environmental
DEFENSE CENTER

LAW OFFICE OF MARC CHYTILO

ENVIRONMENTAL LAW

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October 17, 2008

Santa Barbara County
Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101

By hand delivery

RE: October 21, 2008 Board of Supervisors Hearing on the Santa Barbara Ranch Project; Staged Processing of Project Entitlements

Dear Chair Carbajal and Members of the Board,

This letter is submitted by the Environmental Defense Center (EDC) on behalf of the Santa Barbara Chapter of the Surfrider Foundation, and by the Law Office of Marc Chytilo on behalf of the Naples Coalition.

When the Board voted in closed session to amend the Memorandum of Understanding (MOU), we warned that the decision would undermine the County's ability to resolve the 'Naples problem', and would jeopardize mitigation measures required pursuant to CEQA. At the October 13, 2008 Board hearing on the Santa Barbara Ranch (SBR) Project, the Applicant and Staff revealed the proposed staged development scheme enabled by the MOU amendment, which allows the following:

(1) development of 10 inland SBR lots before required mitigation is implemented, including ACEs and public trails

(2) development of 40 DPR lots before public trails across DPR are dedicated and before the configuration and level of development in the coastal portion is known

(3) development of between 59 and 67 coastal lots instead of the 16 proposed under the Alt. 1B project, if Coastal Commission actions cause DPR to pull out of the project. These 59-67 lots are *in addition* to the 50 inland lots, resulting in a project with substantially more development than the MOU, Alternative 1 or Alternative 1B, and a substantially larger footprint than Alternative 3A (The EIR's Grid Alternative).

This scheme could result in a development scenario that leaves the County and the public in the worst possible position: **50 inland lots, 59-67 coastal lots, no trail connectivity, no resolution to the underlying land use conflicts at Naples, and no resolution to pending or threatened litigation against the County** (see Attachment F-9 of the second Supplement to the Board Letter for the 10/13/08 hearing).

Environmental Defense Center
906 Garden Street, Santa Barbara, CA 93101
Phone (805) 963-1622 FAX (805) 962-3152
www.edcnet.org

LAW OFFICE OF MARC CHYTILO
P.O. Box 92233 • Santa Barbara, California 93190
Phone: (805) 682-0585 • Fax: (805) 682-2379
Email: airlaw5@cox.net

This scheme was outlined for the very first time in a document dated October 8, 2008 and released to the public on October 9, 2008, just one business day before the Board hearing. This newly conceived 'Staged Alternative 1B' segments the Project into several distinct stages, allowing portions of the development to occur without required mitigation measures in violation of CEQA. Moreover, this scheme would create the possibility, and indeed likelihood, that the inland areas of DPR (never part of the "Naples problem") will be developed with 40 residences, and then the Developer could pursue Grid development of the Naples Townsite areas within the Coastal Zone.

Ironically, the avoidance of Grid development was the entire motivating force behind the decades-long dispute over Naples and the purpose of the MOU. The FEIR identified the potential environmental impacts associated with Grid development, and concludes many are significant and unavoidable. The current scheme adds the significant and unavoidable impacts associated with Grid development to the significant impacts associated with developing the inland DPR lands, resulting in a yet-unforeseen project configuration with substantially greater impacts than any other project configuration considered in the EIR.

The MOU amendment and the subsequently devised staged development scheme constitute significant new information released after the close of public comment on the EIR, which creates new significant impacts, substantially increases the severity of existing impacts, and results in an EIR that is fundamentally inadequate to assess the environmental impacts of the Project. For these reasons CEQA mandates recirculation of the EIR.

Additionally, the Staff has mischaracterized the processing requirements for several project components including development of the DPR coastal zone lots. Specifically, the homes in the DPR coastal zone require CDPs that are within the Coastal Commission's appeal jurisdiction, and therefore development of these parcels cannot occur 'at any time' following County approval, as the supplemental materials state (see Attachment F-9 of the second Supplement to the Board Letter for the 10/13/08 hearing, p. 14.)

1. The Proposed Staged Development Violates CEQA

    a. The Staged Alt. 1B Project Constitutes Impermissible Piecemealing

CEQA defines a 'project' as "the whole of an action" which may result in either a direct or reasonably foreseeable indirect physical change in the environment. CEQA Guidelines § 15378 (a). " 'Project' is given a broad interpretation in order to maximize protection of the environment." *McQueen v. Board of Directors of the Mid-peninsula Regional Open Space Dist.*, (1988) 202 Cal. App. 3d 1136, 1143. CEQA also requires that mitigation measures are "required in, or incorporated into, the project." Pub. Resources Code § 21081 (emphasis added).

After an environmental review process which lasted years, the SBR project has suddenly morphed into multiple projects. The Applicant and Staff have postulated that portions of the development may proceed without mitigation measures that are required to mitigate the impacts of the project as a whole. This constitutes improper piecemealing.

In an attempt to dodge a clear CEQA violation generated by allowing portions of the project to proceed without required mitigation, the Applicant and County Staff added a provision to the Conditions of Approval making mitigation measures applicable only to "affected lots." This approach is fundamentally contrary to CEQA.

Specifically, the Conditions of Approval now include the following provisions:

> Environmental Mitigation Measures; C.5: Geographic Applicability. Except or unless otherwise expressly stated in the Mitigation Monitoring and Reporting Plan, the Mitigation Measures are separately applicable to those lots to which the Mitigation Measures apply ("affected lots")
>
> General Provisions; B.3.b: "Affected lots" means the individual lots identified in Exhibit 2 to which a specific condition or Mitigation Measure applies, independent of each other lot.

These provisions appear to mean that unless the MMRP expressly states that a Mitigation Measure applies project-wide, then it only applies to "affected lots". It is entirely unclear how this provision would apply to the Project, and what lots are "affected" by particular mitigation measures. For example, Mitigation Measure SBR-59/Rec-1 requires a trail segment with connectivity to trail segments to the East and West. (see CEQA Findings § 3.c.7.a, p. 24). This mitigation measure does not expressly state that it is applicable project-wide, nor does it specify what lots it applies to. (see MMRP, p. 48).

The development of a sprawling gated residential subdivision and complex creating a visual blight and looming gates on the Gaviota Coast, which is the locus of substantial passive recreational uses and has unparalleled recreational value on land and sea, generates project-wide significant impacts to recreational resources. The Applicant himself testified as to the overwhelming amount of public use of Project lands for recreational purposes at the Board's October 13th hearing on this project, reflecting the fact that the Project site includes numerous trails regularly used by the public. Records gathered on the subject reveal extensive public use of trails on and around the project area.[1] Allowing the Project to proceed generates significant impacts to both the recreational experience from the loss of open space character, as well as the chilling effect of development on recreational activities, the former of which the EIR recognized, then identified Mitigation Rec-1 as a feasible mitigation measure to reduce this Project impact to insignificance. Recreational impacts are project-wide and are visited with the initiation of construction, and Mitigation Rec-1 must also apply project-wide, with the mitigation concomitant to the scarring of the hillsides, the erection of locked gates, to offset the insult to the recreational experience and the chilling effect on recreational activities in this areas that the Project and each of its elements will have on recreational resources on the eastern Gaviota Coast.

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[1] These trails constitute public property by virtue of the public's open, continuous, unpermitted use of these trails. *See* Pubic Use Declarations, attached hereto as Exhibit 1.

The Project's impacts to agricultural resources, and the mitigation of these impacts is similar to recreation; staging the project jeopardizes the availability of required mitigation. In the MMRP, Mitigation Ag-1 specifically requires that the ACEs be recorded with each lot, prior to or concurrent with the first new residential lot within the project. MMRP, p. 43. As such, the Geographic Applicability provision above, whether valid or invalid, does not alter the applicability of the ACE to each lot. DPR is under no obligation to record the ACE until their Coastal Commission entitlements are finalized. The DPR CDPs will likely be appealed, causing a many month to year delay before their participation in the Project will be finally known, and before the ACEs are recorded. **The ten lots proposed as part of 'phase 1' therefore, cannot be sold without the ACEs in place.**

b. Substantial Evidence does not Show that Mitigation Measures Are Required in or Incorporated into the Project as Required by CEQA

Substantial evidence in the record must show that mitigation measures are "required in, or incorporated into, the project." Pub. Resources Code § 21081. Mitigation measures adopted by an agency must be "fully enforceable through permit conditions, agreements, or other measures." *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261. In *Federation of Hillside*, the court concluded that there was no substantial evidence that mitigation measures were required in or incorporated into the project, because there was great uncertainty as to whether the mitigation measures would be implemented and because the city had not adopted policies preventing development from occurring without the mitigation measures. Two required mitigation measures that could be lost if DPR pulls out of the project is the preservation of agricultural land in ACEs and the extension of the De Anza trail.

If DPR pulls out as a result of Coastal Commission action, extending the De Anza trail through DPR could not be required mitigation, because DPR controls the land required for dedication of the trail easement. Therefore Mitigation Rec-1 is not capable of being included in or incorporated into the project and the Board cannot make the required finding for project approval.

Mitigation Ag-1 is relied upon to mitigate the significant agricultural impacts of the Project including Impact AG-6, the cumulative conversion of agriculturally designated lands to non-agricultural use. (CEQA Findings, p. 21) The area proposed for development under 'stage 1' is zoned agricultural, is comprised of designated grazing lands (see FEIR p. 9.7-17), and is adjacent to land currently under Williamson Act Contract. Developing this area alone has cumulatively significant impacts to agriculture without the proposed ACE protections. Mitigation Rec-1 is also required mitigation which applies project-wide. The County may not simply allow this portion of the project to proceed without required mitigation.

If the latest assertions by the Applicant and Staff are correct, and Conditions of Approval allow staged development, the first stage of development will not include required agricultural mitigation and the second stage may not include required recreational mitigation. Because of this, the MOU amendment and proposed staged development violate CEQA.

c. The Staged Alt. 1B Project Fails to Achieve Project Objectives

The key project objective and touted benefit of planned development at Naples is avoidance of grid development. The Staged Alt. 1B Project does not meet this objective because it allows for grid build-out within the Coastal Zone, in addition to the development of 50 inland lots, without the promised benefits of development pursuant to the MOU. The Staged Alt. 1B Project similarly does not meet the objective of resolving litigation. A lot-by-lot ground battle is near-guaranteed to occur if the Developer proceeds with grid development. The Staged Alt. 1B Project is the worst possible project for the County, the public, Naples and the Gaviota Coast.

d. The Staged Alt. 1B Project Fails to Provide Project Benefits Required for Project Approval

In order to approve the Project, CEQA requires that the Board find that specific economic, legal, social, technological, or other benefits of the Project outweigh the unavoidable adverse environmental effects of the Project. CEQA Guidelines § 15093. The Statement of Overriding Considerations provide that the Project will

(i) result in fewer environmental impacts than would otherwise result from development of all of the existing Naples Townsite lots;

(ii) will achieve a long-term solution to the potential development of the existing Naples Townsite lots that would otherwise result in reactivation of pending litigation and future dispute over the potential development of the property between the landowners and the County;

(iii) achieve a comprehensive development concept for Naples that would afford the County the opportunity to control land-use planning for the entire Naples Townsite and that would not leave the County to address development at Naples on a ad hoc, fragmented basis;

(iv) maintain long-term continued agricultural use within the Project site and on adjacent properties that is compatible with a low-density residential development on the Naples Townsite;

(v) allow residential development within the Naples Townsite that balances agricultural, open space, recreational, and residential uses consistent with the California Coastal Act, the CLUO and Comprehensive Plan;

(vi) incorporate a site layout, design and architectural style that reflects the scenic and rural character of the Naples Townsite and Gaviota areas, minimize environmental impacts, and preserve and/or restore wildlife habitats and other coastal resources;

(vii) strike a suitable balance between preservation of rural, coastal resource values; the ownership and use of legal lots within the property area, and density allowing for agricultural and open space; and

(viii) achieve a CLUP that reducers the potential density that would result from the development of the Naples Townsite lots through a reduced density Project landowners are willing to develop in lieu of the possible density of existing lots."

Every last one of these project benefits is jeopardized by the MOU amendment and staged processing of project approvals. The Board therefore cannot sustain a finding on the basis of substantial evidence that specific economic, legal, social, technological, or other benefits of the Project outweigh the unavoidable adverse environmental effects of the Project. CEQA Guidelines § 15093.

2. The Proposed Geographic Segmentation Cannot Be Effectuated

An additional last-minute change added to the Conditions of Approval reads as follows:

> Project Description; A.3.c. Geographic Segmentation. The legislative actions and land use entitlements described in Paragraphs A.3.a. and A.3.b. herein involve land contained both within and outside of the Coastal Zone. For areas outside of the Coastal Zone ("Inland"), the County retains exclusive land use jurisdiction. For areas within the Coastal Zone ("Coastal"), the Coastal Commission retains exclusive jurisdiction over legislative actions and adjudicative authority over certain types of entitlements that are appealable. The geographic segmentation of Project approvals are displayed in Table 4.

In fact, the Project is not so clearly segmented. The Coastal Development on DPR, contrary to assertions in the attachments to the second supplement (see p. 14) cannot occur "at any time during the process, after the initial approvals by the County." As stated in the Project Description and throughout project documents, Coastal Development on DPR requires CDPs, most or all of which are within the Coastal Commission's appeals jurisdiction. Further, the inland subdivision also requires a CDP pursuant to Section 21-15.16 of the County Code, because a portion of a parcel included within the Vesting Tentative Map is located within the Coastal Zone. Moreover, a CDP is also required for the inland development plan pursuant to Section 21-15.16 and 21-15.13 of the County Code, because a portion of numerous parcels included within that development plan are within the Coastal Zone.

3. Last Minute Project Modifications Require Recirculation of the EIR

Recirculation is required when significant new information[2] is added to the EIR after public notice of the draft EIR's availability, but before certification. CEQA Guidelines § 15088.5 (a).

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[2] To be significant, the new information must change the EIR in such a way that deprives the public of a meaningful opportunity to comment upon: a *substantial* adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." *Laurel Heights* (1993) 6 Cal. 4th 1112, 1129; Guidelines § 15088.5 (a). Significant new information also includes a disclosure which shows that a new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented, a substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce that impact to a level of insignificance, a feasible project alternative or mitigation measure considerably different from others previously

The changes to the SBR Project effectuated since completion of the Final EIR are truly astounding in magnitude. In addition to the numerous changes introduced by Alt. 1B and commented upon in our previous letters, the MOU Amendment and last-minute changes introduced to the Project also constitute significant new information for which recirculation is required pursuant to CEQA. The last-minute revisions to project documents enable the developer to fast-track portions of the development in a piecemeal fashion without required mitigation measures in place, and without CEQA review of the environmental consequences of bifurcating the Project.

The public has been extensively involved in the environmental review of this project since the beginning. Folks with full-time jobs spent their precious free time pouring over the many thousands of pages of environmental review documents and attending the numerous public hearings on this project. Since May 29, 2008 when the Applicant proposed the Alt. 1B Project, a veritable fountain of significant new information has changed the Project to a point where it is substantially different from the project(s) analyzed in the FEIR. This significant new information is found in attachments to staff reports, amendments to the attachments, and supplements to the amendments. Some of the most significant of the new information was released one business day before the Board hearing on the project. Even for professionals trained in land use planning and CEQA, evaluating the environmental implications of these changes is an insurmountable task.

Staff forthrightly admits, in the third revision to the Confirming Analysis for Alternative 1B, that the MOU amendment and bifurcation of the Project may result in the following scenario:

> Alternative 3A – No Project Grid Development. The existing Naples town site lot configuration would be retained in this area, and individual lots would be developed individually or sold off as residential sites to individual buyers. It is not known how many lots in this area could be successfully developed, but the estimate in the Final EIR is 59 to 67 (Final EIR Table 11.4-1), as opposed to the 16 lots proposed in this area by Alternative 1B.

Attachment F-9 of the 2nd Supplement to the Board Letter for the 10/13/08 hearing, pp. 14-15.

Ironically, the entire purpose of entering into the MOU in the first place was avoiding Grid development. By amending the MOU and explicitly 'staging' project approvals, the County makes grid development the likely outcome[3], essentially throwing a decade's worth of time, effort, and resources out the window.

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analyzed would clearly lessen the environmental impacts of the project, but the project proponents decline to adopt it, or fundamental inadequacy of the EIR. A revision which remedies the EIR's inadequate analysis of alternatives also constitutes significant new information requiring recirculation of the EIR. *Preservation Action Council v. City of San Jose* (2006) 141 Cal. App. 4th 1336, 1358.

[3] As discussed in a separate letter submitted to the Board on the issue of Sequencing, the Coastal Commission is likely to require the imposition of conditions that will cause DPR to pull out of the Project.

The FEIR concludes that Grid Development would have the most environmental impacts of any project or project alternative considered. *See* pp. 11-20 – 11-31. The MOU amendment and staged approvals allows for the development of 50 inland lots without precluding Grid development. The environmental impacts of developing the inland area *in addition* to grid development within the Coastal Zone will cause a substantial increase in nearly every significant environmental impact identified in the FEIR and may cause new significant impacts as well. For these reasons recirculation of the EIR is required. Further, the ad hoc piecemealing of the project and vagueness introduced regarding the applicability of mitigation measures, compounded with the dearth of analysis concerning Alternative 1B, the EIR is so fundamentally inadequate that it may not be certified in compliance with CEQA and *must* be revised and recirculated. *See* CEQA Guidelines § 15088.5 (a)(4) and *Mountain Lion Coalition v. California Fish & Game Com.* (1989) 214 Cal. App. 3d 1043.

4. Public Recreational Use

Your Board heard testimony from persons living on and near the property regarding the overwhelming magnitude of public recreational use of the subject property. This use is reflected in hiking trails crisscrossing the bluff top and accessing the beach across the property in several locations. Attached are declarations of public use obtained from the California Coastal Commission as part of their efforts to document public recreational use of the coast, including the lands subject to this application. This evidence, and other evidence in the record that has been identified from as early as the first EIR scoping hearing, reflects a fact the landowner knows well. Historic and current public use of the property has been adverse for a period spanning 30 or more years, and as such, reflects an implied dedication of such trails and accessways for continued public access to the ocean and beach. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29 (1970). The California Constitution is the foundation of this important public right. "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water . ." Art. XV, § 2.

This evidence establishes that the Project, if built on the bluff and in other areas conflicting with areas of use, would improperly impede the public's exercise of this prescriptive easement, conflicting with state and local policy and constituting a further adverse environmental impact to existing public recreational rights necessitating analysis in the environmental review document. Failure to observe such prescriptive public access rights violates state and local coastal policy. Public Resources Code § 30211 ("Development shall not interfere with the public's right of access to the sea where acquired by use"); Local Coastal Plan Policy 7-1 ("The County shall take all necessary steps to protect and defend the public's constitutionally guaranteed rights of access to and along the shoreline."). See *The Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903 (2004) (policy inconsistencies constitute evidence of CEQA significant impact).

The Project cannot be approved without a coastal bluff trail and beach access, which the Local Coastal Plan sites in Dos Pueblos Canyon. Either that access is provided, or the project conflicts

with governing policies, including policies enshrined in the California Constitution, and must be denied.

5. Conclusion

For all the reasons stated herein, the Board should not approve the SBR Project, and should direct staff and the applicant to develop a clustered or similar alternative that avoids development on the bluff. We strongly urge the Board to reconsider its decision to amend the MOU, and to reject staging of project approvals.

Sincerely,

Marc Chytilo
Law Office of Marc Chytilo

Nathan G. Alley
Staff Attorney
Environmental Defense Center

Cc: California Coastal Commission
Naples Coalition
Surfrider Foundation

Exhibit 1: Coastal Commission Prescriptive Rights Study, Public Use Declarations and Questionnaires