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Clerk of the Board
Board of Supervisors
County of Santa Barbara
105 E. Anapamu Street, Room 407
Santa Barbara, CA 93101

Via Personal Delivery & E-mail
allen@co.santa-barbara.ca.us

Re: Miramar Beach Resort and Bungalows Project
Appeal of Project Approval to County Board of Supervisors
Citizens Planning Association, Statement of Grounds for Appeal

Dear Clerk of the Board:

Coast Law Group LLP represents the interests of Citizens Planning Association (CPA) with respect to the County's review of the above-referenced project (the Caruso Plan, or Project). Per the attached application materials, CPA has elected to formally appeal the Montecito Planning Commission's approval of the Project at its October 8, 2008 hearing to the County Board of Supervisors.¹ Please accept this correspondence as CPA's Statement of Grounds for Appeal. The approval violated the California Environmental Quality Act (CEQA), the Coastal Act, the Montecito Community Plan, the Coastal Zoning Ordinance, and numerous other County regulations. In addition, the CEQA and Administrative Findings are legally deficient.

Due to the inadequacies set forth below and detailed in our prior comment letters (which are attached hereto as Exhibits A through F, respectively, and incorporated herein by reference), the approval must be overturned. CPA will submit additional comments for the Board's consideration upon review of the Staff Report on the appeal. Thank you for the continued opportunity to participate in the review process.

1. Flood Impacts

The Project will require the placement of 13 feet of fill in the floodplain (along with associated retaining walls). The impacts associated with filling in the floodplain have not been adequately evaluated or addressed. Specific deficiencies include the following:

- a. **Fatal Flaw Issues:** Jon Frye, P.E., the Flood Control District's own engineering manager, identified a "fatal flaw assumption" with respect to the December 2007 flood report prepared by Penfield & Smith (P&S), the Applicant's engineering firm. After stating that CPA's concerns about the same were "irrelevant" and "baffling," Tom Fayram of Public Works purported to address the fatal flaw in a memorandum dated September 30, 2008, which states that (i) the fatal flaw was predicated on P&S's utilization of a model known as the Santa Barbara Urban

¹ CPA appeals approval of all case numbers including 07RVP-00000-00009, 07CUP-00000-00045, 07CUP-00000-00046, 07CUP-00000-00047, 08CUP-00000-00005, 08GOV-00000-00017, 08CDP-00000-00054, the approved modifications to the requirements of the Coastal Zoning Ordinance, and 08EIR-00000-00003 (certification of the Final Subsequent Environmental Impact Report and adoption of the CEQA Addendum).

Hydrograph (SBUH), but (ii) the current, March 7, 2008 flood report, utilized an approved approach.

However, the memorandum omits the fact that the current flood report relied on a program known as Hydro-CAD, which is the functional equivalent of SBUH. At the October 8, 2008 Montecito Planning Commission hearing, Craig Stewart of P&S ultimately admitted this fact. He stated, "We used the SBUH methodology as used in the Hyrdo-CAD program for our analysis." (October 8th MPC hearing video, Part III, 147:50; emphasis added). Thus, the March 2008 report employs *the same defective methodologies used in the December 2007 report.*

Given the above, the determination that the Project will not result in significant flood impacts is based on an entirely inadequate and defective study. In that regard, CPA's concerns are not "irrelevant" or "baffling" as repeatedly claimed by the County. Because the March 7th report continues to rely on the SBUH methodology, the fatal flaw continues to apply. The methodologies employed by P&S cannot at once constitute an "approved approach" and be "fatally flawed."

CEQA requires the County to engage in a good faith effort at public disclosure and to provide a reasoned analysis in response to CPA's public comments on this issue. The purpose of requiring public review is to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action. The evaluation and response to public comments is an essential part of that process. As such, the comments must be addressed in detail giving reasons why specific comments do not raise concern. Conclusory statements unsupported by factual information will not suffice.

The County's certification of the SEIR and adoption of the Addendum constitute an abuse of discretion because the County did not comply with these procedural requirements. The flood-related CEQA and Administrative Findings are similarly defective. In addition, the determination that the Project will result in less than significant flood impacts is not supported by substantial evidence, as defective studies are not entitled to judicial deference.

- b. Disagreements Among Experts: To effectuate CEQA's fundamental goals of providing for informed decision-making and full public disclosure, the statute requires agencies to disclose disagreements among experts in the body of the EIR and explain the agency's reasons for accepting one set of judgments instead of another. Burying information in the administrative record does not satisfy the statute's goals in this regard.

The County abused its discretion by failing to disclose disagreements between B&E Engineers (B&E) and Penfield & Smith with respect to the Project's flood impacts. Notably, B&E's comments reiterated some of the same concerns raised by Jon Frye. The County's belated attempt to "disclose" the disagreement in the isolated Staff Errata Memorandum, dated October 8, 2008, does not satisfy CEQA's minimum requirements. In addition, the County abused its discretion by failing to explain the reasons it accepted P&S's judgments over those of B&E.

- c. Cumulative Impacts: The Project will result in a 3/4 inch rise in flood levels during relevant storm events. The conclusion that such an increase will not result in significant impacts is contradicted by the "No-Rise" certification requirement set forth in County Flood Control's standard conditions of approval, as well as Mr. Fayram's statement that "[i]t has been calculated that *any more filling in of the floodplain is not allowed.*" (Email from Tom Fayram to Scott McGolpin, dated March 11, 2008; emphasis added). Further, even *de minimis* individual project contributions to a cumulatively significant impact warrant denomination as "significant," and thus trigger the requirement to prepare an EIR. The County's failure to adequately address this issue constitutes an abuse of discretion.

- d. Flaws Identified by Pace and B&E: The deficiencies and inadequacies identified by Pacific Advanced Engineering, Inc. (PACE) and B&E Engineers with respect to the Applicant's flood analyses have not been adequately addressed. The same applies with respect to the deficiencies outlined in Mr. Frye's various email communications to Staff and the Applicant. The County also failed to adequately consider the potential for inundation of the Union Pacific Railroad tracks.

- e. Failure to Explain Insignificance Determination: EIRs must provide a brief explanation indicating the reasons for determining that a project's environmental effects are not significant. The County's discussion of flood impacts is legally deficient because it simply repeats the conclusions of the P&S reports without providing any analysis. The Addendum fails to satisfy CEQA's informational purpose because it fails to identify how the placement of 13 feet of fill within the floodplain will not affect downstream properties during a significant flood event.

2. Water Supply Impacts

The SEIR and Addendum fail to adequately identify and evaluate future water sources for the Project. The Addendum's discussion of water resources and supply suffers from both factual and procedural defects under CEQA. In addition, the CEQA and Administrative findings are not supported by substantial evidence. The findings fail to bridge the analytical gap between the evidence and the Commission's actions. The Project will result in significant, unmitigable impacts requiring the preparation of an EIR and statement of overriding considerations. Approval of the Project violated numerous County regulations and development standards requiring adequate serviceability (including findings based on environmental documents and analysis). The following specific deficiencies apply:

- a. Changed Circumstances: CEQA requires production of a Subsequent EIR when substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in severity of previously identified significant effects. Relevant irrefutable facts demonstrate changed circumstances exist that will create new significant and unmitigable environmental effects warranting production of a full EIR, including the following:
 - (i) The considerable water supply shortages that have arisen in Montecito, as reflected in MWD Ordinance 89, which states, "the

reliable supply of water *will not meet the projected demand of District consumers in the current year and in years following;*” and the District “has not located sufficient additional sources to resolve this concern.” (Emphasis added).

- (ii) The fact that the Project will no longer utilize the groundwater and well available at the site resulting in a heightened reliance upon the MWD for water supply.
- (ii) The federal court order issued on December 14, 2007, requiring that the State Water Project reduce pumping operations by up to nearly one-third in order to protect an endangered fish, the Delta Smelt.

The foregoing constitute changed circumstances mandating additional environmental review. The County’s failure to prepare an SEIR on water supply constitutes a prejudicial abuse of discretion.

- b. Factual Misrepresentations: The Addendum contains factual misrepresentations regarding the MWD’s ability to satisfy the short and long-term water supply needs of the Project and existing customers. Citing testimony provided by Tom Mosby, the general manager of the MWD, the Addendum concludes the Project will not result in significant water supply impacts because of “the fact that the district has adequate resources to serve existing customers including excess water available for purchase in the market.”

However, this directly contradicts the findings of Ordinance 89 (noted above) as well as Mr. Mosby’s actual testimony. At the August 28th hearing, Mr. Mosby testified that while MWD was able to purchase 1,400 acre feet (AF) through the State’s dry year water purchase program (which saved the district from facing a 650 AF deficit in 2007-2008), such water may not be available for purchase next year. Mr. Mosby further emphasized that there are no assurances or guarantees that MWD will be able to meet the needs of the Project or existing customers in the years to come. He also testified that MWD’s spot purchase fund has limitations, water costs have been increasing, additional agencies are competing for water, and to the extent water is available, it may be in limited amounts.

Based on the above, the conclusions in the Addendum and Findings related to water supply are not supported by substantial evidence.

- c. Deficient Water Supply Analysis: The Addendum provides an entirely deficient discussion of potential water supply impacts and fails to satisfy the basic principles of analytical adequacy under CEQA. The Findings are equally deficient. The County must provide a reasoned analysis and evaluation of water supplies and storage capacity in the context of expected demand. 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 decision-making. In addition, the discussion must include a reasoned analysis of the *circumstances affecting the likelihood of the water’s*

availability.

The County failed to satisfy these obligations. The Addendum is legally deficient because it does not disclose or analyze the uncertainties related to future water supplies, the potential sources of supplemental water, the number of other districts and agencies vying for those sources, the likelihood that the MWD will out compete those entities, the criteria upon which the State will allocate water to agencies in need of supplemental water, the number and scope of entitled projects within the MWD's jurisdiction that may contribute to the water shortage, the extent of current drought conditions, the potential environmental impacts that would result from the MWD's acquisition of supplemental water, and so on.

- d. Unsupported Usage Calculations: The SEIR, Addendum and adopted Findings fail to provide any meaningful analysis to support the Applicant's water usage estimate. The figure dropped (over a matter of weeks) from 117.6 AFY to 51.1 AFY without any changes in project design. The revised figures fail to account for a number of the Project's water usage components. The figures are also based on inconsistent data and unsubstantiated assumptions. For instance, the Applicant purported to justify the new estimate based on a comparison with the Ritz Carlton Hotel in Laguna Niguel, which has a daily water use estimate of 249 gallons per room. However, the Applicant's usage estimate only allocates 54 gallons per room/day. In addition, the Applicant's analysis was not signed and stamped by a licensed engineer.

In addition, the Applicant failed to provide a water supply and peak demand study for the Project. For good reason, the study must be prepared by a MWD approved engineer *specializing in hotel operations*. There is no basis to defer a complete and adequate review of the usage estimate. Given the enormous discrepancy between the original estimates and those now proposed, greater certainty is required. Speculation regarding water usage at the Beach & Tennis Club, the failure to consider the 5-star nature of the hotel, and reliance on the 1989 Interface Environmental Services study are all prime examples of this deficiency. The foregoing amounts to a deferral of information gathering explicitly disallowed by the courts under CEQA. The failure to adequately evaluate the issue constitutes an abuse of discretion.

- e. Significant Unmitigated Impacts: Per Appendix G of the CEQA Guidelines, a proposed project would result in a significant impact to water supply, availability, and distribution if sufficient water supplies are not available to serve the project from existing entitlements and resources, or results in the need for new or expanded entitlement. The Project will result in significant water supply impacts because it will trigger the need to purchase additional water supplies. First, attempts to establish an environmental baseline equivalent to the historic water use by the prior Miramar Hotel does not override the conditions that exist "on the ground." Because the hotel has sat unused for such a long period of time, the proper baseline use is zero. Given the deficit faced by MWD, operation of the hotel will consume water resources that would have otherwise been allocated to, and used by, other end users. This constitutes a significant environmental impact under CEQA.

Further, even if impacts could be measured based on the most favorable historical usage figure (41 AFY) or the MWD's base allotment (45 AFY) rather than existing conditions, there would still be a delta between those figures and the Applicant's unsupported water usage estimate (51.1 AFY). MWD's base allotments are intended to maintain water usage within MWD's reliable supply. Because the Project will exceed its base allotment, it will exacerbate the need to purchase supplemental water. This constitutes a significant impact under CEQA. Put another way, because the Project would add to the cumulatively significant impact of insufficient water supplies district wide, an EIR is required. Again, even *de minimis* individual project contributions to a cumulatively significant impact warrant denomination as "significant," and thus trigger requirement to prepare an EIR.

- f. Deficient Analysis of Mitigation Measures: The Addendum does not adequately evaluate potential mitigation measures. For instance, the Addendum briefly references Ordinance 90 and then blanketly concludes the subject rate structure will address the current supply imbalance "by establishing an increased rate structure for customers using more than their base allotments." No analysis is provided. This constitutes an abuse of discretion because a simple reference to a water supply management practice does not serve as an adequate water supply analysis. Moreover, it is clear from the record that the efficacy of Ordinance 90 is unknown - the issue is to be evaluated by MWD after one year's time. Because the extent to which MWD's new rate structure will reduce demand - if at all - is entirely speculative, the discussion is legally deficient. Similar defects apply with respect to the off-site laundry measure.

3. Noise Impacts

Pile driving at the Main Building and Oceanfront Units will result in significant, unmitigable noise impacts to neighboring residences as well as beach use and recreation. Such activities would not have been required under the Schragger Plan and constitute a significant project change that were inappropriately analyzed in the Addendum. The conclusion that associated impacts will be reduced to less than significant levels is not supported by substantial evidence. Both the adopted Findings and CEQA Addendum are legally deficient in this regard. Because there is no reasonable basis to conclude that impacts will be mitigated to below the 65dBA threshold, the County committed an abuse of discretion by failing to prepare an EIR and Statement of Overriding Considerations on this issue. The County also failed to adequately consider the potential for train noise reflection and the associated impacts to neighboring residences. Applicable deficiencies include the following:

- a. Impacts from Oceanfront Pile Driving: Pile driving at the Oceanfront Units will result in significant, unmitigable noise impacts. Such activities will occur within 6.5 feet of adjacent residences resulting in noise levels as high as 120 dB at those receptors. These levels exceed the County's 65dB significance threshold by an astounding margin. Yet the County has failed to provide any substantive analysis as to how proposed mitigation measures will actually reduce impacts to levels below 65dB (for instance, the Addendum does not identify the extent to which the proposed 12-foot sound wall will reduce impacts). As such, the noise impact analysis is legally deficient, the impact is significant and unmitigable, and

an EIR is required.

- b. Off-Site Relocation, Lack of Authority: In devising mitigation measures, a public agency may exercise only those express or implied powers provided by law other than CEQA. It constitutes an abuse of discretion for the County to rely on mitigation measures that exceed its authority. Here, the County has no authority to relocate residents from their homes in favor of private development. The conclusion that noise impacts would be mitigated to a level less than significant constitutes an abuse of discretion. The proposed off-site “accommodation” measure is improper as a matter of law. In this regard, the County cannot find that an impact will be reduced to levels of insignificance where the efficacy of the applicable mitigation measure is entirely dependent on the conduct of third parties beyond its control. Further, the bare assumption that residents will be willing to leave their homes is not supported by substantial evidence.
- c. Off-Site Relocation, Significant Impacts: Agencies must evaluate any significant impacts that will result from implementing proposed mitigation measures. Through the off-site relocation measure, the County is requiring neighboring residents to choose from two equally unavailing options - either stay within their homes and face astounding noise levels or be forced from their homes, irrespective of personal circumstances. Either way, the Project will result in significant impacts to neighboring residents. Despite this fact, the Addendum fails to address the impacts associated with the measure.
- d. Inadequate Mitigation Measures: The County concluded that the relocation measure is only one of several mitigations developed to reduce impacts associated with pile driving. Other mitigations include limitations on hours and days of construction, shielding of construction equipment, and erection of temporary sound barriers. However, the County has failed to explain how those measures will reduce noise impacts to less than significant levels. As explained in our prior comment letters and the Applicant’s own studies indicate (i) shielding is not a viable option for pile driving activities, (ii) a sound wall in excess of 30-feet would be necessary to adequately reduce impacts, (iii) the proposed 12-foot sound wall is therefore insufficient, (iv)
- e. Impacts from Pile Driving at Main Building: The Addendum fails to evaluate the significant noise impacts that will result from pile driving activities at the main building, particularly with respect to surrounding residences. As the various noise studies reflect, construction equipment noise levels decrease with distance from the construction site at a rate of approximately 6 dB per doubling of distance. Based on that attenuation factor and the County’s threshold of significance, pile driving at the main building will result in significant impacts (76 dB) at residences located as far as 800 feet away. These impacts have not been addressed.
- f. Deficient Analysis of Mitigation Measures: The Addendum does not address viable pile driving alternatives, including the use of concrete caissons. In the recent past, neighboring property owners have installed such caissons at the County’s request (with even greater space constraints than those currently faced

by the Applicant and with the placement of no equipment on the beach). The use of such an alternative would avoid the significant noise impacts associated with pile driving. The Addendum's failure to independently evaluate the same constitutes an abuse of discretion.

- g.** Significant Impacts, Beach Use & Recreation: The Project will result in significant noise impacts to beach use and recreation. Even considering the Applicant's own entirely unreasonable estimation of the mean high tide line (116 feet from the boardwalk), oceanfront pile driving activities will result in noise levels *in excess of 94 dBA at the public's lateral easement*. Because such levels clearly exceed the 65 dBA threshold, the project will result in significant noise impacts to beach use and recreation. These impacts were never considered or analyzed as part of the review process. To the extent the County concluded beach recreation is not sufficiently important or sensitive to warrant review, the determination is not supported by substantial evidence and directly contradicts the Montecito Community Plan.

The defect is equally clear with respect to the Administrative Findings. For the reasons identified above, the conclusion that the Project "would have less than significant impacts on recreation, including beach use" is not supported by substantial evidence or any reasoned analysis. The Commission failed to bridge the analytical gap between the evidence and its conclusion.

- h.** Significant Impacts, Physical Vibrations: Potentially significant vibrational impacts resulting from pile driving activities have not been reviewed or evaluated. Further, photo-documentation of neighboring residences (as briefly proposed by the Applicant) has not been made a condition of approval and, in any event, would be entirely inadequate in mitigating or redressing impacts.

4. Wastewater Impacts

The SEIR and CEQA Addendum are legally deficient because they fail to adequately discuss and address potential wastewater impacts and the Project's dependence on the construction of additional facilities/improvements. Further, the adopted Findings are deficient because wastewater production estimates and serviceability have not been adequately reviewed and are based on inaccurate water usage estimates. Approval of the Project violated numerous County regulations and development standards requiring adequate serviceability and infrastructure (including findings based on environmental documents and analysis). Applicable deficiencies include the following:

- a.** Inadequate Project Description: Unlike the Schrage Plan, the Project requires construction of a new wastewater lift pump station on the Miramar property. The SEIR's project description is legally deficient because it fails to adequately identify the scope of this new facility. It is clear from the record that the lift pump station has not been sized or designed and the scope of the pumps and improvements have not yet been determined. As a result, the full environmental impacts of the Project remain unknown (e.g. potential construction impacts, noise impacts, odor, maintenance requirements, etc.). Further, the full scope of the Project remains unknown. Because the facility is a necessary project

component, its scope must be adequately described and disclosed in the project description. The failure to do so constitutes an abuse of discretion.

- b. Deficient Analysis of Mitigation Measures: As noted above, the Schrager Plan did not require the construction of a new lift pump station. As such, it is unclear how mitigation measures applicable to the Schrager Plan would mitigate impacts associated with the new facility. Yet the Addendum blanketly concludes that construction impacts associated with infrastructure improvements will be mitigated “as per the construction impact mitigation measures included in 00-ND-003 and hence, impacts would not be substantially more severe.” This conclusion is not supported by substantial evidence or any relevant analysis. Indeed, it will be impossible to make such a determination until the scope of the lift pump station is established. Certification of the SEIR/adoption of the Addendum therefore constitutes an abuse of discretion.
- c. Treatment Capacity and WWTP Expansion: The deficient water usage estimates referenced above have led to a distorted review of the Project’s wastewater impacts. Reasonable wastewater projections indicate the Project will result in the need for an expansion and upgrade of the wastewater treatment plant, a significant impact under CEQA. The March 21, 2008 and August 5, 2008 reports prepared by Penfield & Smith are unsupported and contain significant errors and deficiencies. The information submitted to date does not satisfy the Montecito Sanitary District’s report requirements. The foregoing deficiencies are further explained and identified in Heal the Ocean’s October 2, 2008 comment letter to the Montecito Planning Commission, which is incorporated herein.

5. Floor Area Ratio

The Project violates the County’s floor area ratio (FAR) regulations. As a result, the Project is inappropriate in terms of size, bulk and scale and the scope of physical development must be reduced. Applicable deficiencies include the following:

- a. Inappropriate Inclusion of Parcels 6 & 11: The Commission inappropriately included Parcels 6 (the sandy beach, including the *public’s* 20-foot lateral access easement) and Parcel 11 (Union Pacific Railroad easement) in the calculation of net floor area. FAR is a measurement used to determine development intensity and is based on developable land area. Thus, areas that cannot be developed or improved due to easement restrictions are not to be included in net lot area. The above referenced parcels were properly excluded from the Schrager FAR calculation for this reason.

County Staff has conceded that in the normal circumstance “easements held over another property are not included in a project’s far calculations” and to interpret the regulations otherwise would constitute “a change in methodology of determining the project’s FAR and should not be allowed.” The Commission abused its discretion by approving a Project that violates the County’s FAR regulations and affording preferential treatment to the Applicant. Similar defects apply with respect to Parcel 6 because no permanent improvements can be developed on the beach. Further, the Applicant cannot place anything within the

public's access easement (including temporary items such as umbrellas).

- b. Inaccurate Calculation of Mean High Water Mark: The State owns all tidelands below the ordinary high water mark, and holds such lands in trust for the public. That mark delineates the property line as to neighboring land owners. Per the Parcel 6 legal description, the property's southern boundary "follow[s] the meanderings of said mean high water mark." The line has steadily moved northward through sand depletion processes (as contemplated and acknowledged in the public's ambulatory lateral easement). The Applicant's estimate of the mean high water mark (at 116 feet) contradicts and is entirely inconsistent with the *obvious* physical condition of the beach. Further, the State Lands Commission has indicated that it lacks sufficient information to locate the southern boundary of Parcel 6. Because the boundary line will remain unknown until an accurate survey is performed (with due consideration to sand depletion processes and the current state of the beach), the Project's FAR calculations are inaccurate.
- c. Inconsistent Figures: The County's FAR analysis relies on a total net floor area of 164,489 square feet. However, that figure does not account for unexplained increases in square footage to a number of the hotel's buildings, such as the main building and the retail buildings. Further, while the Addendum and Project Description provide differing floor area totals, they both suggest the Project's FAR exceeds .25. The County's calculation of the Project's FAR is deficient.

6. Improper CEQA Procedure

The County's reliance on the hybrid SEIR-Addendum procedure constitutes a prejudicial abuse of discretion under CEQA. Applicable deficiencies include the following:

- a. Failure to Satisfy Informational Purpose: Rather than providing a comprehensive review of Project impacts up front, in a full and complete environmental impact report, the County has improperly segmented the review process. This fact is illustrated by the innumerable revisions, updates, errata memoranda, and technical study/report "corrections" that have been released throughout the administrative process. The foregoing has made it unreasonably difficult for the public to understand the Project's environmental impacts. The approach violated CEQA's fundamental informational and disclosure requirements. County Staff itself repeatedly noted the inadequate amount of time allocated to the review process (those who did complain were either taken off the Project or quit).
- b. Segmentation of Environmental Review: Use of the Addendum is improper as a matter of law. An addendum is only appropriate to a previously certified negative declaration where minor technical changes or additions are necessary. Because the County expressly concluded that the Project will result in new significant impacts with respect to historical resources, it cannot legally find that the Project involves only minor technical changes or additions or that none of the conditions described in CEQA Guidelines §15162 (calling for preparation of a subsequent EIR) have occurred. At a minimum, the Addendum constitutes a component of the SEIR and is subject to review *against substantive EIR standards*.

In failing to recognize this point, the County improperly segmented the review process. For instance, the County failed to disclose disagreements among flood experts in the body of the Addendum because it concluded the Addendum is not subject to EIR requirements. The County circumvented its statutory obligations by segregating environmental review in the Addendum. CEQA does not permit agencies to fragment the analysis by preparing a lesser environmental document when the findings clearly dictate otherwise.

- c. Improper Baseline, New Project: The County improperly measured Project impacts against the Schragger Plan because the Caruso Plan constitutes an entirely new and different project. In this regard, the County adopted an inappropriate baseline for conducting environmental review.
- d. Improper Baseline, Original Schragger Plan: Even if it were permissible to rely upon the Schragger Plan as a baseline condition, the County would be limited to adopting the approved project as it could be physically built. By adopting the original Schragger Plan (rather than the less intrusive final plan), the County artificially inflated the baseline condition and distorted the project's incremental impacts. The Addendum is thus inherently flawed. Rather than accurately reflecting the project's environmental consequences, it disproportionately minimizes the scope of its impacts.
- e. Improper Baseline, Deficient Comparative Analysis: Even if it were permissible to rely upon the Schragger Plan as a baseline condition, the County has made no attempt to engage in a qualitative comparison of the two projects. Neither the SEIR nor the Addendum adequately define the physical parameters of any structures or improvements that were previously approved under the Schragger Plan. As such, the Project's incremental impacts remain unknown.
- f. Improper Baseline, Vesting Issue: The only reason the Schragger Plan became vested was because the prior applicant expended considerable financial resources in repairing and renovating the historically significant cottages. To the extent a subsequent applicant seeks to take advantage of the incredible benefits associated with that vesting, it must maintain and preserve the "substantial physical construction" that resulted in the vesting determination in the first place. Because the "substantial work" referenced in the SEIR was performed on the very structures that are now slated to be demolished under the proposed project, the Applicant cannot legally rely on the Schragger Plan as a vested project.

7. Modifications

The modifications to the Coastal Zoning Ordinance's standards for height, parking and setbacks are not warranted or appropriate. Neither the Applicant nor the County have ever provided an explanation as to why the Project cannot simply be designed and constructed within County regulations. As such, the requisite justifications for approval of the modifications under Section 35-174.8 have not been established. Specific defects include the following:

- a. Insufficient Justifications: The Commission abused its discretion in approving the

modifications because the stated “justifications” are merely predicated on conferring benefits to the Applicant and the Project (in terms of project layout, internal site design and hotel amenities) rather than the community. Modifications may be appropriate where they confer a significant public benefit or the specific harm that the regulation is intended to prevent would not occur.

For instance, where a structure abuts the bottom of a steep slope, a height modification might be justified to the extent the roof line does not exceed the top of the slope and/or obstruct view corridors. That is not the case here, as the massive height of the main building will impact visual resources (including views of the mountains from the beach). Similarly, the setback modifications approved under the Schragger Plan were required to accommodate the retention of historical structures. Here, the requested modifications serve no such purpose and will have a direct adverse effect on the surrounding community.

- b. Inappropriate Precedent: The Coastal Zoning Ordinance and MCP Overlay District set forth a cohesive set of restrictions designed to ensure appropriate development in terms of mass, scale, bulk and neighborhood compatibility. Section 35.174.8 must be read restrictively in harmony with those provisions such that the overall integrity of the Ordinance is preserved. Modifications should not be granted at the expense of the surrounding community. Approval of the modifications in this case will result in an entirely inappropriate precedent for future projects.

8 Cottage Type Hotel

The Project is inconsistent with the cottage style tradition set forth in the Montecito Community Plan and Montecito Architectural Guidelines & Development Standards. The County’s findings to the contrary are not supported by substantial evidence. Specific defects include the following:

- a. Improper Deferral to MBAR: The conclusion that the Project is consistent with the cottage style tradition constitutes an abuse of discretion, as the Applicant has not yet submitted sufficient plans and renderings to make such a determination. Because the Commission simply did not have the requisite information to make the findings for approval, its determination is not supported by substantial evidence. Further, the Commission inappropriately deferred the issue to the Montecito Board of Architectural Review.
- b. Regulatory Violations: The Project violates the County’s substantive cottage style requirements, including, but not limited to, the regulations set forth in Montecito Community Plan policy LUC—1.6 and Montecito Architectural Guidelines (including section V.B.3.a(2)). The Applicant has not addressed the absurdities associated with Building 44 and the fact that it consists of four separate structures. The approval will set an incredibly poor precedent for future projects.

9. Historical Resources

The SEIR’s discussion of historical resources is legally deficient. These defects apply to the alternatives analysis, the discussion of mitigation measures, responses to public comments, the

adopted findings (including the finding that environmental impacts have been reduced to the maximum extent feasible), and the statement of overriding considerations.

- a. Inadequate Response to Public Comments: A number of public comments on the Draft SEIR, including comments from the County Historic Landmarks Advisory Commission, proposed feasible mitigation measures with respect to historical resources, including restoration or replication of a few of the cottages rather than all of them. The County failed to provide adequate responses to these comments.
- b. Deficient Analysis of Mitigation Measures: The SEIR fails to adequately evaluate the feasibility of replacing or restoring historic structures on-site. A number of appropriate mitigation measures (including preservation of a reduced number of cottages) were not adequately evaluated. Such measures set forth a reasonable middle ground that would provide greater mitigation than photo-documentation but would not conflict with project objectives. The County's rejection of these measures constitutes an abuse of discretion. Measures should be capable of minimizing impacts by limiting the degree or magnitude of the action and its implementation. As such, the County may not disregard potentially feasible measures simply because those measures will not reduce the impact all the way to a level of insignificance. If the rule were otherwise, an agency could refuse to adopt *any mitigation measures* simply because the impact would still be significant.

Further, conclusions regarding the infeasibility of restoring or replicating cottage structures are not supported by sufficient analysis. First, the prior applicants' ability to restore the cottages as recently as 2005 casts serious doubt on the claim that restoring the cottages would be economically infeasible. Further, the SEIR must evaluate the costs of repair in light of the proposed project's total cost. Until the feasibility issue is evaluated in that context, the SEIR's analysis will be legally deficient. The alternatives analysis is deficient for the same reasons.

- c. Deficient Alternatives Analysis: The alternatives proposed in the SEIR were not sufficiently analyzed. Simply raising and dismissing alternatives does not satisfy CEQA's analytical requirements. For instance, the SEIR fails to provide any specific information with respect to relocating the historical structures to off-site. In addition, the blanket conclusion that the alternative would be cost prohibitive is not supported by substantial evidence in the record. The discussion is further deficient because it failed to consider alternatives that would avoid the significant impacts discussed above (related to flooding, water supply, noise, and so on). The discussion does not "contain analysis sufficient to allow informed decision making.

10. Green House Gasses

The County failed to make a meaningful attempt to analyze the Project's effects upon global warming. The Addendum fails to assess Project contributions to such impacts. The conclusion that impacts cannot be measured or evaluated without undo speculation constitutes an abuse

of discretion. Specific deficiencies include the following:

- a. Conclusions Regarding Speculative Impacts: The County improperly concluded that it is unable to determine whether the Project's incremental contributions to the state's GHG totals are cumulatively significant or insignificant. The County did not engage in a meaningful attempt to analyze the Project's effects upon greenhouse gases or global warming. Under CEQA, the County must engage in a *thorough investigation* before it can find that a particular impact is too speculative for evaluation. The County's failure to do so constitutes an abuse of discretion.
- b. Deficient Discussion of Cumulative Impacts: There is no question that the problem of global warming is itself significant. Cumulative emissions of greenhouse gases are warming the planet and causing, or will cause, environmental destruction. Once a cumulative impact is assessed, whether contributions from a project are significant or *de minimis* is relevant only to determine the extent of mitigation required, not whether mitigation is required at all. Without any data, the County concludes the Project is "unlikely" to contribute considerably to cumulative impacts. Without substantial evidence in the record to support the conclusion, any contribution to a cumulatively significant impact is itself significant and an EIR must be produced.
- c. Failure to Gather Relevant Data: An agency may not avoid preparation of an EIR by failing to gather relevant data. The energy consumption from the Project's hundreds of air conditioning units, fountains, spa heaters, lights, and other fixtures could be calculated. Further, occupancy rates could be estimated, as could energy demanding services. From such figures, the total energy demand could be calculated, which, depending on how the supplied energy is generated, would yield a total GHG emission estimate. The hotel industry has successfully implemented energy conservation measures, and has been a leader in taking advantage of energy generation opportunities of photo-voltaics and stationary fuel cells. Regardless, the failure to even attempt quantification of GHG emission renders the Addendum inadequate.

11. Parking & Traffic

The County's parking and traffic analyses are legally deficient. The County failed to adequately consider the deficiencies raised by Hansen Associates Traffic & Transportation Engineering in their report dated October 6, 2008. The employee staff counts provided by the Applicant as well as those set forth in the environmental documents are vague, inconsistent and incomplete. Staffing requirements have been underestimated and will not serve the hotel's needs during peak summer time uses.

Further, the County failed to evaluate impacts based on the total number of people that will be attending special events rather than the arbitrary number of events. The impacts associated with back-to-back events have not been adequately evaluated. In addition, the ATE analyses are deficient and fail to consider the 5-star nature of the hotel. The proposed signage and associated measures will be inadequate to ensure that public parking spaces will not be taken by hotel guests. The Project will result in significant short-term construction impacts as well as

significant long-term parking impacts in the surrounding neighborhood.

12. Miscellaneous

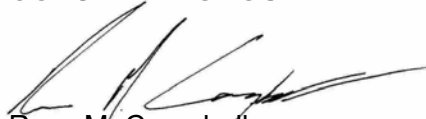
The Commission further abused its discretion in approving the Project based on the following: (a) the findings relating to zone district consistency cannot be made, as the Union Pacific Railroad has not yet authorized the construction of any improvements in its right of way; (b) the County failed to adequately address or evaluate stormwater management and drainage impacts (including unexplained changes in pre-project flow calculations and other inconsistencies identified in our prior comment letters as well as those of Heal the Ocean); (c) The County failed to adequately address significant liquefaction concerns; (d) the County failed to adequately evaluate potential groundwater impacts (including potential breaches of the aquifer); (e) the County failed to identify any past, present, or probable future projects that may affect the cumulative impacts analysis; (f) the Findings are deficient because the Project's adverse impacts have not been mitigated to the maximum extent feasible; (g) the County failed to adequately evaluate grading and visual impacts; (h) the County failed to independently review the Applicant's work prior to relying on it; (i) vacation of the north-south segment of Miramar Avenue was improper; (j) the County failed to adequately evaluate impacts resulting from the seawall improvements; (k) the Project is not compatibility with the surrounding area, and (l) the Project does not comply with applicable public access and recreation policies.

13. Conclusion

For the foregoing reasons, CPA appeals the Montecito Planning Commission's approval of the Project at the October 8, 2008 hearing on the matter. The approval violated CEQA, the Coastal Act, the Montecito Community Plan, the Coastal Zoning Ordinance, and other applicable policies and regulations. Because the Project is not legally defensible and the approval constituted an abuse of discretion, CPA respectfully requests that the Board of Supervisors overturn the decision.

Sincerely,

COAST LAW GROUP LLP



Ross M. Campbell
Marco A. Gonzalez

Exhibit A-E: Prior comment letters submitted by Coast Law Group LLP
CC: Client, Office of County Counsel, Planning & Development Dept. (Via E-Mail)