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January 31, 2014 Via Email

Board of Supervisors
County of Santa Barbara
123 East Anapamu Street
Santa Barbara, CA 93101

SUBJECT: Paradiso del Mare Ocean and Inland Lot Residential Development
Appeal 13APL-00000-000038
Hearing Date: February 4, 2014

Dear Chair Lavagnino and Honorable Board of Supervisors:

On behalf of CPH Dos Pueblos Associates (CPH), I would like to thank you for your time and consideration of the Paradiso del Mare Residential Project ("Project"). We have worked closely with County Planning and Development Staff, California Coastal Commission Staff, and members of the community to address the matters raised in the subject appeal and to reach agreement, as much as possible, on the project description and design, as well as Conditions of Approval for the Project. We are pleased to report that, with the assistance of your Staff and continued coordination with representatives of the Santa Barbara County Trails Council, we have resolved several appeal issues related to the proposed public access and recreational easement dedications resulting in withdrawal of the appeal filed by the Santa Barbara County Trails Council.

We very much appreciate the time the Planning Commission and County Planning and Development Staff have taken to conduct a comprehensive evaluation of the Project's consistency with all applicable County policies and ordinances, along with a thorough environmental review of the Project as disclosed in the Final Environmental Impact Report (FEIR), associated EIR Revision Letters and substantial expert testimony provided throughout the course of the Planning Commission hearing process (Planning Commission Hearings conducted on March 3, 2013, November 20, 2013 and December 4, 2013). We believe the County's careful analysis and consideration of the Project appropriately addresses the issues raised in the remaining appeal, and offer the following supplemental comments in response to specific issues raised the appeal.

1. Introductory Comments

The appellants contention that the "applicant elected to entirely scrap at great cost and delay" the previous 2009 Draft EIR is an erroneous statement that ignores the substantial coordination efforts that occurred for more than a year between the applicant team, County Planning and Development Staff, California Coastal Commission Staff, and members of the community to identify appropriate project revisions, to conduct numerous, updated special studies, and to identify the best options for conducting additional environmental review to reflect the project revisions that resulted from that coordination process. At the direction of County Planning and Development, the applicant proceeded with revising the entire EIR (indeed at great delay and cost) to accurately and comprehensively reflect the proposed project revisions that included substantially reduced residential and agricultural development in conjunction with proposals for a comprehensive habitat restoration plan, open space/conservation easement, and significant public access and recreation

easement dedications, all intended to address the Class I Impacts identified in the 2009 Draft EIR related to biological resources (white tailed kite foraging habitat), visual resources, and archaeological resources (associated with the waterline extension) as well as the needs and desires of the community. The project description revisions made subsequent to publication of the 2009 DEIR included the following:

- Relocation of the development envelope of the Ocean lot approximately 1,200 feet to the west of the originally proposed location to eliminate encroachment into 100-foot buffers for wetlands identified in the 2009 DEIR, and to avoid site areas historically documented as white-tailed kite nesting habitat and documented tarplant occurrences;

- Relocation of the development envelope of the Inland lot approximately 150 south/southeast of the originally proposed location to provide additional setback of the home site from Highway 101 and to better cluster and visually align the residential development on both lots;

- Construction of a bridge for residential access over the Union Pacific Rail Road (UPRR) corridor in place of the previously proposed undercrossing, thereby eliminating construction within Drainage 4;

- Realignment and consolidation of residential access roads/utility corridors into a single, shared access driveway/utility corridor located within the Inland lot and aligned as close to the Highway 101 right-of-way as possible.

- Reduction in the proposed Ocean and Inland lot development envelopes from 2.8 and 6.10 acres to 1.9 and 4.1 acres, respectively (acreages include all structures, grading, access road, driveways and utility corridors);

- Reduction in the proposed Ocean and Inland lot residences from 8,042 and 12,413 sq. ft to 7,227 and 9,163 to sq. ft., respectively (square footages are gross calculations as presented in the 2009 and 2012 EIR and include all proposed structures including garages, basements, wall and mechanical spaces, etc., and therefore far exceed proposed habitable square footages for the homes);

- Designation of specific agricultural planting areas and tree limitations (dwarf and semi-dwarf species) within the proposed agricultural envelope to maintain natural open space along the Highway 101 corridor, to provide landscape screening of the residences as viewed from Highway 101, and to ensure such plantings are consistent with agricultural practices along the Gaviota Coast and will not block bluewater views from Highway 101 upon reaching maturity;

- Inclusion of a number of offers to dedicate (OTDs) easements for both vertical and lateral public access and recreation facilities, contingent on approval of the proposed Project, including:

  - Public vehicular access from Highway 101 via the existing site entrance and driveway to the an area on the Inland lot dedicated for a public parking lot (20 spaces).

  - Trail access from the parking lot, over the UPRR property via the existing wooden bridge or new pedestrian bridge, to the California Coastal Trail easement.

  - Beach access via a "floating" easement that extends along the bluff of the Ocean lot from Drainage 5 to Eagle Canyon, which provides flexibility for siting and design options for a beach access trail/stairway.

  - Approximately 35 acres included in a floating easement for the development of over 7,500 linear feet of the proposed California Coastal Trail extending the entire length of the Ocean lot and including a bluff top loop trail.

  - Two coastal overlooks on the Ocean lot.

  - Lateral access along the beach for the entire length of the site measured from the base of the bluff to the mean high tide line.

  - Construction of a portion of the proposed California Coastal Trail easement, in conjunction with the proposed project utility corridor that extends from the existing wooden bridge connecting the Ocean and Inland lots over the UPRR to a proposed overlook area on the Ocean Estate;

- Overall site plan reconfiguration on both lots, as described above, intended to concentrate residential and agricultural land uses in areas of the property adjacent to anticipated and existing development and uses (Naples Townsite/Santa Barbara Ranch and Highway 101) and provide for contiguous open space over 96% of the property (when considering the proposed open space agricultural and conservation easement areas together);

- Inclusion of a 91 acre Open Space Conservation Easement, later expanded to 117 acres during the environmental review process, encompassing all on-site drainages and streams (including Eagle Canyon), and all areas know to contain sensitive cultural resources, wetlands, special-status plants (native grasslands, southern tarplant, and cliff aster), monarch butterfly aggregation site habitat, primary white-tailed kite nest habitat, California red-legged frog and tidewater goby habitat; and

- Inclusion of a Conceptual Upland and Riparian Mitigation and Monitoring Plan for 23.5 acres of on-site mitigation/revegetation on the Inland lot designed to establish a mosaic of new riparian, California sagebush scrub uplands, native grasslands, and enhanced exotics-free buffer zone areas intended to increase and enhance hunting, nesting and perching habitat for the white-tailed kite and their primary prey, the California vole.

The result of the extensive environmental review process conducted for the Project has resulted in a project that carefully balances limited development, resource protection, and public recreational amenities, which we believe resolves decades of debate over the appropriate balance of land uses for the property. In addition to the sensibly planned residential, agricultural and public access project elements, the applicant's proposed contributions to establish endowments for a Gaviota Seals Watch ($20,000) and Public Access Implementation plan ($500,000) will ensure longterm protection of significant coastal resources, while providing maximum public access and recreational opportunities of both regional and state-wide significance.

2. Project Description and Alternatives Relative to the Applicant-Owned Naples Lots

The appeal asserts that the project description and EIR analysis should include development of 25 lots on the Naples Townsite owned by the applicant because 1) the applicant has a "Standstill and Settlement Agreement" with the California Coastal Commission that allows for application of two homes on the subject properties and up to10 homes on the 25 Naples lots owned by the applicant and 2) construction of the waterline and driveway to serve the two proposed homes will be used in the future to serve the applicants 25 Naples lots. The appeal further indicates that by not considering development of the Naples lots as a part of the proposed project for the two single family homes *"the County and the public is deprived of any meaningful public benefit that could compensate for that Class I impact, which necessarily requires the siting of the coastal access trail at Tomate West through the Naples Townsite lots. This result is directly at odds with CEQA."* The appellants have raised similar arguments during the County's review of the project relative to the project alternatives analysis, arguing that the alternatives analysis is deficient because it has not considered off-site development on the applicant owned Naples lots. The appeal letter further asserts that a private covenant restricting development on the Project site and adjacent Naples lots supports their argument for analysis of an off-site alternative location for the Project.

<u>The FEIR Addresses Potential Development of the Applicant Owned Naples Lots Consistent with CEQA</u>

The FEIR clearly identifies the applicant owned 25 Naples lots as a related foreseeable project as enumerated in FEIR Table 3.0-1, No. 3. There is no requirement under CEQA to include development of the applicant's Naples lots with the proposed project. This would only follow if the County had determined that the Paradiso del Mare project site and the applicant's Naples lots would be part of the same Specific Plan area, requiring comprehensive planning of those two holdings contemporaneously. Accordingly, there is no "piecemealing" of this project. The FEIR adequately and correctly characterizes potential development of applicant's Naples lots as a related "reasonably foreseeable" project consistent with CEQA Guidelines Section 15130(b)(1)(a). Therefore, the contribution of impacts on cultural resources related to the proposed project in addition to the applicant's Naples lots is appropriately discussed under the FEIR cumulative impacts Section 3.5.4.4, and the FEIR adequately addresses this related project on page 3.5.-59, lines 29-32: "According to the Planning & Development cumulative list for the Gaviota Coast, 112 single family residences (not including agricultural employee housing) have been proposed for the region..."

Similar to the proposed project-specific environmental analysis, the cumulative impact on cultural resources was determined to be significant and unavoidable (Class I). This is the location in the FEIR where the project's contribution to regional impacts is combined with those from potential development of the applicant's Naples lots. The project statement of overriding considerations addresses both the project-specific and project contribution to cumulative impacts on cultural resources.

The appellant states that the impacts to cultural resources that may result from development of the applicant's Naples lots will not be appropriately addressed. This statement is very speculative as it is reasonable to conclude that any future development of the applicant's Naples lots will be subject to environmental review, particularly in light of the fact that the proposed project consisting of two single family residences was subject to an EIR. It also is reasonable to conclude that the cumulative impacts discussed

in relation to the any future development of the applicant's Naples lots will take into account the impacts associated with the Paradiso del Mare project, as this will be characterized as a "related foreseeable project" at that time in the future (even if the two houses will be built by then - related projects include "past and present" applications). As such, the environmental analysis for any future development of the applicant's Naples lots will indeed address the cumulative impacts on cultural resources resulting from that project and the Paradiso del Mare residential project.

Further, each project is addressed on its own merits and feasibility to reduce environmental impacts. The appeal forecasts the potential environmental review for the applicant's Naples lots, which has no justification under CEQA. This does not follow from CEQA Guidelines Section15144, Forecasting, that requires an agency to "use its best efforts to find out and disclose all that it can." Determining at this time what the County will require in the future is much more "too speculative for evaluation" per Guidelines Section 15145.

The FEIR Appropriately Addresses a Potential Offsite Alternative Consistent with CEQA

The appellants have argued that the County should consider an "off-site alternative that "merges" the Inland and Ocean lots and relocates the ocean lot development on the inland lot. The Inland and Ocean lots are zoned AG-II-100, which allows one single family dwelling unit per legal lot (Section 35-69.3.5 of the Coastal Zoning Ordinance). Because the UPRR owns in fee the parcel separating the Inland and Ocean lots, a lot line adjustment, resubdivision or lot merger to permit a second home site on the Inland lot is not legally possible.

In addition, the appeal letter asserts that the County should consider an alternative that would locate the proposed Ocean lot residence to the inland side (north of the UPRR property) of the applicant owned Naples lots. The result in either case would be to deny the property owner any and all use the Paradiso del Mare project site and adjacent Naples lots located south of the of the UPRR property. There are several reasons why this assertion has no merit.

First, a leading CEQA treatise explains its view that "identification of suitable locations for particular types of uses is a planning concern that should be addressed when local and regional land use plans are adopted. Once the policy decision has been made on the appropriate uses for a site, and that policy is incorporated in applicable land use plans, a specific development proposal should not trigger ad hoc reconsideration of plan policies." (Kostka & Zischke, Practice Under the California Environmental Quality Act (2nd Ed.) §15.25, p. 758.) The FEIR explains "the subject parcels are zoned AG-II-100, which allows one single family dwelling unit per legal lot (Section 35- 69.3.5 of the Coastal Zoning Ordinance)." Because the Project is consistent with the County's existing plans, policies and zoning, a review of alternative sites is not necessary.(Mira Mar Mobile Community v. City of Oceanside (2004) 119 Cal.App.4th 477.)

Second, CEQA requires that the County only consider a reasonable range of potentially feasible alternatives, which the FEIR (Chapter 6) amply reflects was done here. (14 Cal. Code Regs., §15126.6(a).)

Third, an EIR need not consider an off-site alternative that is legally infeasible. (Pub. Res. Code, § 21061.1; 14 Cal. Code Regs., §15364.) The EIR here determined that an analysis of alternative off-site locations was considered infeasible, stating: "Irrespective of development on alternative parcels, these two existing legal

parcels [the Inland and Ocean lots] would continue to be subject to development requests consistent with the allowable use of construction of a single-family home on each parcel." The off-site alternative suggested contemplates that the County deny all reasonable use of the Ocean lot, which would constitute a "taking." The EIR therefore properly considered the off-site alternative to be legally infeasible.

Fourth, an EIR does not need to consider alternatives that do not offer significant environmental advantages. (14 Cal. Code Regs., §15126.6(b); Tracy First v. City of Tracy (2009) 177 Cal.App.4th 912, 929.) As noted, the EIR correctly explains that even if development were permitted on an alternative off-site parcel, the applicant would still be entitled to develop a residence as a permitted use on the Ocean lot, "creating a circumstance where the alternative would foster increased development." The EIR therefore additionally concluded that the off-site alternative would be "unproductive" and would not offer a significant environmental advantage. (Id.)

Fifth, an alternative must also implement most basic project objectives. (14 Cal. Code Regs., § 15126.6(a).) The EIR explains that the major objectives of the project include (1) developing two high-quality coastal homes with supporting amenities on two existing legal parcels and (2) resolving pending litigation between the applicant and the Coastal Commission which, among other things, alleges that denial of a golf course use on the property resulted in an inverse condemnation. An off-site alternative that would require denial of a residence on the Ocean lot would not implement fundamental project objectives, and therefore need not be considered.

Finally, the FEIR explains that CEQA requires a certain level of certainty for a project alternative to be considered feasible. The FEIR further explained that "[t]here are a number of barriers and obstacles to the development of the applicant-owned Naples lots at this time, as demonstrated by the long and difficult review process experienced with the Santa Barbara Ranch Project . . . Because any future development on the applicant-owned Naples Townsite parcels would face similar hurdles, it is too speculative to presume the number of lots, location of lots, and technical characteristics of future development." The suggested alternative is therefore additionally infeasible because of the legal and practical uncertainty about the ability to implement it. (Marin Mun. Water Dist. v. KG Land Cal. Corp. (1991) 235 Cal.App.3d 1652, 1666 (legal uncertainty about ability to implement alternative justified determination of infeasibility.)

Private Utility Corridor Easement

The easement document referenced by the appellants was identified by the County as an application submittal requirement many years ago (2007/2008), and was required to be submitted to the County prior to deeming the subject applications "complete" for processing. The easement document permits the installation and maintenance of utilities on the Gaviota Holdings property to serve the two residences proposed. It is not a regulatory document nor was it made for the benefit of the public. It is a private agreement entered into for the benefit of the two parties, enforceable only by those parties. Under no circumstances has the property owner agreed to restrict the development potential of their Naples lots as allowed under the County's policies and ordinances, the Settlement Agreement with the Coastal Commission, and the existing Water User Agreement with the Goleta Water District.

3. Hazardous Materials

The appeal asserts the FEIR is inadequate in regard to description of existing hazardous materials conditions on the project site (*See* Appeal Letter, b. Inadequate Environmental Baseline, pp. 4-6). The following responses are organized to follow the same general order as the Appeal Letter discussion.

Page 5, First Paragraph

A specific claim is made in the first paragraph of Page 5, "*The EIR does not disclose the location, nature, or extent of the potential hazardous soil or groundwater contamination present on the site, associated with the extensive past on-site oil and gas activities (See EIR p. 3.9-8).* Such claim is erroneous; in fact the EIR from page 3.9-7 through 3.9-11 summarizes each of the components of former oil related operations on the property, assessment activities to address environmental contamination, and identification of instances where contamination was detected. EIR *Figure 3.9-1* accompanies the discussion by providing a graphic illustration of the location of each former oil operation component, soil remediation areas, and abandoned oil wells.

The appeal letter fails to acknowledge the responsibility and obligation of Atlantic Richfield Oil Company (ARCO) to correct or remediate residual contaminant levels on the property resulting from the former oil operations. The FEIR, pp. 3.9-2 to 3.9-5 details former oil operations by several companies at the property, and the resulting obligation of ARCO for ultimate remediation of contamination above acceptable levels (commonly referred to as "action levels"). The FEIR, pp. 3.9-7 to 3.9-8, summarizes the history of assessment activities and remedial action plans (RAPs) from 2006 through 2012. The description of hazardous materials conditions present on the property (which constitute the environmental baseline) presented in the FEIR, page 3.9-7 through 3.9-11, represents a summary of the detailed information from these investigations.

CEQA allows for, and encourages, the *incorporation by reference* of detailed studies that contain technical information beyond the grasp of the average member of the public to which the EIR is targeted. It is a common and accepted practice to present a summary discussion of the detailed evaluations in the EIR, focusing on a distilled version of the data germane to consideration of potential project impacts. Full citation is provided in the FEIR for each of the studies performed on behalf of ARCO to characterize site contamination and for the design of a program to correct or remediate unacceptable contamination levels. Therefore, employing the allowed method of incorporation by reference, the FEIR provides comprehensive detail regarding hazardous materials conditions on the project site.

Page 5, Second Paragraph

The first paragraph concluding sentence states: *The EIR also acknowledges "there is a possibility for some oil, methane, or toxic gases (e.g., volatile hydrocarbons, hydrogen sulfide) to remain after remediation of the site has been completed.* This sentence introduces the claim presented in the second full paragraph:

Depending on the nature and extent of the contamination, it may be necessary to relocate development envelopes and/or the agricultural envelope, to avoid significant impacts, but this is not contemplated in the

EIR. Proposed mitigation measures are limited to stopping work if "visual contamination or chemical odors are detected" (MM HAZ-3, FEIR p. 3.9-20). This mitigation is patently insufficient to address potential hazards and ensure that impacts are minimized.

With regard to contaminants remaining after site remediation is complete, regulations enforced by the California Department of Toxic Substances Control, Central Coast Regional Water Quality Control Board, and Santa Barbara County Fire Department Protection Services Division each allow for contamination to be left in place where such contamination does not pose a health risk due to exposure potential or contaminant concentration. SBFPD staff have expressed satisfaction that neither large scale soil removal nor other extensive remediation activity would be necessary which could necessitate relocation of the development envelopes, based upon detailed assessment data presented as part of the open clean up order against ARCO. Testimony to this effect was provided at the Planning Commission hearings, now part of the administrative record for consideration of environmental effects of the project.

The claim that MM HAZ-3 is the only mitigation addressing potential contamination is false and intentionally misleading as to the sufficiency of the mitigation program for hazardous materials impacts. MM HAZ-1 is in fact the principle mitigation to address potential hazardous materials impacts:

MM HAZ-1 A remedial action plan (RAP) shall be implemented by ARCO with SBFPD oversight, in accordance with all applicable regulatory guidelines. Results of the site assessment shall be used to develop remedial alternatives and ultimately an updated RAP, including mitigation for potential secondary impacts such as dust emissions; disturbance to sensitive ecosystems (e.g., wetlands); and worker health and safety hazards. SBFPD approval of the RAP shall be obtained and the RAP shall be implemented with SBFPD oversight, in accordance with all applicable regulatory guidelines and action levels.

Plan Requirements and Timing. Remediation at the proposed project site by ARCO shall be completed in accordance with an approved RAP. Site remediation shall occur prior to issuance of a Coastal Development Permit for project development.

The future residence home sites are therefore adequately protected, in that the remediation must be completed to the satisfaction of SBFPD before Coastal Development Permits can even be issued for the project.

It must also be noted the requirement for ARCO to implement an approved RAP for the property in order to achieve compliance with all regulations governing hazardous materials contamination and protection of human health applies irrespective of the proposed project. ARCO is under an existing, on-going, obligation to comply with clean up requirements imposed on this property, regardless of whether the proposed Paradiso project moves forward. This obligation of ARCO to comply with regulations cannot be construed to constitute an effect of the Paradiso project.

Page 5, Third Paragraph

The initial sentences read: *At the March 20, 2013 hearing, the Commission requested additional information regarding potential hazardous soil contamination underlying the Ocean Estate. Since that hearing, AECOM prepared a document responding to comments from County HazMat staff, which*

unfortunately discloses that the extent of soil contamination is still largely unknown. The evidence provided to support the claim is contained in the closing sentence: *In response AECOM provided Figures 2 and 3, which marks the extent of contamination with question marks for both lateral and vertical directions, showing that the "Approximate extent of TPH impacts· [is] quarried where uncertain". (See AECOM Report, 8/2/13, hereby incorporated by reference).*

Standard procedure for assessment of soil contamination is the collection of samples starting at the source, and stepping out at a prescribed interval (usually 3 to 5 feet), with each sample point including discrete depths (also usually 3 to 5 foot intervals). Once the samples are analyzed for concentration of contaminants, a determination is made regarding which concentrations are over an acceptable limit (impacted soil) versus those below (not impacted). Where adjacent samples include concentrations "above" the limit and "below" the limit, a boundary is interpolated between these sample points depicting the probable extent of the impacts soils. The *quarried* boundaries on Figures 2 and 3 simply indicate the probable boundary between the data points that indicate elevated concentrations, from the data points that have acceptable concentrations. The quarried lines do not automatically denote the need for further investigation, particularly where the boundary of marginally contaminated soil occurs at a depth that would preclude exposure to persons.

MM HAZ-1 already requires that identified soil contamination be remediated to acceptable levels before any coastal development permits are issued for the residences. The Santa Barbara County FPD will dictate the methods used for characterization, remediation, and verification sampling and analysis to demonstrate compliance with MM HAZ-1. As the Planning Commission has heard from testimony, both Paul McCaw and Tom Rejzek are satisfied with the assessment/characterization program conducted for the project site.

<u>Page 5, Fourth Paragraph</u>

The first sentence reads: *As explained in two comment letters to the Planning Commission from hydrologist and geochemist Mark Kram, Ph.D. dated 11/19/13 and 11/25/13 (hereby incorporated by reference), on account of this uncertainty, it is unknown what total amount of material would require remediation or removal*.

It must be noted that Mr. Kram's company manufactures equipment for the collection of soil and water samples to support identification of contamination in these two media. The equipment is designed to allow continuous and discrete sampling in the field for more precise delineation of contamination boundaries. Mr. Kram has also been working to recommend methodologies that employ this technology as part of a refined standard he is hoping will be adopted by the American Society of Test Methods (ASTM). The level of detail Mr. Kram professes is necessary for petroleum contamination exceeds adopted standards; however, if he fails to provide comments at every opportunity on local projects involving petroleum-related environmental contamination, his efforts at having a new standard adopted could be stifled. The Planning Commission did not find Mr. Kram's points to have merit.

With regard to remediation effort, it must again be stressed the remediation is an existing obligation of ARCO, irrespective of the Paradiso project. The property is not zoned for commercial or industrial use, and therefore the clean-up standard is the same whether the property is used for residences or open space.

The closing sentences read: *Further, if contamination extends to the water table, there would be an entirely new potential risk to be addressed. County HazMat staff clarified that an assumption was made that groundwater in the vicinity of the Ocean Estate would be too deep to be reached by any potential contamination, without any actual testing or knowledge of groundwater depth on site.* The claim trivializes research performed to identify groundwater depth below the project site. Various investigators have performed evaluations regarding the depth to the shallowest occurring groundwater, including those for the original facility abandonment assessment, the Dos Pueblos Golf Links proposal (where absence of groundwater lead to proposed importation of water by pipeline), and the development of various versions of the RAP. These studies employed research and analysis of recorded depth to groundwater for existing water wells along the Gaviota Coast. Regional well data is an accepted method of evaluation, where the depth to groundwater would result in prohibitive expense to drill a well on a site for the purpose of defining this depth.

Groundwater was not encountered in the soil borings conducted to assess soil contamination anywhere within the property. Therefore *potential* contamination affecting shallow groundwater is not an exposure risk for future project residents. The homes will be supplied from a municipal water source, not from groundwater extraction at the site; therefore *potential* contamination of groundwater occurring at greater depth would also not represent a health risk for future project residents. The two proposed homes would not involve the use of chemicals or substances that could worsen *potential* contamination of groundwater beneath the site. And finally, introduction of the homes on the site would not preclude future assessment or groundwater remediation activities; were groundwater contamination to be identified in the future, extraction wells and a treatment system could be located outside of the building envelopes. The claim of "new potential groundwater risk" not addressed in the EIR is therefore spurious.

Page 5, Final Paragraph

The second sentence contains the only information not stated in earlier claims: *Because the EIR has not adequately characterized the level of contamination on the Project site, it does not adequately evaluate potential health and safety impacts associated with the development of the site*." AECOM prepared a health risk assessment which evaluated the highest concentration level of all contaminants identified in shallow soils (which present the greatest risk of exposure to future residents), and which concluded the contaminant concentrations in shallow soils do not pose an elevated heath risk. The 2012 AECOM health risk assessment findings were presented in the FEIR (p. 3.9-11), while the AECOM report itself *was incorporated by reference.* Therefore, the FEIR does evaluate health and safety impacts associated with development of the site.

The closing sentences of the paragraph assert additional undisclosed impacts: *The EIR also fails to disclose, analyze or mitigate potentially significant impacts associated with remediation of contamination that may be much greater than assumed in the EIR and would result in greater excavation of soils (which could be substantially greater than assumed in the EIR) and concomitant new significant impacts to biological, visual, recreational, biological, geologic, and water resources.* First, the appeal draws an unsubstantiated conclusion that necessary remediation would involve extensive excavation, as opposed to the testimony by SBFPD staff that identified contamination would largely be allowed to remain in place, in accordance with allowances in applicable regulations, and based upon the findings of a health risk assessment.

Second, the remediation of the subject property is an existing obligation of ARCO, irrespective of the Paradiso project. The remediation must be completed prior to issuance of coastal development permits for the Paradiso project, and will be mandated by regulatory authorities, even if the Paradiso project is not constructed. Therefore, the remediation project is an entirely independent and separate activity, the impacts of which must not be assigned to the Paradiso project.

4. Harbor Seal Haul-Out Noise Issues

The appeal asserts the Final Environmental Impact Report is inadequate in regard to analysis of project noise impacts upon the Naples Harbor Seal Rookery (*See* Appeal Letter, c. Inadequacy of Project Impact Analysis and Mitigation Measures, i. Significant Unmitigated Impacts to Biological Resources, 2. Naples Harbor Seal Rookery, pp. 9-10). The following response is organized to follow the same general order as the appeal letter discussion.

Page 9, First Paragraph

The third sentence reads: *While public access in the vicinity of the rookery has been ongoing for generations and is part of the environmental baseline, constructing and occupying a residence in such close proximity to the rookery will introduce an entirely new and unfamiliar use that could be the final straw resulting in the loss of this precious local resource (see Howorth comments to Planning Commission).* Neither the appellants in their complaint, nor the marine mammal experts engaged to oppose the project, acknowledge the period of history with much greater intensity of activity on the project site associated with oil extraction and production activities. As detailed in the oil production history of the subject property (Final EIR pp. 3.9-2 to 3.9-5), oil production on the site began in 1929 and was sustained until abandonment of the facilities in 1998 (a period of 70 years). During this period activity on the site included the drilling of wells, operation of well pumps, regular trips by heavy tanker trucks, construction of collection lines and storage tanks, etc. The noise levels and use of night-time lighting during this period was of far greater intensity than that which would be associated with construction or occupation of two single family residences on the property. No documentation presented by the appellants suggests the Naples Harbor Seal Rookery had a declined level of use across the 70 year period of oil activities on the site; from a noise perspective, this suggests that the harbor seal population using the rookery has some tolerance for anthropocentric noise generation.

Page 9, Second Paragraph

This paragraph reads:

> *Marine mammal expert Peter Howorth submitted extensive comments (including comment letters dated 10/15/13 and 12/4/13, hereby incorporated by reference) criticizing the EIR's failure to adequately address the Naples Seal Rookery. Among his criticisms is the EIR's failure to analyze whether construction and occupancy of the Ocean Estate would result in impacts to the Seal Rookery. Additionally Mr. Howorth expresses numerous concerns regarding the proximity of the Ocean Estate and associated construction staging area so close to the seals, due to the potential for noise lighting, vibrations, and human activity to impact the seals. The EIR, response to comment, and revised*

> *biological resources section do not include any actual data or analysis regarding whether occupant related activity may cause continuing (post-construction) impacts and force abandonment of this site for a less-favorable seal haulout and rookery area. An ad-hoc explanation offered at the March 20th Planning Commission hearing by a member of the applicant's team (with no experience or credentials with respect to marine mammals), regarding construction noise is that passing trains have a similar noise frequency to construction noise. Of course, as clarified by Mr. Howorth before the Planning Commission, trains pass only infrequently whereas construction noise would be more constant, resulting in substantially more disturbance to the seals. Impacts to the seals from transient noise and impacts from constant noise are not comparable, and are assessed and mitigated entirely differently.*

First, with respect to the proximity of the Ocean Estate and Mr. Howorth's concern regarding "*potential for noise lighting, vibrations, and human activity to impact the seals"* the industrial period of the site cannot be overlooked or discounted. Figure 3.9-1 (*see* FEIR p. 3.9-3) indicates the location of three former oil wells within the development envelop. The construction of each of these wells alone would have involved several weeks of continuous drilling activity (drilling cannot be disrupted due to the risk of collapse of the bore hole), followed by pumping. Noise for the drilling activity would be similar to construction activity for the proposed Ocean Lot improvements, except the Ocean Lot's construction activity would be limited to the day time. The Ocean Lot's construction would also not involve night-time lighting. No evidence has been presented by the mammal experts that use of the Naples Seal Rookery declined during the former on-site oil operations, or related ongoing abandonment and remediation activities, including those located as close the seal rookery as the Lot. To the contrary, evidence from the appellant mammal expert and biologists involved in the preparation of the EIR indicate continuing successful use of the rookery site, and not abandonment of the site caused from industrial noise levels.

Second, with respect to the assertion: "*The EIR, response to comment, and revised biological resources section do not include any actual data or analysis regarding whether occupant related activity may cause continuing (post-construction) impacts and force abandonment of this site for a less-favorable seal haulout and rookery area"* the claim is false as it relates to noise effects of the project. The responses to comments on the EIR, and to Mr. Howorth's comment letter of 10/15/13 provide quantification of sound levels produced during construction and the attenuated sound levels that would exist at the seal rookery area. The analysis demonstrated the noise from construction would produce a lower average noise level (community noise equivalent level or CNEL) at the seal rookery than the existing CNEL generated from train operations on the UPRR tracks. Train operations produce a calculated noise level of 18 dBA CNEL at the rookery, whereas construction is calculated to result in a noise level of 8 dBA CNEL at the seal rookery.

Third, the appeal letter includes an inflammatory representation of the following assertion: *An ad-hoc explanation offered at the March 20th Planning Commission hearing by a member of the applicant's team (with no experience or credentials with respect to marine mammals), regarding construction noise is that passing trains have a similar noise frequency to construction noise.* The context of the response was omitted, but was essential for the framing of this response. The Planning Commission had just been presented with the verbal summary of construction noise levels versus the noise levels from train operations. A member of the Commission remarked that while the construction noise would be lower than train noise, the two sources would have totally different sound qualities. As a *credentialed noise expert*, Jonathan Leech explained to the Planning Commission that in fact the frequencies of individual sound

produced from train operations (i.e., the diesel train engine, exhaust stack noise, squeaking of metal wheels against the steel track), would indeed be very similar to the frequencies produced from construction (construction equipment diesel engines, exhaust stack noise, squeaking of metal tracks on tracked equipment).

The closing sentences of the paragraph contain misinformation attributed to an individual unqualified to make the 'findings' presented: *Of course, as clarified by Mr. Howorth before the Planning Commission, trains pass only infrequently whereas construction noise would be more constant, resulting in substantially more disturbance to the seals. Impacts to the seals from transient noise and impacts from constant noise are not comparable, and are assessed and mitigated entirely differently.* It should be noted that Mr. Howorth is not an acoustics expert, having no identified professional experience in acoustics nor any affiliation with an institution or society which is responsible for maintenance of standards in acoustics or certification of acoustics practitioners. His views on how noise is assessed, or how noise impacts are mitigated, must not be taken as more than conjecture from a non-expert. In fact, the UPRR alignment which runs through the subject property carries six passenger trains per day and approximately 11 freight trains per day. This is a frequency of nearly one train per hour, around the clock; characterizing this as *infrequently* is not at all accurate. The mitigation for the proposed, temporary, construction noise includes restriction to daytime hours only and the use of noise barriers between the construction activity and the seal rookery; each of these measures would result in an assured, and verifiable, reduction in the construction-related average noise levels reaching the seal rookery. There is no requirement for UPRR to mitigate the on-going noise effects of rail operations through the subject property, including the existing noise levels incident upon the seal rookery.

5. Public Access and Recreation

The appellants contend that it is "impermissible" for the FEIR to specify that only the proposed project in the applicant's preferred configuration would include public benefits including the public access offerings and the conservation easement. The appellants further assert that the loss of one unauthorized trail at the project site would result in a Class I recreational impact, and that the County may *"never accept the easements or improve them for public use."*

<u>Absent the Applicant's Proposal to Offer to Dedicate the Public Access and Recreation Easements, the Access Easements Could Not be Required by the County</u>

The proposed Project includes development of a single-family residence and agriculture use area on the westerly (or upcoast) portion of both the Inland Lot and the Ocean Lot. The developments have been carefully sited in this location so that, consistent with the Settlement Agreement, they are clustered nearest the Naples lots immediately to the west, placed furthest from the identified sensitive habitat areas and proposed public access areas, to provide for reasonable separation between the residential, agricultural and public uses to ensure land use compatibility, and to accommodate a 117-acre Open Space Conservation Easement.

As clearly identified in the project description, all public access easement dedications are contingent on approval of a residential development site that is located a sufficient distance from the public easement

dedications and in the westerly portion of the lot to ensure residential, agricultural, and recreational land use compatibility of the site.

While the Project proposes only two homes and an agricultural use on each of two lots, the offers to dedicate public access and recreation easements are substantial. They include lateral and vertical trails on the property, lateral access on the beach, a scenic overlook at the bluff edge, and an area for an 18-car public parking lot on the easterly (or downcoast) portion of the inland lot. As noted, the offers to dedicate are contingent in nature. It bears emphasis that if the Applicant did not volunteer to offer these easements, the easements could not be required in connection with this two-house development because of constitutional and other constraints.

First, in the CEQA context, the access easements would not be legally permissible as a mitigation measure because the two-house project itself will not create any significant adverse environmental impact on public access. The site is and for decades has been fenced, posted with "No Trespassing" signs, and patrolled by security guards. Consequently, there would be nothing to mitigate.

The FEIR underscores throughout that there is currently "unauthorized" public access across the property. The Project Overview explains:

> "The project site is private property that is currently fenced, gated and patrolled by a security guard. However, some level of unauthorized ongoing public access is evident. A moderately sized unauthorized trail crosses the site from U.S. Highway 101 east of Tomate Canyon and an additional unauthorized trail cross the UPRR in the vicinity of Eagle Canyon. In addition, an unauthorized east-west trail appears to exist along the UPRR corridor and a steep, but useable pathway exists from the bluff top east of Tomate Canyon to the beach below."

We understand that, as in the past, there are those who assert that through trespass, surfers have somehow acquired a prescriptive right to continued use of the trail. While the FEIR does explain that there is one trail across the site and that its use has been "unauthorized," it must be noted that there is substantial evidence and site history which confirm that the uninvited access over this property has indeed been unauthorized and that no prescriptive right to use any portion of the property exists.

Specifically, in connection with the original golf course proposal, CPH's predecessor, ARCO, provided the County and Coastal Commission with sworn affidavits from oil company personnel for the period from the mid-1940's to the present which indicated that a continuous and effective effort has been made over the years to exclude trespassers from the site. This evidence has previously been provided to County Staff. Moreover, based upon that evidence, the Court of Appeal in *Surfrider Foundation v. California Coastal Commission* (1997) 2d Civil B101510, explained, in reviewing the Commission's original decision to approve the Golf Links Project:

> "In an effort to prevent surfers from crossing the site, ARCO has installed fences, posted signs against trespass, and employed security guards to remove surfers from the beach. The site has no legal beach parking. Thus, to reach the beach, surfers and beachgoers must park along the far side of Highway 101, cross the highway, scale at least one barbed wire fence, cross a railroad track, and climb down a steep, and at time unstable, bluff.

Referring to the access program on the property which ARCO proposed in connection with the Golf Links Project, the Court of Appeal continued:

> " . . . For the first time, beachgoers will enjoy access without parking illegally, dashing across an interstate highway, climbing over barbed wire fences and a railroad track, shimmying down a steep bluff, or being escorted off the property by security guards."

The Court of Appeal also went further in noting that the Commission cannot decide whether public prescriptive rights exist: "Nor will the project destroy any access rights that may have been acquired through public use. The Commission did not decide whether such rights existed, nor could it." In short, while there has been acknowledged unauthorized use of one trail across the site, there is ample substantial evidence that no prescriptive right of access exists.

Moreover, to impose mitigation measures on a project, a public agency may exercise only those powers provided to it by legal authority independent of CEQA. (Pub. Res. Code § 21004; *Sierra Club v. California Coastal Commission* (2005) 35 Cal.4th 839, 859.) There is no authority in the Coastal Act or the County Coastal Plan (which implements the Coastal Act) which authorizes either the Commission or the County to somehow adjudicate or "decree" public prescriptive rights across private property. In *LT-WR v. California Coastal Commission* (2007) 152 Cal.App.4th 770, for example, the Coastal Commission denied a CDP for security gates and "no trespassing" signs under Coastal Act Sections 30210 and 30211 based on the existence of *potential* prescriptive rights in favor of the public. The Court held the denial of a permit on such grounds to be speculative and beyond the authority of the Commission:

> ". . . [W]e conclude the trial court properly overturned the Commission's denial of a permit for the gates and no trespassing signs. Inherent in one's ownership of real property is the right to exclude uninvited visitors. In prohibiting LT-WR from excluding the public from its property on the theory that "potential exists to establish prescriptive rights for public use," the Commission in effect decreed the existence of such rights. We find the Commission's denial of a permit for the gates and signs, premised on the existence of 'potential' prescriptive rights, was speculative and properly was overturned by the trial court.
>
> * * *
>
> "[T]he Commission is not vested with the authority to adjudicate the existence of prescriptive rights for public use of privately owned property. In denying LT-WR a permit for the gates and no trespassing signs due to the possibility of prescriptive rights, the Commission gave credence to the claimed prescriptive rights. The Commission's denial of a permit for the gates and signs, premised on the existence of 'potential' prescriptive right, was speculative and properly as overturned by the trial court." (152 Cal.App.4th at 775, 806.)

Thus, "unauthorized access" cannot be converted into lawful access and mitigated to require public access. If the Applicant did not offer the access easements noted above, a mitigation measure requiring some form of public access could not be lawfully imposed. (CEQA Guidelines § 15126.4(5).)

Second, as with any government exaction or condition of approval, a mitigation measure cannot violate state or federal constitutional standards. The CEQA Guidelines explain:

> "A lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid all significant effects on the environment, consistent with applicable constitutional requirements such as the "nexus" and "rough proportionality" standards established by case law (Nollan v. California Coastal Commission, (1987) 483 U.S. 825, Dolan v. City of Tigard, (1996) 512 U.S. 374, Ehrlich v. City of Culver City, (1996) 12 Cal.4th 854." (CEQA Guidelines § 15041(a)

CEQA Guidelines Section 15126.4(a)(4) further explains, in relevant part:

> "Mitigation measures must be consistent with all applicable constitutional requirements, including the following:
>
> (A) There must be an essential nexus (i.e. connection) between the mitigation measure and a legitimate governmental interest. (*Nollan v. California Coastal Commission*, (483 U.S 825 (1987); and
>
> (B) The mitigation measure must be 'roughly proportional' to the impacts of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994) . . . ." (Emphasis added.)

The two U.S. Supreme Court cases cited in the CEQA Guidelines frame the constitutional limitations on public access easements. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, holds that there must be an "essential nexus" between the burden created by a project and the exaction or mitigation measure imposed to address it. In other words, there must be a precise match between the condition imposed and the specific type of burden on access created by the project. *Dolan v. City of Tigard* (1994) 512 U.S. 374, holds that in addition to satisfying the *Nollan* "nexus" requirement, there must be "rough proportionality" between a condition and extent of the impact it is supposed to mitigate. The Court explained: "No precise mathematical calculation is required, but the city must make some sort of *individualized determination* that the required dedication is related *both in nature and extent* to the impact of the proposed development."

In the absence of the Applicant's decision here to volunteer the access easements noted, neither requirement could be satisfied here. There may be illegal parking offsite on the inland side of Highway 101 and an unauthorized trail across the property. Neither situation, however, was created by CPH or its predecessors, and it should suffice to state that extraordinary mitigation measures or conditions requiring dedication of an 18-car parking lot and an extensive access network on the property in connection with a two-house development would lack the "essential nexus" and "rough proportionality" required, even if the sentiment is that such access would provide a significant community benefit.

In any event, the legal constraints on the imposition of access requirements should not present an issue with the instant application as CPH has proactively offered to dedicate the public access and recreation easements, subject to the contingency noted above. The offers to dedicate could, of course, be accepted by the County and implemented shortly after project approval.

Conclusion

We believe the issues raised in the remaining appeal have been thoroughly vetted during the many years of development review for the subject properties, including the County's and Coastal Commission's review of the previous Dos Pueblos Golf Links Project, and the eight-year County review process culminating in the two-home residential proposal now being presented for your consideration. As a result of a diligent environmental review process, close coordination with County and Coastal Commission Staff, and input provided by numerous stakeholders, the proposed Project carefully balances limited residential development and agricultural uses with protection of significant coastal resources, while providing maximum public access and recreational opportunities of both regional and state-wide significance.

We thank the Board of Supervisors and Staff again for your time and consideration and, based on substantial evidence in the record, we wholly support the Staff Recommendation to deny the appeal and approve the Project finding that the Project complies with the California Environmental Quality Act and is consistent with all applicable provisions of the County's General Plan and certified Local Coastal Plan.

Sincerely,

April Winecki
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