

CALIFORNIA COASTAL 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



W34a

Extension Request Filed: 5/1/2018
Staff: Susan Craig - SC
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Hearing Date: 11/13/2019

STAFF REPORT: CDP EXTENSION REQUESTS

Extension Numbers: 3-08-013-E3 and 3-08-013-E4¹

Applicants: AquaLegacy Development LLC and Ruby Falls Fund LLC²

Project Location: About 3.5-acres of vacant property along both the seaward and inland portions of Cannery Row, extending seaward from the Monterey Peninsula Recreation Trail between Hoffman and Drake Streets, and including some 500 linear feet of shoreline, in the City of Monterey.

Project Description: Mixed use commercial/residential project consisting of almost 90,000 square feet of retail and retail support (including 30,000

¹ CDP 3-08-013 was originally approved on August 7, 2008, and its original expiration date was August 7, 2010. Via legislative action associated with subdivisions that automatically extended certain discretionary permits (including CDPs) in response to the economic downturn that started in 2008, and then via two Commission-authorized on e-year CDP extensions (i.e. 3-08-013-E1 and -E2), the CDP was extended to August 7, 2018. The Applicants originally applied prior to that date to extend the CDP's expiration date to August 7, 2019 (CDP extension request 3-08-013-E3). Per the Commission's regulations, the CDP's expiration is stayed pending Commission action on that extension request. Because the CDP would have expired on that date if the Commission were to extend the CDP now (i.e., if CDP extension request 3-08-013-E3 were to be granted at the November Commission meeting, then the CDP would have been extended to August 7, 2019, which date has already past), the Applicants submitted a second extension request (prior to August 7, 2019) to ensure that the expiration would be extended to August 7, 2020 if these requests were to be granted by the Commission. Thus, although the substantive issue before the Commission is singular (in terms of whether to extend the CDP or not), there are actually two extension requests before the Commission (3-08-013-E3 and 3-08-013-E4).

² There are two Applicants for these extension requests because both AquaLegacy Development LLC and Ruby Falls Fund LLC assert that they are the owners of the subject property, and thus each claims to be the sole Applicant/Permittee under the CDP. The two entities are currently involved in active litigation to resolve that property ownership dispute, but both have agreed to be Co-Applicants for these CDP extension requests. Thus, no matter which entity is ultimately determined to be the rightful property owner, these extension requests are properly before the Commission for action.

square feet allotted to restaurant use), 38 market-rate condominiums, and redevelopment of the remaining building as a history center with a plaza, all on the seaward side of Cannery Row; 13 moderate-income housing units, about 8,500 square feet of coastal-related retail or community use, and a community park, all on the inland side of Cannery Row; almost 400 contained parking spaces (on both sides of the street, some subsurface); a pedestrian bridge over Cannery Row connecting both sides of the project; and an onsite desalination system with seaward (extending roughly 1,200 feet offshore) intake/discharge components.

Staff Recommendation: Deny the Extensions

SUMMARY OF STAFF RECOMMENDATION

Coastal Commission coastal development permit (CDP) approvals typically allow two years for a Permittee to exercise a CDP pursuant to the terms and conditions of the CDP adopted by the Commission. If a Permittee has not so exercised their CDP, then the CDP expires. However, the Commission's regulations also provide that a permittee can request an extension of that deadline of up to a year. Extension requests such as these can only be granted provided the Commission finds that there are no changed circumstances that would affect the consistency of the development with the policies of the Coastal Act and/or the applicable Local Coastal Program (LCP).

In this case, the Commission approved a CDP, but the Applicants have not yet been issued the CDP, and thus have not yet commenced work under the CDP (which they cannot legally do without the CDP being issued) and thus the Applicants have not yet exercised the CDP.³ On this point it is important to note that the CDP includes both "prior to issuance of the CDP" and prior to construction requirements, neither of which have been met.⁴ In fact, the Applicants have not submitted *any* materials for review that are pre-conditions to starting construction (namely a series of required plans and other materials embodied in the pre-construction conditions) in the eleven years since CDP approval, and the only thing that has been submitted for review was a

³ A CDP can be considered "exercised" and development can continue to proceed past its expiration date (provided it is pursued in a diligent manner) when the following has taken place: all "prior-to-issuance" conditions have been met, the CDP has been issued, an applicant has met all other pre-conditions to construction, and an applicant completes significant construction (e.g., complete foundations for structures) prior to the CDP expiration date.

⁴ Ruby Falls Fund LLC previously submitted deed restriction documents in 2017 to Commission staff for review and approval. However, given that there was ongoing litigation between Ruby Falls Fund LLC and AquaLegacy Development LLC regarding ownership of the Ocean View Plaza property, and given the lack of clear, evidence by which the Commission can reasonably rely upon to determine that Ruby Falls Fund LCC in fact owns the property in question, it was premature (and remains so) for the Executive Director to review and approve documents that would allow Ruby Falls Fund LLC to deed restrict the property. (If the ultimate outcome of the litigation between Ruby Falls Fund LLC and AquaLegacy Development LLC is that Ruby Falls Fund LLC does not own the property, any recording of a deed restriction by Ruby Falls Fund LLC will have been ineffectual and any CDP that would have been issued would have been done so erroneously.)

draft deed restriction⁵ (required prior to CDP issuance), which cannot be reviewed given the dispute over property ownership (as discussed above). In short, other than suing the Commission,⁶ and pursuing extensions to the CDP expiration, the Applicants have exhibited little due diligence in taking the steps necessary to initiate let alone complete the project, raising a separate question as to whether they are meeting the due diligence requirements of the CDP.⁷ In short, the CDP has not been issued, the Applicants have not begun yet alone completed their prior to construction requirements, no work has commenced under the CDP, and thus the CDP has not been exercised. Thus, the Applicants are requesting an extension of the CDP's expiration deadline to August 7, 2020.

In this case, the Commission approved a CDP, but the Applicants have not yet exercised that CDP. In fact, the Applicants have not yet met the "prior to issuance of the CDP" condition regarding the required deed restriction. Because Executive Director sign-off of the deed restriction is a precondition to issuing the CDP, the CDP has not yet been issued. In addition, because Executive Director sign-off and an issued CDP, as well as the Applicants meeting all "prior to commencement of construction" conditions, are precursors to the Applicants being able to commence construction, no work has commenced under the CDP. Thus, the Applicants are requesting an extension of the CDP's expiration deadline to August 7, 2020. Staff recommends that the CDP extension **NOT** be granted because changed circumstances exist that affect the development's consistency with the Chapter 3 policies of the Coastal Act, specifically related to water supply and coastal hazards, as described below.

In 2008 when this large scale commercial and residential project (i.e., a total of almost 90,000 square feet of structures and covering 3.5 acres spanning both sides of Cannery Row along 500 linear feet of shoreline) was originally approved by the Commission on essentially vacant properties (which remain vacant today),⁸ the City of Monterey was using its full allotment of

⁵ And submitted by Ruby Falls Fund LLC, but not by AquaLegacy Development LLC.

⁶ On October 9, 2009 AquaLegacy Development LLC's predecessor-in-interest (i.e., the original permittee, Cannery Row Marketplace LLC) sued the Commission in Monterey County Superior Court (Case No. M101813) seeking a writ to, among other things, set aside the adopted revised findings for the original approval of the 2008 CDP as not reflective of the Commission's decision. The court denied this writ petition on June 16, 2015, for which Cannery Row Marketplace LLC's successor-in-interest, Aqualegacy Development LLC, on September 3, 2015 appealed the trial court's decision to the Sixth District Court of Appeal (Case No. H042782). On December 15, 2015, due to filing of bankruptcy proceedings by AquaLegacy Development LLC, the Sixth District Court of Appeal stayed the appeal pending resolution of the bankruptcy proceedings. Meanwhile, on November 1, 2013 AquaLegacy Development LLC also sued the Commission in Monterey County Superior Court (Case No. M125474) seeking a writ to, among other things, compel the Commission to review design plans without regard to consistency of such plans with the City's Land Use Plan or, in the alternative, to compel the Commission to consult with the petitioner or hold a hearing pursuant to Section 13169 of the Commission's regulations regarding the dispute over the contents of the CDP. This case is still active, though the last filing occurred on April 1, 2015 (and, as referenced above, the petitioner filed for bankruptcy on December 15, 2015).

⁷ Standard Condition 2 of the CDP states in applicable part that: "Development shall be pursued in a diligent manner and completed in a reasonable period of time." CDPs can be deemed to have expired by the Commission for a lack of the required diligence. Although not the question before the Commission for these extension requests, the due diligence issue can provide relevant context for understanding the extension requests.

⁸ The two sites are and were vacant, but include remnant foundations and associated hard structures from since demolished buildings, and one still standing (but boarded up) remnant cannery structure on the seaward portion of

water from the Monterey Peninsula Water Management District, and additional domestic water from Cal-Am (the local water purveyor) was not available to serve the project's water needs (estimated to be 27.89 acre-feet of water per year) due to restrictions (which remain today) on Cal-Am pumping from the Carmel River and the Seaside groundwater basin, which are the sources of Cal-Am water. For these reasons, the Applicant at that time proposed, and the Commission approved, an onsite desalination facility, along with associated ocean water intake and discharge pipelines (including a subsurface intake, an above-surface emergency intake, an above-surface brine disposal, and a vault located below the sea floor) extending into the Pacific Ocean roughly 1,200 feet seaward of the shoreline off of Cannery Row, to provide the water to serve the project. The intake and outfall pipelines and related ocean-based development for the desalination facility were to be located above and below the sea floor in the waters of the Monterey Bay National Marine Sanctuary, as well in an area also designated by the California Department of Fish and Wildlife (CDFW) as a State Marine Conservation Area (SMCA, the Edward F. Ricketts SMCA), and a Marine Protected Area (MPA) under the California Marine Life Protection Act (CMLPA).

Since the time of the Commission's approval of the project in 2008, the water situation in the City of Monterey remains virtually unchanged and there continues to be no water available from Cal-Am to serve the project.

However, in 2015, and in response to statewide concerns regarding the potential for adverse impacts from a potential proliferation of desalination facilities, the State Water Resources Control Board (SWRCB) adopted an amendment to the Water Quality Control Plan for the Ocean Waters of California (also known as the Ocean Plan) explicitly to address effects associated with the construction and operation of seawater desalination facilities (the Ocean Plan Amendment). The Ocean Plan Amendment requires new or expanded seawater desalination plants to use the best available site, design, technology, and mitigation measures feasible to minimize intake and mortality of all forms of marine life, including benthic organisms. The Ocean Plan Amendment also includes very specific requirements for desalination that might affect an MPA, such as is the case here. And while the Ocean Plan Amendment "grandfathered" certain pending projects without the need to meet the new requirements, the project here does not meet those tests, is not grandfathered, and the current Ocean Plan Amendment requirements apply to it.⁹ And those requirements indicate that the previously approved project cannot be approved consistent with the current more stringent Ocean Plan.

Specifically, desalination intake and discharge structures *are prohibited in MPAs* unless they can be constructed, operated and maintained without *any* marine life mortality. To this point, the Ocean Plan explicitly references slant wells as an example of a type of project that may be able to meet such criteria (e.g., because slant wells can be constructed, operated and maintained in a

the site. There also appears to currently be a paid parking lot being operated on a portion of the inland property without any CDP authorization.

⁹ Per the Ocean Plan, only desalination facility projects that have received all necessary permits, including CDPs, and that commenced construction prior to January 28, 2016 are so grandfathered, and this project has not received its CDP nor commenced construction (and is unable to commence construction in any case without a CDP and without meeting the pre-construction requirements of the CDP), and thus the project does not meet those criteria of the Ocean Plan.

way that does not even introduce project elements into the open ocean). Here, though, the approved project includes intake and discharge pipes, a concrete vault, an open water brine discharge, and an above-surface emergency intake, all of which would be trenched into the ocean floor, with one intake line ultimately extended into the water column above the sea floor, all in the Edward F. Ricketts MPA. It would be impossible to construct, operate and maintain such a system without marine life mortality, and the project thus is prohibited by the Ocean Plan. In addition, desalination projects that are allowable under the Ocean Plan (and this is not one of them) require discharges and surface intakes to be located outside of any MPA, and this project does not do that. As a result, Commission staff, as well as staff from the SWRCB and the Regional Water Quality Control Board (RWQCB) (all of whom have regulatory authority over the desalination portion of the project under the Ocean Plan and the CMLPA), concur that the desalination portion of the project cannot be constructed, operated or maintained consistent with the Ocean Plan or the CMLPA.¹⁰

This change in circumstance from the original CDP approval means the desalination portion of the project, which was perhaps the most controversial portion of the project when it was approved in 2008, including due to its impact to marine resources, cannot be built as approved by the Commission in 2008. Further, based on evidence in the administrative record, it does not appear that there are desalination options that *could* be found consistent with the Ocean Plan at this location, including because of the granitic subsurface conditions underlying the site and the offshore area appear to make slant wells (or other subsurface options) infeasible. Thus, the approved project does not have evidence of an adequate and sustainable water source, raising the specter that it cannot be found consistent with the Coastal Act in this regard (including Section 30250).¹¹

Furthermore, in the time since the project was approved in 2008, there has also been a change in the Commission's understanding of the coastal hazards that affect the portions of the project site that are located on the seaward side of Cannery Row (i.e., the 2.2-acre portion of the project located seaward of Cannery Row, which extends along about 500 linear feet of shoreline), especially as related to sea level rise. Specifically, in 2008 the Commission found that the project would be safe for a 100-year design life based on the Commission's then estimated three-foot rise in sea level over that time. However, in 2015, the Commission unanimously adopted a "Sea Level Rise Policy Guidance" document that provides an overview of the then current best available science on sea level rise for California, and recommended methodologies for addressing sea level rise in Coastal Commission planning and regulatory actions. Further, in November 2018, the Commission unanimously adopted a "Science Update to the Sea Level Rise Policy Guidance." The 2018 science-focused changes reflect recent scientific studies and statewide guidance that update the Commission's

¹⁰ Laws have also changed with respect to the manner in which community services districts can be formed, but not in ways that would affect the Ocean View Community Services District (OVCS D) that was formed to own and operate the desalination components of the project. OVCS D appears to continue to be a valid CSD, even if it only covers this private project site.

¹¹ And currently applicable conditions of approval cannot be met either on this point, including with respect to the required desalination plans (Special Condition 1), water supply contingency plans (Special Condition 2), and other agency approvals, including explicitly from RWQCB and CDFW (Special Condition 15). Again, as indicated above, the Applicants have yet to submit any materials required by the CDP's terms and conditions to date.

understanding of best available science on sea level rise projections relevant to California. The updated Guidance's sea level rise projection tables estimate a significantly higher level of sea level rise (i.e., up to 6.9 feet, or over a 100% increase in projected sea level rise) in Monterey by 2100 (i.e., within about 80 years) than was used as the baseline for coastal hazard related issues in the 2008 approval. In addition, other evaluations and tools now being applied to this stretch of coast¹² indicate that a portion of the site will be affected by sea level rise and related effects potentially as early as 2030.

In short, the approved project relied on sea level rise information that is now outdated and obsolete, and current information suggests that the degree of threat to this site is much more severe than understood in 2008. This constitutes a critical changed circumstance affecting the approved project's consistency with the Coastal Act's hazards policies (including Sections 30235 and 30253), particularly as exacerbated by sea level rise.¹³ At a bare minimum, and presuming the Applicants can identify an adequate and sustainable water source, these changed coastal hazard circumstances are likely to require substantial redesign of the project to ensure its consistency with the Coastal Act.

In conclusion, the Coastal Act's CDP extension process allows the Commission to extend the expiration date of a CDP by one year, provided there are no changes in circumstances since the time of CDP approval that would affect the approved project's consistency with the Coastal Act. In this case, there are significant changed circumstances in the time since original CDP approval that not only affect the project's consistency with the Coastal Act, but also that will require fundamental project changes to allow for a CDP to authorize the project under the Coastal Act, most significantly the need for a water source of nearly 30 acre-feet per year in an area where there is not any water available for the project. Further, current sea level rise predictions mean that the current project will also need to fundamentally change in terms of its approach to addressing hazards. These are critical and fundamental changes that must be addressed for CDP purposes to ensure ongoing consistency with applicable Coastal Act policies. Per the Commission's regulations, a finding of changed circumstances would mean that the extension requests are denied and the project would be reviewed de novo at a future date, after the Applicants have submitted the requisite filing fee, information to address the changed circumstances, and any other materials necessary to provide the necessary data for Commission review. Here, the Applicants will need to submit not only the required fee (i.e., as required by the Commission's regulations), but also evidence of adequate water, updated coastal hazard evaluations, and updated project plans responding to both. In addition, and given the scope of project changes that are likely to be necessary to allow for Commission reconsideration of the proposed project, the Applicants will need to also provide evidence of current City of Monterey approvals for any such revised project.

¹² For example, as part of the City's efforts to develop an LCP, in 2016 the City produced a sea level rise and vulnerability analyses document that includes illustrative maps that show portions of the seaward side of the project site being inundated in about the 2030 timeframe.

¹³ And currently applicable conditions of approval cannot be met either on this point, including with respect to the required historic construction plans (Special Condition 4), public access construction plans (Special Condition 5), design plans (Special Condition 6), drainage plans (Special Condition 7), wave impact/tsunami plans (Special Condition 8) and construction plans (Special Condition 9). Again, and as indicated above, the Applicants to date have not submitted any materials required by these conditions.

Staff recommends that the Commission make a finding of changed circumstances and deny the extension requests. Unlike other CDP actions, if three or more Commissioners vote to find changed circumstances (i.e., as opposed to a majority), then changed circumstances are found, and the project will be set for a new hearing in the near future, provided the Applicants provide the necessary information to allow for the Commission to consider the application. Alternatively, if only two or fewer Commissioners vote for changed circumstances, then the CDP expiration will be extended to August 7, 2020. The motion to implement the staff recommendation is found on page 9 below.

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APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contacts with Agencies and Groups

EXHIBITS

Exhibit 1 – Location Map

Exhibit 2 – Site Photos

Exhibit 3 – Approved Project Plans

Exhibit 4 – Commission-Adopted Conditions of CDP 3-08-013, as amended (CDP 3-08-013-A1)

Exhibit 5 – RWQCB Letter dated July 12, 2017

Exhibit 6 – California Code of Regulations Section 13169 (Extension of Permits)

I. MOTION AND RESOLUTION

Staff recommends that the Commission find that there are changed circumstances that affect the consistency of the development with the Chapter 3 policies of the Coastal Act, and therefore recommends that the Commission deny the extension requests. To implement this recommendation, staff recommends a **YES** vote on the following motion. An affirmative vote of three or more Commissioners is needed to deny the extension requests and adopt the following resolution and findings.

***Motion:** I move that the Commission find that there are changed circumstances that affect the consistency of the development approved in Coastal Development Permit Number 3-08-013 with the Chapter 3 policies of the Coastal Act, and I recommend a yes vote.*

***Resolution to Deny the Permit Extension Requests:** The Commission hereby denies the requests to extend the time in which development must commence under Coastal Development Permit Number 3-08-013 in order for the permit not to expire, and adopts the findings set forth below on the grounds that there is sufficient evidence of changed circumstances that affect the consistency of the development approved in this permit with the Chapter 3 policies of the Coastal Act.*

II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. CDP 3-08-013

Location

The project site is located along Cannery Row in the City of Monterey. Cannery Row is both the name of the general area (i.e., about a mile of coast extending upcoast from the City of Pacific Grove city limits to the Monterey Harbor), and also the name of the main shoreline-fronting street through the area, with visitor-serving development lining both the inland and seaward sides of the road, where the seaward side of the road is fairly narrow and perched above Monterey Bay proper. Cannery Row is one of the premier tourist destinations in the coastal zone, with a variety of attractions, including the world famous Monterey Bay Aquarium as well as the spectacular shoreline and offshore Monterey Bay itself.

The 3.5-acre project site spans Cannery Row on both sides of the street, extending seaward from the Monterey Peninsula Recreation Trail between Hoffman and Drake Streets, and includes some 500 linear feet of shoreline. The 2.2-acre seaward portion of the site is sandwiched between the El Torito Restaurant (downcoast) and the Chart House Restaurant (upcoast) along the shoreline, and was historically occupied by two canneries, i.e. the Pacific Fish Company on the downcoast portion of the site and the San Xavier Canning Company on the upcoast portion of the site. These canneries closed in the early 1960s and the project site has been essentially vacant since that time, except for the use of a former San Xavier building as the Stohan's Gift Gallery up until 1997.¹⁴ The 1.3-acre inland portion of the site is currently occupied by a paved parking lot (being operated without a CDP), the remains of the foundation of the former San Xavier Warehouse, and other structural remnants of the Cannery Row cannery era, including a storage tank, sandwiched between the Monterey Peninsula Recreation Trail and the Cannery Row roadway. The project site occupies a large portion of the Cannery Row area, and is by far the largest vacant site along all of Cannery Row.

See **Exhibits 1** and **2** for a location map and photographs of the site and project area.

Approved Project

On August 7, 2008, the Commission approved a CDP for a mixed-use commercial/residential project consisting of almost 90,000 square feet of retail and retail support (including 30,000 square feet allotted to restaurant use), 38 market-rate condominiums, and redevelopment of the historic Stohan's building as a history center with a plaza, all on the seaward side of Cannery Row; 13 moderate-income housing units, about 8,500 square feet of coastal/community use, and a community park, all on the inland side of Cannery Row; almost 400 contained parking spaces (on both sides of the street); a pedestrian bridge over Cannery Row connecting both sides of the project; and an onsite desalination system with seaward (extending roughly 1,200 feet offshore) intake/discharge components. See **Exhibit 3** for the approved project plans.

¹⁴ The gallery has since been boarded up, and all that remains on the seaward portion of the overall site are the boarded-up building as well as remnant foundations and related structures associated with past warehousing and fish storage.

The project was controversial, perhaps most so in terms of the desalination components of the project, when it was approved in 2008, including due to its potential impact to marine resources. The desalination components led to a series of required terms and conditions to address Coastal Act issues, including with respect to the required desalination plans (Special Condition 1), water supply contingency plans (Special Condition 2), Ocean View Community Services District (OVCSA)¹⁵ requirements (Special Condition 3), water supply production and use restrictions (Special Condition 10), other agency approvals (Special Condition 15), and special property marketing (Special Condition 12) and desalination assumption of risk (Special Condition 14) requirements. In short, it was not clear that the desalination portion of the project was going to be able to effectively (including in terms of costs) provide water to the project at all times, and the Commission built in a series of safeguards to ensure that all parties were not only aware of the potential for issues thereto, but also to provide contingencies in the event of intermittent issues with water supplies, particularly for emergency purposes.

The project also included a series of requirements related to plan submittals to address a variety of Coastal Act concerns, perhaps most notably in relation to overall siting and design, public recreational access and coastal hazards, including with respect to the required historic construction plans (Special Condition 4), public access construction plans (Special Condition 5), design plans (Special Condition 6), drainage plans (Special Condition 7), wave impact/tsunami plans (Special Condition 8), construction plans (Special Condition 9), archaeology restrictions (Special Condition 11), and coastal hazards risk (Special Condition 13).

On December 10, 2008, the Commission approved an amendment to the CDP (CDP amendment 3-08-013-A1) that modified the timing associated with various CDP-required submittals from “Prior to Issuance of the CDP” to “Prior to Construction.” That amendment also made some changes to the water supply contingency plan condition and several other conditions. See **Exhibit 4** for the conditions, including as amended by CDP 3-08-013-A1.

To date, the Applicants have not yet met the “prior to issuance of the CDP” condition regarding the required deed restriction.¹⁶ Because Executive Director sign-off of the deed restriction is a requirement before issuing the CDP, the CDP has not yet been issued. In addition, because Executive Director sign-off of the deed restriction, an issued CDP, and compliance with all “prior to commencement of construction” conditions are all necessary in order for the Applicants to be able to commence construction, no work has commenced under the CDP. As a result, the CDP has not been exercised.

¹⁵ Because no water from the local purveyor (Cal-Am) was available to serve the project, in 2005 the Applicant at that time (i.e., Cannery Row Marketplace LLC) received authorization from the Local Agency Formation Commission (LAFCO) to form a community services district that would act as a public entity that would operate and maintain the proposed desalination components of the project.

¹⁶ Ruby Falls Fund LLC previously submitted draft deed restriction documents to Commission staff for review and approval. However, given the ongoing litigation between Ruby Falls Fund LLC and AquaLegacy Development LLC regarding ownership of the Ocean View Plaza property, it was premature (and remains so) for the Executive Director to review and approve documents that would allow Ruby Falls Fund LLC to deed restrict the property.

1. Prior CDP Extensions

Coastal Commission CDP approvals typically allow two years for a permittee to exercise a CDP pursuant to the standard terms and conditions of the CDP adopted by the Commission. If a Permittee has not so exercised the CDP, then the CDP expires. However, the Commission's regulations also provide that a permittee can request (prior to expiration) an extension of that deadline of up to a year (see California Code of Regulations Title 14 Section 13169 in **Exhibit 6**). Extension requests such as these can only be granted provided that fewer than three Commissioners find that there are changed circumstances that would affect the consistency of the development with the policies of the Coastal Act and/or the applicable LCP.

In this case, the CDP was approved by the Coastal Commission on August 7, 2008, and it included a two-year term standard condition of approval with an expiration date of August 7, 2010. Typically, absent a CDP extension, CDP 3-08-013 would have expired on that 2010 expiration date. However, the approved project includes a subdivision associated with the condominium/residential components of the project. During the period of economic recession that roughly began in 2008, the California Legislature passed a series of laws that provided for certain automatic extensions for unexpired subdivision maps and related discretionary approvals (such as CDPs). Accounting for these automatic extensions, the expiration date for CDP 3-08-013 was automatically extended to August 7, 2016. As of that date, the Applicants had not yet pursued nor completed the required steps to allow for the CDP to be issued, and thus had not yet been issued the CDP, and thus had not yet commenced construction.

The Applicants applied for one-year CDP extensions in 2016 and 2017¹⁷ (in each case prior to expiration of the CDP), both of which were granted by the Commission. In both of those extensions the Commission concluded that there were some outstanding questions related to water supply for the project in relation to consistency with the then just passed State Water Resources Control Board (SWRCB) Ocean Plan Amendment¹⁸ that instituted updated seawater desalination requirements statewide moving forward. At that time, however, those questions were in the process of being evaluated through the Regional Water Quality Control Board (RWQCB) and the California Department of Fish and Wildlife (CDFW), including through a then-pending Ocean Plan Amendment conformity determination submitted by one of the Applicants.¹⁹ Given that status, and because SWRCB, RWQCB and CDFW staff were

¹⁷ There are two Applicants here because both AquaLegacy Development LLC and Ruby Falls Fund LLC assert that they are the owners of the subject property, and thus each claims to be the sole Applicant/Permittee under the CDP. The two entities have been and are currently involved in active litigation to resolve this property ownership dispute, but both agreed to be Co-Applicants for these CDP extension requests.

¹⁸ In 2015, and in response to statewide concerns regarding the potential for adverse impacts from a potential proliferation of desalination facilities, SWRCB adopted an amendment to the Water Quality Control Plan for the Ocean Waters of California (also known as the Ocean Plan) explicitly to address effects associated with the construction and operation of seawater desalination facilities (the Ocean Plan Amendment). The Ocean Plan Amendment requires new or expanded seawater desalination plants to use the best available site, design, technology, and mitigation measures feasible to minimize intake and mortality of all forms of marine life, including benthic organisms. The Ocean Plan Amendment also includes very specific requirements for desalination that might affect an MPA, such as is the case here. See also further discussion below.

¹⁹ Submitted by AquaLegacy Development LLC in 2017, but never filed by the RWQCB as complete because AquaLegacy Development LLC did not submit the RWQCB-required information (see **Exhibit 5**). Ruby Falls Fund LLC has to date not submitted a formal application to the RWQCB for a similar determination.

continuing to evaluate Ocean Plan issues and Marine Protected Area (MPA)/California Marine Life Protection Act (CMLPA) issues (and because their sign off was required by the CDP as a condition to development under the CDP), the Commission granted CDP extensions, resulting in a CDP expiration date of August 7, 2018, which is the currently applicable CDP expiration date.

2. Current CDP Extension Requests

The Applicants originally applied (prior to August 7, 2018, as required) to extend the CDP's expiration date to August 7, 2019 (CDP extension request 3-08-013-E3). At that time, Commission staff did not bring that extension request forward to the Commission because staff was in ongoing discussions with SWRCB, RWQCB and CDFW staff in an attempt to clarify whether the desalination components of the project could be found consistent with the Ocean Plan and the CMLPA. Per the Commission's regulations, the CDP's expiration was stayed pending Commission action on that extension request in the interim. More recently, however, SWRCB and RWQCB staff have reached certain conclusions regarding Ocean Plan and the CMLPA consistency, as discussed below, and Commission staff scheduled the extension request for the November 2019 Commission meeting. Because the CDP would have been already expired if the Commission were to extend the CDP now (i.e., if CDP extension request 3-08-013-E3 were to be granted at the November Commission meeting, then the CDP would have been extended to August 7, 2019, which date has already passed), the Applicants submitted a second extension request (prior to August 7, 2019) to ensure that the expiration would be extended to August 7, 2020 if these requests were to be granted by the Commission. Thus, although the substantive issue before the Commission is singular (in terms of whether to extend the CDP or not), there are actually two extension requests before the Commission (3-08-013-E3 and 3-08-013-E4).

B. CHANGED CIRCUMSTANCES DETERMINATION

1. Coastal Commission CDP Extension Regulations

As indicated above, Coastal Commission CDP approvals typically allow two years for a Permittee to exercise an approved CDP pursuant to the standard terms and conditions of the CDP adopted by the Commission. If a Permittee has not so exercised the CDP, then the CDP expires. However, the Commission's regulations²⁰ also provide that a Permittee can request an extension of that deadline of up to a year (see CCR Section 13169 in **Exhibit 6**). Extension requests such as these can only be granted provided fewer than three Commissioners find that there are changed circumstances that would affect the consistency of the development with the policies of the Coastal Act and/or the applicable LCP.²¹ The Executive Director is tasked with evaluating such extension requests in the first instance and if the Executive Director determines that there are changed circumstances, the Executive Director makes a recommendation to the Commission regarding the changed circumstances question. Upon receipt of the Executive Director's recommendation, 14 CCR Section 13169(d)(1) provides that if at least three Commissioners

²⁰ Title 14, Division 5.5 of the California Code of Regulations (CCR).

²¹ The City of Monterey does not have a certified LCP, and thus the Coastal Act is the standard of review with respect to determining if there is a changed circumstance in this case. That said, the City has a certified Land Use Plan (LUP) and relevant LUP sections can provide non-binding guidance to the Commission.

determine that there are changed circumstances that affect the consistency of the development with the policies of the Coastal Act, the extension request shall be denied.

In this case, the Executive Director has determined that there are changed circumstances affecting the project's consistency with the Coastal Act (specifically related to water supply and coastal hazards), and is recommending that the Commission find changed circumstances and deny the CDP extension request. If the Commission does so, the regulations provide that the application be set for a new hearing once the Applicant has paid the requisite fee and has provided the information necessary to evaluate the effect of the changed circumstances with respect to Coastal Act consistency.

2. Water Supply

Applicable Coastal Act Policies

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

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

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

Because the project includes a public desalination plant that is outside of the current public service system for the City of Monterey, Section 30254 of the Coastal Act also is applicable. It provides for new or expanded public works facilities and states:

Section 30254. New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted consistent with the provisions of this division; ... Special districts shall not be formed or expanded except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use, essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

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

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

The approved desalination water supply raises potential concerns with the protection of the coastal waters and resources of the Monterey Bay. Therefore, Coastal Act Sections 30230, 30231 and 30233, which provide for the protection of marine resources and coastal waters, including their biological productivity, are also relevant:

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

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

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

Section 30233(a). *The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following: (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities. (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps. (3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities. (4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines. (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas. (6) Restoration purposes. (7) Nature study, aquaculture, or similar resource dependent activities.*

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

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

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

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

CDP-Approved Water Supply

The availability of a long-term sustainable public water supply has been an ongoing matter of concern in the southern Monterey Bay and the Monterey Peninsula area for decades. Potable water for this area, including the project site, is provided by the California-American Water Company (Cal-Am), a private water purveyor providing public water that is regulated by the California Public Utilities Commission. The distribution and use of Cal-Am water is regulated by the Monterey Peninsula Water Management District (MPWMD), which allocates water among various cities and the County, who in turn decide how to distribute their allocations. In 2008, when the Commission approved the project, the City of Monterey was using its full allotment of water from the MPWMD,²² and additional water from Cal-Am was not available to serve the project's water needs due to restrictions on pumping from the Carmel River and the Seaside aquifer, which are the sources of Cal-Am water.²³

Due to these water supply issues, the applicant for the project at that time (i.e., Cannery Row Marketplace LLC) proposed an onsite desalination facility to provide the 27.89 acre-feet-of-water per year needed to serve the project. Because the Monterey County Health Department requires that desalination facilities be publicly managed and operated, and because the Commission required evidence of a public source of water to serve the project as a filing requirement,²⁴ the City of Monterey worked with the then-Applicant to form a community

²² As of the date of this report (11 years after the project's approval), the City of Monterey is still using its full allotment of water from the MPWMD and there is no water available to serve the project.

²³ Today, as in 2008, Cal-Am is under an Order by the SWRCB (Order 95-10 and Cease and Desist Order 2009-0060) to reduce pumping on the overdrafted Carmel River and Seaside aquifer water sources, including due to a lack of required water rights as well as significant adverse habitat impacts from water extractions. Cal-Am is currently proposing a desalination project to meet area water needs in a different way, and to meet SWRCB requirements, and that proposed project is scheduled to be considered at the Commission's November 2019 meeting as well.

²⁴ In a May 5, 2005 action, the Commission upheld the Executive Director's determination on this point (i.e., because the then-Applicant challenged the Executive Director's filing determination and requested that the Commission intervene).

services district to own, operate, and manage the desalination facility, namely the Ocean View Community Services District (OVCS D).^{25, 26}

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

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

A six-inch emergency intake pipe riser would be attached to the two intake pipes through a Y-valve near the concrete vault, and it would be extended so that it would daylight about one to two feet above the ocean floor and into the water column.

²⁵ On December 27, 2005, the Monterey County Local Agency Formation Commission (LAFCO) approved the formation of the OVCS D and a Sphere of Influence for OVCS D. The boundaries for the OVCS D service area are coterminous with the 3.5-acre project site, and the desalination water would only serve the project. The members of the Monterey City Council have acted as board members for the OVCS D in the intervening years and continue to include the OVCS D as a recurring agenda item at City Council public hearings.

²⁶ Laws have also changed with respect to the manner in which community services districts can be formed, but not in ways that would affect the Ocean View Community Services District (OVCS D) that was formed to own and operate the desalination components of the project before the changes in the law took effect, i.e. the OVCS D appears to continue to be a valid CSD, even if it only covers this private project site.

The approved intake and discharge pipelines, and related ocean-based development for the desalination facility, would be located in the waters of the Monterey Bay National Marine Sanctuary. These waters are also designated by the California Department of Fish and Wildlife (CDFW) as a State Marine Conservation Area (SMCA) (the Edward F. Ricketts SMCA) a category of Marine Protected Area (MPA) under the California Marine Life Protection Act (CMLPA).²⁷

Ocean Plan Amendment

On May 6, 2015, the SWRCB adopted an amendment to the Water Quality Control Plan for the Ocean Waters of California (also known as the Ocean Plan) to address effects associated with the construction and operation of seawater desalination facilities (the Ocean Plan Amendment). The Ocean Plan Amendment generally supports the use of ocean water as a supplement to traditional water supplies provided marine life and water quality can be appropriately protected. The Ocean Plan Amendment also provides uniform and consistent guidelines and requirements for permitting of seawater desalination facilities statewide moving forward. In doing so, it provides direction for the RWQCBs when permitting new or expanded facilities, and provides specific implementation and monitoring and reporting requirements. After receiving other necessary state and federal approvals, the Ocean Plan Amendment has been fully in effect since April 2016.

The Ocean Plan Amendment requires new or expanded seawater desalination plants to use the best available site, design, technology, and mitigation measures feasible to minimize intake and mortality of all forms of marine life, including benthic organisms. Based on the best available science, the Ocean Plan Amendment identifies preferred technologies; however, alternative intake and disposal methods can be used if demonstrated to be as protective of marine life as the preferred technologies. Additionally, mitigation measures are required in order to address harmful impacts on marine life that occur even after a desalination facility uses the best available site, design, and technology feasible. Feasibility considerations regarding site, design, technology, and mitigation measures take into account economic, environmental, social, and technological factors and whether something is capable of being accomplished in a successful manner within a reasonable period of time.

The Ocean Plan Amendment also includes very specific requirements for desalination that might affect an MPA, such as is the case here. And while the Ocean Plan Amendment “grandfathered” certain pending projects without the need to meet the new requirements, the project here does not meet those tests, is not grandfathered, and the current Ocean Plan Amendment requirements apply to it.²⁸ And those requirements indicate that the previously approved project cannot be

²⁷ Under the California Marine Life Protection Act passed in 1999, California began an historic effort to establish a science-based, statewide network of MPAs through a collaborative effort that includes the California Department of Fish and Wildlife and California Department of Parks and Recreation (State Parks). By protecting entire ecosystems rather than focusing on a single species, MPAs are powerful tools for conserving and restoring ocean biodiversity, while allowing certain activities such as marine recreation and research.

²⁸ Per the Ocean Plan, only desalination facility projects that have received all necessary permits, including CDPs, and that commenced construction prior to January 28, 2016 are so grandfathered, and this project has not received its CDP nor commenced construction (and is unable to commence construction in any case without a CDP and without meeting the pre-construction requirements of the CDP), and thus does not meet those criteria of the Ocean Plan.

approved consistent with the currently more stringent Ocean Plan. Specifically, desalination intake and discharge structures *are prohibited in MPAs* unless they can be constructed, operated and maintained without *any* marine life mortality. The Ocean Plan states (in Section III.M.2.b.(7)):

Ensure that the intake and discharge structures are not located within an MPA or SWQPA²⁹ with the exception of intake structures that do not have marine life mortality associated with the construction, operation, and maintenance of the intake structures (e.g. slant wells). Discharges shall be sited at a sufficient distance from an MPA or SWQPA so that the salinity within the boundaries of an MPA or SWQPA does not exceed natural background salinity. To the extent feasible, surface intakes shall be sited so as to maximize the distance from an MPA or SWQPA.

Thus, desalination intake, discharge, and other structures are not allowed in MPAs unless they can be constructed, operated and maintained without marine life mortality. To this point, the Ocean Plan explicitly references slant wells as an example of a type of project that may be able to meet such criteria (e.g., because slant wells can be constructed, operated and maintained in a way that does not even introduce project elements into the open ocean). Specifically, the approved project includes pipe extensions, a concrete vault, open water brine discharge, and an above-surface emergency intake that would cause construction-related mortality within the Edward F. Ricketts MPA and would not be allowed pursuant to the Ocean Plan Amendment per SWRCB and RWQCB staff.³⁰ Given that the desalination facility as a whole cannot function without these specific components, the desalination facility as a whole is rendered infeasible. It would be impossible to construct, operate and maintain such a system without marine life mortality, and the project thus is prohibited by the Ocean Plan. In addition, even projects allowable under the Ocean Plan (and this is not one of them) require discharges and surface intakes to be located outside of any MPA, and this project does not do that. As a result, staff from the SWRCB and the Regional Water Quality Control Board (RWQCB) (both of whom have regulatory authority over the desalination portion of the project under the Ocean Plan and the CMLPA), all concur that the desalination portion of the project cannot be constructed, operated or maintained consistent with the Ocean Plan or the CMLPA.³¹

This change in circumstance from the original CDP approval means the desalination portion of the project, which was perhaps the most controversial portion of the project when it was approved in 2008, including due to its impact to marine resources, cannot be built. Further, based on evidence in the administrative record, it does not appear that there are desalination options that *could* be found consistent with the Ocean Plan at this location, including because the granitic

²⁹ Per the Ocean Plan Amendment, State Water Quality Protection Areas (SWQPAs) consist of “Areas of Special Biological Significance” and “Marine Protected Areas” that require special protections.

³⁰ CDFW staff is still reviewing the project against the requirements of the CMLPA and the Ocean Plan (pers. comm. between Susan Craig (Central Coast District Manager) and Eric Wilkins, Senior Environmental Scientist Specialist, CDFW).

³¹ Personal communications between Susan Craig, Coastal Commission Central Cost District Manager, and (1) Daniel Ellis, Environmental Scientist, and Leslie Hart, Environmental Scientist with the SWRCB; and (2) Peter von Langen, Engineering Geologist, Central Coast RWQCB.

subsurface conditions underlying the site and the offshore area appear to make slant wells (or other subsurface options) infeasible.

Further, there do not appear to be any other options that may be available to the Applicants for water supply. In fact, the project EIR evaluated several alternatives for a potable water supply, including an onshore seawater well, a fixture retrofit program, and trucking potable water to the site. Each of these alternatives was rejected for feasibility, adverse impact, or regulatory reasons. Regarding the alternative of an onshore seawater well, the EIR concluded that this alternative was infeasible “given the site’s coastline location and the potential for seawater intrusion.” Furthermore, the EIR noted that no other wells are known to exist in the immediate project vicinity. The fixture retrofit program (for which the Applicant would cover the cost of installing water-saving fixtures elsewhere in Monterey, and transfer the water savings to the project) was determined to be unworkable because City and MPWMD policy stipulates that no water produced by fixture retrofit may be used for private commercial purposes (and such commercial uses are major components of the approved project). Finally, the mobile water supply (i.e., daily transport of water produced at wells outside the area and transported to the site via tanker trucks) was found to be infeasible for unidentified regulatory reasons. Also, this latter option was not authorized by the Commission in its approval.³² And the nearly 30 acre-feet of water per year is not an inconsequential amount of water to obtain.

Thus, the project does not have evidence of an adequate and sustainable water source, raising the specter that it cannot be found consistent with the Coastal Act in this regard (including Section 30250).³³

3. Coastal Hazards

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

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

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

³² Special Condition 2 of the approval (see **Exhibit 4**) requires a water supply contingency plan *only* in the event that the approved and constructed desalination facility does not provide adequate water for the project. And in such case, the condition requires that such water, whether supplied from within or outside of the coastal zone, shall not result in adverse impacts to coastal zone resources.

³³ And currently applicable conditions of approval cannot be met either on this point, including with respect to the required desalination plans (Special Condition 1), water supply contingency plans (Special Condition 2), and other agency approvals, including explicitly from RWQCB and CDFW (Special Condition 15) (see **Exhibit 4** for these conditions). Again, as indicated above, the Applicants have yet to submit any materials required by these conditions to date.

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

In addition to the above-identified changed circumstances regarding water supply, since the project was approved in 2008, there has also been a change in the Commission's understanding of the coastal hazards that affect the portions of the project site that are located on the seaward side of Cannery Row. Specifically, portions of the approved project are located in an area subject to wave run-up, especially during storms. Also, per the 2001 project EIR, the bayside portions of the project site are also subject to flood hazards from tsunamis and the lower level of one of the buildings (from the shoreline to approximately 20 to 60 feet inland) would be in an area that the Federal Emergency Management Agency maps as subject to coastal flooding. A separate project geotechnical report (not contained in the EIR) also evaluated potential impacts from a one-foot rise in sea level over the next 100 years. Commission staff (in 2007) requested, and the then-Applicant provided, an analysis of the potential wave run-up impacts to the project if a three-foot rise in sea level takes place over that time frame. In its 2008 approval of the project, the Commission, using the then applicant's three-foot rise in sea level, found that in the worst case scenario wave run-up across the shoreline would reach 31 feet above mean sea level (MSL). Building B of the project was approved with a three-foot-wide reinforced concrete ledge or "eyebrow" at an elevation of 31.1 MSL, which was designed to mitigate wave-run up impacts to the building. The history plaza would also get wet based on a maximum calculated wave run-up of 31 MSL. As approved, Building A would be designed so that waves would run under the structure and break, which the Commission found should dissipate the wave energy, and the Commission also found that the maximum wave crest (with a three-foot rise in sea level) should not cause damage to Building A. Persons using the lower-level promenade in Building A, the coastal access stairs, or the rocky shoreline at the project site would also be at risk during a storm or tsunami.

However, since 2008 when the Commission approved the project (based on a 2001 draft EIR and a separate 2007 geotechnical report), the Commission unanimously adopted a "Sea Level Rise Policy Guidance" document in August 2015. This document provides an overview of the best available science on sea level rise for California and recommended methodology for addressing sea level rise in Coastal Commission planning and regulatory actions. In November 2018, the Commission unanimously adopted a "Science Update to the Sea Level Rise Policy Guidance." The science-focused changes reflect recent scientific studies and statewide guidance that update our understanding of best available science on sea level rise projections relevant to California. The updated Guidance's sea level rise projection tables, which have been updated to reference the 2018 Ocean Protection Council's Guidance, estimate a significantly higher level of sea level rise in Monterey over the next 80 years than was evaluated by the Commission in its 2008 approval of the project.³⁴ In addition, other

³⁴ Applying the Guidance's "medium-high risk aversion scenario" (i.e., the 1-in-200 chance (or 0.5% probability of exceedance), which the Guidance suggests should be used for projects with greater consequences and/or a lower ability to adapt to changing sea level (such as this project), results in an estimated 6.9-foot sea level rise in Monterey by the year 2100.

evaluations and tools now being applied to this stretch of coast³⁵ indicate that a portion of the site will be affected by sea level rise and related effects potentially as early as 2030.

In short, the approved project relied on sea level rise information that is now outdated and obsolete, and current information suggests that the degree of threat to this site is much more severe than understood in 2008. This constitutes a critical changed circumstance affecting the approved project's consistency with Coastal Act's policies regarding coastal hazards (including Sections 30235 and 30253), particularly with respect to sea level rise.³⁶ At a bare minimum, and presuming the Applicants can identify an adequate and sustainable water source, these changed coastal hazard circumstances are likely to require substantial redesign of the project in order for it to be able to be found consistent with the Coastal Act.

4. Changed Circumstances Conclusion

In conclusion, the Coastal Act's CDP extension process allows the Commission to extend the expiration date of a CDP by one year, provided there are no changes in circumstances since the time of CDP approval that would affect the approved project's consistency with the Coastal Act. In this case, there are significant changed circumstances since the original CDP approval that not only affect the project's consistency with the Coastal Act, but that also will require fundamental project changes to allow for a CDP to authorize the project under the Coastal Act, most significantly the need for an identifiable and adequate water source of nearly 30 acre-feet per year in an area where there is not any water available for the project. Further, current sea level rise predictions mean that the current project will also need to fundamentally change in terms of its approach to addressing hazards. These are critical and fundamental changes that must be addressed for CDP purposes to ensure ongoing consistency with applicable Coastal Act policies. Thus, the Commission finds that changed circumstances exist that fundamentally effect the consistency of the project with the Coastal Act

Per the Commission's regulations, by the Commission finding changed circumstances the extension requests would be denied and the project would be reviewed de novo at a future date, after the Applicants have submitted the requisite filing fee, information to address the changed circumstances, and any other materials needed to provide the necessary data for Commission review. Here, the Applicants will need to submit not only the required fee (i.e., as explicitly required by the Commission's regulations),³⁷ but also evidence of an adequate water supply to serve the project, updated coastal hazard evaluations, and updated project plans responding to both. In addition, and given the scope of project changes that are likely to be necessary to allow

³⁵ For example, as part of the City's efforts to develop an LCP, in 2016 the City produced a sea level rise and vulnerability analyses document that includes illustrative maps that show portions of the seaward side of the project site being inundated in about the 2030 timeframe.

³⁶ And currently applicable conditions of approval cannot be met either on this point, including with respect to the required historic construction plans (Special Condition 4), public access construction plans (Special Condition 5), design plans (Special Condition 6), drainage plans (Special Condition 7), wave impact/tsunami plans (Special Condition 8) and construction plans (Special Condition 9) (see **Exhibit 4** for these conditions). Again, as indicated above, the Applicants to date have not yet submitted any materials required by these CDP conditions.

³⁷ 14 CCR Section 13169(d) states that "upon payment of the filing fee specified in [CCR Section] 13055(a) (i.e., the Commission's application fee schedule) of these regulations for an application for a coastal development permit the development shall be set for a full hearing of the Commission pursuant to Subchapter 1 of these regulations."

for Commission reconsideration of the proposed project, the Applicants will need to also provide evidence of current City of Monterey approvals for any such revised project. Specifically, the Applicants will need to provide the following as soon as possible to allow the Commission to consider the CDP application:

- A filing fee of \$100,000.³⁸
- Evidence of an adequate and sustainable water source, including submittal of all relevant authorizations necessary to allow construction, operation, and use of such water.
- An updated coastal hazard evaluation using the best available science.³⁹
- Updated proposed project plans responding to project changes required due to water supply and coastal-hazard-related project changes.
- Evidence of current City of Monterey approvals for the updated proposed project plans and supporting elements (including with respect to water supply)

After the fee and the above materials have been received, the application will be set for a new hearing in front of the Coastal Commission as is provided for by the Commission's regulations. Because the project was approved over 11 years ago, any further delay will only result in the potential for additional changed circumstances that will necessarily inform staff's evaluation of project consistency with the Coastal Act at the time that the requisite information is actually provided. For this reason, the Commission strongly encourages the Applicants to provide the identified material needed to evaluate the effect of the changed circumstances determination *within one year* and will follow up with the Applicants at period intervals to ensure timely submittal of the required information.

After the fee and the above materials have been received, the application will be set for a new hearing in front of the Coastal Commission as is provided for by the Commission's regulations. Because the project was approved over 11 years ago, and because the Applicants have not to date exhibited any significant due diligence towards meeting the Commission's CDP conditions with respect to actually initiating the project, the Commission is concerned regarding the potential for additional delay in providing the required materials. Thus, the Commission strongly encourages the Applicants to provide the required materials as soon as possible, including so as to allow a prompt resolution of issues. In addition, it is also possible that further delay will only increase the potential for additional changed circumstances that will necessarily inform staff's evaluation

³⁸ Based on the Commission's current fee schedule, the filing fee will likely be in the range of \$100,000 to \$150,000 and will be based on the number of residential units, the square footage of the commercial development, the cubic yards of grading, the subdivision of the property, and the development cost of the non-residential/non-commercial components of the project (e.g., the public park, history center, etc.). The fee may change based on the materials submitted, and the fee schedule in place when submitted. The exact required fee will be calculated when the Applicants submit a preliminary filing fee of \$100,000, and either a refund will be provided to the Applicants (if the required fee is lower than \$100,000) or an additional fee will be required of the Applicants (if the required fee is higher than \$100,000), where the latter will be required to be submitted as part of these required submittals.

³⁹ Using at least use the "medium-high risk aversion scenario" sea level rise estimate for Monterey described in the Commission's Sea Level Rise Policy Guidance.

of project consistency with the Coastal Act at the time that the requisite information is actually provided, and inform the Commission's evaluation when presented to the Commission at public hearing. For this reason, the Commission *strongly* encourages the Applicants to provide the identified materials needed to evaluate the effect of the changed circumstances *within one year*, and directs staff to follow up with the Applicants at appropriate intervals to ensure timely submittal of the required information, and further directs staff to bring potential issues regarding same to the Commission for resolution as needed.

Appendix A – Substantive File Documents

- CDP 3-08-013 file, including immaterial amendment A1 and extensions E1 and E2

Appendix B – Staff Contacts with Agencies and Groups

- City of Monterey Planning Department
- State Water Resources Control Board
- Central Coast Regional Water Quality Control Board
- California Department of Fish and Wildlife