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VIA E-MAIL AND HAND DELIVERY

Board of Supervisors
County of Santa Barbara
105 East Anapamu Street
Santa Barbara 93101

Re: Beach Club Family Trust Lot Split
Case Nos. 12TPM-00000-00006,
11CDH-00000-00006 and -00054

Dear Chair Lavagnino, Vice Chair Wolf, and Honorable Supervisors:

We represent the 3282 Beach Club Drive Family Trust, the Applicant on the above-referenced cases (collectively, the "Project"), and we write to dispel a number of errors in the Appellants' claims in their letters and appeal forms, particularly as they relate to the County's interpretation of its own policy documents, and significant overstatements regarding public rights as they relate to the Project Site. As described in more detail below, the Planning Commission properly approved the Project and certified the Mitigated Negative Declaration ("MND") for the Project. The Appellants attempt to use a series of selective, out-of-context quotes in an unsuccessful attempt to raise a "fair argument" that the County must prepare an environmental impact report ("EIR").

Three basic and erroneous assumptions underlie Appellants' arguments regarding a purported requirement for vertical access on the Project Site: (1) the presence of Toro Creek in the Summerland Community Plan requires its designation as a trail; (2) County policy does not allow consideration of factors other than public access; and (3) the MND contains a baseline other than what the California Environmental Quality Act ("CEQA") requires and fails to evaluate certain issues. As described below, none of these assumptions withstands analysis. Accordingly, the Board of Supervisors (the "Board") should affirm the Planning Commission's determination, certify the MND, and approve the Project.

1. Neither the Community Plan nor County Policy Designates or Requires Toro Creek as a Trail.

Appellants reference one figure and selectively quote certain policies regarding coastal access to wrongly imply that coastal access is required on the Project Site. Appellants rely extensively (and mistakenly) on Figure 15 of the Community Plan, and devote considerable

discussion to the validity of that figure and its place in the hierarchy of County planning documents. However, *the MND and Planning Commission staff report do not dispute that Exhibit 15 constitutes a portion of an adopted planning policy document*. Rather, the opposite is true: both documents specifically address the Community Plan in their policy and planning analyses.

Appellants disingenuously claim that Figure 15 affirmatively designates Toro Creek as a trail, omitting an important qualification in the figure that severely undercuts their argument. As discussed on page 5 of the November 15, 2013 Planning Commission staff report (explicitly and repeatedly incorporated by reference in the revised Planning Commission decision letter dated January 23, 2014), Figure 15 shows a "*possible* future trail" (emphasis added) on a portion of the Project site. That is, the notation for Toro Creek is a highly contingent one: nothing about a designation of an area that could, conditions permitting, potentially be considered for a trail "requires" that the Project provide such a trail, particularly when a number of important considerations—such as nexus, proportionality, and environmental protection—militate against such a requirement. Contrary to Appellants' contentions, and as described further below, State law and County policies both require consideration of a range of factors in determining the suitability of any particular access point—factors already considered by the County—and these factors effectively preclude the requirement for a vertical access easement.

2. State Law and the County's Policy Framework Require Consideration of Environmental and Other Factors in any Decision Regarding an Access Easement.

Appellants cherry-pick four policies that they then consider in a vacuum and outside the context of the County policy framework. Additionally, Appellants mischaracterize State policy, specifically the Coastal Act.

(a) County Policy Requires Consideration of Several Factors, Including the Environment, in Determining Whether to Provide Public Access.

As a preliminary matter, the Planning Commission's general finding of consistency with applicable plans, including the General Plan, does not require strict consistency with every policy or with all aspects of the plan. Land use plans attempt to balance a wide range of competing interests, leading to competing and sometimes conflicting policies, and a project need only be consistent with a plan *overall*. Consequently, even though a project may deviate or appear to deviate from some particular provisions of a plan, the County may still find the project consistent with that plan on an overall basis. *See, e.g., Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 815 (2007).

The County policies attempt to balance public access with protection of a range of environmental resources, including archaeological sites and sensitive biological resources. Courts must defer to an agency's interpretation of its own General Plan and factual findings unless "a reasonable person *could not* have reached the same conclusion." *No Oil, Inc. v. City of*

Los Angeles, 196 Cal. App. 3d, 223, 243 (1987) (emphasis added). Here, this balancing problem is directly articulated in the Comprehensive Plan Open Space Element:

"As the State Planning Law is written, areas of 'outstanding cultural value,' which logically include archaeological sites, are classified as Open Space for Outdoor Recreation. This classification is somewhat contradictory in that ***archaeological sites can only be preserved by preventing public access*** . . . [s]uch sites should be ***administered much like natural preserves*** where access is permitted for scientific study only."

Page 15 (emphasis added). Thus, the County policy framework recognizes that pothunting or other vandalism (which has occurred on the Project Site) is a major source of damage and destruction and increases with increased public access. Consistent with this determination, the Conservation Element states, on page 235-6, "[o]ne of the most significant indirect threats for the destruction of archaeological sites is public access." The Summerland Community Plan contains a similar policy, HA-S-1, which requires "[s]ignificant cultural, archaeological and historical resources in the Summerland area ***shall be protected and preserved***" (emphasis added). Also, recognizing the threat that public access poses to cultural resources, Native American tribal representatives, as well as qualified archaeologists, have specifically requested that the County protect the resources by ***not*** providing public access on the Project Site.

Public access poses a similar problem for habitat areas. Numerous policies throughout elements of the General Plan similarly emphasize protection of natural and other resources. Coastal Land Use Plan ("CLUP") Policy 3.9.3 specifies recreational uses as among those posing the greatest threat to habitat, "because existing County regulations do not provide adequate protection. . . . Impacts from recreational uses include . . . trespass, trampling or alteration of vegetative cover, disturbance of wildlife, collection of specimens . . ."

Consistent with these concerns, Policy 7.2 of the CLUP, lists four factors for consideration in determining whether to require an easement, including, most notably, the following two:

- a. Another more suitable public access corridor is available or proposed by the land use plan within a reasonable distance of the site measured along the shoreline,¹ or
- b. Access at the site would result in unmitigable adverse impacts on areas designated as "Habitat Areas" by the land use plan.

¹ The MND and staff report specifically address an alternative beach access trail from Loon Point. The access point is located within about 1/4 mile of the Project Site, though the public parking area for that access point is merely 500 feet from the Project Site (public parking is prohibited on Padaro Lane). Additionally, an offer of dedication for public access has occurred at 3443 Padaro Lane.

Again, contrary to Appellants, the weight and structure of County policy clearly and repeatedly **requires** balancing a range of factors. Collectively, these factors also relate to Policy PRT-S-2 of the Community Plan, which provides for protection of public access opportunities, "[i]n compliance with applicable legal requirements." Such legal requirements include other policies of the General Plan, State law, and nexus.

(b) The Coastal Act Requires Balancing Access with Other Factors, Including Environmental.

The Coastal Act affirmatively requires protection of natural and cultural resources. For example, Section 30264(a) of the Coastal Act requires "[e]nvironmentally sensitive habitat areas **shall** be protected against any significant disruption of habitat values, and **only** uses dependent on such resources shall be allowed within such areas [emphasis added]." However, Appellants mischaracterize this section of the Coastal Act, claiming that it merely allows for dependent uses, "including trails," to be located in ESHA. Section 30264 contains no declaration that beach access trails are dependent on ESHA, nor could it. Moreover, restrictions on human entry into ESHA and, in fact, development near ESHA, exist throughout the State, including restricted areas and an Exclusion Zone near the University of California, Santa Barbara. See VISION 2025: UNIVERSITY OF CALIFORNIA, SANTA BARBARA 2010 LONG-RANGE DEVELOPMENT PLAN, Section F.

The Coastal Act also requires that impacts to cultural resources be mitigated. Section 30116 defines "sensitive coastal resources," which are considered "vital" and/or "sensitive," to include designated archaeological sites. Section 30244 of the Coastal Act requires implementation of "reasonable mitigation measures" where archaeological or paleontological resources would be adversely affected. Here, however, as described above, County policy already recognizes that excluding the public from archaeologically sensitive areas is the only practical way to protect those areas.

Further, Appellants argue not for a restricted trail into a natural area merely for scientific observation, but free and unrestricted public access to a beach area already accessible by other means (the Loon Point trail, approximately 1/4 mile from the Project Site, and which includes space for public parking). Appellants do not and cannot advance any credible theory as to why an open beach trail depends on riparian habitat. Lastly, we note that unfettered public access also would defeat the purposes of the development exclusion areas proposed with the Project for the specific purpose of protecting various biological and cultural resources on the Project Site.

(c) The Project Site, and Particularly Toro Creek, Contain Sensitive Natural Resources, which Unrestricted Public Access would Damage.

The MND and the staff report contain thorough discussions of the significant archaeological and biological resources on the Project Site, including portions of Toro Creek.

Even more importantly, the Project includes measures specifically to protect or enhance those resources.

As described on page 6 of the MND, the portion of the Property within Toro Canyon Creek is designated as environmentally sensitive habitat area ("ESHA") by the County's Land Use Map, Coastal Land Use Plan, Summerland Community Plan (which also characterizes the riparian habitat at Toro Creek as "open and structurally diverse," with "excellent nesting sites for raptors; see p. 95), and the Toro Canyon Plan. Moreover, as described in pages 18 to 21 of the MND, the Project Site includes an approved revegetation plan that the Project proposes to modify. The revegetation plan already has stabilized the banks of, and improved habitat values within and adjacent to, Toro Creek, and completion of the plan will further stabilize Toro Creek and improve those values. For example, page 19 of the MND notes that planned replanting will result in a beneficial impact to rare plant communities and species diversity.

(d) The Project Site and Neighboring Property Contain Sensitive Cultural Resources, which Unrestricted Public Access would Damage.

The Santa Barbara coast and channel areas have one of the longest known occupations of any coastline in the Americas, and a very rich archaeological record² that, notwithstanding this richness, is threatened by a variety of factors, including human-caused damage.³ As detailed in the MND (pages 25 to 27), extensive cultural resources investigations on and adjacent to the Project Site have identified significant resources (CAL-SBA-1566) on a large portion of the Project Site and on both sides of Toro Creek. These resources include human remains, for which a most likely descendant has been identified (MND, p. 26). These resources have also been determined eligible to the California Register of Historical Resources (MND, p. 25), and therefore are considered significant for the purposes of CEQA and "sensitive coastal resources" for the purposes of the Coastal Act.

Concerns about the safety of cultural resources on the Project Site are not merely academic. Some pothunting already has occurred on the Project Site. Moreover, as described by Patrick Tumamait, Chumash tribal representative and consultant, in his letter of April 30, 2014, and the professional archaeologists of Compass Rose Archaeology (who completed extensive study of the archaeological deposits on the Project Site) consider the cultural resources still to be at risk. Mr. Tumamait and the archaeologists also urged that the resources be protected "by all means possible," specifically by *preventing public access* to the Project Site.

² See, e.g., Reeder, L.A., et. al., 2010, "Our Disappearing Past: A GIS Analysis of the Vulnerability of Coastal Archaeological Resources in California's Santa Barbara Channel Region": J. COAST. CONSERV.; Glassow, Michael. 1996. PURISEMENO CHUMASH PREHISTORY, MARITIME ADAPTATIONS ALONG THE SOUTHERN CALIFORNIA COAST. Case Studies in Archaeology. Harcourt Brace, Fort Worth.

³ Reeder, L.A., et. al., 2010.

(e) A Refusal to Require Public Access through Toro Creek is Consistent with County Policy and State Law.

As described above, these resources require protection as a practical matter, particularly as one of the objectives of the Project is enhancement of the ESHA and stabilization and preservation of the cultural resources. Moreover, even assuming that Toro Creek is a designated public access trail the County is ordinarily required to accept in first instance (as described above, it is not), as recognized by Coastal Plan Policy 3.9.3, *protection of the biological and cultural resources on the Project Site is incompatible with public access* to and through Toro Creek. Policy 7.2 of the CLUP requires that the County consider impacts to, among other areas, ESHA.

Further, as described above, the Comprehensive Plan's Open Space Element specifically recognizes that preservation of cultural resources can only occur when public access is prevented. That is, much like ESHA, archaeological sites—and particularly archaeological sites determined eligible for the CRHR and that contain human remains—must be treated as preserves, with limited access solely for scientific research. Thus, consistency with policy HA-S-1, which requires that archaeological resources "shall be protected and preserved" can only be achieved by preventing public access.

Here, the establishment of an unrestricted, public coastal access corridor directly through newly and continually restored—and County- and State-designated—ESHA would thwart the restoration and, as recognized by County policy, unavoidably result in significant damage. Therefore, consistent with CLUP section 7.2, no requirement exists to exact an easement. Similarly, such unrestricted public access also would conflict with Policy HA-S-1 by thwarting the preservation of the archaeological resources that underlie the majority of the eastern portion of the Project Site, over which any possible public access might be provided.

As described above, the lack of an easement on the Project Site also is consistent with and effectuates Sections 30244 and 30264(a) of the Coastal Act. As stated above, Section 30244 requires implementation of reasonable mitigation measures to protect archaeological resources. Here, as confirmed by the County's Comprehensive Plan, as well as Native American representatives and archaeological consultants, reasonable mitigation in this case requires that the Project Site be protected *from* public access. Similarly, Section 30264(a) requires the protection of ESHA for all but uses dependent on ESHA, and a beach access trail is not a use dependent upon on ESHA. Thus, no easement on the Project Site is consistent with, and effectuates, applicable State law.

The lack of an easement is also consistent with the Community Plan. Policy PRT-S-2 provides for protection of opportunities for public access "in compliance with applicable legal requirements." Consistent with the County- and State-mandated protection of ESHA, as well as the County- and State-mandated protection of cultural resources, the lack of an easement on the Project Site complies with applicable legal requirements.

For all of the reasons described above, the Project would comply with the County General Plan and applicable provisions of State law.

3. The MND Employed a Proper and Consistent Environmental Baseline.

Section 15125(a) of the CEQA Guidelines provides that an EIR describe the existing physical conditions at the time the NOP is published, or if no NOP was published, at the time of commencement of environmental review. This baseline *normally* constitutes the basis for environmental impact analysis. Pages 7 and 8 of the MND describe the physical setting of the Project Site, and provide context regarding how the Project reached its existing condition, including "unpermitted grading." However, because the Project is defined to include remediation activities for the grading, as well as implementation of a habitat restoration plan, and the County reasonably believed that excluding those activities from the environmental analysis would mislead the public as to the potential effects of the Project, the condition of the Project Site prior to those remedial activities served as the baseline. Further, the unpermitted activity that occurred on the Project Site was known and documented, and the County will oversee the remedial activity, eliminating uncertainty as to the nature and enforcement of the remediation. *See Kenneth Fat v. County of Sacramento*, 97 Cal. App. 4th 1270, 1277–78 (2002) (agency retains discretion as to how to evaluate unpermitted activity).

Contrary to the law, the Appellants demand that the County consider a portion of a gate as part of the impact analysis, on the theory that the gate is illegal. However, as described in testimony before the Planning Commission, the County has *not* determined that the gate represents a violation. To the contrary, County records indicate that the gate predates the adoption of the Community Plan. The gate is therefore legally non-conforming and exempt from the requirements of the Community Plan. This is confirmed on page 8 of the MND, which states that all violations have been abated, though the restoration plan (which the Project proposes to modify) remains under implementation. As a result, the gate also is not relevant to the impact analysis of the MND.

4. The MND Considers Views Currently Available from Padaro Lane in the Vicinity of the Project Site.

Appellants cite the Community Plan for the proposition that a view corridor exists across the Project Site, and erroneously claim the MND failed to evaluate the purported impact to this corridor. In fact, page 137 of the Community Plan contains a very general description of a view corridor across the "Padaro Lane area." Accordingly, the MND, on page 9, describes the views currently available onto and through the Project Site. As stated in that discussion, views of the Project Site and ocean are "substantially filtered" by existing mature vegetation, including *myoporum* trees, though filtered views include blue water ocean. Although post-project views would include one new proposed residence and one anticipated residence, the MND concluded that filtered views of blue water ocean would remain available from Padaro Lane, and that the impact to views would be considered less than significant. Further, mitigation measures listed and described on pages 9 and 10 of the MND, and which include design review for the final

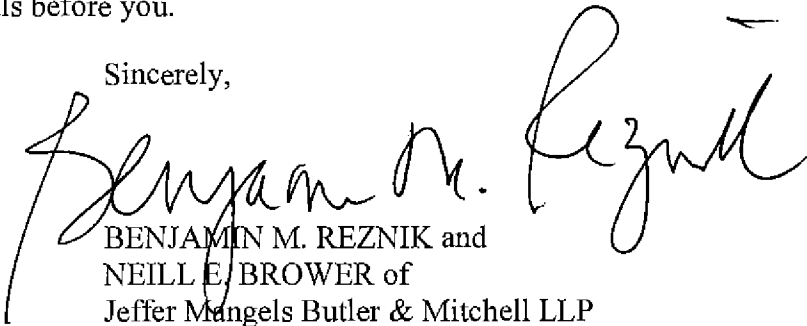
proposed structures, would further ensure that aesthetic impacts would remain less than significant.

Moreover, and contrary to Appellants' claims, purported observations by residents of less obstructed views in the past do not conflict with the discussion in the MND. Rather, the MND analysis is based on currently existing views, not historical views, and evaluated impacts on that basis.

5. Appellants Fail to Raise a Fair Argument that a Significant Impact Would Occur, and the Planning Commission Properly Approved the MND.

For the reasons discussed above, the MND properly and completely evaluates the potential effects of the Proposed Project. The environmental baseline reflects existing conditions on the ground, as required by CEQA, and evaluates all appropriate environmental issue areas in terms of the effects of the Project on those conditions. Further, the Project is consistent with the policy framework established in County plans and in State law, regarding the need to balance public access with protection of the significant and designated natural and cultural resources present on the Project Site. Consequently, the Planning Commission properly approved the Project and adopted the MND, and the Board should affirm the determination of the Planning Commission and deny the appeals before you.

Sincerely,



BENJAMIN M. REZNIK and
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cc: Dr. Glenn Russell, Director of Planning
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