SAN DIEGO UNIFIED PORT DISTRICT
OFFICE OF THE GENERAL COUNSEL

March 2, 2017

VIA EMAIL (WITHOUT ATTACHMENT E) AND HAND DELIVERED (WITH ALL ATTACHMENTS)

California Coastal Commission
San Diego Area
ATTN: Deborah N. Lee
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RE: Dispute Resolution Permit Appealability No. 6-17-0146-EDD (CDP No. 2016-91)

Dear Ms. Lee and Ms. Lasiter,

This letter supplements the February 6, 2017 letter sent by the San Diego Unified Port District (District) in regards to the February 2, 2017 Executive Director Determination on Appealability for the Portside Pier Project (Coastal Development Permit (CDP) Application No. 2016-91) (February 6th Letter), incorporated herein by reference.[1] This letter and the attachments are to be included in the California Coastal Commission (CCC or Commission) staff report for agendized Item 28 (as of March 2, 2017), Dispute Resolution No. 6-17-0146-EDD (Brigantine, Inc., San Diego), on March 8, 2017 (CCC staff report). The District requests that the attachments to the District's February 6th Letter also be included in the CCC staff report as they were missing from the published report and are integral to the District's position. Those attachments were provided to CCC staff at the time the letter was delivered to them, but for convenience, are being transmitted electronically again with this letter.

[1] Please note that the District was given less than 24-hours' notice that any written comments to be included in the CCC staff report must be submitted to CCC staff by noon on March 2, 2017, and hence, additional oral comments may be provided to the Commission on March 8, 2017.

The District's position that CDP No. 2016-91 was correctly issued as a non-appealable CDP, that the CCC has no authority to hold a "dispute resolution" hearing or review CDP No. 2016-91 (or any other District-issued non-appealable CDPs) and that the CCC is illegally usurping a Court decision between the parties has not wavered. For the reasons set forth herein, the CCC staff report only supports the District's position. This letter asserts additional grounds as to why the CCC's conduct is outside of its authority and clarifies the legal precedent that restaurants are not within the scope of Section 30715 of the California Coastal Act (Coastal Act).

As detailed in this letter, Section 13569 of the CCC regulations only applies to "local governments" and has no bearing on or applicability to ports. In any event, the procedures of Section 13569 were not followed and restaurants are not within the scope of Section 30715. Consequently, the CCC "dispute resolution" hearing on March 8th regarding the appealability of CDP No. 2016-91 is being conducted in excess of the CCC's authority.

I. Section 13569 Does Not Apply to Ports and Does Not Give the CCC Authority or Jurisdiction to Hold a "Dispute Resolution" Hearing on the Appealability of CDPs Issued by the District

CCC staff incorrectly relies on 14 California Code of Regulations (CCR) Section 13569 to assert that the CCC has authority and jurisdiction to hold a "dispute resolution" hearing on whether District-issued CDP 2016-91 is "appealable" under the Coastal Act. Yet, Section 13569 squarely does not apply to ports. As shown in Attachment B, the plain language of the regulation is crystal clear – it only applies to local governments with adopted Local Coastal Programs (LCPs). Every subsection of 13569 mentions "local governments" and sets forth a process for local governments or determinations of local governments. It simply does not mention ports.

Importantly, Section 13569 only appears in the Chapter 8, Subchapter 2, of the Commission's regulations, the scope of which is limited to LCPs and state university or college long range planning land use development plans (14 CCR § 13500 (defining the scope of Subchapter 2).) There are no similar provisions or reference to Section 13569 in the Subchapter 6 of regulation that apply to ports. (*See* 14 CCR §§ 13600-13648 (CCC regulations that apply to ports and accordingly, the District).) In contrast, other provisions of the Coastal Act and CCC regulation explicitly mention application to both LCPs/local governments and Port Master Plans/ports. (*See e.g.*, Cal Pub. Res. Code § 30620.6 (citing Coastal Act provisions that apply to local governments and those that apply to ports); 14 CCR § 13641(c) ("Appeals [for Port-issued appealable approvals] shall be filed and processed by the Commission in the same manner as appeals from

local government actions as set forth in Chapter 7 of the Coastal Act and Chapter 5 of these regulations".) Moreover, there are no provisions of the Coastal Act or the District's CDP Regulations, which were approved by the CCC, that grant the CCC authority to hold the "dispute resolution" hearing on the appealability of Non-Appealable CDP No. 2016-91 or any other District-issued non-appealable CDP for a restaurant development.

Additional evidence of the inapplicability of Section 13569 is found in 14 CCR Section 13641, entitled "Appeals After Certification of Master Plan." Specifically, Section 13641(c) states that: "Appeals [for Port-issued appealable CDPs and exclusions] shall be filed and processed by the Commission in the same manner as appeals from local government actions as set forth in Chapter 7 of the California Coastal Act and Chapter 5 of these regulations." (Emphasis added.) This is the only cross reference to a Chapter of the CCC regulations that applies LCPs/local governments as also applicable to ports. Hence, Chapter 5 of the CCC regulations is the sole "manner" by which the CCC or any interested person may appeal or decide the appealability of a District-issued CDP. Section 13569, the illegal vehicle by which CCC staff is bringing this item before the CCC, is located in Chapter 8 of the CCC regulations - not Chapter 5.

Accordingly, the Coastal Act and the CCC's own regulations do not give the CCC authority or jurisdiction to hold the "dispute resolution" hearing over the appealability of a non-appealable CDP for restaurants issued by the District. The CCC's exercise of jurisdiction without Legislative authority to do so, like here, is illegal and an *ultra vires* action that is void by operation of law. (*See e.g.*, *Burke v. California Coastal Com.* (2008) 168 Cal.App.4th 1098, 1106; *Security Nat. Guar., Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 422.)

II. While Inapplicable to Ports, the Process Codified in Section 13569 Does Not Give the CCC Executive Director or Staff the Ability to Unilaterally Agendize a "Dispute Resolution" Hearing

As discussed in detail in Section I of this letter, Section 13569 does not give the CCC the authority or jurisdiction to hold a "dispute resolution" hearing for CDP No. 2016-91 or any other District-issued non-appealable CDPs for restaurants. Nonetheless, that Section includes a detailed and mandatory process for such hearings, which was not followed here. Section 13569 states that: "Where an applicant, interested person or local government has a question as to the appropriate designation for development, the following procedures shall establish whether the development is categorically excluded, non-appealable or appealable. . . ." (Emphasis added.) This provision expressly provides that Section 13569 establishes the exclusive procedures for the CCC to review whether local government's (not port's) approvals should be

excluded, issued an appealable CDP or issued a non-appealable CDP. That process is mandatory and must be followed. (*Common Cause of California v. Bd. of Supervisors of Los Angeles Co.* 49 Cal.3d 432, 443 (1989) (The word "may" in a statute is construed as permissive, whereas "shall" is construed as mandatory, particularly when both terms are used in the same statute); *Jones v. Catholic Healthcare West* (2007) 147 Cal.App.4th 300, 307 ("courts routinely construe the word "may" as permissive and words like "shall" or "must" as mandatory").) Further, Section 13569 can only be triggered by "an applicant, interested person or local government." Here, there was no applicant, interested person or local government that questioned the non-appealable nature of CDP No. 2016-91. Brigantine, Inc. did not question it and no local government questioned it. Neither did the District, a non-local governmental entity. No interested person questioned it.

Importantly, CCC staff and the Executive Director are not "interested persons" under the Coastal Act or the CCC regulations. Section 30323 of the Coastal Act defines an "interested person" as:

> (a) Any applicant, an agent or an employee of the applicant, or a person receiving consideration for representing the applicant, or a participant in the proceeding on any matter before the commission. (b) Any person with a financial interest, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a matter before the commission, or an agent or employee of the person with a financial interest, or a person receiving consideration for representing the person with a financial interest. (c) A representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a commission member on a matter before the commission.

This is the sole definition of is "interested person" in the Coastal Act (found in Article 2.5 of the Coastal Act) and is instructive. Moreover, other provisions of the Coastal Act that use the term "interested person" or "interested parties" expressly denote a difference between the CCC and interested persons/parties, supporting the fact that the CCC and its staff are distinct entities from "interested persons." (Coastal Act §§ 30335.1, 30606, 30620, 30712 and 30717 (listing separately Commission, governmental agencies and interested persons); *see also* 14 CCR §§ 13054 (interested person does not include CCC or CCC staff), 13302, 13504, 13537 (listing separately

from interested person, the executive director).) Consequently, Section 13569 cannot be unilaterally triggered by CCC staff.

Subsection (b) of 13569 states that after the local government makes a determination whether the development is excluded, appealable or non-appealable (pursuant to subsection (a)), "[i]f the determination of the local government is challenged by the applicant or interested person, or if the local government wishes to have a Commission determination as to the appropriate determination, the local government shall notify the Commission by telephone . . . and shall request an Executive Director's opinion." Here, the non-appealable CDP was not challenged by the applicant or an interested person and there was no request by a local government or the District for an Executive Director's opinion. Additionally, the CCC Executive Director did not transmit his determination within 2 working days of a request being made or inspection conducted as required by subsection (c). This could be because Section 13569 does not apply here and NO request was made as required by subsection (b) of 13569. Finally, subsection (d) states that if the Executive Director's determination differs from the determination of the "local government," the CCC shall hold a hearing for determining the designation at the "next Commission meeting . . . following the local government request." No local government has made a determination as the District is a port not a local government under the Coastal Act and CCC regulations.

In summary, not only does Section 13569 fail to give the CCC jurisdiction or authority to hold a "dispute resolution" hearing for CDP No. 2016-91, none of the mandatory procedures codified therein where triggered, let alone followed.

III. Section 30715 of the Coastal Act Does Not Include Restaurants and the CCC Staff's Interpretation that Only Water-Oriented Developments Are Non-Appealable is Nonsensical and Contradictory

For the reasons set forth in the District's February 6th Letter, restaurants are non-appealable development under Section 30715 of the Coastal Act. CCC staff does not present any convincing, legal or substantial evidence to the contrary. Since the February 6th Letter is an attachment to the CCC staff report, I will not repeat its contents here, except to note that if the Legislature wanted to include restaurants in 30715 it could have specifically or used a broader term that clearly encompasses restaurants. (*See e.g.*, Cal. Pub. Res. Code, § 32027.) It did not.

Coastal Act Section 30715 provides that the District's permitting authority transferred to the District upon certification of its Port Master Plan (PMP), which

occurred in 1981. That Section also lists six specific categories of development that may be subject to appeal to the CCC. Aside from approval of development within those categories, the decisions of the District are final and are not subject to CCC review. This is a statutory grant of authority from the California Legislature to ports, including the District, and may not be usurped by the CCC.

In attempting to include a category of development (restaurants) which is not included in the Coastal Act's list of appealable development for ports, CCC staff suggests the six categories of development could be recast into two: (1) maritime or water-oriented developments or port activities, which are non-appealable and (2) any other uses, as appealable. Rather than abiding by the categories as written by the Legislature, CCC staff redefines the category of appealable development and greatly broadens the scope of appealable projects from the plain language of the Coastal Act as enacted by the Legislature.

Commission staff allegedly finds justification for its unlawful expansion of the categories of appealable development based on the context of Section 30715 and the general goals and policies of the Coastal Act. This approach runs afoul of several well-established rules of statutory construction. In accordance with the statutory canon that the expression of one thing is the exclusion of another (*expressio unius est exclusio alterius*), there is a legal presumption that when a list of categories are included in a statute, the Legislature intended to exclude whatever is missing from the list. Adding categories to an enumerated list impermissibly rewrites the statute. Here, Section 30715 includes a list of appealable categories of development – none of which include "restaurants" – and the CCC cannot insert restaurants into that list.

Furthermore application of "broad purposes" of legislation cannot be made at the expense of specific provisions. In other words, specific provisions prevail over general ones. Nonetheless, the CCC staff's proposed reading of Section 30715 is inconsistent with the broader structure of the Coastal Act, which delegates to ports the responsibility of implementing the Coastal Act upon certification of a Port Master Plan and, for the most part, limits the CCC's role post-certification of Port Master Plan to review of amendments to the Port Master Plan and an appeal of the six specific categories of development enumerated in Section 30715. If the Legislature intended that the District only had authority to issue non-appealable CDPs for water-oriented uses or port activities, Section 30715 would have been expressly written in a way to do so, but it was not.

The plain language of Section 30715 also contradicts the CCC staff's assertion. Section 30715(a)(4) includes "recreational small craft marina related facilities" and "commercial fishing facilities" – both clearly water-oriented categories of development as neither can be located outside of the water. Moreover, transmission of liquefied natural gas and crude oil – specified as appealable under Section 30715(a)(1) – are water-oriented activities as they may be transported by vessel. Commission staff posits that the project is a "shopping facility not principally devoted to the sale of commercial goods utilized for water-oriented purposes" and because it is not water-oriented or related to the Port's normal activities it is subject to appeal. In the very same staff report CCC staff then posits that the dock and dine facility (a use that is totally water-oriented) is a recreational small craft marina-related facility subject to appeal. This contradiction refutes the proposition that non-water-oriented development is subject to appeal. Commission staff is advancing contradictory theories in its unfounded attempt to categorize the project as subject to Section 30715.

To the extent that there is uncertainty about the meaning of the Coastal Act, which in the District's opinion there isn't, it is the constitutional role of the courts to interpret the Coastal Act – not the CCC. This already occurred in *San Diegans for Open Government v. California Coastal Commission; San Diego Unified Port District*, Case. No. 37-2013-00057492-CU-TT-CTL (2013) (Restaurant Lawsuit) where both the CCC and the District were parties. That decision is binding on the parties. As elaborated on in the Brigantine's letter, submitted by Steven Kauffman, and incorporated herein by reference, the decision holds that restaurants are not appealable. The issue whether restaurants were "shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes" was squarely before the Court, it was fully briefed by the parties and was repeatedly addressed by the judge. (See Mr. Kauffman's Letter and Attachment C, Parties' Briefs in the Restaurant Lawsuit.) It is disingenuous, at the very least, to assert the issue was not decided by the Court. The CCC, as an executive branch of the government, should not and cannot act contrary to the court's decision without violating the separation of powers doctrine. (*See Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287,297-298; *See, e.g., In re McLain* (1923) 190 Cal. 376, 379; *People's Federal Sav. & Loan Ass'n v. State Franchise Tax Bd.* (1952) 110 Cal.App.2d 696, 700.)

IV. Restaurant Listed in the PMP, As Appealable, Are Associated or Accessory Uses to an Appealable Category of Development and Occurred Prior to the Restaurant Lawsuit

As stated in the District's February 6th Letter, with the exception of one restaurant, all the restaurants listed on appealable project list of the District's PMP are associated with or an accessory use to an appealable development:

- Planning District 1: (15) Bay City/Sun Harbor Development: New 50-slip marina with restaurant. Small craft marinas are appealable.

- Planning District 2: (1) Hotel complex: Up to 500 rooms, restaurant. . . . Hotels are appealable.

- Planning District 3: (4) North Embarcadero Redevelopment: Grape Street piers replacement and restaurant. Demolition of former commercial fishing support facility AND restaurant. Commercial fishing facilities are appealable.

- Planning District 3: (7) Hilton San Diego Bayfront: 1200 hotel rooms with restaurants. Hotels are appealable.

- Planning District 3: (11) Old Police Headquarters Rehabilitation: Specialty retail, entertainment, and restaurant uses. The specialty retail – the primary use – not principally devoted to the sale of commercial goods utilized for water-oriented uses is appealable.

- Planning District 3: (12) Pier Walk Building: New Pier Walk building to accommodate existing commercial fish processing operations, as well as associated retail, restaurant, and other services/support uses. Commercial fishing facilities are appealable.

- Planning District 6: (2) First Street Commercial Area: Construct restaurant, commercial buildings, parking and landscaping, pier and slips. Specialty Shopping in the commercial buildings are appealable.

- Planning District 7 (11) Resort Conference Center: Up to 100,000 square-feet with restaurant. Hotel is an appealable development.

- Planning District 7: (27) Ferry Terminal: Ferry terminal with second story restaurant/retail. Recreational small craft marine-related facility is appealable.

- Planning District 10: (4) Restaurant: construct restaurant and ancillary commercial uses on expanded pier platform when market demands. This was listed as appealable due to the unknown nature of the "commercial

uses" and the pressure by CCC staff that it would be denied without it being on the appealable list.

Regardless of the District's PMP characterization of these restaurants, they were drafted into the PMP prior to the Restaurant Lawsuit and going forward the District may issue non-appealable CDPs for ALL restaurants consistent with the Court's 2013 ruling in the Restaurant Lawsuit. Moreover, a notice of final determination, whether transmitted to the CCC staff in the past, is clearly not required by the District's CDP regulations for non-appealable developments (see February 6th Letter). The District also added the CCC staff to the notification list for the final Mitigated Negative Declaration (MND) and the final action of the CDP. The CCC was notified as any other stakeholder on the list. In fact, CCC staff was notified several times starting that the Board of Port Commissioners were contemplating adoption of the final MND and Non-Appealable CDP 2016-91 (stating on December 1, 2016) and the approvals had occurred (January 10, 2016). Moreover, as required under the California Environmental Quality Act, a Notice of Determination was posted publically with the County Clerk on December 14, 2017 (see Attachment D). No additional noticing requirements exist. Yet, three months later and within days of when the current tenant of the existing facility is vacating, CCC staff institutes an unauthorized process and an illegal appeal of CDP No. 2016-91, potentially leaving the existing facility vacant and boarded up unless a Court intervenes.

V. The Merits of the CDP are Not at Issue in the "Dispute Resolution" Hearing and the CCC Should Not and Cannot Consider them During the Hearing

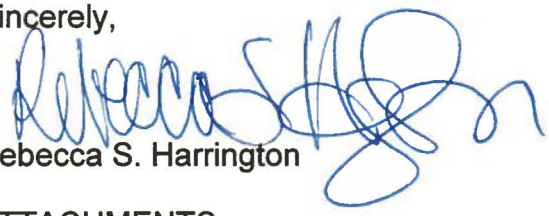
The CCC staff report includes several pages about the merits of CDP No. 2016-91 and incorrectly alleges that it is not in conformance with the PMP and the Coastal Act. If the CCC chooses to hold the "dispute resolution" hearing despite the fact it has no authority or jurisdiction to do so, the sole issue before the CCC is whether CDP No. 2016-91 is appealable – not the merits of the permit. Not whether the proposed dock and dine facility is located within a correct land use category, which would not be subject to an appeal, but rather a different means of legal review. This is not a substantial issue hearing pursuant to Coastal Act Section 30603, which again, would be a hearing held in excess of the CCC's authority because the CDP was legally issued as a non-appealable CDP. The CCC cannot and should not rely on the merits of the permit – its public access components, its water coverage, whether an amendment to the PMP is required, or the value of the development. In any event, CDP No. 2016-91 is consistent with the PMP and Coastal Act.

VI. The "Dispute Resolution" Hearing and Outcome is Not Binding on the District and the Court is the Final Arbitrator of Statutory Interpretation

As stated in the District's February 6th Letter and as discussed further in this letter, the Court is the appropriate branch of government to decide the scope of Section 30715 of the Coastal Act. It already has done so in the Restaurant Lawsuit. Accordingly, any decision by the CCC would not only be *ultra vires* and void, it would not be binding on the District or limit the District's authority to issue non-appealable CDPs for restaurants. If CCC staff wants a determination whether restaurants are appealable under Section 30715, it is required to take the correct legal channels to do so.

The District appreciates the opportunity to submit comments and respectfully requests that the CCC does not hold the "dispute resolution" hearing as it is in excess of the CCC's authority, and if it does, CCC upholds the fact that Section 30715 of the Coastal Act does not include restaurants, as supported by the February 6th Letter, this letter and Brigantine's letter.

Sincerely,



Rebecca S. Harrington

ATTACHMENTS:

A: February 6, 2017 District Letter with Attachments (in a separate email(s) due to size)
B: 14 California Code of Regulations (CCR) Section 13569
C: Parties' Briefs in the Restaurant Lawsuit
D: Stamped Copy of the Notice of Determination
E: Final MND (hardcopy for inclusion in the record and CCC consideration)

cc (via email):
Robin Mayer, Attorney, California Coastal Commission
Randa Coniglio, District President/Chief Executive Officer
Thomas A. Russell, District General Counsel
T. Scott Edwards, District Vice President/Chief Operating Officer
Shaun Sumner, District Assistant V.P., Operations
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