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Via Electronic Mail

December 1, 2008

The Honorable Members of the
Santa Barbara County Board of Supervisors
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re: Miramar Beach Resort and Bungalows Project (08APL-00000-00036)

Dear Members of the Board of Supervisors:

We write on behalf of Jean and Stan Harfenist, as well as other homeowners who reside in close proximity to the proposed Miramar Beach Resort and Bungalows Project ("Project"). These homeowners have serious concerns about the approval process for the Project. In short, the record is clear that the County has prejudged this project from the start, promising the applicant that the project could avoid a time-consuming Environmental Impact Report (EIR) that would ordinarily be required under the California Environmental Quality Act (CEQA). Accordingly, the serious concerns about flooding and water resources, as well as other potentially significant environmental impacts, have been swept under the rug during the environmental approval process. The County's approval of this project without an EIR has resulted in inadequate analysis and numerous violations of CEQA. Furthermore, the Project does not conform to many requirements of the Montecito Community Plan or the Coastal Act. For these reasons, the approval of the Montecito Planning Commission is invalid. We urge the Board of Supervisors to send this project back to the Planning Commission for a complete environmental review.

I. Inadequate Environmental Review Under CEQA

The record before the County — and the record that will be presented to any court in the

inevitable litigation that would follow the County's flawed approval of the Project — makes patently clear that the County prejudged the Project and endeavored at every turn to manipulate the environmental process to speed the approval through and minimize the appearance of any environmental impact. From ignoring the comments of its own staff, to removing staff from the project who demanded too much from the applicant, the County has done everything within its power and beyond to grease the way for the Project's construction. It is incumbent upon the Board of Supervisors to turn a critical eye to the method in which this project was approved, to avert at the very least a serious erosion of public confidence in the integrity of the environmental approval process in Santa Barbara County.

A. The Caruso Project Is Not the "Same" as the Schrager Project and Requires a Full Environmental Review

To understand the errors in the Project's environmental review, it is necessary to understand the flawed edifice on which the review is constructed. Rather than view the Project — which proposes to demolish every existing structure on the site and to completely re-grade and re-contour the entire property — as a *new* project, the County elected to treat this project as a modification of an entirely different project, referred to as the Schrager Plan. The Schrager Plan, evaluated and approved by the County in 2000, involved operation of a hotel on the Miramar site. Unlike the Project, however, the Schrager Plan called for *preservation* of the existing buildings, leaving the site in a nearly identical configuration and primarily remodeling the interiors of the existing buildings. Because the Schrager Plan involved minimal change to the project and no additional unmitigable impacts, the County approved the project after preparation of a Mitigated Negative Declaration (MND). The Schrager Plan was never implemented, and the site remains vacant and unused. The County now seeks to essentially bootstrap an entirely different project onto that nearly decade-old MND by claiming that the Project is the same as the Schrager Plan.

The County Planning & Development Department's determination that the applicant's project is simply a "modification" of the Schrager Plan has no support in the record, and is contrary to case law interpreting CEQA. About the only thing that the applicant's project and the Schrager Plan have in common is that they are both called Miramar and are both hotels. Otherwise, the project is entirely different from the Schrager Plan: new buildings, more intensive intended uses (such as larger and more frequent events on the property and on the beach), and a completely new configuration of the site, including the topographic landscape. The Court of Appeal in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, recognized that, where a project is new and distinct from another project that underwent environmental review in the past, even where the new project proposed a use nearly identical to the prior project, an addendum is inappropriate. (*Id.* at pp. 1300-1301.) In analyzing the use of an addendum for a motel project proposed on the same site of an earlier, similar proposed motel project, the court rejected "the proposition that an addendum may be used if the project is replaced by another project that happens to be similar in nature." (*Id.* at p. 1300.) The court noted that the two projects had "different proponents and [that there was] no suggestion that the latter project utilized any of the drawings or other materials connected with the earlier project as a basis for the new configuration of uses." (*Ibid.*) The court concluded that it did not even need to reach the

question of whether the new project posed new significant environmental impacts under Public Resources Code section 21166 because, as a *new project*, independent environmental review was necessary. (*Id.* at p. 1301.) Just as in *Save Our Neighborhood*, the Project at issue here bears no physical relationship to the prior-approved Schrager Plan, and thus requires independent environmental review.

Even if the Project were related to the Schrager Plan, the use of an addendum is inappropriate. It is beyond question that if the Project were considered as a "new" project, appellants have presented a "fair argument" of environmental impact requiring the preparation of an environmental impact report. (See, e.g., *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th. 903, 927 [explaining that under the "fair argument" standard, an agency must prepare an EIR if substantial evidence shows that the project may have a significant effect on the environment, "even though it may also be presented with other substantial evidence that the project will not have a significant effect."].) The developer and County staff have argued that the fair argument standard is inapplicable here because the Schrager Plan has already been reviewed. However, the Schrager Plan was reviewed through a Mitigated Negative Declaration, not an EIR. Although the Court of Appeal in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, explicitly stated that under CEQA,"an addendum is ***only appropriate*** to a previously certified negative declaration where '***minor technical changes*** or additions are necessary'" (*id.* at 1400 [emphasis added]), the County has insisted that preparation of an Addendum is sufficient for this Project with respect to all issues except for historical resources. Yet "[t]he rationale for limiting the circumstances under which a supplemental or subsequent EIR may be prepared is 'precisely because in-depth review has already occurred . . . .'" (*Id.* at p. 1398 (quoting *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d. 1065).) And even though the County concedes that a supplemental or subsequent EIR is required to be prepared whenever the Project may produce "new significant environmental effects or a substantial increase in the severity of previously identified significant effects" (14 Cal. Code Regs., § 15162, subd. (a)), it has accepted at face value the developer's incredible and unsupported assertion that its proposal to demolish every existing structure on the site, to re-contour and re-grade the entire 16 acres, filling in the floodplain with some 46,100 cubic yards of dirt, and to completely redevelop the property with more than 400,000 square feet of new buildings, underground parking, and sound walls, will somehow produce not a single new significant effect on the environment.

CEQA was enacted to ensure that both the public and the relevant decisionmakers are made fully aware of the environmental consequences of a proposed project so that they may consider less environmentally harmful alternatives and, if such alternatives are not feasible, so that they may impose appropriate conditions and adopt necessary measures to mitigate the adverse environmental impacts. The failure of the County Planning & Development Department to require a comprehensive environmental impact report for this Project has denied the public the information to which they are entitled and, in the case of this Board, the information that you need in order to properly perform your responsibilities as decisionmakers. We urge you to demand a more complete environmental review than has been provided to date, and to insist upon a truly independent analysis from County staff, not the mere rubber-stamping of the developer's inadequate and biased analyses that is found in the current record.

B. The Project's Impacts Have Not Been Adequately Evaluated

The fundamental purpose of CEQA is to ensure that the environmental effects of a proposed project are considered by government decisionmakers and disclosed to the public. (Pub. Resources Code, §§ 21000, 21005.) By inappropriately using an Addendum instead of a full EIR, the County has failed to fulfill the evaluative and disclosure objectives of CEQA, and has inadequately evaluated the Project's environmental impacts. In each of the environmental impacts discussed below, the Caruso Project may have a significant effect on the environment, and the substantial changes proposed by the Caruso Project from the Schrager Project will involve new significant environmental effects or a substantial increase in the severity of previously identified significant effects. In addition, the Addendum's conclusions with respect to each of the above areas and impacts are not supported by substantial evidence. (14 Cal. Code Regs., §§ 15126.2, 15382.)

1. *Flooding and Drainage Impacts*

Perhaps no area more exemplifies the inadequacy of the Project's existing environmental analysis than its treatment of the drainage and flooding issues associated with the Project's plan to fill the nearly entire floodplain located adjacent to the west bank of the Oak Creek Floodway. As perspective on the implications of the plan to fill the floodplain, it is useful to review the history of the last major development in this area: the construction of the Montecito Estates condominiums and the placement of significant fill in the floodway. As far back as 1978, the U.S. Army Corps of Engineers provided a "Flood Hazard Evaluation for Oak Creek in Montecito, California." (See Exhibit 1.) That analysis noted that the area is "undesirable for development from a flood hazard viewpoint," and cautioned that the combined flows from Oak Creek and San Ysidro Creek during a 100-year storm would lead to flooding. (*Ibid.*) Specifically, the agency cautioned that the "flows in Oak Creek Channel should have access to a sufficient length of the railroad embankment to allow weir flow to occur without a significant rise in water surface elevation." (*Ibid.*) And if development were to "obstruct any portion of the weir flow across the railroad or cause any rise in water surface elevation," the Army Corps warned this "would cause more water to cross the railroad to the east increasing the flood hazard to homes along San Ysidro Creek." (*Ibid.*) Fast forward to 2008, and the applicant proposes to fill along the railroad embankment, precisely where the Army Corps warned would increase the risk of flooding.

The 1978 Army Corps warning was not the last time that the County has been informed that filling the floodplain in this area could have serious consequences, and that stringent review of any such proposal is required. In 1988, the County and the developer of the Montecito Estates condominiums sought to obtain a Conditional Letter of Map Revision from the Federal Emergency Management Agency (FEMA) in order to fill in the floodplain on the east side of Oak Creek. At that time, FEMA informed the County that the information it had submitted was insufficient to evaluate the impact of the proposed fill and channel improvements on the floodplain. (See Exhibit 2 [February 15, 1988 letter from John L. Matticks to Jeffrey B. Paley].) FEMA informed the County that significant additional data was required in order to

appropriately determine the base flood elevation. (*Id.* at p. 2.) Rather than provide that data, the County entered an agreement with the developer *waiving* the requirement that the developer obtain a map revision. (See Exhibit 3, p. 2 [February 23, 1988 memorandum].) The development proceeded without such a map revision, and presumably without the additional analysis necessary to determine what impacts that fill would have on flooding in the local area. Today, the Board of Supervisors is being asked to consider approving a project that will fill in the remaining floodplain in this area, and being told that it is *certain* that it will not cause a flooding problem. This issue has been swept under the rug too many times to rely on these assurances.

In spite of the serious concerns that have historically been presented to the County by the federal agencies responsible for flood control, the County has proceeded to approve the applicant's proposal to fill most of the floodplain on the Miramar site. The developer's engineer, Penfield & Smith ("P & S"), has submitted no less than ***seven*** different drainage and flooding reports; each time a flaw is discovered and pointed out in one of the reports, a revised report is submitted that nevertheless miraculously comes to the same conclusion. The chain of internal e-mails obtained from the County confirms that since July of 2007, the Engineering Manager of the Santa Barbara County Flood Control & Water Conservation District, Jon Frye, has been demanding additional watershed studies from the developer that would include a comprehensive analysis of how the San Ysidro Creek overflows would affect the Oak Creek area, and what would occur with the flood waters that, during a large storm event, would have flowed into the Oak Creek floodplain through and onto the hotel property, but which would now be prevented from doing so by the proposed walling off and filling of the retention pond that presently exists on the site. Tellingly, in late November 2007, Mr. Frye reported in an e-mail that he had specifically requested that P & S address the San Ysidro overflows (which the P & S engineer had personally observed in 1995) in its drainage report, but that the P & S engineer had responded that "his gut feel is that he doesn't think he can show no adverse impact."

As of February 2008, both Mr. Frye and another engineer in the Flood Control District confirmed that the P & S analyses contained a "fatal flaw," and the Flood Control District, through the Planning & Development Department, provided P & S with a list of some 17 additional issues that needed to be addressed or revised in its drainage and flood analysis. P & S's response was to request a meeting with Mr. Frye to discuss the list, because "there were some items listed that 'FC [Flood Control] just isn't aware of the implications.'" When Frye asked P &S's engineer to put his concerns in writing, he was told that "he's been directed by the developer not to put anything down in writing."

Apparently, a meeting was ultimately arranged for March 12, 2008, among the developer's representatives and County staff to obtain the developer's additional analysis of the drainage and flooding issues. On March 5, Jon Frye wrote to the Planning & Development Department [which had set up the meeting], quite sensibly asking that the developer submit to them whatever new information they had come up with *prior to* the meeting, so that they could review it and knowledgeably discuss it at the meeting. The developer, however, refused to do so, insisting that "he'd prefer to have the opportunity to present the information to you knowing that

you won't be able to respond as to the adequacy of the info during the meeting."

At about the same time, on March 11, 2008 — in response to the developer's request to Supervisor Carbajal and CEO Mike Brown to set up a meeting with County staff "to discuss unacceptable delays with the Miramar project" — Deputy Public Works Director Tom Fayram (with the concurrence of Director Scott McGolpin) prepared a draft letter to Planning & Development Department Director John Baker laying out "exactly where we are today and how this project moves forward from here." Mr. Fayram's draft letter explained:

> "[T]he Miramar project proposes to fill in the Floodplain, or also called the Floodway Fringe. County Ordinance allows this area to be filled in, as does FEMA regulations. The Floodway is identified as that portion of the floodplain that is not allowed to be obstructed. As defined, the [sic] when you fill in the floodway, it allows the flood elevation to increase, but only up to a maximum of 1 foot increase. It has been calculated that any more filling in of the Floodplain is not allowed.
>
> "Area residents have expressed concerns as to what the impacts of this would be on them. In fact, so did the Montecito Planning Commission. Flood made it clear to P&D that the Miramar can be approved as is under County Ordinances. However, if we wanted to determine what the impact of this filling is, then an additional analysis would be required. ***The earlier work by the applicant was NOT in concert with any standard manner to do this work. The applicant refused to do the work.*** In fact, unlike the hundreds of other projects I have worked on, the Applicant would not allow their engineer to talk to us. In one meeting we had with them, the meeting was of no use, because there was no exchange of information at all.
>
> "So what to do? The way I slice it, we have 3 choices. 1) just proceed and stand by the statement that the project does not fill the Floodway and conforms to County Ordinances; 2) Tell the applicant to do the required work and wait to go to PC until they did; or 3) do the analysis through the CEQA document with a 3rd Party Engineer.
>
> * * *
>
> "We just need to know what to do."

We don't know exactly what happened at the March 12 meeting or what Mr. Fayram was told to do, but immediately thereafter, he completely changed his position. Although the Flood Control District had previously insisted that P & S's use of the Santa Barbara Urban Hydrograph (SBUH) program to quantify the impact of filling the flood plain constituted a "fatal flaw" in P & S's analysis and had demanded that P & S instead use a HEC RAS approach for the entire analysis, on March 14, Fayram signed off on P & S's revised Oak Creek Flood Analysis, dated March 7, 2008, even though it continued to use the rejected SBUH program for much of its

analysis. More disturbing, in his e-mail to the Planning & Development Department approving P & S's conclusions, Mr. Fayram acknowledged that he had not himself analyzed or apparently even read P & S's complete report, but that "Craig Steward [the P & S Engineer] described the conclusions of the report followed by my review of *the Executive Summary*." (This is not surprising, since Mr. Fayram had all of a day and a half to analyze the revised P & S Flood Analysis before writing his March 14 e-mail.) And equally troubling, when Jon Frye, the Engineering Manager for the Flood Control District, was asked the next week by Planner Michelle Gibbs whether he concurred with Mr. Fayram's conclusion, he refused to reply, telling her that he had not reviewed it at all. As Mr. Frye explained his thinking to Mr. Fayram:

> "I don't want to review the study quite frankly. As you said this morning, it's the project engineer's responsibility to do the details correctly, and you have already reviewed the bigger picture stuff.
>
> "From another perspective, I prefer to have absolutely no comment to this study for the very reason that I haven't looked at it and I haven't looked at it because my boss did not direct me to look at it. That way, no matter who gets hold of me, I have nothing to say, good bad or indifferent."

These e-mails make clear that there has never been any meaningful review by the County of the drainage and flooding issues associated with the Project's proposed massive filling of the Oak Creek floodplain. Under CEQA, the County must apply its "independent review and judgment to the work product [of the applicant] before adopting and utilizing it." (*Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1452-1453.) It is most decidedly ***not*** solely the project engineer's responsibility to perform "the details," and the County cannot legally confine its review to "the bigger picture stuff." The County's handling of the environmental review and analysis for the Project makes a mockery of CEQA.

Furthermore, the County and the applicant have not fully disclosed to the public what the "fatal flaw" in the December 2007 P & S study was, nor whether it has been adequately resolved. For months, the County and the developer had refused to disclose what the "fatal flaw" was that the Flood Control District's engineers had identified in all of P & S's previous analyses, contending that the issue was irrelevant because the flaw had supposedly been cured in the revised March report. On September 30, 2008, Mr. Fayram finally revealed that the objection referred to P & S's use of the SBUH program rather than the HEC RAS approach. Yet Mr. Fayram fails to provide any explanation for why the Flood Control District has suddenly reversed its position and has now concluded that SBUH is "an approved approach to determine the increase in flood level." And now the applicant apparently contends that Mr. Fayram is *wrong* about the "fatal flaw" that his own staff identified. (See November 6, 2008, DLA Piper letter, p. 2.) The applicant claims that Mr. Fayram misunderstood "the application and use of HEC-RAS in the Oak Creek model." (*Ibid.*) The applicant appears to claim that the fatal flaw was Mr. Frye's failure to use a high enough flow rate in his tests to show a detectible impact from the project. (*Ibid.*) What is clear from the applicant's letter is that the issue of the "fatal flaw" in the flooding analysis remains as unresolved today as it has since it was first pointed out by Mr. Frye

in July 2007. The applicant cannot credibly claim that the CEQA objectives of full disclosure have been met, nor that the record fully discloses this dispute between experts, if this issue remains unresolved at this late stage in the approval process.

The degree to which serious issues remain unresolved shows in the final work product. As the study from Pacific Advanced Engineering, Inc. (PACE) attached as Exhibit 4 indicates, numerous analyses in the P & S March 7, 2008, study "were either erroneous or incorrectly performed which led to erroneous or incorrect engineering findings and bases of design." (Exh. 4, p. 1.) The P & S hydrology study fails to account for the existing retention basin on the grounds of the Miramar. Most critically, the study does not accurately account for the existing hydraulic restriction associated with the channel between the residences located adjacent to Oak Creek on Posilipo Lane. Because the channel is so narrow, in heavy storm conditions water backs up behind the Union Pacific Railroad bridge. Water surface levels rise, and water spills over the west bank of the Oak Creek channel and into the floodplain on the Miramar hotel site. Water remains in the floodplain until volume in Oak Creek is reduced, when water flows back into Oak Creek, percolates into the ground, or evaporates. The failure of the March 2008 study to adequately account for the present day function of the floodplain "results in a gross misstatement of the impacts that [the Project] will have on the downstream property owners." (*Id.*, p. 2.)

Similarly, both the hydraulic and hydrology studies fail to correctly model the capacity of the culvert underneath the U.S. 101 Freeway. According to PACE, "[t]his erroneous miscalculation of the actual culvert condition results in a gross misstatement of the conveyance capacity and hydraulic performance of the existing SR 101 Freeway culvert. . . . This error fails to acknowledge the reason for the documented flooding of the SR 101 Freeway in this area." (Exh. 4, p. 3.) Moreover, the flooding of the highway is not the only condition affected by this major analytical error. Because the culvert is too small to hold all of the water in Oak Creek during significant storm events, that water leaves the channel and flows overland across the 101 Freeway. Not all of this water returns to the Oak Creek channel. Some of this water is currently conveyed to the low lying floodplain area on the grounds of the Miramar Hotel, precisely what the applicant now proposes to fill. PACE comments that a model should be prepared showing the present-day and projected flow for overtopping of the 101 Freeway. Without such a study, "the actual volume of water that is conveyed to the existing depression/basin within the existing Miramar Hotel site via overland flow has not been determined." (*Id.*, pp. 3-4.) PACE states that this is again "a gross oversight" which causes "erroneous conclusions regarding the existing condition of the watershed conveyance mechanisms and comparatively inaccurate conclusions regarding the impact that [the Project] will have on SR 101 Freeway flooding depths and the existing nearby residences both upstream and downstream of the project site." (*Id.*, p. 4.)

Although the applicant attempts to dismiss the PACE study as irrelevant, its comments simply reveal that the applicant's consultant fundamentally misunderstands the nature of the flooding risk in this topographic setting. The applicant's primary critiques of the PACE analysis are that it purportedly assumed that water from Romero Creek flows into Oak Creek, and that it is unnecessary to consider the size of the 101 Freeway culvert to accurately assess the impact of

filling in the floodplain on the Miramar site. As the letter attached as Exhibit 5 demonstrates, neither concern is well-founded. As for the first concern, regarding Romero Creek, PACE points out that its study is based on the conveyance capacity of Oak Creek, regardless of the source of the water. (Exh. 5, p. 1.)

This observation leads to the flaw in the applicant's critiques — the applicant's ignorance of the actual capacity of the freeway culvert results in an inaccurate depiction of the present day water flow regime, and prevents any understanding as to how that regime will be affected by the proposed fill. "A failure to model the actual existing condition demonstrates a failure to recognize the importance of correctly determining how much water can actually be conveyed within the banks of Oak Creek." (Exh. 5, p. 2.) Further, "[t]he actual baseline existing condition must be established correctly in order to provide a true evaluation of the impact that the proposed project would have on the watershed drainage/conveyance deficiencies and resultant flooding." (*Ibid.*)

PACE explains the role of the freeway culvert in an appropriate analysis. Because the culvert serves to regulate flow from the north side of the freeway across to the south, its limited capacity dictates the volume of water that will remain in the Oak Creek channel. (Exh. 5, pp.1 - 2.) All of the water that cannot be accommodated in the under-sized culvert will overtop the freeway — yet not all of this water will be conveyed into the Oak Creek channel. (*Ibid.*) As PACE explains:

> "Since the general relief of the land is from northerly to southerly, from the coastal hills and mountains to the ocean, the storm runoff that overtops the northerly side of the freeway is conveyed southerly across the freeway toward the existing Miramar Hotel site. The existing topographical sump area provided within the Miramar Hotel site provides depression storage . . . . If the proposed site plan were to remove this depression storage, then the result would be the elimination of temporary storage area in the depression or basin, which ***would increase flooding elsewhere.***" (*Id.*, p. 2.)

So it is critical to understand where the water that cannot fit into the limited freeway culvert is currently traveling, and where it might be able to travel once the floodplain has been filled. Even if Oak Creek could, in theory, hold all of the water in the worst-case scenario, if that water is naturally directed elsewhere, the theoretical analysis is useless.

In fact, PACE explains that the planned fill and development on the Miramar site *will* direct water in ways that will increase flooding upstream of the project:

> "The proposed improvements will eliminate the peak attenuating affects that depression storage provides to the watershed(s) runoff hydrograph. If that attenuation is eliminated by removing the existing natural temporary depression/basin storage that is provided in the sump of the Miramar Hotel site, then the peak will be translated downstream of the existing channel constriction

> which will result in a relative increase in the design storm HGL (water surface profile) and cause a backwater condition to propagate upstream since the system operates in the subcritical flow regime. ***This backwater condition will result in increased flooding depths upstream and possibly farther spreading than historical flooding.***" (*Id.*, p. 1.)

The applicant's disregard for the likely impacts of its fill plan is blatant. As PACE points out, "[t]he major concern for this project, from the perspective of those already living nearby the site is that their homes and lives could be placed in even greater peril and they can experience an even greater likelihood of flooding by the proposed elimination of the depression storage that is provided by the existing site. It is imperative that the project engineer understand the gravity of ignoring or overlooking the operation of the existing overall system. This leads to an erroneous conclusion that the proposed condition would not affect the nearby homes." (Exh. 5, p. 4.) This erroneous conclusion could be devastating for those property owners whose homes will be affected — and it is not yet known precisely who might bear the brunt of the impact of this shoddy, inaccurate analysis.

In sum, there can be little doubt on the record before the Board of Supervisors that serious concerns have been raised, both by outside engineers and by County employees themselves, that the developer's analytic approach to determining the potential impacts of the Project's proposal to fill in the floodplain is severely flawed, and that the true impacts of the Project remain unknown. This is exactly the type of issue for which the preparation of an EIR is required by CEQA.

2. *Traffic*

Similarly, the traffic impacts of the proposed Project have not been adequately analyzed. Instead, the traffic analysis relies on a patchwork of traffic counts and inconsistent traffic data. Attached to this letter as Exhibit 6 is a review of the Project's traffic studies, including all relevant comments and responses, prepared by Hansen Associates. Hansen Associates concludes that "it does not appear that a comprehensive traffic impact study was prepared for [the Project]." (Exh. 6, p. 4.) The theme of the existing, incomplete traffic study and the responses to comments noting its deficiencies is that the Project will generate less traffic than the thresholds of significance, so no further study is supposedly needed. Such an attitude is contrary to the mandate of CEQA.

Of course, if the foundation for the determination of traffic impacts is flawed, the conclusion that the Project is operating under the thresholds is flawed as well. As the Hansen Associates review notes, the traffic counts on which the determination of impact is based were conducted in 1998 and 1999, approximately 10 years ago. (See *id.*, p. 3.) The traffic study does not factor in traffic from other approved developments or from annual growth in its analysis at any study intersections. It is important to recall that there has essentially been no traffic to or from this property for over *eight years*. Regardless of how many trips over and beyond the Schrager Plan the Project will add to the neighborhood, it will add at least 166 PM peak hour

trips that at present do not exist in the area. An analysis that evaluates current traffic levels and assesses how the *total* number of new trips will affect area intersections is thus critical. Furthermore, the traffic study fails entirely to analyze weekend traffic, including the impact of huge special events. Because the applicant proposes to host events for 500 people, it can reasonably be anticipated that these events will generate significant traffic on weekend days and evenings. In combination with summer beach traffic, this increased traffic could have the potential to cause serious impacts on local area intersections.

The traffic study also fails to adequately analyze impacts associated with the U.S. 101 freeway and its on- and off-ramps, in a section of the freeway that is already quite congested, according to CalTrans' May 15, 2008, comments. There has been no analysis of the merging issues at any of the on- and off-ramps on U.S. 101, including those associated with the Southbound 101 on-ramp at South Jameson, despite CalTrans specifically commenting upon this failure in its May 15, 2008, letter. CalTrans noted that this on-ramp appeared to be non-standard length and thus raised particular safety concerns. There has been no response to this concern provided by the applicant or the County. What's more, although traffic counts conducted in 1999 revealed that the intersection of San Ysidro Road and the US 101 Southbound off-ramp operated at LOS F, the applicant decided that new traffic counts were warranted for this intersection. Conveniently, however, this count excludes hotel traffic that would have been included in the baseline for the Schrager Project. The new count shows traffic at this intersection operating at LOS C. Hansen Associates notes that hotel traffic must be factored into these counts in order to give a more realistic and accurate LOS during peak hours. (*Id.*, p. 3.)

Finally, the traffic study fails to adequately analyze the impacts of construction traffic. Although construction traffic is required to depart after 3:30 p.m., coinciding almost perfectly with PM Peak Hour traffic at 4:00 p.m., construction traffic is not factored into the analysis at any study intersection. This is yet another example of the way in which the environmental review conducted for the Project repeatedly attempts to minimize or ignore potential impacts, and another reason why full review in the form of an Environmental Impact Report is required.

3. *Water Resources and Water Supply*

As has been detailed in comments by the Coast Law Group (see October 7, 2008, CLG letter, pp. 4-8), the environmental analysis does not meet the standards for water supply analysis required under CEQA. As with most of the analyses of the Project, the analysis of the water use of the Project has been repeatedly revised with little detailed analysis provided to the public. In the original Addendum, the Project's water needs were estimated to be 117 acre feet per year. While the Montecito Water District (MWD) declared its intention to serve the Project's needs in May 2007, it revised its assessment of the Project's water needs substantially downward in July 2008, revising the *applicant's estimate* of its water consumption from 117 acre feet per year to 45 acre feet per year — without a single change in the Project's design. This revised estimate is not based on design specifics regarding the types or quantities of fixtures that will be utilized in the Project, nor is the analysis based on a "water supply and peak demand study," required by the MWD's conditions of approval. And even with the revised estimate, the MWD has stated that

"there is no guarantee" that it will be able to provide the Project with its water needs, given the drought conditions and long-term uncertainties in the District's future water supply. (Testimony of General Manager Tom Mosby, August 28th MPC hearing video, Part III, 6:00.) Yet the Revised Addendum simply states that the MWD has a commitment to serve its customers and that this commitment is sufficient for a determination that the Project will not have a significant effect on groundwater — it does not even address water resources generally. (Revised Addendum, p. 52.) The applicant concedes that it does not have a guarantee of service but contends that the construction of the Project does not constitute a significant change in the water supply needs from the Schrager Plan. (November 6, 2008, DLA Piper letter, p. 10.) Without specific details — details that are completely absent from the Addendum — it is impossible to know whether this statement is accurate. The analysis provided fails to meet the standards required by CEQA.

Furthermore, CEQA requires more precision in the analysis of water resources. Although the applicant attempts to disclaim the applicability of the Supreme Court's water analysis standards by suggesting that such standards apply only to "analysis of water supply impacts for a large, multi-phase project" (November 6, 2008, DLA Piper letter, p. 10), this distinction is invalid. The standards for water analysis are set forth in *Vineyard Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, and while the Court notes that there are specific requirements for analysis of projects that will take a number of years to fully develop, and that a limited amount of uncertainty is permissible for projects *early in the planning stage*, nowhere does the opinion limit its application to large projects or suggest that a project well beyond the conceptual planning stage such as the Miramar is exempt from its requirements. The opinion plainly states that "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" (*Id.* at p. 429 (quoting *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829).) "[T]he future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA." (*Vineyard Citizens*, 40 Cal.4th at 432.) It is beyond clear that specificity is required in analyzing the availability of sufficient water for any land use development. The sparse analysis in the Addendum and the reliance upon untested mitigation measures such as the Ordinance 90 rate structure is insufficient under these exacting standards.

4. *Noise Impacts*

Like many aspects of the Project, it is nearly impossible to pin down just what the Project's impacts to noise might be. While the September 25, 2008, Revised Addendum discusses — and dismisses as insignificant — the impacts to neighboring residents from pile driving activities for the beachfront bungalows, the newly Revised Addendum states that the project has been modified to eliminate the pile driving and to utilize Torque Down 1275 piles. The applicant appears to have recognized that asking residents to leave their homes or endure exceedingly high volumes of noise was an inappropriate Hobson's choice. This appears to have

been a voluntary concession by the applicant, and not a response by the County to the lack of enforceable mitigation measures for the pile driving impacts. Appropriate mitigation is still called for due to the high noise levels from the Torque Down 1275 piles driven as close as 25 feet to residences. Assuming that the alternative proposal does eliminate noise impacts, the new information on the pile driving alternative is too recent to be evaluated, and thus it is unknown whether there are no impacts from the alternative proposed.

5. *Other Impacts*

In numerous other areas, the Addendum fails to provide adequate analysis of potential impacts. These include sewage treatment, land use and visual resource impacts, greenhouse gas impacts, drainage and water quality impacts, and coastal erosion. In brief, as to drainage and water quality impacts, the environmental analysis relies sight unseen upon the developer's say-so that a drainage system will handle and adequately treat runoff from the site. On greenhouse gases, the environmental document essentially relies upon a *lack of knowledge* of the thresholds of significance to conclude that the project will have no impact. This is a blatant disregard of the County's duty to gather relevant data and base its determination on meaningful analysis. Land use impacts will be discussed in detail below, as these impacts stem largely from the project's complete disregard (and the MPC's complicit acquiescence) of numerous requirements and restrictions of the Montecito Community Plan.

C. Project Review Has Been Illegally Segmented

The County's decision to rely upon the MND for the Schrager Plan represents bootstrapping of the worst kind. The County and the applicant rely upon the fact that a prior project planned for the site had no impacts in order to evade review of a large new project with significant impacts. The effect of this bootstrapping is to illegally segment the review of the Project into a review of the Schrager Plan, and a scaled down look at isolated impacts of the Project. Appellate decisions have concluded that "[a] public agency is not permitted to subdivide a single project into smaller individual subprojects in order to avoid the responsibility of considering the environmental impact of the project as a whole." (*Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171.) In *Orinda,* the Court of Appeal noted that a public agency could not issue a demolition permit for a project before the impacts of the demolition were analyzed during the CEQA process. (182 Cal.App.3d at p. 1172.) The court noted that "[t]he requirements of CEQA cannot be avoided by chopping up proposed projects into bite-sized pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." (*Id.* at p. 1171.) The County has, by relegating a significant aspect of environmental review of the Project to the review conducted for the Schrager Plan, illegally segmented the review in violation of CEQA.

D. Environmental Review Is Conducted Upon an Improper Baseline

Establishing the baseline of the environmental setting for a project is critically important for an accurate analysis of a project's impacts under CEQA, regardless of whether the analysis is

conducted in an MND or an EIR. The impact the project will have if approved is determined by comparison to the environmental baseline. If the baseline under- or overstates the existing environmental conditions, an incorrect yardstick is used to assess the impacts, making the entire environmental assessment inaccurate. The CEQA Guidelines establish that the baseline environmental conditions for a project are to be calculated on the basis of existing conditions at the beginning of environmental review. (14 Cal. Code Reg., § 15125(a).)[1] Courts have minced no words in articulating the importance of an accurate environmental baseline: "Without a determination and description of the existing physical conditions on the property at the start of the environmental review process, the EIR cannot provide a meaningful assessment of the environmental impacts of the proposed project." (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 119.) Further, "the impacts of the project must be measured against the 'real conditions on the ground.'" (*Id.* at p. 121 [citation omitted].) Yet here, the baseline utilized is the approved Schrager Plan. The impacts of developing this entirely abandoned site are being measured as if the site contains a fully operational hotel. What's more, the baseline utilized is not even the *approved* Schrager Plan, but the "worst-case" plan that was modified over time to become less intrusive. The baseline thus makes the Project's impacts appear less significant by comparison to an artificially-inflated "present day" that bears no relation to the actual activities on the site.

E. The Project Description Is Deficient

CEQA requires that the project description contain a summary of the proposed action and its consequences, including "[a]reas of controversy known to the Lead Agency including issues raised by agencies and the public." (14 Cal. Code Regs., § 15123, subd. (b).) CEQA also requires that the EIR contain "[a] general description of the project's technical, economic, and environmental characteristics." (*Id.* at § 15124, subd. (c).) The SEIR's project description is deficient because it does not meet these basic standards. It fails to disclose known public controversies regarding water supply, flooding, and impacts to land use and visual resources. It also fails to provide even a basic description of major components of the Project, including the plan to fill in the floodplain and to construct a retaining wall to protect this newly elevated area. These deficiencies render the SEIR legally inadequate.

F. The SEIR Contains Inadequate Analysis of Historic and Cultural Resources and Incomplete Consideration of Alternatives and Mitigation Measures

The environmental review of one area that the County deemed sufficiently changed so as

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[1]Although this requirement specifically refers to an EIR, courts have applied this same provision in the context of negative declarations, noting that "section 15125 of the Guidelines supplies the definition of 'environmental setting' against which environmental impacts are measured at each of the three steps in the CEQA process." (*Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278.)

to require a full EIR — historic resources — suffers from the same lack of comprehensiveness that pervades the entire Addendum. The analysis of the impacts on historic resources, and, most notably, the analysis of alternatives, is cursory and dismissive of any suggestions that might inconvenience the applicant. The EIR concludes that the project will have an unavoidable significant adverse impact on historic resources — a nearly foregone conclusion since the project involves the *destruction of every historic structure on the property* (structures which would have been preserved under the Schrager Plan, of course). Several commenters offered suggestions that might enable the County to *preserve* some small aspect of these historic resources, such as restoring or recreating a small number of the original cottages in a convenient location on the project site or in an alternative location. (See, e.g., Comment 12a & 47a.) These commenters included the County Historic Landmarks Advisory Commission. (Comment 47a.) The SEIR's response to these comments was simply that it would forward the comment to the Planning Commission for consideration. Such a dismissive response hardly meets CEQA's standards, which require the response to comments at variance with the agency's position to contain a detailed response explaining why comments and suggestions were not accepted. (14 Cal. Code Regs., § 15088.)

The lackluster analysis continues in the SEIR's discussion of alternatives. The SEIR discusses the feasibility of replacing or restoring the historic structures on-site, concluding that this is infeasible because the applicant's plan would have to be redesigned to accommodate the historic structures, which would interfere with the applicant's objective of creating an open site, and because many buildings could not be restored or brought up to modern code requirements. The SEIR does not evaluate the possibility of restoring a smaller subset of the cottages, as suggested by commenters, simply concluding that it is infeasible to restore *all* of the cottages. This is an abject failure to assess the viability of a reasonable alternative. The other alternative discussed in the SEIR is the feasibility of relocating the historic structures off-site. The SEIR provides almost *no* discussion of this alternative, simply stating that there is no off-site location for the cottages and that the cost of rebuilding the cottages would be exorbitant. There is no analysis of the benefits of relocating and restoring a subset of the cottages. The discussion of alternatives fails to meet the objectives of CEQA that decisionmakers receive sufficient analysis of alternatives for informed decisionmaking.

G. The County Has Not Adequately Considered Alternatives

A key function of an EIR "is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197.) The environmental review for the Project fails to consider an adequate range of alternatives. Because the SEIR evaluates *only* those alternatives pertaining to historic resources (and does not even do a sufficient job of evaluating those, as discussed above), it fails to evaluate alternatives that will eliminate the Project's likely impacts on flooding, water resources, traffic, and visual resources. The SEIR is therefore inadequate.

H. Analysis of Cumulative Impacts Is Deficient

The Public Resources Code specifically requires that agencies consider the cumulative effect of proposed projects. (Pub. Resources Code, § 21083, subd. (b)(2) [" The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, 'cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."].) The environmental review for the Project fails to consider the cumulative impact of the Project and other projects in the area when considering the analysis of traffic impacts. As discussed above, relying on a traffic study that is based upon 10-year-old traffic counts presents a distorted picture of the Project's likely impacts. Such an analysis not only fails to consider the cumulative impact of *future* projects, it fails to consider the cumulative impact of projects constructed in the last 10 years. The analysis of the cumulative impacts of traffic is inadequate.

I. Responses to Public Comments Have Been Inadequate

CEQA requires that an agency's written responses to comments provide a description of the significant issues raised by the comments and, particularly when the opinion in the comments varies from that of the agency, the agency must address the comments in detail and provide a good-faith reason why specific comments and suggestions were not accepted. (14 Cal. Code Regs., § 15088; see *id.*, § 15202.) The County's responses to comments here are inadequate. As an example, in response to appellants' concerns regarding the previously mentioned "fatal flaw" in the applicant's flooding analysis, the County responded, "The comments related to drainage and flooding are not addressed to the latest Drainage report (March 7, 2008). Comments relative to earlier report are irrelevant in that the March 7, 2008 report supersedes the previous reports and focuses on the current project." (Response to Comment 8h.) In the context of appellants' comments — concern that the new study did not address the flaws in the prior version — the County's response is stunningly devoid of any substance. Pretending that the prior version did not exist is not an option: that study is part of the record, and comments that relate to the prior study are relevant. This attitude indeed assures that "stubborn problems or serious criticism [*is*] swept under the rug." (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1240.)

J. The Environmental Review Fails to Disclose Disagreements Among Experts

Neither the SEIR nor the Addendum meets the requirement under CEQA that an EIR "summarize the main points of disagreement among experts." (14 Cal. Code Regs., § 15151.) As discussed above, the record contains evidence of disagreement among experts with regard to flooding and traffic impacts. The environmental documents fail to disclose any aspect of this disagreement. The applicant appears to believe that simply because a local environmental group was able to submit a lengthy appeal letter (November 6, 2008, DLA Piper letter, p. 21), that the informational purposes of CEQA have been satisfied. This would be a perverse conclusion at

best — the only reason that much of the information in appellants' appeals has been produced for the record are appellant's own efforts to obtain information that would otherwise never have been disclosed. CEQA requires that the environmental document contain this information — the public should not have to sift through the voluminous administrative record to uncover the fact that there is a difference of opinion among experts about the potential severity of an environmental impact.

K. The County Has Not Applied Independent Review to the Work Product of the Applicant

As detailed in the discussion of Flooding and Drainage Impacts, above, the applicant's consultants' efforts to evade the requests of County staff in analyzing the impacts of filling in the floodplain belie the applicant's assertion that the County has applied its "independent judgment" to the approval process. Indeed, the emails from the County Flood Control Department reveal an astonishing lack of independent judgment as Mr. Fayram changed course 180 degrees following a meeting with the developer's consultant — a meeting in which he was presented with a report that the consultant *deliberately* withheld so as to *limit* the ability of the staff to adequately review it — and then, on the basis of a review of the *Executive Summary*, concluded that staff's previous concerns about the report were no longer salient, and that the analysis adequately revealed that there would be no impact. Even more tellingly, when requested by Planner Michelle Gibbs to review the study, Mr. Frye stated, "I don't want to review the study quite frankly. As you said this morning, it's the project engineer's responsibility to do the details correctly, and you have already reviewed the bigger picture stuff. . . . That way, no matter who gets hold of me, I have nothing to say, good bad or indifferent." This is an utter abdication of the County's duty to independently review the analysis of the applicant. Closing one's eyes and wishing that someone else could handle the details — or the extreme political pressure — is simply not acceptable under CEQA.

L. The County Unlawfully Pre-judged the Adequacy of the Environmental Documentation

Beginning with the "Miramar Hotel Project Charter," dated July 24, 2007, it has been clear that the County and the applicant never intended to prepare an EIR for the project. While the timeframe established in the charter nominally provides for an eight-week period during which the County would conduct an initial study and determine what environmental review would be required, that same timeline allows only *two weeks* for the preparation of the environmental document. There is little doubt that the signatories to the "Charter" — the developer and the County agencies with jurisdiction over the Project — already had determined that an EIR would not be required for the Project.

II. Non-Conformance with Montecito Community Plan and Coastal Zoning Ordinance

Not only does the Project's approval fail to meet the substantive and procedural standard

of CEQA, it also fails to conform to the requirements of the Montecito Community Plan and the Coastal Zoning Ordinance. The MPC's approval of the Project allows the applicant to violate numerous restrictions and limitations in the plan without adequate findings to support such relief. As such, the MPC committed error of law and abused its discretion under the Montecito Community Plan, the Montecito Land Use & Development Code, and the Coastal Zoning Ordinance.

A. The MPC Has Granted Numerous Unsupported Modifications

Purporting to act under the authority of the Coastal Zoning Ordinance (Ch. 35, art. II, § 35-174.8), the Montecito Planning Commission (MPC) issued several "modifications" to the zoning requirements of the Montecito Community Plan. These modifications are outside of the MPC's authority.

The Modification provision of the Coastal Zoning Ordinance places conditions on the circumstances under which a modification may be granted for a Development Plan. A modification can only be granted if the project "justifies" relief from the applicable requirements. Such a limitation on the award of modifications is necessary in order to ensure that the zoning provisions set forth in the Montecito Community Plan are routinely given effect, and only modified where conditions on the site require it. As one court explained, if the interest in "preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1009.) The MPC granted multiple modifications to the Project: several modifications to the applicable height limit, to setback requirements in multiple locations, and to parking requirements. The MPC justified these modifications by claiming that each aided in the Project's objectives of "site uniformity and site layout," "to create a cohesive design," and "to increase public beach parking." What these justifications boil down to, in essence, is that the applicant designed a project that did not meet the limits, and the MPC is agreeing to accommodate the applicant's design preferences. The findings in support of these modifications to the height limits, setback requirements, and parking standards contain no support for these statements and thus constitute an abuse of discretion by the MPC.

1. *Modifications to Applicable Height Limits Are Not Justified*

Under the Montecito Community Plan Overlay District, various structures planned for the site fall within either a 35-foot height limit or a 16-foot height limit. (Montecito Community Plan, §§ 35-208.2(1), 35-204(1).) The MPC awarded modifications of the 35-foot height limit for the Main Building and the Ballroom, allowing 46- and 41-foot buildings, respectively. The relaxation of height limits for both buildings relies upon the use of underground parking. The findings do not state that it would be infeasible to construct underground parking as well as the associated structures within the specified height limits. The justification for the Main Building also notes that the tallest portion of the building is set back from South Jameson Road — however, the applicant simultaneously received a setback modification for this building!

The Beach and Tennis Club required a modification to permit a 26-foot building where only 16 feet are allowed. The justification for nearly doubling the height limit is to increase "open space views." There is no discussion why such a large structure improves "views." The evidence in the record does not support the justifications for the height limit modifications for any of these structures, and thus reflects an abuse of discretion by the MPC.

2. *Modifications to Setback Requirements Are Not Justified*

As with height limits, the evidence in the record fails to justify the use of modifications for the setback requirements for "a number of buildings." The justification for such modifications is the Project's site design. The justifications note that these setbacks are in some instances less than those that would have been required for the Schrager Plan. This is no justification. The Schrager Plan preserved *existing* buildings in place. These structures pre-dated the setback requirements. Where, as proposed here, the applicant is razing all of the structures, the fact that the applicant is intruding less into the setback than under the Schrager Plan is totally irrelevant. What's more, the reliance on the limited setbacks on other properties in the area illustrates the devastating slippery slope of such modifications. With no more than a vague reference to other properties in the area that may have setback modifications, this modification will establish yet another precedent allowing the next project to claim that other properties have setback modifications, each instance decreasing the likelihood that any future applicant will construct a project within the setbacks. The setback limits will become meaningless if they are so blatantly violated.

3. *Modification to Parking Regulations Is Not Justified*

The most logically flawed of the justifications for the Project's modifications are those justifying the reduced parking the Project will provide. Under the Montecito Community Plan, the Project is required to provide 639 parking spaces, of which the Project provides only 551, with an 88-space shortfall. Incredibly, the justifications for this modification is the ***increased public beach parking*** that will be provided! If the Project provides *less parking* than is called for by code, the reliance on *increased public parking* is illusory at best. The findings also rely on the faulty premise that the use of the Project is of the same intensity as the Schrager Plan. Of course, this is not true. The Project proposes larger and more frequent special events, which are a major generator of parking demand at a hotel. The findings do not justify relief from the requirement to provide the 639 parking spaces required by code.

B. The Project Is Not "Cottage Style" Architecture

The Montecito Community Plan and the Montecito Architectural Guidelines require that improvements to hotels be "consistent with the existing historic 'Cottage Type Hotel' tradition from the early days of Montecito." (Montecito Arch. Guidelines, § V.B.3.a.) The code defines the "Cottage Type Hotel tradition" as cottages limited to six units per cottage, with two-thirds of structures housing guest rooms to be 16 feet or less in height. The Project does not meet these requirements. The applicant tries to disguise the fact that it does not come within these standards

by creating a fake "single" building (Building 44) that is in reality three buildings connected by enclosed catwalks. These buildings are not "attached buildings" under the Coastal Zoning Ordinance definition: "[a] building having at least five lineal feet of wall serving as a common wall with the building to which it is attached." (Santa Barbara County Code, Ch. 35, art. II, § 35-58.) Because Building 44 is definitionally not a single building, it cannot be counted as such for purposes of the two-thirds requirement. Because Building 44 is actually three separate multi-story buildings, the Project's guest room makeup consists of 26 buildings, only 16 of which will be one story. This does not meet the requirement that two-thirds of the buildings are under 16 feet in height. The MPC has allowed the applicant to engage in a bit of architectural fiction in order to justify construction of a project that is not compatible with the historic Cottage Hotel tradition.

C. The Project Exceeds the Permissible Floor Area Ratio by Impermissibly Including Parcels on Which Development Is Prohibited in the Calculations

The applicant has included ***two*** inappropriate parcels in the calculations of floor area ratio (FAR): Parcel 6, the sandy beach area; and Parcel 11, the easement across the Union Pacific railroad. Although the MPC had been expressly cautioned that neither of these parcels should be included in the FAR calculations, it approved the Project with a FAR ratio that exceeds the 0.25 limit imposed in the Coastal Zoning Ordinance. (Ch. 35, art. II, § 35-203.)

The Coastal Zoning Ordinance defines FAR as: "[a] measurement of development intensity represented by the quotient of net floor area . . . divided by net lot area. Where there is an approved Final Development Plan, the floor area ratio shall be the quotient of net floor area . . . divided by the sum of the net lot area of all parcels included in the Development Plan." (Ch. 35, art. II, § 35-202.) In reliance on that definition, the MPC approved the development simply because both Parcels 6 and 11 are included in the Development Plan. This is an absurd construction of the FAR definition, and one which circumvents the ***stated purpose*** of the provision: to provide a measure of development intensity. It is not a true measure of development intensity on *developable* parcels to include the net lot area of *nondevelopable* parcels in the FAR calculation. Neither Parcel 6 nor Parcel 11 is developable.

Parcel 11 is an easement over *railroad tracks*. Even though staff acknowledged that in other cases, similar "access only" easements are not considered in FAR calculations, the MPC included Parcel 11 in the FAR calculations. As the applicant itself pointed out in its November 6, 2008, letter, the definition of "net lot area" specifically excludes the area of any parcel that is located in a public street. (p. 19.) An easement over a railway line is not dissimilar from a portion of a lot that is located in a public street or public right-of-way.

Parcel 6, the sandy beachfront, is not developable with any permanent structures. The hotel may only place items such as chairs and umbrellas in this area. Furthermore, Parcel 6 contains a 20-foot wide public access lateral easement that runs the width of the property. The easement across Parcel 6 is devoted exclusively to the public use. As none of Parcel 6 may be

developed in any manner that contributes to development intensity, none of the parcel should be included in the FAR calculations. To include the 20-foot public easement in the calculation ignores the purpose of the public easement and the obvious inability of the land included in the easement to contribute in any meaningful way to development intensity. Inclusion of Parcels 6 and 11 raises the FAR to above the 0.25 limit, and thus the Project cannot be approved as designed.

D. The Schrager Plan Is Not Lawfully "Vested"

The fundamental basis of the County's determination that the Project requires no additional environmental review is that the Schrager Plan is "vested" and that the applicant would have the right to construct the Schrager Plan as approved. The determination that the Schrager Plan's permits had not expired was based on the $5 million worth of construction performed by the previous owner, which the Director of Planning and Development concluded constituted "substantial physical construction" under the Coastal Zoning Ordinance. (Ch. 35, art. II, § 35-174.9, subd. (3).) The approvals granted for the Schrager Plan have not lawfully "vested" under the requirements of the California Constitution and County law. The purpose of "vesting" a previous permit is to provide some protection for the investment-backed expectations of the developer. As the applicant explains, the work that the prior owner performed on the site included "cottage repair and restoration" as well as some grading and demolition. (November 6, 2008, letter from DLA Piper, p. 24.) The primary feature of the Schrager Plan was to preserve the original cottages. There is no information in the record regarding the proportion of funds expended by the applicant on restoration of the cottages as compared to other efforts to prepare the site for development. Calling the Schrager Plan "vested" in light of the developer's intention to demolish all of the cottages disregards the intent of allowing for "vesting": the original developer's investment that is to be backed by declaring the plan vested was the preservation of the historic cottages, whereas the applicant today plans to destroy them.

III. Non-Conformance with the Coastal Act, Coastal Land Use Plan and Coastal Zoning Ordinance

The Project's approval also fails to conform to the policies of the Coastal Act, the Local Coastal Plan, and the Coastal Zoning Ordinance. The MPC committed error of law and abused its discretion under the California Coastal Act, the County Coastal Land Use Plan, and the Coastal Zoning Ordinance. Approval of the Caruso Project is inconsistent with and does not comply with these land use ordinances and plans for the reasons discussed below.

A. The Project Fails to Provide and Instead Interferes with Adequate Public Access and Use of the Beach

Under the Coastal Act, Public Resources Code, section 30252, new development in the Coastal Zone must "*enhance*" public access to the coast. The Project will limit such access. As the findings note, the Schrager Plan would have permitted 12 weddings per year on the beach, lasting a total of 30 minutes and limited to 50 guests. The Project will permit 30 events on the

beach (including events other than weddings), and allow up to 100 guests at each event. The Project intends to more than *double* the number of events on the beach, and to double the number of guests permitted at the events. The increased activity on the beach will certainly limit the public's access to the coast during these events. Furthermore, the closure of Miramar Avenue will remove public parking spaces and alter access patterns to the coast. The Coastal Act also requires that the project improve transit access to the coast. (See Pub. Resources Code, § 30252.) The Project provides no such improvements. The Project fails to meet the requirement of the Coastal Act that new development *improve* public access to the coast.

B. The Project Fails to Protect and Instead Interferes with and Limits Public Views of the Coast

The Project does not maintain or improve views to the coast for the public, preferring instead to construct a project that maximizes views for visitors to this luxury hotel. The construction of the Main Building, at a height of 46 feet, will obstruct views to the coast from South Jameson and from the 101 Freeway. The proposed sound wall running along the edge of the property will complete the obstruction of any views to the coast.

The Coastal Act requires that greater consideration be paid to the design of new construction in the coastal environment. Public Resources Code section 30251 provides:

> "The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas . . . shall be subordinate to the character of its setting."

The Project does not meet this mandate. It impedes views to the coast, fundamentally alters the topography of its site, and privileges views for guests over views for the general public. The Coastal Act is intended to prevent such self-serving development.

C. The Project Is Incompatible with the Established Physical Scale of the Area

There can be little debate that the Project does not conform to the established physical scale of the community. As discussed in Section II.A above, the applicant requires modifications to the applicable height limits and setbacks, in order to accommodate larger and taller buildings than local zoning intended. The Project will violate the 35-foot height limit and the 16-foot height limit, and will construct numerous structures in mandated setbacks. The proposed buildings are larger than anything currently located on the site and larger than most of the buildings proposed for the Schrager Plan. The Project also includes 13 feet of fill and associated retaining wall structures, as discussed below. While the County claims that "over time" the

retaining walls will be hidden by vegetation, for years, residents in the area will be forced to look at man-made walls where previously a natural hill sloped into a creek. This vista is incompatible with the generally rustic character of the community. By proposing numerous structures that are taller and larger than nearby residences, and by proposing to construct a large series of retaining walls where today, a creek flows at the bottom of a gentle slope, the Project will create structures that are out of scale with the community.

D. The Project's Grading and Filling of the Site Will Significantly Alter Existing Natural Landforms

There is no dispute that the Project proposes to change the gently rolling terrain of the current site to a large plateau that will maximize ocean views for visitors to the Project, while creating a vista of retaining walls for residents and beach-goers looking toward the site from the coastal area and particularly along Oak Creek. "Grading for the proposed project would essentially level the existing rolling site topography starting at the western portion of the property with four feet of cut and ending in 13 feet of fill at the eastern end of the property supported by a series of engineered stepped retaining walls." (October 8, 2008, Findings, p. 47.) The Montecito Community Plan prohibits such grading for the sole purpose of creating or enhancing views. The plan to create an entirely new landform is contrary to the purposes of the Coastal Act, which aims to preserve the natural coastal setting. The increased flooding risk that is created by the applicant's planned fill in the Oak Creek floodplain is yet one additional reason that the Project's plans are inappropriate for this area.

E. The Project Is Not in Compliance with the Coastal Land Use Plan

The Project violates several policies of the Coastal Land Use Plan. Under Coastal Land Use Plan Policy 7-28, a visitor-serving project such as the Miramar should not change the character of or impact residential areas. The Project proposes to increase the intensity of large guest events and the frequency and size of events located on the beach. It is not accurate to say that the Project does not impact this residential neighborhood when it proposes to host events of up to 500 guests who will be traveling into the area in cars. Further, the Project proposes to increase Beach Club membership, which will also increase the number of visitors to the residential neighborhood. Coastal Land Use Policy 3-12 requires that development not contribute to flood hazards. As discussed extensively in Section I.B.1 above, the Project *increases* the risk of flooding by placing significant fill in the Oak Creek floodplain.

CONCLUSION

We recognize that there is a strong desire on the part of the applicant, the Board and members of the public — ourselves included — to move forward expeditiously with the proposed Project in order to replace the dilapidated eyesore that now exists on the Miramar site. But shortcutting and circumventing the required environmental review is not the way to move the project forward expeditiously, for it will only lead to lawsuits that will result in even greater delay down the road. More importantly, a complete and adequate environmental review —

particularly of issues with such underlying safety concerns as flooding and drainage — is necessary to ensure that all reasonable mitigation measures have been incorporated into the Project and its design. We plead with you not to disregard your responsibilities under the law and to the citizens of this community, and to postpone approval of the Project until the many unanswered questions about flooding, drainage, water availability, traffic, noise, and consistency of the Project with the Montecito Community Plan have been resolved through a complete and honest environmental review process.

Respectfully submitted,

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