



SAN DIEGO UNIFIED PORT DISTRICT
OFFICE OF THE GENERAL COUNSEL

February 6, 2017

VIA EMAIL (W/O ATTACHMENTS) AND IN-PERSON DELIVERY

California Coastal Commission
San Diego Area
ATTN: Deborah N. Lee
Melody Lasiter
7575 Metropolitan Drive, Ste 103
San Diego, CA 92108

RE: February 2, 2017 Executive Director Determination on Appealability for the
Portside Pier Project (CDP Application No. 2016-91)

The San Diego Unified Port District (District) is in receipt of the February 2, 2017 letter from California Coastal Commission (Coastal Commission) staff entitled "EXECUTIVE DIRECTOR'S DETERMINATION ON APPEALABILITY," Coastal Development Permit Application No. 2016-92, 1360 North Harbor Drive, San Diego, CA 92101 (February 2, 2017 Letter). The February 2, 2017 Letter asserts that the proposed redevelopment of the existing Anthony's restaurant establishments by The Brigantine, Inc., as the applicant and project proponent (Project), is subject to appeal. As explained in detail herein, the Coastal Act designates the District as the permitting authority for restaurants and this Project is not among the category of projects subject to appeal under the Coastal Act.¹

As you are aware, like Anthony's, the Project involves three restaurants, a coffee and gelato shop, a dedicated public viewing deck, and a dock and dine facility.² As you also are aware through the numerous notices given to the Coastal Commission, the Board of Port Commissioners (District Board) approved a Mitigated Negative Declaration (MND) and authorized issuance of a non-appealable Coastal Development Permit (CDP) for the

¹ The Coastal Act is codified in California Public Resource Code Section 30000 et seq.

² Anthony's includes three restaurants, a walk-up coffee kiosk and a dock.

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 2 of 11

Project on December 13, 2016. (See Attachment A (District staff report, which includes the Draft Non-Appealable CDP), District Board Resolution 2016-205 and District staff's presentation to the District Board.³)

The February 2, 2017 Letter claims that the proposed Project required an "appealable" CDP because restaurants and dock and dine facilities are appealable under Coastal Act Section 30715. This assertion is contrary to (1) the plain language of Section 30715, (2) the District's CDP Regulations, which were approved by the Coastal Commission, (3) the certified Port Master Plan (PMP), (4) past practices as demonstrated by previously issued CDPs for other restaurants in the District, and (5) a recent court ruling in a case involving both the District and the Coastal Commission.

Coastal Commission staff also insists that the District must issue a notice of final action for the non-appealable CDP. Yet, as also discussed, below, no such notice is required. In any event, Coastal Commission staff had notice prior to the District Board's approval of the Project and thereafter as well.

The establishment of a 10-day appealable period by Coastal Commission staff, institution of an unauthorized dispute resolution process, and the hearing of an appeal of a non-appealable CDP for the Project would each be an action in excess of the authority and jurisdiction granted to the Coastal Commission. Additionally, it may constitute interference with contract and a taking of property rights. Accordingly, the District requests that the Coastal Commission ceases initiation of the appeal period or any process to bring an appeal to the Coastal Commission.

I. Restaurants and Dock and Dine Facilities are Non-Appealable Developments

As stated in the responses to comments to Coastal Commission staff's comment letter on the Draft MND and as discussed in more detail below, the proposed Project is a non-appealable category of development as set forth in by Coastal Act Section 30715, as well as the District's Coastal Act regulations, which were approved by the Coastal Commission. (See Attachment B, Response to Comments and Errata). The certified PMP also supports the fact that restaurants and dock and dine facilities whether or not they are accessory uses, are non-appealable developments. Additionally, the interpretation is supported by the California Superior Court ruling in *San Diegans for*

³ The staff report and draft resolutions can also be found online at:
<https://portofsandiego.legistar.com/LegislationDetail.aspx?ID=2902778&GUID=83CE8ADF-7957-4114-989D-C6B79DDC1B50>

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 3 of 11

Open Government v. California Coastal Commission; San Diego Unified Port District, Case. No. 37-2013-00057492-CU-TT-CTL (2013) (Restaurant Lawsuit) where the Court found that a restaurant was not an appealable development (see Attachment C.)

A. Restaurants and Accessory Dock and Dine facilities Are Not Appealable Developments Under Coastal Act Section 30715 and the District's Coastal Act Regulations

Section 30715 of the Coastal Act specifies the categories of development that may be appealed to the Coastal Commission. Section 30715(a)(4) states that: "Offices 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" may be appealable to the Coastal Commission.

Neither restaurants nor eating establishments are listed as appealable in Section 30715 of the Coastal Act. A restaurant is not a "shopping facility." Coastal Commission staff's interpretation would expand appellate jurisdiction well beyond the plain language and intent of Section 30715(a)(4). Specifically, the Legislature used plain terms to describe "office and residential buildings," "hotels," "motels" and it knew how to use a plain term to describe a "restaurant." However, the Legislature did not do so, leaving restaurants as "non-appealable" developments.

A dock and dine facility is also not considered a "recreational small craft marina related facilities."⁴ The certified PMP includes distinct land uses for "recreational small craft marina[s]," which do not include dock and dine facilities. Rather, the PMP includes "Pleasure Craft Marinas" and "Recreational Boat Berthing" uses that allow for longer-term berthing and storage of small recreational crafts, as well as boat rentals, charter and sales, fueling docks, etc. (PMP, p. 20.) In contrast, a dock and dine facility is allowable under the "Commercial Recreation" land use designation in the PMP. (PMP, p. 19.) Dock and dine facilities are not related to marinas, may be used by more than recreational small crafts, and unlike recreational marinas or associated facilities, dock and dine facilities are intended to be used for a short period of time while patrons visit restaurant establishments. (PMP, p. 19 (describing dock and dine facilities as "public boat docks located in proximity to a restaurant . . . where boaters may tie up and

⁴ Coastal Commission staff did not assert in its MND comment letter to the District that the dock and dine facility was an appealable development.

Deborah N. Lee
 Melody Lasiter
 February 6, 2017
 Page 4 of 11

disembark for a short period of time to dine).) In other words, dock and dine facilities are akin to short-term parking lots for boats.

The dock and dine facility is an accessory use to the restaurant establishment and does not change the nature of the restaurant from non-appealable to appealable. This is consistent with the Coastal Commission's position when it certified the San Diego Convention Center expansion Port Master Plan Amendment (PMPA) where the inclusion of retail shops did not convert San Diego Convention Center expansion from a non-appealable development to an appealable development. (PMP, pp. 68-71, 72 (accessory retail uses did not convert the San Diego Convention Center expansion into an appealable development).)

B. The Superior Court, in Litigation Where Both the District and Coastal Commission Were Parties, Clarified that Restaurants are Not Appealable Development

The decision in the Restaurant Lawsuit, challenging a Coastal Commission-issued CDP for the redevelopment of a restaurant by Sunroad, supports the interpretation that restaurants are non-appealable developments. There, Sunroad proposed the redevelopment of a site with a restaurant that was historically developed with a restaurant. The District issued a Coastal Act exclusion/exemption for it but failed to issue the noticed required by Section 30717 of the Coastal Act, which is required for appealable developments and starts the 10-working-day appeal period for exclusions/exemptions. The exemption/exclusion was appealed and after finding a substantial issue, the Coastal Commission conducted a de novo hearing and issued a CDP for the restaurant.

That CDP was subsequently challenged in the Restaurant Lawsuit filed by San Diegans for Open Government, Case. No. 37-2013-00057492-CU-TT-CTL (2013). In response to allegations by the petitioner and the Coastal Commission that a "restaurant" was "appealable" under Section 30715(a)(4) because a restaurant was a type of "shopping facility, and akin to other appealable development," the Court squarely ruled that a restaurant was NOT an "appealable" category of development under the Coastal Act. (Attachment C, p. 3.) Specifically, in response to petitioner's argument that a PMPA was required for the Sunroad restaurant to add it to the appealable project list, the court unambiguously found that "the [p]roject was not an 'appealable' development" and pursuant to Section 30711 of the Coastal Act, the Legislature could have required all projects be listed in a port master plan "but instead expressly stated that only . . . 'proposed projects listed as appealable in Section 30715 be included.'" These were two key grounds for denying petitioner's cause of action.

Deborah N. Lee
 Melody Lasiter
 February 6, 2017
 Page 5 of 11

Additionally, several Coastal Commission Commissioners during the de novo hearing on the Sunroad restaurant rejected the interpretation that restaurants were appealable “shopping facility” developments:

- “[S]hopping facilities not principally devoted to the sale of commercial goods utilized for water oriented purposes is not a restaurant. A restaurant is a restaurant.” (see Attachment B, Appendix II p. 002705 [p. 63 of transcript] (excepts from the hearing transcript of the Sunroad Coastal Commission hearing).)
- I “would have a hard time calling [a restaurant] a shopping facility” and that an “attempt to stretch that definition of a shopping facility is a little too broad for where we should be.” (*Id.* at pp. 002717 – 002718 [pp. 75-76 of the transcript].)
- Staff’s interpretation that a restaurant is an appealable development is “a shortcutting the rules on Section 7015” and such a staff policy of doing so should be reviewed by the California Coastal Commission. (*Id.* at 002720 [p. 78 of the transcript].)

C. The PMP, certified by the Coastal Commission, does not Characterize Standalone Restaurants or Dock and Dine Facilities as Appealable

The District has excluded/exempted eight restaurants and issued non-appealable CDPs for at least two restaurants: the Chart House and the Fish Market, both of which were standalone restaurants like the Project. (See Attachment B, Appendix III.) Importantly, Anthony’s, the existing restaurant proposed for redevelopment by the Project, is not identified as “appealable” in the Port Master Plan. (See PMP, pg. 69.) Some restaurants have been listed as appealable in the PMP or issued an appealable CDP. However, the sole basis for the appealable characterization of such restaurants was the fact that they were a part of a larger appealable category development – like, The Wharf – Point Loma Marina LLC or The Ferry Landing Expansion. This is consistent with the District’s and Coastal Commission’s interpretation that accessory uses take on the appealable or non-appealable category of the primary use (see Section I.A of this letter.) Additionally, the Imperial Beach PMPA, certified nearly 20 years ago in 1997, included unidentified commercial uses on the pier, which could have been considered appealable developments and the District took a liberal approach and identified it as appealable. Subsequently, the court’s decision in the Restaurant Lawsuit clarified that restaurants are not appealable development. The doctrine of *res judicata*

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 6 of 11

prevents the Commission from re-litigating that issue. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.

Currently, there are eleven (11) existing dock and dine facilities associated with restaurants within the District located at the Kona Kai Marina, Bali Hai Restaurant, Sun Harbor Marina, Sunroad Resort Marina, Marriott Marquis San Diego, Joe's Crab Shack, Chula Vista Marina, Loews Coronado Bay Resort, Seaforth Boat Rentals, Coronado Ferry Landing, and Pier 32 Marina. Additionally, a dock for restaurant patrons was located at the Anthony's facility. None of them are listed or described as appealable development in the certified PMP (compare PMP, pp. 85 and 113 (Recreational Marina and Marina development listed as appealable). That is because they are non-appealable developments.

Section 7.d(3) of the District's CDP Regulations, approved by the Coastal Commission, state that "non-appealable" developments are those that are not classified as "emergency", "excluded" or "appealable" by the regulations. Appealable categories of development mirror the development categories of Section 30715 of the Coastal Act. While the District has unique "exclusions" in its CDP Regulations, those are inapplicable here because Coastal Act exclusion was not issued for the Project.

II. Section 30717 of the Coastal Act is Not Implicated Because the District Approved a Non-Appealable CDP

Section 30717 of the Coastal Act only applies to "appealable developments" and states that:

[P]rior to commencement of any appealable development, the governing body of a port shall notify the commission and other interested persons, organizations, and governmental agencies of the approval of a proposed appealable development and indicate how it is consistent with the appropriate port master plan and this division. An approval of the appealable development by the port governing body pursuant to a certified port master plan shall become effective after the 10th working day after notification of its approval, unless an appeal is filed with the commission within that time.

For the reasons set forth in this letter and in the record, the Project is not appealable and hence, Section 30717 of the Coastal Act was never triggered.

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 7 of 11

Additionally, Section 11i. of the District's CDP Regulations specifically states that: "Notice of the action of the Board on a proposed appealable development shall be mailed to the applicant...[and] the Coastal Commission...not later than five (5) working days following the decision of the Board." Since District staff determined that the Project is a non-appealable development and the Board approved a Non-Appealable CDP, the District is not required to send a Notice of Board Action to the Coastal Commission. For non-appealable developments, under the District's CDP Regulations (Section 10f), the District is only required to forward Draft and Final California Environmental Quality Act (CEQA) documents to the Coastal Commission, which, as explained in Section III of this letter, it did for this Project.

III. Coastal Commission Staff was Given Advance Notice of the District Board Actions and District Staff Confirmed the District Board's Approval of a Non-Appealable CDP on January 10, 2017

As the District has provided plentiful notice to Coastal Commission staff about the District Board's action on the subject non-appealable CDP, as detailed, below:

- On December 1, 2016, prior to the December 13, 2016 District Board meeting, District staff emailed Coastal Commission staff its CEQA and Coastal Determination for the Project, for which District staff determined the Project to be a "Non-Appealable development" and that "A Non-Appealable Coastal Development Permit (CDP) must be obtained...." (See Attachment D)
- In Coastal Commission staff's August 31, 2016 comment letter on the Project's Draft MND (Comment D-6), staff "respectively request notice of any future action taken on the subject project, including the final environmental document and final action on a CDP." In response to this comment, District staff stated that "CCC staff have been added to the notification list for the final MND and the final action on the CDP." (See Attachment B, Response to Comment D-6.) On December 2, 2016, more than 10 days prior to the Board's action on the CDP, District staff emailed and mailed Coastal staff a "Notice of Board of Port Commissioners Meeting to Consider Adoption of Portside Pier Restaurant Redevelopment Project Final Mitigated Negative Declaration." (See Attachment E.) That notice, in compliance with the CEQA contained:
 - Written responses to Coastal's comment letter on the Draft MND;

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 8 of 11

- A CD of the Final MND and an internet link to the same;
 - The date, time, and location of the District Board meeting for consideration of adoption of the Final MND; and
 - A statement that at that same District Board meeting, "The Board will also consider authorizing issuance of a non-appealable Coastal Development Permit."
- After the District Board's action on the Non-Appealable CDP, District staff, in an email reply to Coastal Commission staff dated January 10, 2017, confirmed that the District Board approved the issuance of the CDP for the Project on December 13, 2016. (See Attachment F.) As referenced in District staff's email, the District is only required to send a "Notice of Board Action" to the Coastal Commission for appealable developments.

As District staff has conveyed to Coastal Commission staff in conversations on January 12, January 18, and January 20, 2017, District staff would like to maintain consistency in its CEQA and Coastal Act processing of projects. In Coastal Commission staff's email of January 13, 2017, it asserted that District staff has been providing Coastal Commission staff with Notices of Board Action on non-appealable developments (see Attachment G). This is unfounded, not required and cannot be relied upon under the law. District staff has reviewed its most recent practices in the past two years and has confirmed that it has not been providing such notices to Coastal Commission staff for non-appealable developments. Section 30717 of the Coastal Act and Section 11i. of the District's CDP Regulations do not require notice for non-appealable developments (see Section II of this letter for more discussion). In its January 13 email, Coastal Commission staff provided an example of a Notice of Board Action on a Non-Appealable CDP that District staff mailed to Coastal Commission staff in June 2013 (see Attachment G). This was almost four years ago and District staff has ceased preparing such notices as they are not required. Just because District staff used a practice not legally required in the past, does not mean it is required to continue to do so or do so now. Importantly, District staff has been emailing all CEQA/Coastal Determinations to Coastal Commission staff, as it did here. District staff has only been emailing CEQA/Coastal Determinations to Coastal Commission staff after a Board meeting if the Project involves a CEQA Exemption or a Coastal Exclusion.

The second example Coastal Commission staff provided in its January 13 email was a CEQA/Coastal Determination for Amendments to the Port Code relating to certain parking lots and meters. In this example, because it involved a CEQA

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 9 of 11

Exemption, the CEQA/Coastal Determination was provided to Coastal staff after the Board meeting, and a Notice of Exemption was filed with the County Clerk, to allow for the 35-day statute of limitations to begin on any challenges to the CEQA Exemption. Nonetheless, this was not legally required.

In the case of a project, such as here, which District staff determined to be a non-appealable development and prepared a MND pursuant to CEQA, District staff would have only provided the CEQA/Coastal Determination to Coastal staff prior to, and not after, the Board meeting. In addition, a CEQA/Coastal Determination should not be confused with a Notice of Board Action on a Coastal Development Permit; they are two separate documents and are provided at different times in the process.

IV. Establishing a 10-Day Appeal Period and Taking Jurisdiction of the CDP Are Illegal Actions

A. The Coastal Commission Is Not Authorized to Proclaim and Notice a 10-Day Appeal Period

Please take note that the Coastal Commission is not authorized under the Coastal Act to “announce and notice the beginning of the 10-working day appeal period” as threatened in the last paragraph on page two of the February 2, 2017 Letter. Section 30717 of the Coastal Act vests the District with that authority where an appealable development is at issue, which as discussed at length in this letter has not occurred here. Any such notice by the Coastal Commission – whether or not for an appealable development – would not be within the Coastal Commission’s statutory jurisdiction and would not trigger the statutory effect. The Coastal Commission is not authorized to assume authority vested in the District.

Additionally, Coastal Commission staff failed to cite to any regulatory authority for the alleged “dispute resolution” process it is claiming to institute. It appears that none exist for ports. Hence, using a sham process to get the issue before the Coastal Commission would likewise be in excess of the Coastal Commission’s jurisdiction and would infringe on the due process rights of the District and others affected by such an ad hoc procedure.

B. The Coastal Commission is Not Authorized to Hear an Appeal of a Non-Appealable CDP

As discussed at length in Section I of this letter, restaurants and dock and dine facilities are non-appealable developments. Hence, the Coastal Commission does not have jurisdiction to even consider an appeal, let alone find a substantial issue and hold

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 10 of 11

a de novo hearing on the CDP. Such actions would be made in excess of the Coastal Commission's authority and jurisdiction.

C. Interference with Prospective and Existing Contracts and Regulatory Takings Claims May Arise

The District and Anthony's are currently operating under an existing lease that requires Anthony's to vacate the premises, which includes removing all furniture, fixtures and certain other items. Pursuant to the lease, Anthony's has until May 1, 2017 to finalize these actions and any delay as a result of a Coastal Commission appeal would interfere with the District's contractual rights to have the premises completely vacated by May 1st. Additionally, the District and the applicant have been negotiating a lease for several months with the intent that the lease be finalized and approved by the District Board in the next couple of months. Any delay in the approval and execution of such a lease would interfere with the District's and the applicant's prospective contractual rights.

Moreover, because the premises is to be vacated by May 1, 2017, if not sooner, any regulatory action by the Coastal Commission that would temporarily or permanently foreclose demolition on the site and/or deprive a use of the premises would constitute a regulatory taking.

D. Coastal Commission Staff was Given Notice on January 10, 2017, 23 Days Prior to the District's Receipt of Its February 2, 2017 Letter and Any Appeal Would be Untimely

Additionally, while not required for non-appealable development, Coastal Commission was given notice on January 10, 2017, sixteen (16) working days from the date the District received Coastal Commission staff's February 2, 2017 Letter. Even if an appeal were legally available (it is not), any appeal by the Coastal Commission would be untimely. Section 30717 of the Coastal Act sets forth a 10-working-day appeal period, which here, expired on January 25, 2017.

Please contact me with any questions or to discuss the issue.

Sincerely,



Rebecca S. Harrington
Deputy General Counsel
San Diego Unified Port District

Deborah N. Lee
Melody Lasiter
February 6, 2017
Page 11 of 11

ATTACHMENTS:

- A: District Staff Report, District Board Resolution, District Staff Presentation
- B: Coastal Commission Staff's Comments on the MND; District Responses to Comments and Supporting Appendices to District Responses
- C: Superior Court Minute Order - *San Diegans for Open Government v. California Coastal Commission; San Diego Unified Port District*, Case. No. 37-2013-00057492-CU-TT-CTL (2013)
- D: Categorical Determination for the Project, Sent to Coastal Commission staff on December 1, 2016
- E: Correspondence and Transmittal for the of Final MND to the Coastal Commission
- F: Notice to Coastal Commission staff of District Board Approval
- G: Correspondence from Coastal Commission staff to District staff

cc: 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
Wileen Manaois, District Principal, Development Services