SHUTE, MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

ELLISON FOLK
Attorney
folk@smwlaw.com

January 30, 2014

Via Email and U.S. Mail

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

Re: Appeal of the Planning Commission's Approval of the Paradiso del Mare Ocean and Inland Estates Project

Dear Chair Carbajal and Member of the Board of Supervisors:

This firm represents the Santa Barbara Chapter of the Surfrider Foundation on matters related to the County's processing of the Paradiso del Mare project. I submit this letter on behalf of Surfrider and the Gaviota Coast Conservancy to address claims that a denial or substantial revision of the project would result in a unconstitutional taking of the Applicant's property.

Throughout the administrative process, the applicant has sought approval of a development project that is far larger and more environmentally destructive than the appropriate project that could be approved consistent with state and local law. Rather than redesign its project to address these impacts, the applicant has relied on threats of litigation in an attempt to coerce the County into approving the applicant's preferred project. As set forth in this letter, even if the County's zoning ordinance gives the applicant the right to build two homes (one for each parcel), the applicant does not have a right to approval of a particular type of project. Rather, the County retains its right to modify the project to address issues of public concern, and it is obligated to ensure that the project is consistent with the Local Coastal Plan and the California Environmental Quality Act.

Here, ensuring that the applicant's project is consistent with the requirements of state and local law would not result in a taking unless it effectively "appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 539 (2005). Even substantial reductions in property values resulting from government regulation are not sufficient to demonstrate that a taking has occurred. See,

e.g., *MHC Financing Ltd. Partnership v. City of San Rafael* (9th Cir. 2013) 714 F.3d 1118, 1127 ["81% diminution in value (from $120 million to $23 million)" insufficient economic impact to justify a finding of a taking].); *HFH, Ltd.*, 15 Cal. 3d at 512 n.2, 512-18 (where property retained value of $75,000, allegation that value had diminished by 80% did not state a claim for a taking); *Cormier v. County of San Luis Obispo*, 161 Cal. App. 3d 850, 859 (1984) (75% or more diminution in value due to downzoning not a taking); *Friedman v. City of Fairfax*, 81 Cal. App. 3d 667, 675-77 (1978) (recreational zoning which reduces property value by 80% does not eliminate all viable economic use).

When the applicant purchased the Dos Pueblos property, it was (and remains) designated for agricultural use and subject to the requirements of the County's Local Coastal Plan, its Land Use and Development Code, and the provisions of state law that require protection of coastal and environmental resources. These policies and laws (which have been addressed at length in the submissions of Surfrider and the Gaviota Coast Conservancy) mandate changes to the applicant's development plans to ensure that they do not encroach on environmentally sensitive habitat areas or adversely and unnecessarily affect environmental and public resources, such as white-tailed kites, a seal rookery and haul out, and long-established public access to the coast. Compliance with the requirements of these state and local laws will require re-location of the development envelopes and a substantial reduction in their size.

As noted above, even if ensuring compliance with these state and local laws substantially diminishes the value of the applicant's property, there is no automatic taking or County liability. For example, in *MacLeod v. Santa Clara County*, a property owner sued for a taking after he was denied a timber harvesting permit for his 7,000 acre ranch. 749 F.2d 541, 542-44 (9th Cir. 1984). On appeal, a 9th Circuit court held that the denial of the permit was not a taking because the owner could continue to use or lease the land for cattle grazing as well as hold the property as an investment. *Id.* at 547. "The fact that the denial of the permit prevented [the owner] from pursuing the highest and best use of his property does not mean that it constituted a taking." *Id.* at 548. Similarly, in *Long Beach Equities v. County of Ventura*, the court found that even where "zoning restrictions preclude recovery of the initial investment made." they do not result in a taking as long as some use of the property remains. 231 Cal. App. 3d 1016, 1038 (1991).

Furthermore, where property is purchased as a speculative investment, it is not the government's responsibility to ensure that this investment is protected. *MacLeod*, 749 F.2d at 549 ("the Fifth amendment is not a panacea for less-than-perfect investment or business opportunities"); *Long Beach Equities*, 213 Cal. App. 3d at 1041; *see also*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. . . .

Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform.") As a result, in *Del Oro Hills v. City of Oceanside*, the court reiterated the holdings of *Long Beach Equities* and *MacLeod* and found that where the property owner is engaged in land use speculation, it is not entitled to a profit on its investment. 31 Cal. App. 4th 1060, 1081-81 (1995).

The County also should not be liable for any claim by the applicant that the processing of this project has been unduly long. First, the County bears no responsibility for the Coastal Commission's denial of the golf course project and any dissatisfaction that the applicant may have with that process is irrelevant here. With respect to the project before the County, it is the first time the applicant has sought approval of a residential project for the site. Dissatisfied with the initial 2009 DEIR, the applicant itself revised the application and requested that the County retain another, different consultant to prepare a completely new DEIR, despite only minor changes to the Project Description.

Additionally, the site has an extraordinary set of natural resources and associated site constraints. The site has a long history of oil production; before that it was the site of extensive Native American occupation. The site contains important agricultural resources, a broad array of biological resources, and is visually prominent in an area with extremely high visual qualities. The site has a long history of public recreational use to look at and access the ocean that has been impacted by the applicant and will be impaired by the proposed Project. Resolving the many issues associated with developing in this environmentally sensitive area necessarily requires substantial time to evaluate impacts and ensure compliance with the requirements of CEQA that prohibit approval of a project with significant impacts if there are feasible mitigation measures and alternatives. That this process has taken time merely reflects the complex and sensitive nature of the issues raised by the applicant's application. Mere delays in the approval process for new real estate development are not compensable takings of property. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 351 (2002); *Loewenstein v. City of Lafayette*, 103 Cal. App. 4th 718, 736-37 (2002) ("A landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits.")

As documented above, nothing in takings law precludes the County from requiring relocation of the homes, a substantial reduction in the development envelopes and house sizes, and limits on future development of the site. The ability to relocate the homes includes the ability to move the coastal estate to the inland parcel. As long as the County can show that the developer receives a financial benefit from the transfer of development relocation of the estate, it should not be liable for a taking. Here, CEQA, the Coastal

Act, and County land use regulations require substantial reduction in the size and/or location of the homes to avoid significant impacts to public and environmental resources. Nothing in the law entitles the applicant to 8,678 and 9,963 square foot homes and 1.7 and 1.9 acre development envelopes. Therefore, the County could require the applicant to transfer the economic benefit of developing the coastal estate to the inland estate, where a larger home than might otherwise be permitted or two smaller homes could be constructed. The applicant would still receive economic value from its property and important coastal resources would be protected. *See Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484 (1982) (upholding TDR program that provided compensating densities on the receiver parcel); *Barancik v. County of Marin,* 872 F.2d 834 (9th Cir.1988) (same).

This result is especially true here where the Applicant has treated is property as a single economic unit and as a speculative investment. The property was purchased as a single unit, the original golf course project would have covered the entire landholding, and the settlement agreement with the Coastal Commission envisions residential development of the entire property, including the 25 antiquated Naples lots. When a "developer treats several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel." *See Forest Props., Inc. v. United States,* 177 F.3d 1360, 1365 (Fed. Cir. 1999) (holding relevant parcel included 53 upland acres and 9 acres of lake bottom where tracts were acquired at different times but "economic reality" was that owner treated the property as single integrated project).

Finally, the County's obligation to mitigate the impacts of the Project extends to its adverse impacts on public recreation. Here, the record, including the 2009 EIR and the testimony of surfers and other beach users, more than demonstrates that the Project will foreclose long-standing public access to the beach. County policies require protection of the public's constitutional right to access the coast. County Land Use Policy, 7-1, 7-2. Nothing in *LT-WR v. California Coastal Commission*, 152 Cal. App. 4th 770 (2007) precludes the County from conditioning approval of the project on the provision of adequate beach access to mitigate the adverse impacts of this project. In *LT-WR*. the court found only that the Coastal Commission could not prohibit the placement of a gate over a road based on the speculative potential to interfere with historic use of that road to access public recreation areas. Here, by contrast, the record is replete with evidence establishing the public's right to access the coast through the applicant's property. Moreover, approval of the project does not simply involve the placement of gates, but extinguishment of the trail long used to access the coast.

For the foregoing reasons and those set forth in the appeals of Surfrider and the GCC, we urge the County to reject the project as proposed and direct preparation of a revised EIR that recognizes the project's significant impacts and seeks to avoid these impacts through a robust alternatives analysis that considers siting some of the development and coastal access on the Naples lots.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Ellison Folk

558930.4