sand* is distinguishable from the present case on numerous grounds, as described above. Therefore, the Commission finds that the Applicants have not met their burden of establishing a “contractual” vested right.

## **F. CONCLUSION**

The Applicants have failed to meet their burden of proof to establish a vested right to domestic water service from CSA 12 under Coastal Act Section 30608. The Applicants have presented no evidence of governmental approvals, much less evidence that they or their predecessors in interest performed substantial work or incurred substantial liabilities while undertaking the development for which they claim a vested right. Although the Applicants argue that they need not present such evidence to establish a vested right under Section 30608, they cite no persuasive authority to support this assertion. The Applicants’ only effort to establish the evidence required to substantiate a vested rights claim is their assertion that their predecessors-in-interest’s payment of an unspecified amount of money in special property taxes to help fund the Lake Lopez Reservoir, which was actually a County project, establishes the necessary evidence to support their vested rights claim. Setting aside the fact that the reservoir was a public infrastructure project and that there is no evidence in the record of the amount of money contributed by the Applicants’ predecessors in interest, at best this evidence *might* establish a vested right to construct the Lake Lopez Reservoir. It is entirely irrelevant to the Applicants’ claim of a vested right to receive CSA 12 water at the Property. For all of the foregoing reasons, the Applicants’ vested rights claim is denied.



County of San Luis Obispo

Sheet 4 of 5

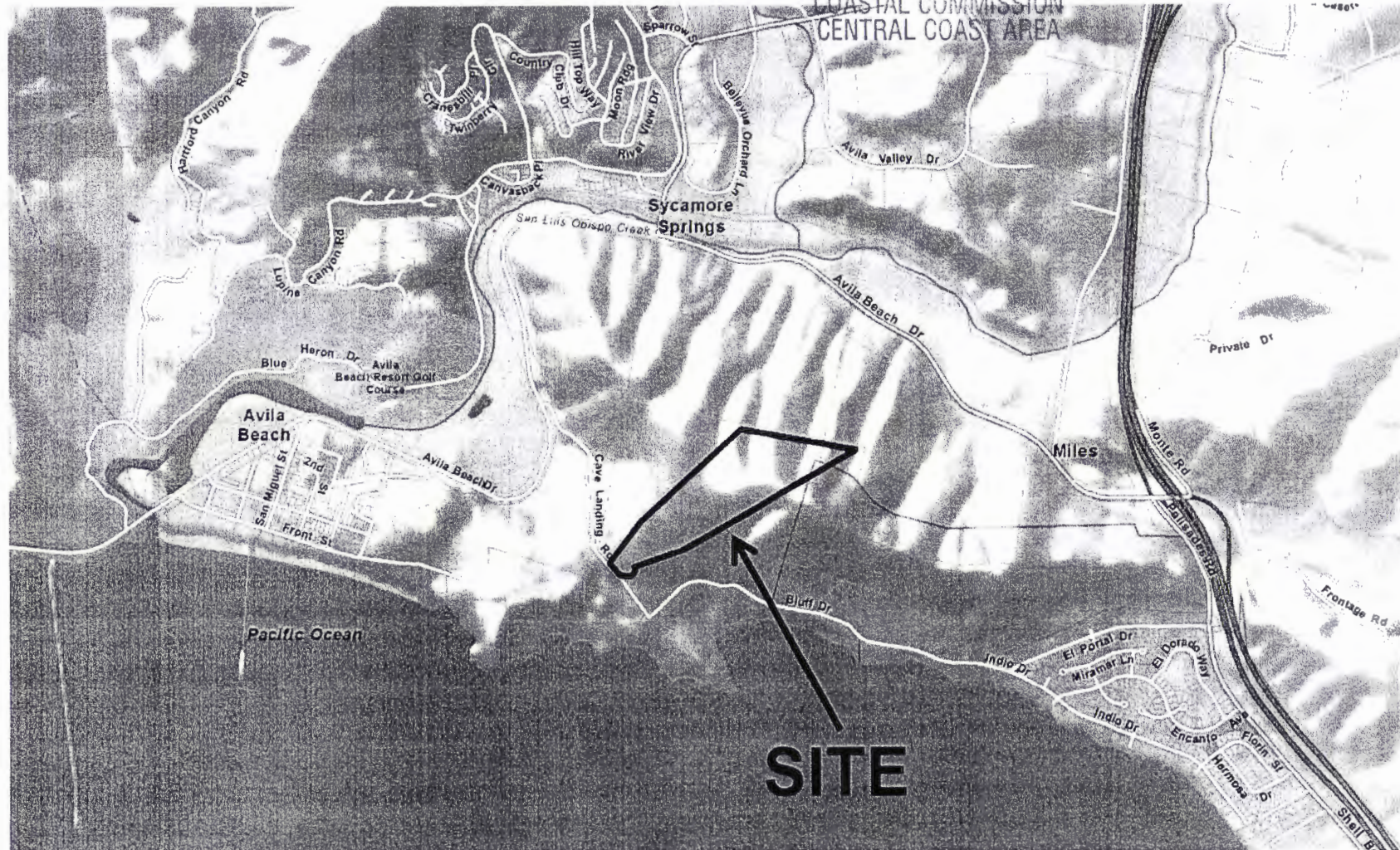


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SAN LUIS OBISPO COUNTY DEPARTMENT OF BUILDING AND PLANNING

APR 25 2012

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA



3-39

PROJECT

Conditional Use Permit  
DRC2009-00095 / McCarthy



EXHIBIT

Vicinity Map

Exhibit 1

Page 2 of 4





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APR 25 2012

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

### Conditional Use Permit

## Site Plan/Grading and Drainage

~~Exhibit 1~~

Page 3 of 4

[illegible]

Conditional Use Permit  
DRC2009-00095 / McCarthy



## Grading Plan

3-141

**CALIFORNIA COAST/ COMMISSION**

CENTRAL COAST DISTRICT OFFICE

725 FRONT STREET, SUITE 300

SANTA CRUZ, CA 95060

PHONE: (831) 427-4863

FAX: (831) 427-4877

WEB: WWW.COASTAL.CA.GOV

**CLAIM OF VESTED RIGHTS**

**NOTE:** Documentation of the information requested, such as permits, receipts, buildings department inspection reports, and photographs, must be attached.

1. Name of claimant, address, and telephone number:  
(Please include zip code & area code):

Rob and Judi McCarthy

1800 19th Street, Bakersfield, CA 93301, (661) 431-1620

2. Name, address and telephone number of claimant's representative, if any:  
(Please include zip code & area code):

Gregory W. Sanders, Esq.

c/o Nossaman LLP, 18101 Von Karman Ave., Ste. 1800, Irvine, CA 92612 (949) 833-7800

3. Describe the development claimed to be exempt and its location. Include all incidental improvements such as utilities, road, etc. Attach a site plan, development plan, grading plan, and construction or architectural plans.

Domestic water service from San Luis Obispo County Service Area No. 12. (See attached letter to Dan Carl, District Manager, Central Coast District, California Coastal Commission dated January 17, 2012.)

4. California Environmental Quality Act/Project Status.

Check one of the following:

- a. Categorically exempt \_\_\_\_\_. Class: \_\_\_\_\_. Item: \_\_\_\_\_

Describe exempted status and date granted: \_\_\_\_\_

- b. Date Negative Declaration Status granted: July 28, 2011

- c. Date Environmental Impact Report approved: \_\_\_\_\_

Attach environmental impact report or negative declaration.

**FOR COASTAL COMMISSION USE:**



**California Coastal Commission**

Claim Number: \_\_\_\_\_

Date Submitted \_\_\_\_\_

Date Filed \_\_\_\_\_

5. List all governmental approvals which have been obtained (including those from federal agencies) and list the date of each final approval. Attach copies of all approvals.

Development Plan/Coastal Development Permit - July 28, 2011 (includes water service from County Service Area No. 12).

6. List any governmental approvals which have not yet been obtained and the status of the application or anticipated date of approval.

None

7. List any conditions to which the approvals are subject and date on which the conditions were satisfied or are expected to be satisfied.

See conditions of approval appended to San Luis Obispo County Planning Commission Resolution No. 2011-019 (Resolution Relative To The Granting Of A Development Plan/Coastal Development Permit) attached hereto that may be applicable to water service from County Service Area No. 12.



California Coastal Commission

8. Specify, on additional pages, the nature and extent of work in progress or completed, including (a) date of each portion commenced (i.e., grading, foundation work, structural work, etc.); (b) governmental approval pursuant to which portion was commenced; (c) portions completed and date on which completed; (d) status of each portion on February 1, 1973 and/or January 1, 1977 (e) status of each portion of development on date of claim; (f) amounts of money expended on portions of work completed or in progress (itemize dates and amounts of expenditures; do not include expenses incurred in securing any necessary governmental approvals).

See attached letter to Dan Carl, District Manager, Central Coast District, California Coastal Commission  
dated January 17, 2012; water service line from water main in Avila Drive to the subject property to be  
installed in Cave Landing Road.

9. Describe those portions of development remaining to be constructed.

Water service line from water main in Avila Drive to the subject property to be installed in Cave Landing  
Road.

10. List the amount and nature of any liabilities incurred that are not covered above and dates incurred. List any remaining liabilities to be incurred and dates when these are anticipated to be incurred.

None

11. State the expected total cost of the development, excluding expenses incurred in securing any necessary governmental expenses.

Approximately \$150,000.00

12. Is the development planned as a series of phases or segments? If so, explain.

No



13. When is it anticipated that the total development would be completed?

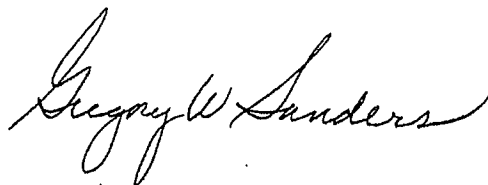
Within twenty-four (24) months following resolution by California Coastal Commission of pending  
appeal.

14. Authorization of Agent.

I hereby authorize \_\_\_\_\_ to act as my representative and bind me  
in all matters concerning this application.

\_\_\_\_\_  
Signature of Claimant

15. I hereby certify that to the best of my knowledge the information in this application and all attached exhibits is full, complete, and correct, and I understand that any misstatement or omission, of the requested information or of any information subsequently requested, shall be grounds for denying the exemption or suspending, or revoking any exemption allowed on the basis of these or subsequent representations, or for the seeking of such other and further relief as may seem proper to the Commission.



\_\_\_\_\_  
Signature of Claimant(s) or Agent



California Coastal Commission





Via FedEx

January 17, 2012

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

Re: Coastal Commission Appeal No. A-3-SLO-11-061 (Rob and Judi McCarthy Single  
Family Residence) – Entitlement To County Service Area No. 12 Water Service

Dear Mr. Carl:

We continue to represent Rob and Judi McCarthy, the applicants for a Coastal Development Permit to construct a single family residence on a parcel of property within the Pirates Cove property (sometimes identified as the "Ontario Ridge" property in County of San Luis Obispo planning documents) situated between the eastern boundary of the Avila Beach Community Services District and the western boundary of the City of Pismo Beach (the "Property"). The purpose of this letter is to demonstrate the legal and factual basis on which the McCarthys are presently entitled to County Service Area No. 12 ("CSA 12") water service.

**1. Background**

The Property has been included within the boundaries of CSA12 since its formation in 1966. CSA 12 was created by the San Luis Obispo County Board of Supervisors to act as the contracting agency with the San Luis Obispo Flood Control and Water Conservation District ("District") Zone 3 for the acquisition and distribution of Lake Lopez Reservoir water to the Avila Beach area. CSA 12 is entitled to an allotment of water from the District's Zone 3, which it sells to public agencies and private property owners whose lands are located within its boundaries.

CSA 12 and the District entered into a water supply agreement on November 21, 1966. The agreement allocates to CSA 12 an entitlement of 337 acre feet of water annually (to the extent such water is available for the District to deliver to CSA 12. The agreement provides that the District and CSA 12 contracted for "a water supply to be for the use and benefit of the lands and inhabitants served by [CSA 12] and for which [CSA 12 will make payment to the District upon the terms and conditions [in the agreement]."

 (Emphasis added.)

Voters within the District's Zone 3 approved a special property tax to pay for the original cost of construction of the Lake Lopez Reservoir and related infrastructure. Subsequent special taxes were approved to pay for the Lake Lopez Reservoir dam seismic remediation project. As such, the landowners within CSA 12, including the McCarthys and their predecessors in interest in the Property have paid their proportionate share of the cost of the Lake Lopez Reservoir infrastructure.

**2. The McCarthys Have A Vested Right As Third Party Beneficiaries To Water Service From CSA 12**

Under Civil Code section 1229, "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it. Beneficiary status is established at the time of contracting. (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4<sup>th</sup> 1412, 1441.) A contract made for the benefit of a third party does not need to explicitly identify the third party by name. (*Garratt v. Baker* (1936) 5 Cal2d 745, 748.) Similarly, a party may establish third party beneficiary status without showing that the contract was intended to benefit the party as an individual. The third party beneficiary must merely demonstrate that the party is a member of a class that the other parties to the contract intended to benefit. (*Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4<sup>th</sup> 879, 891.) To support a third party right to enforce a contract, it must appear from the direct terms of the contract that it was made for the benefit of the third party. (*Strauss v. Summerhays* (1984) 157 Cal.App.3d 806, 816.)

In the case of the Property, contract between the District and CSA 12 expressly states that the water supplied to CSA 12 is for the benefit of the property and inhabitants of CSA 12, all as discussed above. As the owner of the Property, which has been within the boundaries of CSA 12 since its inception, the McCarthys are third party beneficiaries to the contract. McCarthy's third party beneficiary rights vested when his predecessors in interest learned of the right to water service (*Riley v. Riley* (1953) 118 Cal.App.2d 11, 15.) or acted in reliance on the terms of the 1966 contract (*Silveyra v. Harper* (1947) Cal.App.2d 761, 766-67). The McCarthys' predecessors paid special taxes in order to avail the Property of water in reliance on the 1966 contract. Thus, McCarthys have a vested right to water service from CSA 12 in accordance with the 1966 contract.

**3. The McCarthys' Vested Right Is Sufficient To Constitute A Vested Right In A Development Under Public Resources Code Section 30608**

Public Resources Code section 30608 provides that "[n]o person who has obtained a vested right in a development prior to [January 1, 1977] . . . shall be required to secure approval for the development [by obtaining a coastal development permit] pursuant to this division." The Coastal Act at Public Resources Code section 30106 defines "development" very broadly to include a "[c]hange in the intensity of use of water, or of access thereto . . ." (Emphasis added.) Further, the courts have consistently interpreted the definition of "development" very broadly, noting that such an interpretation is consistent with the legislative policy of the Coastal Act (*Stanson v. San Diego Coast Regional Com.* (1980) 101 Cal.App.3d 38, 47.) In the case of the McCarthys' property, receipt of water from CSA 12 must be considered "development" for purposes of the Coastal Act because it involves a "change in the intensity of use of water, or of access thereto," as specified in Public Resources Code section 30106. Specifically, the McCarthys have a right to CSA 12 water service as demonstrated above; exercising that right will change the intensity of, and access to, water for the Property and in the CSA 12 service territory.



In addition to the foregoing, the McCarthys do not need to rely on the land use vested rights doctrine established by the California Supreme Court in *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785 case. As demonstrated above, the McCarthys vested right to water service from CSA 12 and a Coastal Development Permit exemption under Public Resources Code section 30608, which requires a "vested right in a development," is based on their status as contractual third party beneficiaries, not under the land use vested rights doctrine.

4. **Relocation Of The Urban Services Line Is Not Required For CSA 12 Water Service To The Property**

Although we have demonstrated above that no Coastal Development Permit is required for the provision of water service to the Property by CSA 12, we also wish to address the provision of water service outside the delineated Local Coastal Program ("LCP") Avila Beach Urban Services Line ("USL") as the above referenced appeal raises the issue. In fact, the appeal questions whether the provision of water service by any purveyor is appropriate for the Property.

As discussed above, the Property is located within the boundaries of CSA 12 and has been since its inception. The San Luis Bay Area Plan ("Area Plan"), a part of the certified Local Coastal Program for the area in which the Property is located, in Chapter 3 (Public Facilities and Services) identifies eight special districts in the planning area that provide various services to the cities and unincorporated areas covered by the plan. These special districts are identified in Table C (Special Districts San Luis Bay Planning Area) of the Area Plan. Table C is reprinted below:

TABLE C SPECIAL DISTRICTS SAN LUIS BAY PLANNING AREA		
SPECIAL DISTRICT	SERVICE AREA	SERVICES PRESENTLY PROVIDED
County Service Area No. 12	Port San Luis Harbor west of Avila Beach area east Avila townsite including Ontario Ridge, Avila Valley, and Squire Canyon area	Acquisition and distribution of Lopez Reservoir water
Oceano Community Services District	Oceano	Acquisition and distribution of groundwater and Lopez water, street lighting, collection and transporting of sewage, fire protection
Avila Lighting District	Avila Beach	Street lighting
South SLO County Sanitation District	Arroyo Grande, Oceano Halcyon, Grover City	Sewage treatment and disposal

Continued on next page.

SPECIAL DISTRICT	SERVICE AREA	SERVICES PRESENTLY PROVIDED
Avila Beach County Water District	Avila Beach	Fire protection, water and sewer service
Port San Luis Harbor	Entire South County from Cuesta Grade to Santa Maria River	Development, maintenance and operations of harbor piers and facilities
Arroyo Grande Public Cemetery District	Arroyo Grande and outlying areas	Full cemetery services
Coastal San Luis Resource Conservation District	Extends from southern Arroyo Grande through Pismo Beach, San Luis Obispo, Morro Bay and Cayucos to join the Las Tablas Resource Conservation District	Prevention of soil erosion, agriculture education and water conservation

(Emphasis added.) (San Luis Bay Area Plan, p. 3-2, Rev. Aug., 2009)

Table C states in very clear terms that the Property (in Ontario Ridge) is located within the service area of CSA 12 and that water service from that entity is among the "Services Presently Provided" (at the time the Area Plan was adopted). Indeed, as discussed above, the Property has been located within the Sphere of Service of CSA 12 long before the LCP was adopted and certified. Table C makes it clear that water service to the Property was acknowledged to have been available **prior to the adoption and certification of the LCP**. In any event, the LCP recognizes that the Property is located within a USL by acknowledging the equivalence of the CSA sphere of service to a USL:

**Because LAFCO definitions of "sphere of service" and "sphere of influence" correspond to the LUE definitions of urban service line and urban reserve line, respectively, such coordination is necessary to support orderly urban expansion.**  
(Emphasis added.)

(Coastal Zone Framework For Planning, p. 3-13, Rev. Apr., 2011.) Inasmuch as the Property is located within the sphere of service of CSA 12, by the express terms of the LCP it is within a USL.

In addition to the foregoing, provision of water service to the Property by CSA 12 is consistent with the requirements of Public Works Policy 1 of the LCP which requires that "New development (including divisions of land) shall demonstrate that adequate public or private service capacities are available to serve the proposed development." Because the sphere of service is equivalent to the USL, and because the LCP acknowledges that water service to the Property is provided by CSA 12, and further, because CSA 12 has a sufficient allotment of water to serve the Property, provision of such service complies with both the letter and spirit of the LCP.

Finally, the Avila Beach USL is irrelevant to water service for the Property. Water service to the Property will not be provided by the Avila Beach Community Services District. Though it should be obvious, it bears emphasizing that no water service infrastructure will be extended from Avila Beach to the Property. The LCP provides further support for the conclusion that the Avila Beach USL is irrelevant to water service by CSA 12. The Area Plan states, at 3-8:

As Avila grows, the community and LAFCO should consider consolidating services into a community services district, including services now provided by CSA No. 12, Avila Beach County Water District and the Avila Beach Lighting District.

Therefore, the LCP acknowledges that CSA 12 is a separate entity that now provides water service.

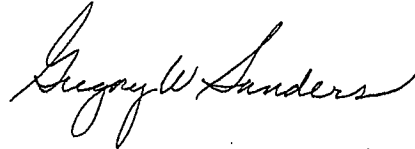
In view of the above, no LCP amendment to relocate the USL to encompass the Property is necessary in order for water service to be provided by CSA 12.

Finally, we would like to emphasize that, to our knowledge, no adverse precedent would be set by a Coastal Commission decision on the above-referenced appeal affirming the San Luis Obispo County Planning Commission's decision to permit water service to the Property by CSA 12. We believe the set of facts and circumstances regarding the Property and CSA 12 are unique. Further, as determined by the Planning Commission, water service by CSA 12 is an environmentally superior alternative than water service from the existing on-site well.

We have enclosed herewith the required Coastal Commission Claim of Vested Rights form.

We would be pleased to discuss this matter with you if you so desire. In the meantime, we are prepared to respond to any questions you may have regarding the subject matter of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Gregory W. Sanders".

Gregory W. Sanders  
of Nossaman LLP

GWS/cjm



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MAR 13 2012

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST AREA

Via FedEx

March 12, 2012

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

Re: **Rob and Judi McCarthy Single Family Residence  
Vested Right To County Service Area No. 12 Water Service**

Dear Mr. Carl:

This letter responds to the California Coastal Commission's ("Commission") letter dated February 17, 2012 requesting additional information from Rob and Judi McCarthy regarding their claim of a vested right to receive water service from County Service Area No. 12 ("CSA 12"). For reference, a copy of the Commission's letter is attached hereto as Exhibit 1. We continue to represent the McCarthys, the owners of the Pirates Cove property (sometimes identified as the "Ontario Ridge" property in County of San Luis Obispo planning documents), situated between the eastern boundary of the Avila Beach Community Services District and the western boundary of the City of Pismo Beach (the "Property"). This letter is intended to address the Commission's request for additional information, to demonstrate that *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal. 3d 785 ("Avco") is inapplicable to the McCarthys' situation, and to request that the Commission validate the McCarthys' claim of a vested right to receive water service from CSA 12.

**A. Avco is Inapplicable to the McCarthys' Vested Rights Claim**

The California Coastal Zone Conservation Act was enacted on November 7, 1972 as a temporary measure that required a person desiring to develop property within the coastal zone to obtain a permit from one of six regional coastal commissions. (Former Pub. Resources Code, § 27000 *et seq.* ("1972 Act").) Section 27404 of the 1972 Act, however, exempted a developer from this requirement if the developer had obtained a vested right to build on the property by securing a building permit prior to enactment of the Act. Specifically, section 27404 provided that, if "any city or county has issued a building permit, no person who has obtained a vested right thereunder [prior to enactment of the 1972 Act] shall be required to secure a permit from the regional commission."

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gsanders@nossaman.com

Refer To File #: 400494-0001

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CENTRAL COAST AREA

Section 27404 of the 1972 Act was amended in 1976 with the enactment of the California Coastal Act ("Coastal Act") to include broader statutory exemption language. (Pub. Resources Code, § 30000 *et seq.*) Specifically, the provision states that "[n]o person who has obtained a vested right in a development prior to [January 1, 1977] . . . shall be required to secure approval for the development [by obtaining a coastal development permit] pursuant to this division." (Pub. Resources Code, § 30608.) Section 30608 conspicuously omits the building permit requirement contained in section 27404 and, thus, clearly indicates that the Legislature did not intend to preclude a developer from obtaining a vested right on the grounds that the developer did not acquire a building permit.

The narrower language of the 1972 Act, and not the broader provision contained in the Coastal Act, was at issue in the California Supreme Court's decision in *Avco*. *Avco* owned approximately 8,000 acres of land in Orange County, a small portion of which was located in the coastal zone. (*Avco, supra*, 17 Cal.3d at p. 788.) Prior to February 1, 1973 (the effective date of the 1972 Act), *Avco* had obtained zoning and tentative and final subdivision map approvals, and had nearly completed construction of storm drains and utility improvements on the property, but had not received a building permit for construction. (*Id.* at p. 789.) Based on the fact that *Avco* had not acquired a building permit, and that section 27404 specifically required such a permit, the Court held that *Avco* did not have a vested right to proceed with construction. (*Id.* at p. 793.)

The holding in *Avco* was based on the language in the 1972 Act that required a building permit to establish a vested right. The *Avco* decision, however, did not address the broader language contained in section 30608 of the Coastal Act, which does not require a building permit.<sup>1</sup> Since it is this broader standard that governs the McCarthys' claim of a vested right to receive water service from CSA 12, *Avco* does not apply to the McCarthys' claim of a vested right.

#### **B. The McCarthys' Vested Rights Claim Does Not Fall Within the Scope of *Avco***

The California Supreme Court's holding in *Avco* stands for the proposition that, when a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, the developer has acquired a vested right *to complete construction of the project in accordance with the terms of the permit*. (*Avco, supra*, 17 Cal.3d at p. 791.) That is, the

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<sup>1</sup> Courts have subsequently addressed the significance of *Avco* in light of the fact that section 30608 contains broader language than its predecessor. In general, courts have determined that a building permit is not necessary to establish a vested right, but that some type of governmental approval is required. (See *Tosh v. California Coastal Com.* (1979) 99 Cal.App.3d 388, 393.) Assuming that this broader interpretation of *Avco* applies to the McCarthys' claim of a vested right (which it does not for the reasons set forth herein), the 1966 contract between CSA 12 and the San Luis Obispo Flood Control and Water Conservation District, as described in the McCarthys' January 17, 2012 letter (attached hereto as Exhibit 2), constitutes such a governmental approval. Courts typically also require an individual to perform substantial work and incur substantial liabilities in good faith reliance upon the approvals. (*Ibid.*) As respects these requirements, the McCarthys' predecessors in interest paid special property taxes to fund the construction of the Lake Lopez Reservoir and the subsequent dam seismic remediation project in reliance on the 1966 contract. These taxes and related infrastructure projects demonstrate that the McCarthys and their predecessors in interest performed substantial work and incurred substantial liabilities in good faith reliance upon a governmental approval. Thus, the McCarthys have satisfied the vested rights requirements under the Coastal Act, even if *Avco* applies.

issue in *Avco* was whether the developer had obtained a vested right to *construct or build* a physical structure on his property. (*Id.* at p. 792.) Case law interpreting *Avco* similarly focuses on whether a developer can establish a *vested right to build*. (See, e.g., *McCarthy v. California Tahoe Regional Planning Com.* (1982) 129 Cal.App.3d 222 [vested right to complete demolition and construct a new structure]; *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781 [vested right to complete construction of a development project]; *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687 [vested right to develop an apartment building project].) Even when courts have considered other types of vested rights, the issues addressed by the courts were tangible or “brick and mortar” in nature. (See, e.g., *Billings v. California Coastal Com.* (1980) 103 Cal.App.3d 729 [vested right to subdivide]; *Hermosa Beach Stop Oil Coalition v. City of Hermosa* (2001) 86 Cal.App.4th 534 [vested right to drill for oil].) In these types of cases, it makes sense for a developer to be required to satisfy the *Avco* factors, namely, governmental approvals, good faith reliance on such approvals, and performance of substantial work.

Conversely, as acknowledged by the Commission, the McCarthys are claiming a vested right “to have water provided by CSA 12.” This vested right is not the type of “brick and mortar” right typically at issue under *Avco*. But, in its February 17, 2012 letter, the Commission attempts to frame the McCarthys’ claim as one to “construct the infrastructure necessary to transport water from CSA 12 to the Property.” That is, the Commission appears to portray the McCarthys’ claim as a claim to “construct” water infrastructure to make it fit the typical *Avco* mold. Yet the McCarthys do not seek a vested right to “construct” anything. Rather, they merely seek a determination from the Commission that they have a vested right as a third party beneficiary to receive water service from CSA 12. As such, the McCarthys’ vested rights claim is outside the scope of *Avco*. Thus, the additional information requested by the Commission under *Avco* inaccurately reflects the McCarthys’ claim, and is not required.

### **C. The McCarthys Have a Contractually Vested Right to Water Service From CSA 12**

It is undisputed that *Avco* applies to the traditional land use vested rights analysis. In certain cases, however, a landowner or developer may establish a vested right based on a contract with a governmental agency, notwithstanding the fact that there has been no issuance of a governmental permit, or good faith substantial expenditures in reliance thereon. (Longtin, California’s Land Use (2d ed. 1994 & 2011 supp.) § 1.92[1].) That is, a vested right may be established contractually, outside the scope of the typical *Avco* analysis. For example, in *Monterey Sand Co. v. California Coastal Commission* (1987) 191 Cal.App.3d 169, the issue before the court was whether Monterey Sand Co. had acquired a vested right to continue its sand extracting operations without a coastal development permit by virtue of a 1968 mineral lease it had acquired before enactment of the Coastal Act. (*Id.* at p. 176.) The company acknowledged that it had not obtained the requisite federal permits for its operations until several years after the effective date of the Coastal Act. (*Ibid.*) In holding that Monterey Sand Co. had obtained a vested right, the court found that, given the 1968 mineral lease, the Commission was estopped from requiring the Monterey Sand Co. to obtain a coastal development permit for its sand extraction activities. (*Id.* at p. 178-9.) Accordingly, the court ruled that the company had obtained a vested right, exempt from permit requirements, to perform its sand extraction operations pursuant to the mineral lease. (*Ibid.*; see also *M.J. Brock & Sons, Inc. v. City of Davis* (1975) 401 F.Supp. 354, 361 [holding that a public entity should not be allowed to avoid its responsibilities under a land use contract].)

As described in our letter to you of January 17, 2012 (see Exhibit 2), the McCarthys’ vested right to water service from CSA 12 is based on their status as third party beneficiaries to the 1966 contract between CSA 12 and the San Luis Obispo Flood Control and Water Conservation District (“District”).

Civil Code section 1229 provides that “[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” Beneficiary status is established at the time of contracting. (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1441.) To support a third party right to enforce a contract, it must appear from the direct terms of the contract that it was made for the benefit of the third party. (*Strauss v. Summerhays* (1984) 157 Cal.App.3d 806, 816.) As respects the Property, the 1966 contract between the District and CSA 12 expressly states that the water supply at issue in the contract is to “be for the use and benefit of the lands and inhabitants served by [CSA 12].” As the owner of the Property, which has been within the boundaries of CSA 12 since its inception, the McCarthys are third party beneficiaries to the contract. The McCarthys’ third party beneficiary rights vested when their predecessors in interest learned of the right to water service (*Riley v. Riley* (1953) 118 Cal.App.2d 11, 15) or acted in reliance on the terms of the 1966 contract (*Silveyra v. Harper* (1947) 82 Cal.App.2d 761, 766-67). The McCarthys’ predecessors paid special taxes in order to avail the Property of water in reliance on the 1966 contract; thus, the McCarthys have a vested right to water service from CSA 12, as established by the 1966 contract. This contractually based vested right is outside the scope of the traditional land use vested rights doctrine governed by *Avco*, and does not require the submission of any additional information in order to be validated by the Commission.<sup>2</sup> (See *Monterey Sand Co.*, *supra*, 191 Cal.App.3d at 178-179).

#### **D. Conclusion**

Finally, we would like to emphasize that, to our knowledge, no adverse precedent would be set by a Commission decision validating the McCarthys’ vested rights claim to water service from CSA 12. We believe the facts and circumstances regarding the Property and CSA 12 are unique. As the Commission is aware, most vested rights claims will be subject to *Avco*. The McCarthys’ situation, by contrast, will not disrupt the Commission’s long-standing analytical framework regarding such claims. Rather, the McCarthys’ claim represents a unique, contractually-based vested right that enables the Commission to validate the claim without the submission of additional information regarding the *Avco* factors. Accordingly, the McCarthys’ respectfully request that the Commission validate the McCarthys’ claim of a vested right to have water provided by CSA 12. Please refer to the Coastal Commission Claim of Vested Rights form submitted with the McCarthys’ January 17, 2012 letter, attached hereto as Exhibit 2, for additional details regarding the McCarthys’ vested rights claim.

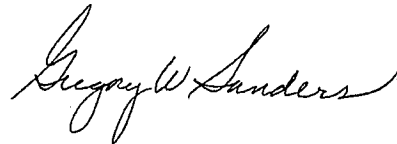
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<sup>2</sup> The McCarthys’ vested right is also sufficient to constitute “a vested right in a development” under Public Resources Code section 30608. Specifically, receipt of water from CSA 12 must be considered “development” for purposes of the Coastal Act because it involves a “change in the intensity of use of water, or of access thereto,” as set forth in Public Resources Code section 30106.

Dan Carl, District Manager  
March 12, 2012  
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We would be pleased to discuss this matter with you further at your convenience. In the meantime, we are prepared to respond to any questions you may have regarding the subject matter of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Gregory W. Sanders". The signature is written in black ink and is positioned above the printed name.

Gregory W. Sanders  
of Nossaman LLP

GWS/AJR