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December 5, 2008

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

Dear Honorable Members of the Board:

Coast Law Group LLP respectfully submits the following additional comments on behalf of Citizens Planning Association (CPA). Thank you for the continued opportunity to participate in the review process and for your time in considering CPA's appeal of the above-referenced project (the Caruso Plan, or Project). We have reviewed Staff's appeal memorandum for the December 9th hearing (Staff Memorandum) and the attachments thereto. As a preliminary matter, the Staff Memorandum fails to address the substantive issues raised in our appeal package with any meaningful level of detail. As such, the points identified in our Grounds for Appeal and prior comment letters have not been adequately addressed. In addition to the critical deficiencies discussed below, CPA joins in the December 1, 2008 comments submitted on behalf Jean and Stan Harfenist, and other concerned residents.

1. Flood Impacts

As the Board is likely aware by this point, the County's own email communications disclose "fatal" deficiencies with respect to the December 2007 Penfield & Smith (P&S) flood report submitted by the Applicant.[1] For instance, on February 20, 2008, in an email to Tom Fayram, deputy director of Public Works, Mr. Frye indicated that his staff "confirmed a fatal flaw assumption in the modeling approach that P&S took in their RAS/SBUH attempt to consider the affects of the loss of the overbanks." (Emphasis added). Similarly, on February 29, 2008, Mr. Frye indicated that "the drainage study P&S submitted has a serious flaw or two that Dale's initial review didn't pick up on." (Emphasis added).

Over the course of the past seven months, we have repeatedly requested that the County provide additional information regarding the scope of these deficiencies and the manner in which they have been corrected. Up until the last Montecito Planning Commission (MPC) hearing on October 8th, the County claimed that our comments were "irrelevant" because they related to the December 2007 report rather than the current March 2008 P&S report. (Resp to

[1] Those communications (which were originally obtained via Public Records Act request) are set forth in detail in our July 15th comment letter and are collectively attached to CPA's Appeal Packet. (*See* emails attached to Exhibit D thereto).

Public Comment 8h; *see also* July 28, 2008 Fayram memorandum, August 6, 2008 Staff Report, Attachment J - stating, "CLG's contention that superseded reports should continue to be relevant to our review is baffling.").

However, leading up to the final MPC hearing, the County released a memorandum from Tom Fayram, dated September 30, 2008, purporting to finally address the issue. The memorandum states:

> Penfield & Smith utilized a program called SBUH (Santa Barbara Urban Hydrograph) to quantify the impact of filling the floodplain. In utilizing this approach, the area is more treated like a basin or bathtub than a flowing creek system. We disagreed with Penfield & Smith on that application and stand by that. We preferred a HEC RAS approach that is in line with what FEMA accepts.
>
> Subsequent to that, Penfield & Smith completed another report that supersedes the previous report, and utilized an approved approach to determine the increase in flood level, which was determined to be minimal.

(*See* attachment to Staff Errata Memorandum, dated October 8, 2008; emphasis added).

Notably, the memorandum did not disclose what approach was actually applied in the March 7, 2008 report. However, CPA subsequently learned 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 MPC hearing, Craig Stewart of P&S ultimately admitted this fact. He stated, "We *used SBUH methodology* as used in the HyrdoCAD program for our analysis." (October 8th MPC hearing transcript, p. 133:11-13; emphasis added). Thus, the March 2008 report employs *the same defective methodologies used in the December 2007 report*.

After CPA raised the foregoing in its Statement of Grounds for Appeal, the Applicant responded as follows:

> [W]e believe that Mr. Fayram's understanding of the December 2007 Flood report prepared by Penfield & Smith, or the manner in which he conveyed his understanding in the memo was incomplete – in particular about the application and use of HEC-RAS in the Oak Creek model. From his memo, he appears to assume that the SBUH program was the only method used to determine water surface elevations upstream of the Union Pacific Railroad in the December report. However, that was not the case. The December 2007 report used a combination of SBUH (for reservoir routing) and HEC-RAS (for channel analysis) to determine water surface elevations upstream of the railroad. Because of this misunderstanding, Mr. Fayram's determination of the inappropriate use of a computer model was incorrect . . . The acceptability of [P&S's] methodology has been confirmed in subsequent conversations with Tom Fayram (telephone conservation, November 3, 2008).

(DLA Piper Letter, November 6, 2008, p. 2-3; emphasis added).

Once again, the Applicant's claims are not supported by the record. Mr. Fayram's memorandum states that P&S applied the SBUH program "to quantify the impact of filling in the floodplain. In utilizing this approach, the area is more treated like a basin or bathtub than a flowing creek

system. We disagreed with Penfield & Smith on that application and stand by that. We preferred a HEC RAS approach that is in line with what FEMA accepts."

Notably, the Applicant's letter appears to indicate that P&S employed the precise methodology that County Flood Control wanted to be changed. That is, P&S used the SBUH program to apply a "reservoir" or "basin" analysis instead of treating the area as "a flowing creek system." This point is further supported by an email from Jon Frye to Michelle Gibbs (one of the prior planners on the Project), dated January 31, 2008, which states: "HEC software should be used for all hydrology/hydraulics. **Hydrocadd SBUH not applicable**." (See CPA Appeal Packet, Exhibit D, internal emails attached thereto; emphasis added). Thus, Flood Control was very clear that the joint SBUH/HEC-RAS methodology employed by P&S in its December 2007 report was inappropriate. Yet P&S continued to use the SBUH program in the March 2008 report.[2]

As we have explained *ad nauseam,* public comments are an integral part of the review process. *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal. App. 3d 813, 820. "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." *Schoen v. Dept. of Forestry* (1997) 58 Cal.App. 4th 556, 574. Thus, agencies must provide "good faith, reasoned analysis" in response to comments; "[c]onclusory statements unsupported by factual information will not suffice." 14 CCR §15088 (emphasis added).

Notwithstanding the above, the Staff Memorandum makes absolutely no effort to address these issues. Remarkably, the section addressing the adequacy of the County's response to comments states in its entirety, "The County provided complete, written Responses to Comments made on the draft EIR and responded to substantive comments throughout the project review period. Therefore, response to comments on the Caruso project's environmental review documents . . . was adequate pursuant to CEQA Guidelines section 15088. Please see the County's written Response to Comments on the SEIR contained in Binder I. (Staff Memorandum, p. 4).

As is the case throughout the Staff Memorandum, this "response" does not constitute a good faith effort to address the substantive issues raised on appeal. Because critical issues have not been addressed in any meaningful detail, the MPC's approval must be overturned.

2. Water Supply/Resources

At its August 6th hearing, the MPC determined (by a four to one vote) that a Subsequent EIR would be required to adequately address the Project's impacts on water resources. This determination was based, in large part, on the Montecito Water District's recent passage of Ordinance 89, which reflects the critical nature of the drought faced by the County and strictly limits water availability for new and expanded service connections. However, after the Applicant threatened to simply walk away from the Project, the MPC unanimously reversed its decision without any legal basis for doing so.

[2] Upon receiving Mr. Frye's email from Michelle Gibbs, Mr. Middlebrook indicated, "We did not request the information from Jon Frye cited in your email." (*See* Exhibit 1 attached hereto).

As detailed below, the decision to not require an SEIR as to water supply constitutes an abuse of discretion under CEQA. Further, the MPC's vacillating position is not entitled to deference on appeal. Specifically, CPA's appeal must be granted because (i) the CEQA and Administrative Findings regarding water availability are not supported by substantial evidence, (ii) the Project will result in significant water supply impacts due to changed circumstances associated with the current drought and the Project's increased usage requirements, and (iii) the Addendum fails to satisfy CEQA's minimum standards for analytical adequacy under relevant case law.

First, as a basis for concluding the Project will not result in significant water supply impacts, the CEQA Addendum states as a fact that the Montecito Water District (MWD) has adequate resources to serve existing customers as well as the Project. (Revised Addendum, p. 51). However, that statement is completely inaccurate and is directly contradicted by facts established by the MWD, including the following information in the record:

- "[B]eginning in water year 2006-2007,[3] because of unusual climate conditions in the preceding two years, the District began to experience a substantial increase in water usage that resulted in an imbalance between customer demand and the supply available from the District's historically utilized sources of water, causing an increasing dependence on supplemental sources of supply." (Ordinance 90, adopted August 20, 2008, p. 1; emphasis added).

- Because these effects have been felt statewide, the Governor of California declared a drought condition, which resulted in the creation of a State dry year water purchase program. (Testimony of Tom Mosby, August 28, 2008 MPC hearing transcript, p. 67:8-12).

- For the 2007-2008 water year, the total demand for water exceeded the MWD's reliable supply of 5,895 acre feet (AF) by approximately 650 feet. (MWD Power Point, August 19, 2008, p. 9; see also Ordinance 89, adopted April 15, 2008, p. 1).

- The MWD would have had insufficient water supplies to serve its customers as of July 2008, if it had not obtained a San Luis Obispo spot water purchase of 1,400 AF through the State's dry year water purchase program. (MWD Power Point, August 19, 2008, pp. 9-10; Testimony of Tom Mosby, August 28, 2008 MPC hearing transcript, p. 67:10-14).

- The 1,400 AF spot purchase was delivered to MWD's users at a total cost of $859,838 and lasted 45 days. Based on MWD estimates, future costs for the same amount of water (to the extent it will be available at all) could total $1.68 million. (See MWD Power Point, dated August 19, 2008, p. 16, Columns B and E; *see also* Testimony of Tom Mosby, August 28, 2008 MPC hearing transcript, pp. 77:13-19; 77:23-78:1).[4]

[3] The MWD's water year ends on September 30.

[4] 1,400 AF at $160/AF plus additional referenced costs totals $859,838. 1,400 AF at $750/AF plus additional referenced costs totals $1.685 million.

- The MWD has a "normal" reliable water supply of 6,500 acre feet-per-year (AFY). However, due to reduced allocations from the State Water Project, the reliable water supply has dropped to 5,380 AFY. (Letter from Tom Mosby to Deputy Director Ward, dated July 30, 2008, *see* MWD Power Point attached thereto, pp. 2, 6).[5]

- "A water shortage condition currently exists because the reliable supply of water will not meet the projected demand of District's consumers in the current year and in years following." (MWD Ordinance 89, adopted April 15, 2008, p. 2).

- This shortage applies to the 2008-2009 water year notwithstanding the fact that 800 AF was carried over from the San Luis Obispo spot purchase. Specifically, MWD is facing an imbalance of 1,234 AF for the current year and may have to declare a Water Shortage Emergency. (Letter from Tom Mosby to Deputy Director Ward, dated July 30, 2008, *see* attached MWD Power Point, p. 6).

- "The District has sought additional sources of water to be drawn upon to overcome anticipated shortages but has not located sufficient additional sources to resolve this concern." (MWD Ordinance 89, adopted April 15, 2008, p. 2).

In addition to the above, at the August 28th MPC hearing, Commissioner Burrows asked Mr. Mosby to confirm that there are sufficient spot water purchases to meet the County's needs and that the MWD has sufficient funds to make those purchases. In response, Mr. Mosby stated the following:

> I'm definitely going to correct that. Because there are no assurances. We do know the governor is working with the Department of Water Resources to try to create a Dry Year Water Purchase Program for everyone on the state water project. Recognize there are quite a few of us that are tapped in.
>
> We have a special fund set aside at Montecito Water for spot purchases. It is a special reserve fund that we have available to us. But it's got limitations to it. And the interesting thing is, is when you look at spot water purchases, if the rest of the state starts looking at this water, there will be less available to Montecito.
>
> So recognize there is -- it's not always going to be there. And if it is there, it may be a limited quantity. (Testimony of Tom Mosby, August 28, 2008 MPC hearing transcript, pp. 76:18-77:18; emphasis added).

Notwithstanding the above, the CEQA Findings state, "MWD has the ability to serve all its water customers as documented by the General Manager Tom Mosby for both short and long-term needs . . . (CEQA Findings, pp. 15-16). Indeed, "the basis for a determination of no significant impacts to [water supply]" is premised on the MWD's commitment to serve the Miramar as an existing customer and "the fact that the district has adequate resources to serve existing

[5] The reductions are consistent with a 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.

customers including excess water available for purchase in the market." (Revised Addendum, p. 51; emphasis added).

As the record clearly demonstrates, these statements are not supported by substantial evidence. Although this point has been repeatedly made clear in our prior comment letters, the Staff Memorandum continues to make similar representations without addressing CPA's substantive claims. The Staff Memorandum states:

> The Montecito Water District has identified secured and [*sic*] potential future water sources for the project including Cachuma Lake, Jameson Lake, Doulton Tunnel, the District groundwater basin, and District allocation from the State Water Project. These water sources, in combination with the Montecito Water District's recently approved classification definitions and conservation rate structure (Ordinance 90 and Resolution 2047) would *ensure* adequate water supply to the proposed project.

(Staff Memorandum, p. 6-7; emphasis added).

Notably, each of the above-referenced water sources have already been included in the MWD's calculations for the 2008-2009 year. As noted, those calculations show a 1,234 AF deficit for the current year. Moreover, the County's blanket conclusions regarding the efficacy of the new rate structure are misplaced. In that regard, Resolution 2047 expressly states:

> [*E]ven with such conservation rate-based reductions in water usage*, the District anticipates that additional supplemental water may be required in certain years to maintain its water supply/demand balance . . ."

(Resolution 2047, p. 2; emphasis added).

Given these uncertainties, the conclusion that the rate structure will "ensure adequate water supply" is not supported by substantial evidence.[6] *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 439 ("Factual inconsistencies and lack of clarity in the FEIR leave the reader - and the decision makers - without substantial evidence for concluding that sufficient water is, in fact, likely to be available [for the Project].").

Moreover, as reflected by the above-referenced facts, changed circumstances exist with respect to the severe water shortages that have arisen since the Schrager Mitigated Negative Declaration was adopted in 2000. Under CEQA, an SEIR must be prepared whenever substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions to the previously adopted negative declaration due to the involvement of new significant environmental effects. Pub. Res. Code §21166; Cal. Code Regs., tit. 14, §15162. The same principles apply where project changes will result in significant impacts that were not previously considered. *Id.*

Per Appendix G of the CEQA Guidelines, a proposed project would result in a significant impact

[6] For the same reasons specified above, the Administrative Findings as to water supply are not supported by substantial evidence. (*See e.g.* Proposed Findings, p. 27, repeating the language set forth in the Revised Addendum verbatim).

to water supply 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.

Relevant here, the MWD adopted Ordinance 89 in April of this year as an "emergency action" in response to the current drought. (Ordinance 89, p. 4). Through the ordinance, MWD seeks to limit its customers to historic usage patterns by allocating base allotments according to prior use. (*Id*. at 2). The allotments are intended to maintain water usage within the MWD's reliable supply. In that regard, the MWD adopted Ordinance 90 in August of this year to increase the rates applicable to those who exceed their base allotments. MWD explained the reasoning for this structure as follows:

> [B]ecause the District recognizes that its historical sources of water were sufficient to meet its customers' historical usage patters and levels, it intends that customers whose usage exceeds the lowest block rate or base allotment should pay more in the higher tiers to provide funds to pay for the supplemental sources of supply *required to meet their greater demand*.

(Resolution 2047, p. 2, emphasis added).

With respect to the Miramar's historical usage, although the hotel required an average of approximately 30 AFY during its last 10 years of operation (August 6th MPC hearing transcript, p. 99:9-18), the MWD has established a Project base allotment of 45 AFY. However, because the hotel has not been in operation for the past eight years, applying such an allotment will not provide an accurate basis for evaluating the Project's physical impacts. As such, the Project must be measured against conditions as they exist on the ground today.

Regarding usage demands, the Project was originally estimated to require 117 AFY, but the figure was miraculously reduced to 51.1 AFY after the Applicant was informed that Ordinance 89's limitations apply to the Project.[7] However, even if impacts could be measured based on the figures most favorable to the Applicant, the Project will clearly exceed its base allotment and will therefore trigger the need to purchase supplemental water.[8] Per the standards cited above, this constitutes a significant impact under CEQA.

Further, due to the reduced State Water Project allocations, the MWD's water demands (7,415 AFY) exceed its reliable supply (5,381 AFY) by 2000 AFY. As such, to the extent those deficits are not cured, the Project will consume water that has been historically allocated to other end users. This will result in additional significant impacts under CEQA.

Moreover, no such impacts would have occurred under the Schrager Plan because its nominal increases in landscape irrigation would have been accommodated by the on-site well and sufficient water supply was available at that time through the State Water Project. (Schrager

[7] Per CPA's prior comment letters, the revised figure should be disregarded because it is based on inconsistent data, unsubstantiated assumptions and was not prepared by a licensed engineer.

[8] This has become a foregone conclusion even though a "property owner's acceptance of a Certificate of Water Availability pursuant to [Ordinance 89] shall constitute a binding commitment to use no more water than is made available under the Certificate." (Ordinance 89, p. 4; emphasis added).

Mitigated Negative Declaration, p. 88). Thus, due to substantial changes in the Project as well as the circumstances under which it has been undertaken, the Caruso Plan will result in significant environmental impacts not previously considered in the Schrager MND. The County must therefore prepare a Subsequent EIR as to water supply. For the reasons detailed above, its failure to do so constitutes a prejudicial abuse of discretion.

In addition to the deficiencies identified above, the County abused its discretion by failing to adequately identify and evaluate future water sources for the Project under *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412 ("*Vineyard Area Citizens*") and related case law. Despite the Applicant's unsupported attempts to characterize the defect as a substantial evidence issue (DLA Piper Letter, November 6, 2008, p. 10), the failure to provide such an analysis constitutes a CEQA procedural defect (and is actionable as a separate violation). *Id.* at 435.

In its October 7, 2008 comment letter to the MPC (CPA Appeal, Exhibit E, pp. 6-8), CPA explained *Vineyard's* standards and the Addendum's associated deficiencies in detail. As noted, the Revised 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,[9] the extent of current drought conditions, the potential environmental impacts that would result from the MWD's acquisition of supplemental water, the amount of time that will be required for the MWD to establish base allocations to individual users across the District, the extent to which the rate structure is actually expected to reduce demand, and so on.

The Applicant claims the Project should not be subject to the standards set forth in the *Vineyards* decision because that case involved a "very large, multi-year phased project . . ." (DLA Piper Letter, November 6, 2008, p. 10). However, *Vineyards* clearly sets forth "principles of analytical adequacy under CEQA" which the County must satisfy, particularly given the water deficits identified by the MWD for the 2008-2009 year and the years to follow.

Notably, these principles were recently addressed in *Center for Biological Diversity v. County of San Bernardino* (2008) Cal. Court of Appeal, Fourth District, Div. Two, Case No. E042316 (*CBD*) (*See* Exhibit 2 hereto). While *CBD* is not a published decision, it addresses a number of specific claims raised by the County and the Applicant and a reviewing court would likely undertake a similar approach in evaluating the Project's impacts if the present matter were to be litigated.

CBD involved a residential subdivision consisting of 57 lots in the Lake Arrowhead area. On build out, the project would have had a water usage requirement of 19.5 AFY. *Id.* at 17. The court concluded the County violated CEQA because the subject EIR "did not identify a specific

[9] Ordinance 89 expressly notes that other such projects are causing an impact: "[The] redevelopment of improved land, with larger residences and extensive landscaping; and the redevelopment of commercial and institutional uses into larger units are resulting in an increased demand on the District's limited water supply." (Ordinance 89, p. 1, Recital C).

source of water for the project or address the environmental consequences of obtaining water from the various purported alternative sources mentioned in the EIR." *Id.* at 3-4.

Notably, the EIR represented that "there are sufficient water resources in place" and "projected supplies exceed demand through the year 2020." *Id.* at 17. However, the Lake Arrowhead water district identified a number of factual inconsistencies regarding this claimed water availability. In that regard, the State Water Resources Board had challenged the water district's right to withdraw from Lake Arrowhead, the district's predominant source of water. Further, the water district sought to reduce its reliance on Lake Arrowhead and required the applicant to fund the cost of an alternative source. *Id.* at 18-19.

As with the current matter, the county and the applicant argued the analysis was sufficient because the water district had issued "will serve" letters. *Id.* at 22. The court rejected this contention, as follows:

> [The applicant] and County point out that [the water district] has agreed to provide water to the project, as evidenced by three "will serve" letters, and therefore the EIR identifies the project water source. The EIR identifies the water supplier, which is [the water district], but not the source of the water [the district] will supply to the project or the environmental impact of obtaining water from that source. Despite the lengthy discussion of water in the EIR, including the previously noted assurances from [the applicant] that the project will not use water from Lake Arrowhead, the question remains – if the project is not getting water from Lake Arrowhead, where will the project get its water, and what is the environmental impact of obtaining water from that source? *Id.*

Similarly, the court rejected the notion that the *Vineyard* decision did not apply due to the relatively small nature of the subdivision. The court concluded:

> Although *Vineyard* was decided after this case and involved the development of more than 6,000 acres of land into a master planned community that would include 22,000 residential units as well as 480 acres of office and commercial space [citation], it nevertheless stands for the unremarkable principle that an EIR must "adequately address[] the reasonably foreseeable impacts of supplying water to [a] project." [citation]. *Id.* at 25.

Notably, the EIR did identify potential alternative sources of water (including State Water Project imports and potential annexation to the San Bernardino Water District). However, based on the principles set forth in *Vineyard*, the court concluded the EIR was defective because it never discussed the *likelihood* that water would actually be obtained from any of the identified sources. *Id.* at 26.

Here, as in *CBD*, the Applicant's claim that the *Vineyard* decision does not apply is wholly without merit. Likewise, the MWD's commitment to serve cannot serve as a basis to avoid CEQA's minimum analytical requirements.[10] (*See* Staff Memorandum, p. 7; DLA Piper Letter,

[10] For instance, the Applicant contends, "If the ability of the MWD to issue a will serve letter was dependent on its ability to guarantee that water will always be available, then it would never be able to issue any will serve letter since it cannot predict the weather." (DLA Piper Letter, November 26, 2008, p.

November 6, 2008, p. 8). Again, the County must engage in an affirmative effort to identify potential supplemental sources and discuss the likelihood of actually obtaining water from them. Because the Addendum is completely silent on that issue, it is legally deficient under the statute.

Based on the above, there can be absolutely no question that significant unmitigable impacts to water supply/availability exist, and therefore a SEIR and statement of overriding considerations must be prepared.

3. Noise Impacts

As the County is aware, support piles for the Oceanfront Units would not have been required under the Schrager Plan. (Addendum Errata, p. 1, 5). For the reasons detailed below, the inclusion of such activities in the current proposal constitutes a significant project change that is inappropriately analyzed in the Addendum.

Per the Staff Memorandum and associated attachments, the Project will no longer require pile driving activities at the Main Building or Oceanfront Units. In that regard, the Addendum Errata states that no pile system of any kind will be used at the Main Building. (*See* p. 1). However, the discussion remains deficient because it provides no explanation as to how the structure's foundational requirements will otherwise be satisfied. More importantly, with respect to the Oceanfront Units, the Staff Memorandum and Addendum Errata indicate that a torque down method will now be used to install the requisite piles using a screw-driver type action driven by a 560 horsepower Delmag RH26 rig power train. (*Id.*).

Based on a November 19, 2008 noise and vibration report prepared by Acentech, Inc., the Errata concludes noise and vibrational impacts associated with this new installation method will be reduced to less than significant levels. (*Id.* p. 5). However, as explained below, the report is deficient because it is entirely unsupported by acoustical data and understates the impacts associated with the torque down method.

First, the report's findings are premised on the contention that the Delmag rig "would be positioned no closer than about 25 feet from [neighboring] residences when installing the nearest piles." (Acentech Report, p. 2; emphasis added). However, this statement is directly contradicted by facts in the record. For instance, the Revised Addendum (as approved by the MPC) indicates that pile driving at the oceanfront units would occur "within 6.5 feet of adjacent residences causing noise levels at these residences to reach up to 120 dB(A)." (Revised Addendum, p. 33; emphasis added).

Moreover, in support of the claim that the torque down method will not result in any additional geologic impacts, the Addendum Errata expressly states, "The number and location of piles to be installed *would not change* from the previous design." (Addendum Errata, p. 3; emphasis added). It also states that the torque down method "would utilize a similar footprint to pile-driving equipment." (*Id.* at 7). And per the photographs attached to the Acentech Report, the drill rig will be positioned directly above and adjacent to the pile installation site. (*See*

9). This misses the point; CEQA's analytical and informational purposes are not served by simply referring to a will serve letter.

Substructure Support, Inc. attachment).

Based on the foregoing, the Addendum Errata completely misstates the Project's noise impacts. For instance, because the closest installation is actually within 6.5 feet of adjacent residences, the Delmag rig will generate noise levels of approximately 103 dB at those receptors (per the distance standards relied upon by the County and the Applicant).[11]

These defects apply with equal force to the discussion of vibrational impacts. The Acentech Report states, "The following table provides structural damage thresholds for two types of residential structures and the calculated distance from the pile placement that the threshold would occur based upon the propagation of groundborne vibration with distance, shown in Figure 1." (Acentech Report, p. 2; emphasis added). Figure 1, in turn, indicates that pile installation activities will result in structural damage to older residences within 7 to 8 feet of the pile location. (*Id.* at 3). The report then erroneously concludes that "[n]o residential structures are located within these distances." (*Id.* at 2).[12]

The Errata is therefore legally deficient because it understates the Project's actual noise and vibrational impacts, provides the pubic with entirely inaccurate information, and therefore cannot serve as a basis for informed decision-making.

Further, the Errata fails to adequately evaluate potential mitigation measures associated with the proposed torque down method. For instance, the scope, feasibility and efficacy of the sound barriers proposed in the Acentech Report remain unknown.

The Acentech Report states, "[I]nstallation of noise attenuation barriers could reduce noise levels by 10 dB or more." (Acentech Report, p. 2). However, the report provides no acoustical data or factual basis to support this contention.[13] *See* CEQA Guidelines §15384 (substantial evidence includes "expert opinion supported by facts;" it does not include "speculation, unsubstantiated opinion or narrative . . .") (emphasis added). Further, the conclusion is contradicted by noise studies cited in Acentech's own report.

For instance, the Acentech Report relies on a Federal Highway Administration noise model for the fundamental proposition that the Delmag rig would generate 85 dB at a distance of 50 feet.

[11] Those standards provide that a 6 dB drop occurs with a doubling of distance from the source. Thus, based on the contention that the Delmag rig would generate 85 dB at 50 feet, the rig would generate 97 dB at a distance of 12.5 feet and 103 dB at a distance of 6.25 feet.

[12] Neither the Errata nor the Addendum provide an assessment of the age of any neighboring residences or the criteria for determining whether they constitute older or newer structures.

[13] The Acentech Report does not cite to any of the prior Dudek noise studies in reaching its various conclusions. To the extent it does rely on the Dudek studies, it remains unclear how those findings are applicable to the torque down method. In any event, the noise barrier identified by Dudek would have resulted in a noise reduction as low as 5 dB.

(Acentech Report, p. 2, fn. 5).[14] However, in a subsequent section, the noise model indicates that sound barriers will generally reduce noise levels by 10 dB only "[i]f the noise source is completely enclosed AND completely shielded with a solid barrier located close to the source. (*Id.*; *see* FHWA Roadway Construction Noise Model, Version 1.0 User's Guide, January 2006, p. A-1; emphasis added). Neither of these factors apply here[15] and, as noted above, the Acentech Report does not provide any factual support for its conclusion.

Nor does the Acentech Report set forth any specifications for the proposed soundwalls (in terms of materials, height, thickness, etc). Thus, it remains unclear whether 6.5 feet will provide sufficient space for the barrier, particularly after property lines are taken into consideration (the same issue applied to the proposed pile driving activities but was never addressed).

Finally, the County inappropriately attempts to construe the County Thresholds Manual in the manner *least protective* of environmental protection. The County Thresholds Manual sets forth the following general noise standard: "A proposed development that would generate noise levels in excess of 65dB(A) CNEL and could affect sensitive receptors would generally be presumed to have a significant impact." (County Environmental Thresholds and Guidelines Manual, p. 132). The County adopted this standard because "[t]he exposure level of 60-65 dBA is considered to be the *maximum outdoor noise level* compatible with residential and other noise-sensitive land uses." (County Thresholds Manual, p. 130; emphasis added).

Here, the County has adopted the Applicant's position that the Project's noise impacts have been sufficiently mitigated by imposing time/day restrictions on construction activities. (Addendum Errata, p. 6). This contention is premised on the following language contained in the County Thresholds Manual:

> [Based on adopted EPA noise standards], locations within 1600' of the construction site would be affected by noise levels over 65 dB(A). To mitigate this impact, construction within 1600 feet of sensitive receptors shall be limited to weekdays between the hours of 8 AM and 5 PM only. Noise attenuation barriers and muffling of grading equipment may also be required. Construction equipment generating noise levels above 95 dB(A) may require additional mitigation.

(County Environmental Thresholds and Guidelines Manual, p. 133).

The County relies on this provision in reaching the following conclusion:

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[14] The FHWA noise model does not specifically reference the Delmag rig or identify the amount of noise it typically generates. While the model does reference Auger Drill Rigs, the Acentech Report does not explain how these rigs are similar (in terms of horsepower and other operational components). Notably, the model indicates that "all other equipment" greater than 5 horsepower would result in 85 dB at a distance of 50 feet. (See p. 3, Table 1). The Acentech Report applies that estimate to the Delmag rig even though the Delmag rig uses *560 horsepower*. (Acentech Report, p. 1). The Errata is thus deficient because the rig's actual noise levels have not been determined.

[15] For instance, the Addendum Errata states that shielding of the Delmag rig is not feasible and amends mitigation measure "Noise 3" to reflect the same.

> [The torque down method will] produce noise levels of 91 dB(A) measured at 25 feet from the equipment. Noise attenuation barriers would be used to reduce these noise levels to a minimum of 81 dB(A) measured at 25 feet from the equipment. These noise levels are within the County's threshold of 95 dB(a) at 50 feet from the source and do not require additional mitigation measures. (Addendum Errata, p. 6).

First, this conclusion is incorrect for the reasons identified above. Again, piles will be installed within 6.5 feet of the closest receptor which will result in noise levels exceeding 100 dBA. Because the need for additional mitigation measures is triggered by "[c]onstruction equipment *generating* noise levels above 95 dB(A)" the County's position is untenable. Moreover, this is not a generic situation where residences will be subject to 65 dB from equipment located 1600 feet away. Based on the above, the conclusion that noise impacts will be reduced to less than significant levels is not supported by substantial evidence.[16] Because there is no reasonable basis to conclude that impacts will be mitigated to below the 65dBA threshold, the County cannot certify the SEIR without adopting a Statement of Overriding Considerations on this issue.

4. Floor Area Ratio

Perhaps no other issue reflects the specialized treatment afforded the Applicant than the decision to include Parcels 6 and 11 in the Project's floor area ratio (FAR) calculations. In the proposed findings for denial prepared in anticipation of the MPC's August 28th hearing, Staff stated that "normally, 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." (Staff Memo, dated August 21, 2008, Attachment A, p. 1). However, these principles were immediately forget once the MPC decided that it wanted to approve the Project.

By the same token, the Applicant's conclusion that the sandy beach extends 116 feet from the boardwalk is entirely unreasonable. Given the *obvious* physical condition of the beach, the MPC has included substantial portions of the Pacific Ocean in the Project's net lot area. Because FAR is based on *developable land area*, the MPC's approval constitutes an abuse of discretion. Again, this also applies to the sandy beach, particularly the public's 20-foot lateral access easement.

5. Conclusion

Given the lack of any meaningful analysis or discussion in the Staff Memorandum, the issues raised in CPA's Statement of Grounds for Appeal and prior comment letters have not been adequately addressed. Further, the critical issues raised above reflect deficient and biased nature of the environmental review process to date. Given these defects, CPA respectfully requests that the Board of Supervisors grant the appeals and overturn the MPC's approval of the Project.

[16] Notably, the deficiencies CPA has identified with respect to the offsite accommodation measure continue to apply. Forcing residents from their homes will also violate the County's quality of life thresholds. (County Thresholds Manual, p. 137).

Sincerely,

COAST LAW GROUP LLP

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CC: Client, Office of County Counsel, Planning & Development Dept. (Via E-Mail)
Enclosures