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VIA ELECTRONIC MAIL

Dayna Bochco, Chair
Commissioners
California Coastal Commission
45 Fremont Street
San Francisco, CA 91405

Re: "Dispute Resolution" - Permit Appealability
6-17-0146-EDD (Brigantine, Inc.)

Dear Chair Bochco and Commissioners:

This firm represents The Brigantine, Inc. ("Brigantine"). On December 13, 2016, the San Diego Unified Port District ("Port") approved a final, "non-appealable" CDP for Brigantine's "Portside Pier" project ("Project"). The Portside Pier project replaces a pre-coastal restaurant complex, Anthony's Fish Grotto. Like Anthony's, the Project is located almost entirely on a platform over San Diego Bay and consists of a new restaurant complex -- three restaurants and a coffee/gelato bar, a 3,711 square foot oceanfront public viewing deck on the second floor, a public walkway around the first floor, and a replacement dock to serve boating "dock and dine" patrons. Two renderings of the final, approved Project are attached as **Exhibit 1**.

The issue before the Commission is narrow. It involves only questions of jurisdiction – whether the "dispute resolution" proceeding itself is authorized by the Coastal Act or the Commission's Regulations, and whether the restaurant replacement project is "appealable" to the Commission under the Coastal Act. Although the Staff Report somewhat clouds the issue, the issue is not whether there is a substantial issue or whether the Project, as approved, is consistent with the Coastal Act.

Brigantine joins in the letters from the Port District regarding the jurisdictional issue. As discussed further below, a restaurant facility (including a "dock and dine" feature) is not among the categories of projects subject to appeal under the Coastal Act, and the Commission lacks authority to address the issue in the context of a "dispute resolution." The Staff Report places reliance on language in the Coastal Act that manifestly does not apply to the Port's approval of the Portside Pier Project. The staff recommendation attempts to squeeze a square into a round hole.

A copy of this letter has been provided to Coastal Commission Staff

First, the Commission's procedures are governed by those expressly set forth in the Coastal Act and in the Commission's adopted Regulations. The Commission has no inherent authority to create procedures that are not otherwise in the Act or the Regulations. (*Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 419.) In this instance, Staff has made up a proceeding – "dispute resolution" – which is not provided for in the Coastal Act, the Commission's Regulations, or the Port's CDP Regulations, which the Commission certified to govern Port procedures. Simply put, the Commission has no jurisdiction to initiate a "dispute resolution" in this context. Moreover, the section of the Coastal Act on which Staff purports to rely applies only to LCPs, not the ports.

Second, while "appealable developments" are itemized in Section 30715 of the Coastal Act, restaurants, as here, are not included on the list and thus are not appealable. The Staff Report goes beyond any reasonable interpretation in attempting to cast restaurants as "shopping facilities not principally devoted to the sale of commercials good utilized for water-oriented purposes," a specific appealable category set forth in Section 30715. The quoted language does nothing more than make appealable the Port's approval of an ordinary retail use that does not sell goods for water-oriented purposes. In other words, that kind of non-public trust use that can be anywhere. It has nothing at all to do with restaurants on tidelands. Had the Legislature intended to make restaurants appealable, it would have said so in plain and unmistakable terms. As Judge Prager, a well-respected San Diego jurist, stated repeatedly during oral argument in rejecting the Staff's position in *San Diegans for Open Government v. California Coastal Commission (Sunroad).* SDSC Case No. 37-2013-00057492-CU-TT-CTL: "As a matter of statutory construction, I just don't see restaurants there [the Section of the Coastal Act on which Staff relies]." (Reporter's Transcript, p. 20, lines 2-3.) The Staff Report impermissibly seeks to relitigate an issue that the Court put to bed in the *Sunroad* case.

Finally, a "dock and dine" feature of a restaurant similarly does not constitute a "recreational small craft marina facility," which also is a specific appealable category in Section 30715. Neither the Commission nor the Port has ever treated "dock and dine" as appealable, and the Port Master Plan, which this Commission certified, specifically treats "dock and dine" as separate and distinct from "recreational small craft marina facilities."

Each of the foregoing points is discussed below.

A. "Dispute Resolution" is not Available to Review Whether the Restaurant Approval is Appealable.

The Commission's regulatory authority under the Coastal Act is purely statutory in nature. Section 30333 of the Coastal Act authorizes the Commission to adopt regulations "to carry out the purposes and provisions of" the Coastal Act "and to govern procedures of the Commission."

Here, Staff has simply invented a "dispute resolution" procedure. There is no provision in the Coastal Act, the Commission's Regulations, or the Port's separately certified CDP regulations that authorize a "dispute resolution" procedure to review a Port determination that a restaurant is a non-appealable development. Moreover, as discussed below, the provision of the Commission's Regulations that Staff cites as support for this proceeding applies only to LCPs, not to the Ports.

Specifically, Chapter 8 of the Coastal Act, Section 30700 *et seq.*, governs "Ports." There is no provision in Chapter 8 that provides for such a "dispute resolution." Similarly, Sections 13600-13648 of the Commission's Regulations govern "Ports." Again, there is no provision in Sections 13600-13648 that authorizes a "dispute resolution." The Commission has additionally certified the Port's "Coastal Development Permit Regulations." Similarly, there is no provision in the Port's own certified Regulations that authorize a "dispute resolution." There is, therefore, no jurisdictional basis for the proceeding that Staff has scheduled to review an appealability issue. It is pulled out of whole cloth.

As the Court of Appeal explained in *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 419:

> "The Commission, like all administrative agencies, has no inherent powers; it possesses only those powers that have been granted to it by the Constitution or by statute. [Citations.] '[A]n agency literally has no power to act ... unless and until [the Legislature] confers power upon it.' [Citation.] That an agency has been granted some authority to act within a given area does not mean that it enjoys plenary authority to act in that area. [Citation.] As a consequence, if

> the Commission takes action that is inconsistent with, or that simply is not authorized by, the Coastal Act, then its action is void. [Citations.]"

Thus, if the Commission were to act here consistent with the recommendation in the Staff Report, that action would be void.

The Staff Report (on pages 5 and 6) purports to rely on Section 13569 of the Commission's Regulations as support for this proceeding. (A copy is attached as **Exhibit 2**.) Section 13569 does provide a process for dispute resolution concerning appealability. However, it does so exclusively in the context of a determination made by a local government implementing an LCP. That provision applies only to LCPs. It has nothing to do with Ports or the provisions of the Coastal Act or the Commission's Regulations that govern Ports.

Moreover, even if the LCP provision were to apply (again, it does not), there would be two fatal problems with Staff's reliance on it in any event. First, it deals with the local government's designation of the development proposed as categorically excluded, appealable or non-appealable made "at the time the application for development within the coastal zone is submitted." (Regulations, Section 13569.) That is not the case here. The proceeding here arises after the Port has approved the Project.

Second, Section 13569 does not in any sense give the Commission or its Staff any authorization to initiate a "dispute resolution." In the LCP context, the local government makes the appealability determination. (Regulations, Section 13569(a).) Section 13569(b) provides: "If the determination of the local government is challenged by the applicant or an interested person, or if the local government wishes to have a Commission determination as to the appropriate designation, the local government shall notify the Commission by telephone of the dispute/question and shall request an Executive Director's opinion." (Emphasis added.) Here, this is a Commission Staff-initiated "dispute resolution." Neither the Applicant nor the Port (which is not a "local government" for purposes of this regulation) has not made any request for a separate Executive Director determination of the appealability issue.

In short, there is no provision in the Coastal Act or the regulations governing Ports which authorize a dispute resolution, and the Section cited by Staff applies only in the LCP context, not in the context of an appeal determination made by a Port, and would not apply by its terms in any event.

B. Restaurants are not Included in Coastal Act Section 30715 as "Appealable Developments"

Assuming this "Dispute Resolution" proceeding were properly before the Commission, the Staff Report surprisingly attempts a redo of an argument that it recently lost in the San Diego Superior Court. Staff reargues that under the Coastal Act and the Port's Permit Regulations, a restaurant is classified as an "appealable development." However, there is nothing in the Act or the Port's certified CDP Regulations that supports such a conclusion, and that was the precise conclusion of the court in *San Diegans for Open Government v. California Coastal Com. (Sunroad)*, discussed further below.

Section 30715 of the Coastal Act specifically identifies the developments which remain "appealable" after certification of a Port Master Plan. A restaurant is not one of the appealable developments.

Under Section 30715, the Legislature has designated the following developments as appealable:

> "(1) Developments for the storage, transmission, and processing of liquefied natural gas and crude oil in such quantities as would have a significant impact upon the oil and gas supply of the state or nation or both the state and nation. A development which has significant impact shall be defined in the master plans.
>
> "(2) Waste water treatment facilities, except for those facilities which process waste water discharged incidental to normal port activities or by vessels.
>
> "(3) Roads or highways which are not principally for internal circulation within the port boundaries.

> "(4) Office and residential buildings not principally devoted to the administration of activities within the port; hotels, motels, and ***shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes***; commercial fishing facilities; and recreational small craft marina related facilities."
>
> "(5) Oil refineries.
>
> "(6) Petrochemical production plants." (**The language on which Staff relies is bolded and italicized.**)

As it did in the previous case of the Sunroad restaurant on East Harbor Island, Staff argues that restaurants are appealable under Section 30715(a)(4) as "shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes." (Staff Report, pp. 11-15.) This language, however, does not encompass "restaurants." It specifically pertains to retail shopping facilities that are not principally devoted to the sale of commercial goods utilized for water-oriented purposes. In other words – ordinary shopping facilities that do not sell goods for water-oriented purposes are appealable.

By any reasonable interpretation, restaurants are not a "shopping facility," nor do they involve "the sale of commercial goods." No one says, "I'm really hungry. Let's go to a 'shopping facility not principally devoted to the sale of commercial goods utilized for water-oriented purposes.'" They say, quite simply, "Let's go to a 'restaurant'." Staff's interpretation would expand Commission appellate jurisdiction well beyond the plain language and intent underlying Section 30715(a)(4). In Section 30715(a)(4), the Legislature used plain terms to describe "office and residential buildings," "hotels" and "motels." It knew how to use a plain term to describe "restaurants," but did not include restaurants, a clear and proper public trust use, as an appealable development.

Staff erroneously states that restaurants are appealable because they serve the general public and are not principally devoted to Port business activities, are not dependent on waterfront locations, and can be located anywhere. (Staff Report, p. 12.) This misconstrues the nature of a restaurant in the Port on tidelands. Restaurants

are, in fact, a well-recognized and perfectly proper public trust use. The State Lands Commission (SLC) administers public trust lands pursuant to the Public Trust Doctrine. It has prepared two policy documents to guide this Commission and the public generally. Its adopted "Public Trust Policy" explains:

> "Ancillary or incidental uses, that is, uses that directly promote trust uses, are directly supportive and necessary for trust uses, or that accommodate the public's enjoyment of trust lands, are also permitted." (**Exhibit 3**, p. 1.)

The SLC cites "restaurants" as one example of a proper trust use. (*Id.*) The SLC's separate discussion in "The Public Trust Doctrine" further explains that visitor-serving facilities, such as restaurants, also have been "approved as appropriate uses because as places of public accommodation, they allow broad access to the tidelands and, therefore, enhance the public's enjoyment of these lands historically set apart for their benefit." (**Exhibit 4**, p. 5.) It additionally explains that restaurants "are appropriate because they accommodate or enhance the public's ability to enjoy tide and submerged lands and navigable waters." (*Id.*, p. 7.) Staff's attempt to diminish restaurant uses on Port tidelands is therefore meritless.

Staff also contends that restaurants are appealable because they fall under the "Specialty Shopping" designation in the PMP. (Staff Report, p. 13.) Staff, however, erroneously conflates "specialty shopping" with restaurants. The reference in the PMP to "Specialty Shopping" is to a conventional shopping center which "involves the planned assembly of stores, frequently operating within a unified building complex, designed to give patrons a varied selection of retail goods, personal services, and entertainment facilities." (PMP, p. 20.) The PMP states that "activities found in specialty shopping areas" include restaurants and a host of other retail uses – exactly what you would expect to find in a shopping center. But nothing in the PMP designation equates a restaurant with shopping facilities, as described.

The Staff Report also takes another run at projects that were discussed in the Sunroad matter and which were before the court in the *San Diegans for Open Government* case. The Staff Report's assertion that the vast majority of the restaurant projects and all recent ones are listed in the Port Master Plan as appealable is completely misleading. Over the years, the Port itself exempted eight restaurants like the one as issue (**Exhibit 5**, bate stamped pp. 427-455 and 624-648), and it approved

two CDPs which treated the restaurants proposed there as non-appealable. (*Id.*, bate stamped pp. 418-426). Another eight Coastal Commission permits simply included restaurants as part of substantial associated uses that are obviously appealable, such as hotels, an office building, or shopping facility with multiple stores. (*Id.*, pp. 1214-1319.) Only one project offered support for Staff's argument, an old Imperial Beach Port Master Plan amendment for a stand-alone restaurant, although it included an unidentified commercial use on a pier the details of which are not available. *(Id.*, p. 1607.) While courts generally consider and respect an agency's interpretation of a statute within its administrative jurisdiction, a court is not bound by an incorrect interpretation of an unambiguous statute, Section 30715(a)(4), and where the record, as here, fails to carry the indicia of reliability that normally requires deference. (*Dept. of Corrections & Rehab v. St. Personnel Bd.* (2013) 215 Cal.App.4th 1101, 1108; *Bolsa Chica Land Trust v. California Coastal Com.* (1999) 71 Cal.App.4th 493, 507.)

Not only does the Staff Report provide an inaccurate discussion of prior decisions, but most disappointing of all is its misstatement of the recent ruling of the San Diego Superior Court in *San Diegans for Open Government v. California Coastal Com. (Sunroad)*, rejecting exactly the same arguments that Staff makes again here that restaurants are appealable. There, the Port itself determined that the restaurant replacement project proposed was an excluded (or exempt) development. All parties agreed that the "exemption" determination was appealable under Section 30625 of the Coastal Act. However, based on Staff's recommendation, the Commission further took the position that approval of a restaurant also is appealable because it constitutes a "shopping facility not principally devoted to the sale of commercial goods utilized for water-oriented purposes," under Section 30714(a)(4). In the lawsuit that followed, the court specifically rejected the Commission's argument that restaurants constitute an appealable development. In its ruling, the Court stated that "the Project was not an 'appealable development,'" but went on to address and uphold the restaurant project because, as noted, all parties agreed that the Port's determination that the Sunroad project was exempt was expressly appealable to the Commission. (**Exhibit 6.**)

The Staff Report erroneously claims the trial court did not state that restaurants as a class of development that is appealable. (Staff Report, pp. 14-15.) Indeed, that is precisely what Judge Prager ruled. During oral argument, the court made unmistakably clear on several occasions that restaurants are not appealable:

- THE COURT: "I agree with Mr. Kaufmann. I don't think restaurants come[] in that category." (**Exhibit 7**, Reporter's Transcript ("RT") p. 18, lines 4-5; emphasis added.)

- THE COURT: To me, I agree with Mr. Kaufmann's argument if the legislature wanted to say 'restaurants' they knew how to say 'restaurants'." (RT, p. 18, lines 11-21; emphasis added.)

- THE COURT: "As a matter of statutory construction, I just don't see restaurants there." (RT p. 20, lines 2-3; emphasis added.)

- MR. KAUFMANN: ". . . Around noon or so you are going to be hungry. You are going to turn to your clerk and you're going to say, 'I'm going to a shopping facility not principally devoted to the sale of commercial goods utilized for water-oriented purposes, and I'll be back about 1:30." Or you might just say, "I'm going to a restaurant.'" (RT p. 23, lines 18-24.)

- THE COURT: "I[t] just seems to me the pure question of statutory interpretation, this presents a situation. To me when [sic] I say to the legislature is if you wanted to put restaurants in there you should say 'restaurants.'" (RT p. 28, lines 23-27; emphasis added.)

Staff's assertion that the court did not "state that restaurants as a class are not appealable," and that its ruling "does not have any bearing on a matter that is currently before the Commission" is, frankly, quite astounding and dead wrong. Consistent with Judge Prager's ruling, the Port's approval of a restaurant facility here did not constitute an appealable development under Section 30715.

C. "Dock and Dine" for a Restaurant is not Included Coastal Act Section 30715 as "Appealable Development."

The restaurant facility approved here also includes a "dock and dine" feature. As an afterthought, the Staff Report asserts, in one sentence, that the "dock and dine" aspect of the restaurant project constitutes a "recreational small craft marine-related facility," appealable under Section 7.d(4)(d) of the Port's Permit Regulations.[1] (Staff Report, p. 12.) Staff provides no explanation for this assertion, which equally lacks merit.

Section 30715(a)(4) of the Coastal Act specifically includes "recreational small craft marine-related facilities" as among the categories of development that are appealable to the Commission. The Port has numerous recreational small craft marinas throughout its jurisdiction. These are permanent facilities which indisputably would be appealable. The Legislature included this category of uses as appealable to ensure the protection of recreational small craft marinas for boaters. "Dock and dine" facilities, however, are not "recreational small craft marine related facilities," nor have they ever been treated so, either by the Commission or the Port.

The Port has, for some time now, promoted a "dock and dine" program. There are 14 restaurants around San Diego Bay that currently offer "dock and dine." None have been treated as appealable development, and none are shown as appealable on the project lists for each of the 10 Planning Districts within the Port.

In this case, "dock and dine" is a feature of the non-appealable restaurant project, and it permits a boater to tie up and disembark temporarily to dine. Section III of the PMP certified by the Commission includes a comprehensive discussion of Commercial Land Uses in the Port. (PMP, pp. 11-22.) The "Commercial Recreation" sub-category includes "dock and dine," but it is treated as distinct from recreational small craft marina related facilities, which are separately discussed under "Pleasure Craft Marinas." As stated in the certified PMP:

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[1] It is not clear why the Staff Report cites to Section 7d(4)(d) of the Port's Regulations. The provision simply repeats, in identical terms, Section 30715(a)(4) of the Coastal Act.

> "The Commercial Recreation category includes hotels, restaurants, convention center, recreational vehicle parks, specialty shopping, pleasure craft marinas, water dependent educational and recreational program facilities and activities, dock and dine facilities . . ., and sportfishing, which are discussed or illustrated in the various District Plans." (PMP, p. 19; emphasis added.)

"Dock and dine" is not included in the PMP's discussion "Pleasure Craft Marinas," or otherwise discussed or treated as a "recreational small craft marina facility" per se or as a use considered as a part of such a facility. (PMP, p. 20.) In short, the Port's decision to approve "dock and dine" as allowable feature of the restaurant project is not appealable.

D. A Port Master Plan Amendment is Not Required for this Project

The Staff Report appears to suggest that a Port Master Plan amendment is required to first add the Project to the PMP "project list." (Staff Report, p. 3.) This has no merit.

As demonstrated above, and consistent with the Superior Court ruling, restaurants are not standalone projects that are appealable under Section 30715, and therefore need not be included in the PMP "project list" as appealable. Coastal Act section 30711(d)(4) states that a Port Master Plan must include, among other things:

> "(4) Proposed projects listed as appealable in Section 30715 in sufficient detail to be able to determine their consistency with the policies of Chapter 3 (commencing with Section 3022) of this division." (Emphasis added.)

Nothing in the Coastal Act mandates that *every* project proposed in a port – appealable, non-appealable or exempt – be approved first through a PMP amendment. Section 30715(d)(4) requires a "project list" only for appealable projects, and is explicit that the reference to "project list" apply only to "Proposed projects listed as appealable in Section 30715."

CONCLUSION

For all the foregoing reasons, The Brigantine respectfully requests that the Commission find that: (1) it lacks jurisdiction to review a Port determination that a project is non-appealable in the context of a Commission Staff-initiated "dispute resolution," and (2) in any event, the Port's approval of Portside Pier Project is not appealable.

We look forward to discussing these issues further with you at the upcoming hearing.

Very truly yours,

Steven H. Kaufmann

Attachments

Ccs (with attachments):
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