

LETTER NO. 1

1919 S State College Blvd.
Anaheim, CA 92806-6114

RECEIVED BY
PLANNING DEPARTMENT

MAR 30 2009

CITY OF NEWPORT BEACH

March 25, 2009

City of Newport Beach
3300 Newport Blvd.
Newport Beach, CA 92658

Attention: James Campbell

Subject: EIR for 201 – 207 Carnation Ave and 101 Bayside Pl. (PA 2005-196).

Thank you for providing the opportunity to respond to this E.I.R. Document. We are pleased to inform you that Southern California Gas Company has facilities in the area where the aforementioned project is proposed. Gas service to the project can be provided from an existing gas main located in various locations. The service will be in accordance with the Company's policies and extension rules on file with the California Public Utilities Commission when the contractual arrangements are made.

This letter is not a contractual commitment to serve the proposed project but is only provided as an informational service. The availability of natural gas service is based upon conditions of gas supply and regulatory agencies. As a public utility, Southern California Gas Company is under the jurisdiction of the California Public Utilities Commission. Our ability to serve can also be affected by actions of federal regulatory agencies. Should these agencies take any action, which affect gas supply or the conditions under which service is available, gas service will be provided in accordance with the revised conditions.

1-1

This letter is also provided without considering any conditions or non-utility laws and regulations (such as environmental regulations), which could affect construction of a main and/or service line extension (i.e., if hazardous wastes were encountered in the process of installing the line). The regulations can only be determined around the time contractual arrangements are made and construction has begun.

Estimates of gas usage for residential and non-residential projects are developed on an individual basis and are obtained from the Commercial-Industrial/Residential Market Services Staff by calling (800) 427-2000 (Commercial/Industrial Customers) (800) 427-2200 (Residential Customers). We have developed several programs, which are available upon request to provide assistance in selecting the most energy efficient appliances or systems for a particular project. If you desire further information on any of our energy conservation programs, please contact this office for assistance.

Sincerely,

Mike Harriel
Technical Services Supervisor
Pacific Coast Region - Anaheim

LETTER NO. 2

To: James Campbell
Principal Planner, Planning Department
3300 Newport Blvd.
Newport Beach, CA 92658-8915

April 20, 2009

From: Environmental Quality Affairs Citizens Advisory Committee (EQAC)

Subject: Aerie Draft Environmental Impact Report (DEIR) dated March 2009

EQAC is pleased to have this opportunity to comment on the Subject DEIR in the hopes that our comments will lead to the best possible project for the City of Newport Beach, the neighbors and the applicant. Our comments follow in the order of appearance in the DEIR as far as possible.

1.0 Executive Summary

2-1

The Construction Management Plan (CMP) is referenced frequently and often cited pertaining to mitigation measure. The note at the bottom of pg. 1-6 which refers to the CMP is confusing. Is the CMP incorporated by reference in the DEIR and is it to be considered part of the DEIR, and therefore binding on the proponent?

3.0 Project Description

2-2

The project includes removal of existing 4 docks at channel level (25-foot class boats) and expansion to 8 slips plus one side tie-dock which will “accommodate boats up to 100-foot in length”. As shown in Exhibit 3-17 (pg. 3-25), the new docks extend considerably farther into the boating channel than the original docks and the provision for 100-foot boat maneuvering in the busy channel seems problematic. (Note that the USCG Cutter Narwhal is 13 feet shorter at 87 feet and employs a crew of ten). The DEIR deals with this potential problem under Harbor and Bay Element HB 9.2 (pg 4.1-11) by stating that this new dock facility will not “adversely affect safe navigation within the harbor”. However, no harbor traffic analysis is included to support this assertion. Are such studies or analysis available to assure that channel boating operations and safety are not compromised?

4.0 Environmental Analysis

4.1 Land Use

2-3

pg.4.1-8, LU1.1 The modern style of this architecture is out of character for this area, especially as viewed from Carnation Avenue.

2-4

pg.4.1-8, LU 1.3 The small beach area at the foot of this project will be hard to see with the construction of a 60’ gangplank, a larger dock and the possibility of the docking of large vessels. This will be a loss of a visual resource from the water.

- 2-5 | pg.4.1-9, LU 2.5 Because of the configuration of the new dock, it appears that 100' vessels will be close to encroaching on boating lanes. There may be a need to limit the size of vessels docked on channel side of the dock.
- 2-6 | pg.4.1-9, LU 3.2, Who will pay to underground existing utility lines?
- 2-7 | pg.4.1-12, CE 7.1.8, Is there any way to ensure that the residents of Aerie will use the provided garages rather than the street? Using an elevator to park for a short time seems unrealistic.
- 2-8 | pg. 4.1-13, NR 3.11, What will be the effect of long term runoff on the harbor?
- 2-9 | pg. 4.1-14, NR 11.3, How will the loss of eelgrass be mitigated? Specifics?
- 2-10 | pg. 4.1-19, 2.2.1-2 Diagram of planned improvement to catch basin?
- 2-11 | pg. 4.1-19, 2.7.1, It would be helpful to have a larger diagram of planned subterranean land encroachments.
- 2-12 | pg. 4.1-42, 3.20, How will the sand dollar colony be protected during the construction of the dock? Specifics?

4.3 Air Quality

- 2-13 | The document describes (in extreme detail) the existing conditions and State regulations concerning the construction phase. There is no real schedule to facilitate evaluation of the ability of the construction crews to comply with these standards.

4.4 Noise

- 2-14 | What types of noise restrictions will be placed on residents within the completed condominium complex? For example, portable balcony Jacuzzis have appeared recently that are not controlled by existing noise codes. These have minimal plumbing and electrical needs and represent noise pollution that is currently not covered by noise codes. The proponent should take steps to limit these and similar internal noise sources to eliminate future operational controversy within the project or adjacent to it.
- 2-15 | Pg 4.4-24: Vibration from construction will be "felt" for a total of 25 work days during the project. This is an unavoidable negative impact and should be so noted.
- 2-16 | A comment about the DEIR's implied appropriateness of a 65 dBA criterion for residential noise:
 Note, Table 4.4-1, shows noise levels of 65-70 dBA CNEL are considered inappropriate (or, "C = normally incompatible") for all residential categories shown. This makes

excellent sense and is consistent with the literature which clearly states, for example, that "... sound pressure levels exceeding 55 dB(A) ... are disturbing to sleep ..." [1] and, noise from, for example, highway traffic -- typically 70 dB(A) -- is considered "intrusive".

2-16
CON'7

Despite the data shown in Table 4.4-1, this DEIR sets as an acceptable criterion for residential noise at 65 dBA CNEL (as stated throughout the document). Levels of 65 dB(A) are at the threshold for noise classified as both "normally compatible" and "normally incompatible" for residential categories, and exceed the every category of allowable residential noise level standards for the city as shown in Table 4.4-2.

2-17

Section 9.3.10 describes that none of the increases from noise impacts due to project traffic will exceed 65 dBA CNEL, and the DEIR "...anticipates no significant long-term cumulative noise impacts ..." due to the project. However, there should be a better characterization of how the current ranges of average daytime noise levels in the area (see Table 4.4-3).

2-18

Section 9.3.10 concludes: "The greatest increase in ambient noise would occur during the construction phases ..." and that these will "... result in significant impacts in the neighborhood." They then conclude that vehicle-trip noises associated with the completed project are projected to be minimal and not significant contributors to long-term traffic noise (adding only an estimated 47 vehicles per day onto the circulation network). This conclusion seems unrealistically optimistic, and is based on the report's questionable acceptance of a 65dBA standard for appropriate residential noise levels.

2-19

In light of the especially liberal 65dBA criterion discussed above, and the existing ambient noise levels reported, we feel the project's long-term noise impacts are better characterized as unmitigated negative impacts of the project, since the net result will be to substantially raise the area's average daytime noise levels by adding the sort of traffic noise known to be especially disruptive and resulting in stronger negative reactions due to its vibration characteristics and low frequency components. For additional technical data, refer to "Guidelines for Community Noise" The World Health Organization - expert taskforce meeting held in London, United Kingdom, in April 1999. It bases on the document entitled "Community Noise" that was prepared for the World Health Organization and published in 1995 by the Stockholm University and Karolinska Institute. Available at <http://www.who.int/docstore/peh/noise/guidelines2.html>.

2-20

This project sets a bad precedent, taking the opposite view and inflating that which is considered an acceptable standard, even beyond what is recommend by City standards. The impacts of Aerie should be stated as unmitigated negative impacts so as to avoid a tendency to inflate allowed noise impacts of future projects.

4.5 Aesthetics

2-21 | The proposed project will result in a major addition of reflective glass to the bluff compared with what is there now (see Exhibits 4.5-4 and 4.5-16). Under Light and Glare (pg. 4,5-29) the DEIR states that selection of appropriate building materials results in “no significant glare impact from building finish materials” and that “no mitigation measure are required”. However, it is well known that at sunset this area ”lights up” with window reflections. Has the proponent considered a mitigation measure to minimize this effect?

4.6 Drainage and Hydrology

2-22 | Page 4.6-6 4.6.4.2 Long-Term Operational Impacts, First Paragraph

Is the added swimming pool capable to treat all the ingredients from a storm flow?

2-23 | Page 4.6-8 4.6.4.2 Long-Term Operational Impacts, Third Paragraph

What is the storm drain design capacity? Shouldn't that number be in this section as well as having input from the City Engineer?

2-24 | Page 4.6-9 4.6.4.2 Routine Non-Structural BMPs N1

What is sanitary sewage outflow?

2-25 | Add “and dripping” to “dumping oil” in line 3.

2-26 | Page 4.6-9 4.6.4.2 Routine Non-Structural BMPs N11

include in addition to reporting.

2-27 | Page 4.6-10 4.6.4.2 Routine Structural BMPs Second last line of the page:

What are “Abtech Smart Sponge Plus” drains?

2-28 | Page 4.6-11 4.6.4.2 Routine Structural BMPs Fourth line of the page:

How will pool water be safely disposed of properly?

2-29 | Page 4.6-12 4.6.5 Mitigation Measures Water Quality

What is “maximum extent practicable”?

4.7 Biological Resources

2-30 | A map of the existing vegetation on the site should be provided, including the vegetation that was removed according to the Notice of Violation. See page 1, footnote. The coastal bluff vegetation on the site should be shown before the violation occurred and what is there now. For example, the footnote says the lemonadeberry is growing back. What

about the encelia that was removed? How will the existing lemonadeberry survive under the overhang of the deck? The biology report does not address this impact. A mitigation measure should provide that the existing vegetation will not be removed or damaged and that it will survive and flourish after the project is built.

2-31

Coastal bluff scrub is considered ESHA by the Coastal Commission. The EIR should show the boundaries of the coastal bluff scrub on the project site and appropriate buffers such as 50 feet which is required for ESHA under the Newport Beach CLUP. Page 1 of the biology report identifies a "remnant southern coastal bluff scrub community on the rocky outcrop along the northern project boundary extending into Newport Bay", but it ignores the coastal bluff scrub on the bluff face, including lemonadeberry, buckwheat, and encelia. This is also coastal bluff scrub and is ESHA that needs to be protected by protecting the vegetation that is now in place and making sure it will survive the deck overhanging it.

2-32

The wetlands discussion on page 4.7-5 does not address the Coastal Commission upholding the one-parameter definition, such as vegetation (three parameter wetland definition is vegetation, hydric soil, and hydrology). In early April, the Coastal Commission refuted the Glenn Lukos biologist's attempts to ignore the one-parameter definition in a wetland in an RV storage lot in Huntington Beach, which used the same arguments present in this report.

2-33

What is the water source for the umbrella sedge, e.g. 30 inch drain pipe, seepage out of the bluff face from an aquiclude? In any case there appears to be a 190 square foot wetland that meets the Coastal Commission one parameter definition. It should be protected in place, with a buffer, which is 100 feet in the Newport Beach CLUP.

2-34

The sand dollar issue needs more examination. Where else in Newport Bay are sand dollars found? The EIR should locate and describe the other locations. Page 4.7-8 states "...the occurrence of intertidal populations of the species within Newport Bay is unique and rare. The population survives in this location because wave motion/wave energy is moderate, sediments are sandy to silty sand, and tidal exchange is excellent." Will the dock cause changes to the wave motion/wave energy, sediments and tidal exchange? The biology report only makes a condition about signage and not taking specimens out of the marine environment. The changes in the environment including the pollution and changes to wave motion/energy, sediments and tidal exchange need to be stated, analyzed, and mitigated.

2-35

The eelgrass issue needs further analysis. The report refers to studies in 2005 and 2007, but now it is 2009. Has the eelgrass gotten more or less numerous and how much of the dock area is now occupied by eelgrass? What is the mitigation policy for eelgrass that grows back under the boats?

2-36

Pg 4-7-17: The report states that putting the piles in a single row that is parallel and not perpendicular to sand transport will mean that sand transport is not affected. However, the pattern of sand transport is not included in the report. Sand transport varies with the

season and direction of the swells which come from different directions according to the time of year. This might affect the sedimentation in Carnation Cove as well.

2-37

There is a disconnect between page 4.7-4 where the federally endangered tidewater goby is "potentially occurring within the region", but then in Table 4.7-2, it says: "No potential: Extirpated from Orange County"

Marilyn L. Beck
303 Carnation Avenue
Corona Del Mar, CA 92625
949-723-1773
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April 29, 2009

**VIA FEDERAL EXPRESS 7965-6934-3448
AND EMAIL**

James Campbell, Principal Planner
Newport Beach Planning Department
3300 Newport Boulevard
Newport Beach, CA 92658-8915

Re: ***AERIE PA2005-196 Draft Environmental Impact Report***

Dear Mr. Campbell:

Please find enclosed my comments and questions relating to the Draft Environmental Impact Report. I have organized them by section in keeping with the format of the DEIR and hope you won't find it too confusing. I have number listed my statements with specific questions and concerns relating to each numbered item.

Thank you for your consideration of these concerns.

Very truly yours,

Marilyn L Beck

General:

1. Predominant Line of Development: The CLUP states on page 4-76, referring specifically to bluff face development along Carnation Ave, "...development on the bluff face is controlled to minimize further alteration." (Emphasis added). The plans originally submitted by Aerie took advantage of the PLOED on the bluff side of both Ocean Blvd and Carnation Avenue. The City Council rejected that proposal and set a PLOED at 50.7 feet above mean sea level. Aerie states in the DEIR that excavation will be to 28 feet above mean sea level which is the level originally submitted and rejected by the City Council.

3-1 | a) How does the City define the PLOED? Is it the bluff face or does it refer to subterranean development? Are there regulations as to the depth of subterranean development? If so, what are they? Throughout the DEIR there is only discussion of the bluff face development and not the 25++ feet of subterranean development below the PLOED.

3-2 | b) Is the PLOED the vertical line of development? Is there a horizontal line of development as well?

3-3 | c) If subterranean development is allowed below the 50.7 feet, will that set a precedent for further bluff destruction along Carnation Avenue? Several other properties along Carnation are 'tear downs' and they are currently on the market. Will the developers of these properties be allowed to descend all the way down to Bayside Place?

2. The DEIR states at page 4.1-2 that: "A portion of the subject property is located within the limits of the 100-year zone established for tsunami inundation at extreme high tide" and under the heading of Geologic Hazards: "...the site...is subject to the potential for slope failure..." Section 4.4.3-5 of the CLUP (and General Plan NR 23.4) states: "Require all new bluff top development located on a bluff not subject to marine erosion to be set back from the bluff edge in accordance with the predominant line of development in the subject area. This requirement shall apply to the principal structure and the major accessory structures such as guesthouses and pools."

3-4 | a) Aerie plans include a pool below the 50.7 PLOED. How does that comply with the requirements of the CLUP? The CLUP does not state that anything can be built into the bluff itself so long as what shows on the exterior is above the PLOED.

b) Was it the intent of the City when it established the requirements of the CLUP that they referred only to the bluff face and not to the actual structure?

3. The DEIR states that "the site is a steeply sloping coastal bluff and cliff, the west-facing portion of which is subject to marine erosion." The DEIR states that "the existing buildings, including impervious surfaces with the exception of the bluff staircase, presently cover approximately 22 percent of the entire site, consisting of the highest and flattest portions of the site. Coverage is approximately 41 percent of the area of the site above mean higher high tide line."

3-5 | a) The DEIR does not state what percentage of the entire site Aerie will cover including buildings and impervious surfaces. Please provide that information.

3-6

b) It appears from Exhibit 3-7 on page 3-14 of the DEIR that Aerie's buildings and impervious surface area is far more extensive than the equivalent 22% of the existing structures.

3-7

c) Is this site a "significant natural landform"? Is it a 'bluff'?

3-8

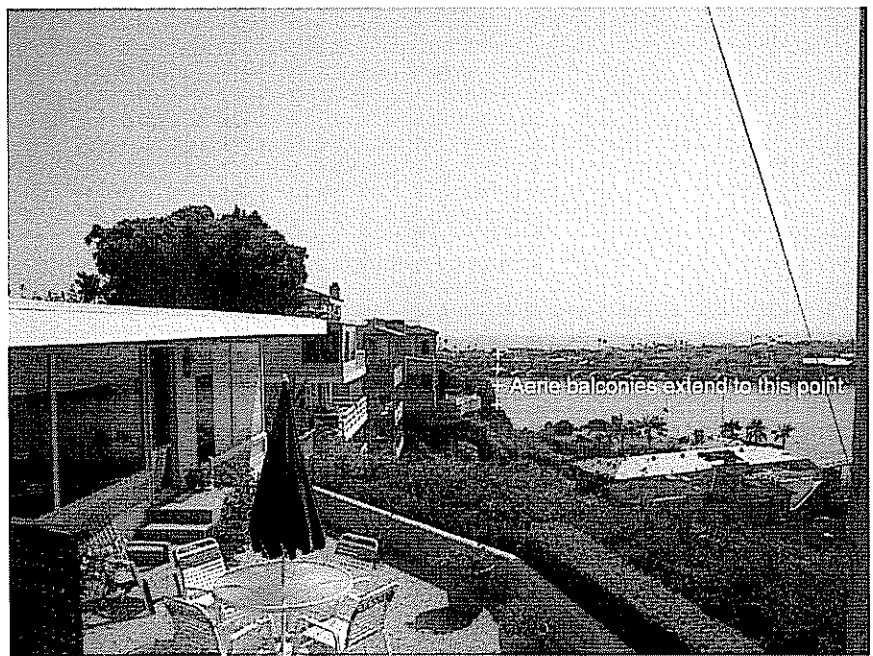
d) How does allowing this level of development comply with the requirements of the General Plan and CLUP, specifically the requirements to minimize development of coastal bluffs?

4. Balcony encroachments are within the 10'7" side yard setback abutting Bayside Place. This puts the outer limits of the building at the property line and way beyond the horizontal predominant line of development along Carnation Avenue/Bayside Place.

3-9

a) How can this be allowed given the requirements of the CLUP? This also is the cause of view corridor encroachment from Begonia Park. Section 4.4.3-6 of the CLUP states: "On bluffs not subject to marine erosion, require new accessory structures such as decks, patios and walkways that do not require structural foundations, to be set back from the bluff edge in accordance with the predominant line of existing accessory development." Does this not refer to balconies and is not the predominant line for the sake of discussion that of the horizontal rather than vertical development?

b) Even if this particular section does not apply because the balconies hang off of structural foundations, the CLUP Section 4 additionally addresses this point as follows: "On bluff top lots where the bluff is not subject to marine erosion, the setback from the bluff edge should be based on the predominant line of existing development along the bluff edge in each neighborhood." Below is a photo of the horizontal line of development along Carnation which clearly shows that Aerie goes far beyond that line.



5. Page 2 of the Notice of Preparation under the heading Existing Conditions states: “The Site is a steeply sloping coastal bluff and cliff, the west-facing portion of which is subject to marine erosion.” The Local Coastal Program Coastal Land Use Plan Section 4 at page 75 states: ‘Development restrictions, including setbacks, must be established to ensure geologic stability while addressing current patterns of development. Where the bluff is subject to marine erosion, development on bluff top lots must be set back at least 25 feet from the bluff edge. On bluff top lots where the bluff is not subject to marine erosion, the setback from the bluff edge should be based on the predominant line of existing development along the bluff edge in each neighborhood. These bluff edge setbacks may be increased to maintain sufficient distance to ensure stability, ensure that it will not be endangered by erosion, and to avoid the need for protective devices during the economic life of the structure (75 years).’

- 3-10 | a) This point is a continuation of the Point 3 above. How does this project and the request for Modification Permit meet these requirements?
- 3-11 | b) Nowhere in the DEIR is there any discussion about the horizontal predominant line of development along Carnation Avenue. If I have missed this, please let me know. This project pushes the envelope going all the way to the property line, way beyond the predominant line of Carnation development. And, in order to do so, requests a Modification Permit. I strongly disagree that there is justification for granting this permit. Please address this specific point.

Land Use & Planning:

6. LU 1.1 & 1.2: These policies address the architectural character of Newport Beach. The DEIR states that its architectural style “promotes architectural diversity in the City” and that this “distinctive architectural character...is consistent with the City’s desire to differentiate NB from other coastal cities”.

- 3-12 | a) How does a design of mushroom shaped domes with purple rooftops comply with the General Plan requirements to “maintain and enhance the beneficial and unique character of the different neighborhoods...” ?
- b) The DEIR is focusing on the term ‘differentiate’ and applying it to a project that is totally out of keeping and character of *anything* in CDM or Newport Beach. There are NO other architectural structures even remotely similar to this design with the one exception of the Portobello residence designed by Aerie’s architect.
- c) Being so completely different from every other structure in the city does not appropriately fulfill the requirements of the General Plan. ‘Differentiate’ doesn’t mean not even remotely like anything found in the city.

7. Under the Section 4.1-Land Use and Planning of the DEIR there is a table of the various General Plan provisions with the developer’s comments. LU 1.4 states: “Implement a conservative growth strategy that enhances the quality of life of residents and balances the needs of all constituencies with the preservation of open space and natural resources”. The DEIR states that because this project has “only eight residential

dwelling units in a single structure..." the development meets the requirement of LU 1.4. What isn't stated is that the total square footage of the project is 61,709 which is a ratio of 7,713.6 per unit.

- 3-13
- a) How does that show "conservative growth strategy" and how does it 'preserve' open spaces and natural resources?
 - b) The developer will remove a structure that is built on only 22% of the lot size (as stated in the opening section of the DEIR) and replaces it with one that effectively uses 100% of the lot resource (going by the same method of calculation as used by the DEIR in reference to the current structure). This does not appear to meet the objective of LU 1.4. Please respond to this point.

8. Section LU 4.1 states: "Accommodate land use development consistent with the Land Use Plan." The developer responds that this only applies to the small parcel of 584 square feet.

- 3-14
- a) Doesn't the entire project come under the scrutiny of the Land Use Plan?

9. CE 7.1.1 states: "Require that new development provide adequate convenient parking..." The response is that car elevators meet this requirement. I realize this is subjective, but it hardly seems 'convenient' to have to wait for a car elevator, drive into it, ride down several levels, drive out and into one's space.

- 3-15
- a) How is this 'convenient' parking?

10. NR 21.3 states: "Support programs to remove and underground overhead utilities..." The plan submitted achieves this and Alternative A proposes to do so also.

- 3-16
- a) Why does this requirement not apply to all the Alternatives?

11. NR 22.1 states: "Continue to regulate the visual and physical mass of structure..." The DEIR states that Aerie is 'similar in both physical mass and character' of the neighborhood and uses Channel Reef as the model of comparison.

- 3-17
- a) There are no developments in the neighborhood of the style of Aerie, which is based on Gaudy architecture. It is unique in all of Newport Beach and Corona Del Mar (with the exception of the Portobello property designed by Aerie's architect).
 - b) Channel Reef was built in the 1960's and would never be approved or allowed today and does not meet any of the requirements of the General Plan.

12. Policy 4.4.1-3: The DEIR states that Aerie complies with this policy because "the proposed condominium structure is situated on the flattest portion of the lot and the building design conforms to the natural contours of the site; therefore, grading of the bluff is the minimal amount needed to build the project to the Predominant Line and the project is consistent with this policy"

- 3-18
- a) Aerie proposes to remove 25,240 cubic yards of dirt from the site, excavating to 28 feet. How can the DEIR state that 'grading of the bluff is the 'minimal amount needed to build the project to the Predominant Line'?

3-18
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b) How is this enormous level of excavation and removal of bluff consistent with this policy?

13. The DEIR does not include or respond to CLUP Policy 4.4.3-3. This policy states: "Require all new bluff top development located on a bluff subject to marine erosion to be sited in accordance with the predominant line of existing development in the subject area but not less than 25 feet from the bluff edge. This requirement shall apply to the principal structure and major accessory structures such as guesthouses and pools. The setback shall be increased where necessary to ensure safety and stability of the development".

3-19

a) Why was this not addressed?
b) The DEIR states that "the site is a steeply sloping coastal bluff and cliff, the west-facing portion of which is subject to marine erosion." Thus, Aerie should be required to comply with CLUP Policy 4.4.3-3. Please address this omission.

14. Policy 4.4.3-5: The DEIR states that basement and sub-basement are below the PLOED but not visible. But the CLUP requires that major accessories, **including swimming pools, to be above the PLOED.**

3-20

a) Aerie has its pool structure below the 50.7 PLOED.
b) Aerie balconies extend beyond the horizontal predominant line of development as well (see number 4 above) and this requires a modification permit.

15. Policy 4.4.3-8: Requires new development to "...be visually compatible with the surrounding area to the maximum extent feasible"

3-21

a) Aerie is larger in square footage than all the existing properties added together along Carnation Avenue bluff (including the property where Aerie is sited). How is Aerie "compatible with the surrounding area to the maximum extent feasible"?
b) Aerie design is out of context with any other property in all of Newport Beach including Corona Del Mar. It is visually incompatible with all other properties in the surrounding area.

3-22

16. Policy 4.4.3-9: Requires the establishment of a predominant line of development. The City Council established a vertical line at 50.7. But a horizontal line has not been established and Aerie is inconsistent with the current line of Carnation (See Point 4 and above photo).

3-23

17. Policy 4.4.3-12: How does removal of 25,240 cubic yards of bluff meet this requirement?

Construction Plan:

3-24

18. Is the Construction Management Plan available to the public on line? It is not attached to the DEIR on the City's web site.

3-25

19. Will the developer or the City be responsible for repair to City streets at the conclusion of this project if there is damage from the heavy truck traffic? This applies to the entire construction route but is particularly concerning in the neighborhoods of Corona Del Mar. Please respond.

Aesthetics:

3-26

20. The simulations of the project show that the rooftops are purple.
a) Is this the proposed color scheme?
b) How is this compatible with the neighborhood?

Alternatives:

21. 3 Single Family Home Alternative: The DEIR states that this alternative would not require 'green' technology or the removal of power lines.

3-27

- a) Is implementation of 'state of the art' energy features, upgrading of the existing catch basin and undergrounding of existing power poles and wiring a requirement by the City or voluntary by the developer?
- b) If it is a requirement of the City, why wouldn't that requirement be the same for the 3 Single Family Home Alternative? If it is voluntary, why shouldn't the same voluntary application be applied to ALL the alternatives, not just the one that the developer *wants* to apply it towards?
- c) This Alternative states that it will require 75 caissons. How many are required for the current Aerie design? Why would there be more caissons required for three homes totaling 23,200 square feet than for a multi-family structure at 61,709?
- d) The DEIR states that 3 homes would require 6 years of construction because the 3 could not be built at the same time unless all three had buyers. Are there 8 buyers for the Aerie condo units? Are all the units sold? If not, why does this requirement apply to the homes and not to Aerie?
- e) Clearly this is a very viable alternative because it requires the excavation of only 10,000 cubic yards of bluff rather than 25,240 and is keeping with the character of the neighborhood.

22. 5-Unit Multi-Family Project: The DEIR states that this alternative would not require 'green' technology or the removal of power lines.

3-28

- a) My question is the same as the prior Alternative in relation to the Aerie project. Why is this something that Aerie proposes but not for this Alternative?
- b) The Alternative does not state the square footage of the proposed 5-Unit building. What is the square footage?
- c) Reducing construction time by 9 months, eliminating 25 caissons and reducing the amount of dirt excavated by 12,240 cubic yards seems like a very reasonable alternative. Why is this not acceptable?

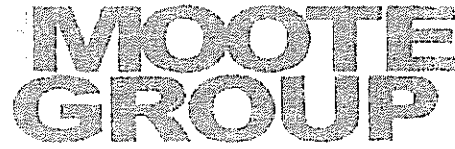
3-29

23. 8 Unit Alternatives A & B. Again, either of these alternatives seem more reasonable than the Aerie project, with reduced square footage and reduced excavation of the bluff. My concerns are the same as above.

24. The DEIR does not address the issue of a Construction Bond. There is significant concern about the financial viability of this project.

3-30

- a) Please address the City's liability in the event the developer fails to complete the project and the bluff has been excavated.
- b) Please address the City's liability in the event the bluff fails and there is damage to the surrounding properties.
- c) Further address this issue in the event that the developer declares bankruptcy.



1516 Brookhollow Drive, Santa Ana, CA 92705

RECEIVED BY
PLANNING DEPARTMENT

MAY 4 2009

May 1, 2009

Selman Breitman

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Santa Ana, CA 92701-4551
www.selmanbreitman.com

Subject: Draft Environmental Impact Report (EIR)
SCH No 2007021054
AERIE (PA 2005-196)

CITY OF NEWPORT BEACH

Dear Ms Friend

On behalf of RESIDENTS FOR RESPONSIBLE DEVELOPMENT, The Moote Group has reviewed the above stated Draft EIR and offers the following comments and questions to The City of Newport Beach Planning Department

Protection Of The Bluff

4-1

The subject DEIR refers to The City of Newport Beach General Plan and the Coastal Land Use Plan (CLUP) policies. Many of these policies address protecting the bluffs, (i.e. CLUP 4.4 1-3 development shall minimize the alteration of natural landforms including bluffs, CLUP 4.4 3-12 employ site design and construction techniques to minimize alteration of coastal bluffs) The Aerie project includes the excavation and disposal of an estimated 25,240 cubic yards of bluff top material. How is this consistent with the Cities adopted policies? Are these policies exempt when the altering of the bluff is subterranean?

4-2

The Aerie project will construct an emergency access tunnel through the bluff face at elevation 40.5 feet as described in the DEIR. The DEIR is silent on how this tunnel will be constructed, potentially by coring through the bluff face or excavating from the top down to elevation 40.5 and then filling over the access tunnel reconstructing the bluff face. The construction of the access tunnel is in direct conflict with the CLUP policies stated above.

4-3

The DEIR states in section 4.9 Soils and Geology (4.9-6) Bluff Erosion, that the excavation of the subterranean levels and day-lighting at the bluff face will leave a trapezoidal (i.e., pillar) section of intact rock as part of the exposed bluff face. This section speaks to future erosion and rock strength to remain in place during the economic life of the building structure (75 years). Our concern is the stability of the trapezoidal section of the bluff face during construction activities such as, caisson drilling, excavation, any necessary rock breaking during excavation utilizing an excavator / breaker (hoe ram), vibrations from other construction activities. In this scenario the bluff face is put at risk. It is likely that at a minimum the upper portions of the trapezoidal section will be damaged and/or fractured ultimately loosening part of the bluff face. The DEIR is silent on this issue.

4-4

The rock bluff face is certain to endure some damage as a result of the construction activity described above, is reconstructing the bluff face with graded dirt and or concrete and steel, acceptable to The City of Newport Beach and complying with the applicable policies?

Eelgrass and Sand Dollar Colony

4-5

Reference 4 1-42. 3.20 support the protection of vital resources. The DEIR stipulates the pre and post construction survey of the eelgrass and intensions to avoid the sand dollar colony seem to fall short. A map identifying the eelgrass and sand dollar colony over-laid by the dock column locations would provide any direct conflicts and distance to conflicts. The projected pier columns are designed up to 24" in diameter. How will the drilling and placement of these columns not impact these resources?

Environmental Analysis

4-6

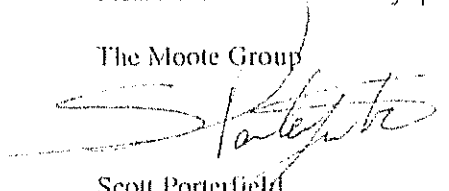
It appears the proper modeling of air pollutants has been provided and expected to be maintained below applicable regulatory thresholds. In order to verify and document the various thresholds given in the DEIR a third party should be given this responsibility

4-7

Noise levels are stipulated during specific portions of the project to be an unavoidable significant impact This sets a bad precedent on future developments.

Please contact me with any questions or concerns.

The Moote Group



Scott Porterfield
Senior Project Manager



Campbell, James

From: JonV3@aol.com
Sent: Monday, May 04, 2009 12:02 AM
To: Campbell, James
Cc: dobehave@earthlink.net
Subject: AERIE Draft EIR Comments PA2005-196

RECEIVED BY
PLANNING DEPARTMENT

MAY 4 2009

CITY OF NEWPORT BEACH

May 3, 2009

James Campbell
Principal Planner
City of Newport Beach
3300 Newport Blvd
Newport Beach, CA 92663

Re: Draft EIR, AERIE Project, PA2005-196

Dear Jim,

Thank you for the opportunity to comment on the Draft EIR for the Aerie Project. I would like to make the following comments regarding the Chapter 4.0 Section 4.7 Biology:

5-1

1. I don't see the map of the existing vegetation in the report nor on the web site for the Aerie Project in the Planning Department. Is that map available? Does the map show the vegetation that was removed according to the Notice of Violation issued by the Coastal Commission? See page 1, footnote. The coastal bluff vegetation on the site should be shown before the violation occurred and what is there now. For example, the footnote says the lemonadeberry is growing back. What about the encelia that was removed? How will the existing lemonadeberry survive under the overhang of the deck? The biology report does not seem to address this impact. A mitigation measure should provide that the existing vegetation will not be removed or damaged and that it will survive and flourish after the project is built.

5-2

2. Coastal bluff scrub is considered ESHA by the Coastal Commission. The EIR should show the boundaries of the coastal bluff scrub on the project site and appropriate buffers such as 50 feet which is required for ESHA under the Newport Beach CLUP. Page 1 of the biology report identifies a "remnant southern coastal bluff scrub community on the rocky outcrop along the northern project boundary extending into Newport Bay", but it seems to ignore the coastal bluff scrub on the bluff face, including lemonadeberry, buckwheat, and encelia. This is also coastal bluff scrub and is ESHA that needs to be protected by protecting the vegetation that is now in place and making sure it will survive the deck overhanging it.

5-3

3. The wetlands discussion on page 4.7-5 totally ignores the Coastal Commission upholding the one-parameter definition, such as vegetation (three parameter wetland definition is vegetation, hydric soil, and hydrology). On April 9, 2009, the Coastal Commission thoroughly refuted the Glenn Lukos biologist's attempts to ignore the one-parameter definition in a wetland in an RV storage lot containing wetlands in Huntington Beach which used the same arguments present in this report. See Coastal Commission staff report at:

<http://documents.coastal.ca.gov/reports/2009/4/Th11-s-4-2009.pdf>

The Coastal Commission vote was unanimous in refuting the Tony Bomkamp Glenn Lukos reasoning, therefore they may very well contradict the wetlands conclusions in this report. The water source for the umbrella sedge may be that 30 inch drain pipe? Or may it be seepage out of the bluff face from an aquiclude? What irrigation would cause it? Is the property being irrigated now? It looked pretty neglected to me when I visited the site last year. In any case there appears to be a 190 square foot wetland that meets the Coastal Commission one parameter definition, therefore it should be protected in place, with a buffer, which is 100 feet in the Newport Beach CLUP.

5-4

4. The sand dollar issue needs more examination. Where else in Newport Bay do they find sand dollars? The EIR should locate and describe the other locations. Page 4.7-8 states "the occurrence of of intertidal populations of the species within Newport Bay is unique and rare. The population survives in this location because wave motion/wave energy is moderate, sediments are sandy to silty sand, and tidal exchange is excellent." Will the dock cause changes to the wave motion/wave energy, sediments and tidal exchange? The biology report only makes a condition about signage and not

taking specimens out of the marine environment. The changes in the environment including the pollution and changes to wave motion/energy, sediments and tidal exchange need to be stated, analyzed, and mitigated.

5-5

5 The eelgrass issue needs further analysis. The report refers to studies in 2005 and 2007, but now it is 2009. Has the eelgrass gotten more or less numerous and how much of the dock area is now occupied by eelgrass? What is the mitigation policy for eelgrass that grows back under the boats? Eelgrass is great habitat for fish, and the fact that it is returning in Newport Bay is a sign of better water quality.

5-6

6 Sand transport Page 4-7-17. The report states that putting the piles in a single row that is parallel and not perpendicular to sand transport will mean that sand transport is not affected. However, the pattern of sand transport is not included in the report. Sand transport varies with the season and direction of the swells which come from different directions according to the time of year. This might affect the sedimentation in the Carnation Cove as well.

5-7

7 There is a disconnect between page 4 7-4 where the federally endangered tidewater goby is "potentially occurring within the region", but then in Table 4.7-2, it says: "No potential:Extirpated from Orange County" Is this site potential habitat for this endangered fish?

5-8

Please put me on the list for notices concerning this project, including by email at JonV3@aol.com and at my home address at:

Jan D. Vandersloot, MD
2221 E 16th street
Newport Beach, CA 92663

Thanks again for the opportunity to comment.

Sincerely,

Jan D. Vandersloot, MD

2009 3 Free CREDIT SCORES: See Your 3 Credit Scores from All 3 Bureaus FREE!

DEPARTMENT OF TRANSPORTATION

District 12
3337 Michelson Drive, Suite 380
Irvine, CA 92612-8894
Tel: (949) 724-2241
Fax: (949) 724-2592



*Flex your power!
Be energy efficient!*

May 4, 2009

James Campbell
City of Newport Beach
3300 Newport Boulevard
Newport Beach, California 92658

File: IGR/CEQA
SCH#: 2008051082
Log #: 1833F
PCH

Subject: AERIE (PA2005-196)

Dear Mr. Campbell,

Thank you for the opportunity to review and comment on the **Draft Environmental Impact Report (DEIR) for the AERIE (PA2005-196) project**. The proposed project involves the demolition of an existing 14-unit apartment building and single-family residence to construct a 6-level, 8-unit condominium complex, grading, and maintenance improvements to an existing private dock. The project site is located on 201-207 Carnation Avenue and 101 Bayside Place in the City of Newport Beach. The nearest State route to the project site is Pacific Coast Highway (PCH).

6-1 | **The Department of Transportation (Department) is a commenting agency** on this project and has no comment at this time. However, in the event of any activity in the Department's right-of-way, an encroachment permit will be required.

6-2 | Please continue to keep us informed of this project and any future developments that could potentially impact State transportation facilities. If you have any questions or need to contact us, please do not hesitate to call Marlon Regisford at (949) 724-2241.

Sincerely,

Christopher Herre, Branch Chief
Local Development/Intergovernmental Review

RECEIVED BY
PLANNING DEPARTMENT

MAY 4 2009

C: Terry Roberts, Office of Planning and Research

CITY OF NEWPORT BEACH

Comprehensive Planning Services

RECEIVED BY
PLANNING DEPARTMENT

May 4, 2009

MAY 4 2009

Jim Campbell, Principal Planner
Newport Beach Planning Department
3300 Newport Boulevard
Newport Beach, CA 92658-8915

CITY OF NEWPORT BEACH

Re: *Comments to Notice of Availability
Aerie residential project (PA 2005-196)
SCH No 2007021054*

Dear Mr Campbell:

As a resident of Newport Beach and professional environmental consultant, I am concerned about the narrow and out dated review of the Aerie project presented in its Draft Environmental Impact Report (EIR). At a minimum, the EIR should be revised and recirculated to address the following very apparent errors:

Air Quality

- 7-1 | The air quality analysis fails to identify the square footage of building material to be demolished and the cubic yards of earth disturbance due to site excavation and grading. Demolition and grading activities contribute significant levels of particulate and carbon emissions, impacting both short-term air pollutant levels and long-term green house gas (GHG) emissions.
- 7-2 | The EIR is remiss in neglecting to identify how demolition and grading activities contribute to construction GHG emissions. Although thresholds relative to CO2 and other GHG emissions are still being formulated by the State, AB32 makes it very clear that it is an objective of every community to reduce GHG emissions to 1990 levels by 2020. The EIR needs to discuss how the Aerie project, which proposes the "tear down, excavate and build large" technique and an elevator system for parking, will work toward meeting these state mandated goals. Clearly, the EIR needs to be revised to fully describe the potential GHG emissions from the Aerie project, including not only CO2, but water vapor, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.
- 7-3 | Although the EIR identifies the health risks associated with criteria pollutants, it provides no assessment of the health risks associated with project development, particularly related to demolition and grading activities during project construction.
- 7-4 | The Impact Summary Table of the EIR erroneously lists SCAQMD rules as mitigation. Case law is very clear that standard rules, regulations and conditions of approval do not constitute mitigation under CEQA. The EIR makes the same error relative to traffic, geology, drainage and biology.

Visual Resources / Aesthetics

7-5

The EIR fails to discuss potential impacts associated with glare from project windows, particularly during the pre-sunset hour when the glare is the greatest. Similarly, the EIR fails discuss how the new dock will block views of the beach that existing bay users currently enjoy.

7-6

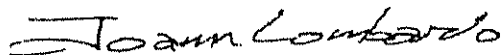
Should the project be approved and demolition and excavation begin. there is reasonable probability that the project may not move forward to completion. In other words, the developer may excavate, leaving a great hole in the cliff, and find the project is no longer feasible. The community is then left with a ravaged cliff. Such scenarios are not uncommon; the halted development at Dover and PCH is a recent example of the eyesore left when site clearing is halted mid-track. Mitigation measures need to be added to the project, requiring the developer to bond for such events

Alternatives

7-7

The alternatives analysis sets a very narrow scope that appears biased toward the project. The 3 single family and 5 multi-family alternatives appear to be intentionally designed so as not to reduce impacts associated with construction noise and paleontological resources. Further, dismissing the Single Family Home Alternative because it does not require 'green' technology is a red herring. Rather, the EIR should compare the GHG emissions of the project to each alternative. Using drought tolerant landscaping or overhangs, as proposed by the project, would not counter the GHG emissions of 9 luxury units when compared to any development with a smaller unit count and smaller footprint.

Yours truly,



Joann Lombardo,

LETTER NO 8

RECEIVED BY
PLANNING DEPARTMENT

MAY - 4 2009

May 4, 2009

CITY OF NEWPORT BEACH

Mr. James Campbell
Principal Planner
City of Newport Beach
Planning Department
3300 Newport Boulevard
Newport Beach, CA 92658-8915

Mr. Campbell:

After reviewing the Draft EIR for the proposed AERIE project located in Corona del Mar, I have concerns regarding some issues discussed in the document as well as issues not addressed in the Draft EIR.

I feel that the following issues are either misrepresented or fail to be addressed in the Draft EIR:

8-1

Construction Management Plan (CMP)
Traffic and Circulation
Coastal Land Use Plan (CLUP)
Predominant Line of Development (PLEOD)
Dock System
Financial feasibility of the project

8-2

Throughout the Draft EIR there is reference to a Construction Management Plan (CMP). This Plan is not a part of the Draft EIR and nowhere is there reference as to where this Plan can be accessed. Due to the size and scope of the proposed project this document should be available for review.

- Since it is frequently referenced, shouldn't the CMP have been included in the Draft EIR or reference made to where the document could be viewed?
- Where can it be viewed?

8-3

Due to size and scope of this project, an unusually large number of heavy construction vehicles and equipment are needed. Table 1-1 indicates that truck traffic would not exceed four trucks per hour and "not significant impacts would occur." The removal of 25,240 cubic yards of earth from the site (not to mention demolition and infra structure) will necessitate over 2,000 truckloads as well as heavy equipment.

8-4

There are no less than 11 Mitigating Measures listed for this issue. I disagree that even with the Mitigating Measures the Level of Significance will be "Less than Significant." Our streets are narrow and are not designed to handle the size and volume of large trucks and heavy equipment required for this project.

- Where will these trucks be staged?
- Will the trucks be lined up along the Haul Route?

8-5

Residents access and exit their homes via alleys, which go out onto Seaview Avenue, and Ocean Boulevard residents must access and exit their properties via Ocean Boulevard entering and crossing the Haul Route.

- What measures will be taken to ensure residents' safety as they enter and cross the Haul Route?

8-6

There is also a significant issue of pedestrian safety, especially along Ocean Boulevard and Goldenrod and Seaview Avenues where there are a limited number of pedestrian crosswalks and stop signs.

- What measures will be taken to ensure pedestrians' safety as they enter and cross the Haul Route?

8-7

The Draft EIR indicates that the proposed project is consistent with the Coastal Land Use Plan. It is my understanding that the purpose of the CLUP is to protect the bluffs and natural landforms within the City of Newport Beach. The City Council has established a PLOED at 50.7 feet above mean sea level. However, the project will have two subterranean levels, as well as elements of the project which will violate this level.

- How is the removal of 25,240 cubic yards of material and subterranean construction consistent with the protection of the bluff/natural landform?
- How is the construction of a 61,709 sq.ft. structure on a 20,935 sq.ft "buildable" site consistent with the protection of the bluff/natural landform?

8-8

The proposed dock system presents a myriad of problems, and in fact, at the April 8, 2009 Harbor Commission Meeting the Harbor Commission voted to recommend denial of the docks to the City. Their comments included concern regarding storm events and potential damage during these events, potential for shifting of the sand dollar population, sand migration concern and the overall size of the dock system.

8-9

This is an extremely ambitious and expensive project. It is my understanding that the developer will be required to post a construction bond.

- What is a construction bond and what does it accomplish?
- What will happen to the project if the developer is unable to complete it?
- Who will be financially responsible for any damage to streets or slope (i.e., Fernleaf and Ocean) failure due to the excessive number of heavy trucks traveling the Haul Route?

8-10

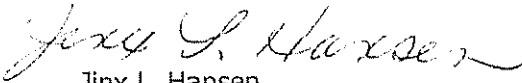
Lastly, there are a great number of Mitigating Measures for the proposed project. Enforcement of these will be time and work intensive.

- How is the City going to ensure that all of the guidelines and Mitigating Measures are enforced?

8-11

This project is NOT consistent with the surrounding neighborhood. It is too large and has huge potential for damage to the site slope as well as residential properties near the project. As required by General Plan Policy CE 7.1.1, the project does not provide convenient parking and will potentially increase the parking problems experienced in the neighborhood.

Sincerely,



Jinx L. Hansen
221 Goldenrod Avenue
Corona del Mar, CA

LETTER NO. 9

TO: James Campbell, Principal Planner
Newport Beach Planning Department
3300 Newport Blvd.
Newport Beach, CA 92658
jcampbell@city.newport-beach.ca.us

RECEIVED BY
PLANNING DEPARTMENT

MAY 4 2011

FROM: Melinda Luthin, Esq.
P.O. Box 417
Corona del Mar, CA 92625
mluthinlaw@gmail.com

CITY OF NEWPORT BEACH

Re: Acric Multi-family Residential Project Draft EIR

Thank you for the opportunity to comment on the draft EIR.

Chapter 1, Executive Summary

1.1.2: A "construction Management Plan (CMP) has been prepared as a component of the proposed project."

9-1
Comment: The DEIR refers to this CMP, but it is not incorporated into this DEIR. Nor is it a part of any public document that has been properly reviewed. The DEIR states that this CMP "addresses parking management... traffic control... safety and security... air quality control... noise suppression measures... and environmental compliance/protection." Yet the veracity of these conclusory statements cannot be evaluated because we have not been given this document to review. This appears to be a very important document that is being kept from public scrutiny. I question this behavior. My questions are: Who prepared this CMP? Has it been properly reviewed? Is it available for public inspection and comment? What does "component" mean, in the above? How are these measures "addressed" and are they adequately and properly addressed?

Since this CMP is not attached, this entire DEIR has not been adequately presented to the public for review.

I recommend that the EIR, with all incorporated documents attached be resubmitted for public review.

1.1.4:

9-2
In general, this section appears to be boilerplate statements without any facts to support the implementation of the project objectives. It reads more like an advertisement for the project rather than a list of objectives. Although contained in the Executive Summary,

this section fails to summarize any means to obtain any of the proposed objectives. My specific comments to each subsection are as follows.

- 9-3 | 1. What is the “advanced design” referred to? What is the minimum “sufficient number and size” of units that will justify such a design? What “architectural diversity” of the community is this trying to emulate? How will this project “add distinction” to the neighborhood? These statements are made without any facts to explain how these objectives are being implemented, or how these objectives benefit the community. Notably, this section refers the reader to subsequent sections for further explanation, yet these sections provide the reader no information specific to the project.
- 9-4 | 2. It appears that the removal of the power poles and replacement with underground wiring is a standard requirement for all new construction. This is not a proper “objective” that is specific to this project.
- 9-5 | 3. What are the energy efficient designs? Can these be implemented in a project that complies, without variance, with the local, regional, state and federal development rules, and in a project that does not require an EIR? If so, then why isn’t this project being built instead?
- 9-6 | 4. This vague section gives the reader no indication of what will be built, other than whatever the developer “deems” to be “important.” This makes no consideration of the needs or interests of the environment, of the community, of the city, state or of our nation as a whole.
- 9-7 | 5. How will a high-density project decrease parking on the street? It seems improbable that this inconvenient parking proposal, which includes mechanical elevators subject to failure, will decrease any parking in the area.
- 9-8 | 6. This project appears to inhibit the scenic views, not enhance them. The view from Begonia park will be significantly impacted, and the view from the site will also be negatively affected. The removal of two power poles is insignificant. It also does not enhance the view from the peninsula or the water. In fact, it will be more detrimental view because the natural bluff will be replaced by a building. Also, the balconies will protrude into the view corridor.
- 9-9 | 8. Although the “average” building height may be below the maximum, there is no comment on the effect of the maximum exceedences that will occur and their impact on the views.

Table 1-1

- 9-10 | This table is confusing. Again, it is filled with conclusory statements without factual support. For instance, the “potential Impact” on “Land Use and Planning” states that, after mitigation, the dock will be “consistent with the Land use Element and Costal Land

use Plan” and “compatible with the existing land uses of the area ” What is the meaning of “consistent?” How is an 8-person, single-building project with subterranean parking that has a footprint multiple times larger than any other residential building in the area “compatible” with the existing land use?

Soils and Geology:

9-11

In general, there is no discussion of compliance with any laws or regulations or other requirements other than local ordinances. There should be a discussion of the project’s compliance or non-compliance with the requirements of all regulations and laws from local, regional, state and federal sources.

9-12

SC 4.9-3: “The property owner shall execute and record a waiver of future shoreline protection ...” I am not sure what this means. It needs to be explained.

9-13

SC4.9-4 Accessory structures shall be relocated or removed if threatened by coastal erosion.” This comment needs explaining. The reader cannot determine what structures are considered “accessory.” This is being proposed as a single structure. What is the proposed “routine maintenance” predicted to be necessary? What will happen if this maintenance is not performed? What will be the impacts of this maintenance on the environment and the community? How often will it be performed? It appears that there may be some information regarding the soil integrity that has not been disclosed to the public, but which is known to some. If potential incidents due to coastal erosion have been identified, the public has a right to know exactly what has been studied, and what risks are being created by this project. All of this information should be disclosed, and provided for comment

9-14

MM4.9.1 Allowing this massive project to be designed via the engineering specifications of one consultant (namely, Nesbit & Associates) seems to be risky. Who is reviewing these engineering specifications? Who is double-checking them? Have there been studies performed at the site to verify their calculations? What are the potential risks? What are their probabilities? This is a huge health and safety concern not only for the residents of this project, but for all residents in the vicinity, including those in Bayside Cove, as well as the environment in the area.

Biological Resources

9-15

The first section does not identify any “Potential Impact” so the reader is left to guess at what the corresponding Mitigation measures are attempting to mitigate.

9-16

The second section refers to the CMP, which is not attached, and therefore this entire DEIR has not been adequately presented to the public for review.

9-17

“A qualified biologist shall conduct a pre-construction survey for active nests of covered species .” This does not identify what “qualifications” the biologist shall have, or who will choose the biologist. It also, only states that they will not disturb nests. It

does not address the issue of the recurring need of any nesting species. This will eliminate any future nesting.

9-18 | The only "mitigation" proposed is obtaining a permit. This can hardly be considered any mitigation of any impact on the protected flora and fauna in the area. The natural habitat is going to be destroyed, with no consideration of the long-term impacts on these species.

9-19 | "A small portion of the existing eelgrass bed (approximately 30 square feet)" will be adversely impacted by the boats. This does not provide us with adequate information. How big is the bed, what numerical portion of the bed does this consist of?

9-20 | "Impacts to eelgrass are avoided through the implementation of measures prescribed in the CMP." Again, the public has not been given the opportunity to fully review this DEIR because they have not been given the CMP. Also, the claim that some secret "measure" described in the CMP can eliminate the effects of 100 plus foot boats seems improbable. This is all the more reason that the public deserves to have access to all the proposed "implantation" measures in order to test their feasibility and veracity.

9-21 | This also states that there will be a pre- and post- construction survey of the eelgrass. It does not address any impacts on the eelgrass due to the construction itself.

9-22 | In general, mitigation is not monitoring and surveys only. Monitoring and surveys are tools used to determine what mitigation is required, they are not the mitigation themselves. In this DEIR, surveys and monitoring are improperly proposed for the purpose of mitigation.

Disturbances to the sandy cover intertidal and shallow subtidal habitat, eelgrass and sand dollar bed.

9-23 | Again, this DEIR incorporates by reference the CMP, which is not attached and not available for public review. Therefore the public cannot adequately review and comment on this DEIR. This mitigation consists of vague statements that the construction workers will "avoid impacts" to the area. It does not state how this will be achieved, other than with signage and yellow construction tape.

Aesthetics

9-24 | The DEIR states that there will be no impact on the view. This is not true, as the view will be impacted from many vantage points throughout the village, the water, and the city (see above).

9-25 | SC 4.5.1-2: The lighting mitigation section is incomplete.

9-26 | SC 4.5. 2 (second): "The applicant shall dedicate a view easement..." This needs to be explained? In whose favor is this view easement? Where is it located? Why is it required?

Cultural Resources

9-27 | This section identifies that the project "will result in site alteration that could encroach into the Monterey Formation ..." Yet, the impacts are defined as less than significant. How is this possible?

Recreation

9-28

No discussion is made of the negative impact on the public that this project will cause by its increased street parking and by the fact that the project will hide and hinder the availability of the public beaches from the public.

Drainage and Hydrology.

9-29

This section discusses the effect of the project on the marine life. This discussion of the impact of the construction is inadequate. So too is the mitigation proposed. The effect of the construction on the marine life and proper and effective mitigation of these effects should have been fully addressed under "Biological Resources" above.

Public Services and Population and Housing

9-30

In general, this DEIR does not discuss the density of the project. It states that there will be "eight luxury condominiums" but does not state how many people are estimated for each. It also does not state the density of the current fifteen unit apartment complex. Therefore, the public cannot adequately evaluate and comment on the impact of any increase in residents at this project.

Sincerely,

Melinda Luthin, Esq.



RECEIVED BY
PLANNING DEPARTMENT

LETTER NO. 10

MAY 4 2009

169 Saxony Road
Suite 204
Encinitas, CA 92024

CITY OF NEWPORT BEACH Tel: 760-942-8505
Fax: 760-942-8515
www.cityofnewportbeach.org

May 4, 2009

James Campbell
Principal Planner
Newport Beach Planning Dept
3300 Newport Boulevard
Newport Beach, CA 92658

Via Electronic Mail
jcampbell@city.newport-beach.ca.us

Re: Aerie Multiple-Family Residential Project
Residents for Responsible Development
Comments on Draft Environmental Impact Report

Dear Mr. Campbell:

Coast Law Group LLP represents the interests of Residents for Responsible Development (RFRD) with respect to the City's review of the above-referenced project (the "Aerie Project" or "Project"). RFRD is comprised of a group of concerned neighbors living in Corona Del Mar and Newport Beach. Thank you for the opportunity to participate in the review process and to submit comments on the Draft Environmental Impact Report (DEIR). While RFRD is not opposed to the appropriate development of the subject property, the Project as currently proposed does not comply with the City's land use regulations and therefore fails to adequately protect the site's coastal bluff and surrounding resources.

Further, the DEIR is legally deficient under the California Environmental Quality Act (CEQA) because it fails to carry out the statute's informational goals. As the City is aware, CEQA mandates full disclosure to promote informed decision-making and an opportunity for meaningful public participation. The statute's fundamental goals have not been carried out in this case. Given the scope of the Project and the numerous significant impacts associated therewith, the Project cannot be approved as currently designed. With these issues in mind, RFRD respectfully submits the following comments for the City's consideration:

1. Coastal Bluff Impacts

The DEIR is legally deficient under CEQA because the Project will result in significant land use impacts. As a cursory review of the DEIR discloses, construction of the proposed condominium structure will result in the complete eradication of the underlying coastal bluff. Notwithstanding this obvious fact and the City's express coastal policies prohibiting the same, the DEIR fails to discuss or otherwise acknowledge the significance of this loss. Indeed, the DEIR painstakingly avoids the issue altogether and therefore fails to satisfy its informational purpose under CEQA.

10-1

Per appendix G of the CEQA Guidelines, a proposed project will result in a significant land use impact if it conflicts "with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect."

Here, the City's General Plan and Coastal Land Use Plan (CLUP) set forth express provisions prohibiting the physical alteration of coastal bluffs and landforms. Particularly relevant to the

consistency analysis in this case, these regulations are separate and distinct from the general restrictions that apply to aesthetics and compliance with the predominant line of existing development (PLOED)

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For instance, one of the discrete goals of the General Plan is to ensure that "[d]evelopment respects natural landforms such as coastal bluffs." (General Plan, Goal NR23, p. 10-40). To effectuate this goal, the Natural Resources Element sets forth a number of specific coastal bluff policies, including the following:

NR 23 1. Maintenance of Natural Topography: Preserve cliffs, canyons, bluffs, significant rock outcroppings, and site buildings to *minimize alteration of the site's natural topography and* preserve the features as a visual resource.

(General Plan, p. 10-40, emphasis added).¹

Similarly, the CLUP contains a discrete section addressing "Natural Landform Protection" (see CLUP §4.4.3, p. 4-74 to 4-80) and expressly states that coastal bluffs are to be protected. (*Id.* at p. 4-75). In doing so, the CLUP notes that coastal bluffs have been "physically or visually obliterated by structures, landform alteration or landscaping." (*Id.* at p. 4-75). As with the General Plan, the CLUP sets forth a number of specific policies to ensure that new development complies with its protective mandate. For instance, the CLUP states:

10-2

4.4.3-12: Employ site design and construction techniques to minimize alteration of coastal bluffs to the maximum extent feasible, such as . . . [u]tilizing existing driveways and building pads to the maximum extent possible.²

(CLUP, pp. 4-78, 4-79)

Furthermore, the CLUP specifically references the coastal platform occupied by Corona del Mar and addresses the manner in which bluff-related development may occur. Notably, the clear intent of the CLUP is to prohibit any further alteration of Corona del Mar's coastal bluffs. The CLUP states:

10-3

Corona del Mar is one of the few areas in the coastal zone where there is extensive development of the bluff face; specifically, residential development on Avocado Avenue, Pacific Drive, Carnation Avenue, and Ocean Boulevard. The initial subdivision and development of these areas occurred prior to the adoption of policies and regulations intended to protect coastal bluffs and other landforms. Development in these areas is allowed to continue on the bluff face to be consistent with the existing development pattern and to protect coastal views from the bluff top. However, development of the bluff face is controlled to minimize further alteration

(CLUP, p. 4-76; emphasis added)

¹ See also Policy LU1.3 (requiring the preservation of "open space resources, beaches, harbor, parks, bluffs, preserves, and estuaries as visual, recreational and habitat resources")

² See also Policy 4.4.1-3 ("Design and site new development to minimize alterations to significant natural landforms, including bluffs, cliffs and canyons.")

To ensure Corona del Mar's coastal bluffs are protected in accordance with this intent, the CLUP sets forth the following policy:

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4.4.3-8: Prohibit development on bluff faces, except private development on coastal bluff faces along Ocean Boulevard, Carnation Avenue and Pacific Drive in Corona del Mar determined to be consistent with the predominant line of existing development or public improvements providing public access, protecting coastal resources, or providing for public safety. Permit such improvements only when no feasible alternative exists and when designed and constructed to minimize alteration of the bluff face, to not contribute to further erosion of the bluff face, and to be visually compatible with the surrounding area to the maximum extent feasible.

(CLUP, p 4-78; emphasis added)³

10-5

Thus, as the foregoing illustrates, coastal bluffs in the area have been physically and visually obliterated due to prior development and associated grading activities. To prevent the continued loss of these resources, development must be carried out such that alterations to the natural topography and underlying coastal bluff are minimized to the maximum extent feasible. This mandate is separate and distinct from the obligation to preserve coastal bluffs as a visual resource. And to the extent bluff-related development is permitted in the Corona del Mar area at all, it must be consistent with and limited to the scope of pre-existing structures such that further landform alterations are avoided. These limitations apply because bluff face development is now strictly prohibited and is only allowed per those grandfathered uses.

10-6

In the General Plan and CLUP consistency analysis, the DEIR repeatedly concludes that the Project complies with the foregoing policies because the exterior development will not extend below the PLOED and the structures will have a "curvilinear" design. In doing so, the DEIR completely ignores the Project's lateral encroachments and subterranean impacts to the bluff. The DEIR's consistency analysis is therefore deficient because it fails to address the specific bluff protection policies outlined above. And as detailed below, the DEIR's findings are not supported by substantial evidence and will be subject to challenge as an abuse of discretion.

10-7

The Project is sited above the entrance to Newport Harbor on one of the City's character-defining coastal bluffs. As such, it is visible from public vantage points throughout the Balboa Peninsula and Newport Bay (DEIR, p. 3-2). The bluff is part of the Monterey Formation, which was formed approximately 80,000 to 120,000 years ago and has a "high paleontological sensitivity" due to an abundance of marine life fossils (DEIR, pp. 4.9-1, 4.10-1). The bluffs are considered "significant scenic and environmental resources and are to be protected" (CLUP, p. 4-75).

Notwithstanding the foregoing, the Project will result in the eradication of the site's underlying coastal bluff, as follows: "The upper elevation of the project site is approximately 70 feet above mean sea level." (DEIR, p. 4.7-1; emphasis added) Project construction will require excavation to an elevation of 28 feet. (DEIR, p. 4.2-2, Table 4.2-1) As such, the proposed project will result in the eradication of 60% of the underlying bluff. (See DEIR pp. 3-19, 3-21,

³ See also Policy 2.8.1-4 (ensure that new development does not contribute to the "destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs");

Ex. 3-13, 3-14, cross sections illustrating extent of bluff removal).

To accomplish this result, the Project will require the excavation of 25,000 cubic yards of the underlying bluff, which will simply be disposed of in the Brea Olinda Landfill. (DEIR, p. 4.2-3). The need to transport such a large quantity of earth material to the landfill will result "in the generation of approximately 2,105 heavy truck trips over the 5-month grading and excavation phase." (*Id.* at 4.2-3).

The scope of the excavation is further illustrated by the fact that the project will require a setback variance, as "the majority of the encroachments are subterranean." (*Id.* at 4.1-20). In that regard, the site will be completely hallowed out such that only a sliver of the bluff face will remain intact. The DEIR states:

10-8
Excavations for and construction of planned subterranean levels, which will remove existing fill soils as well as a majority of the terrace deposits capping the bedrock and daylighting on the bluff face, will leave a trapezoidal (i.e. pillar) section of intact rock as part of the exposed bluff face to approximately Elevation 52.8 NAVD. With the removal of these materials, the bluff face will be less vulnerable to bluff erosion.⁴ Considering the [*sic*] both the lithologic bedrock unit exposed and the rock quality, the remaining trapezoidal section of intact rock will have sufficient strength to remain in place during the economic life of the structure (i.e., 75 years).

(DEIR pp. 4.9-6, 4.9-7; emphasis added).

The direct purpose of these excavation activities is to accommodate a massive, six story building consisting of over 61,000 square feet by eradicating the underlying bluff and disguising a high-rise structure in its place. (See DEIR, p. 3-12).⁵ To allow such a practice would set an incredibly poor precedent for future development in the area and would lead to the complete destruction of the City's coastal bluffs over time. Moreover, the Project would permanently alter the 100,000 year-old bluff in favor of leaving a rock "pillar" that is only expected to remain in place for the structure's 75-year economic life.

10-9
Notwithstanding the foregoing, the DEIR states that the Project "has been designed to 'fit' the bluff" and "would not alter the existing landform that characterizes the site." (DEIR, pp. 4.1-20, 4.5-8). As set forth above, these contentions are not supported by substantial evidence. In that regard, there is no question that the Project violates the protective policies of the General Plan and CLUP, as the proposed development has not been designed to "minimize alteration" of the site's natural topography and underlying bluff "to the maximum extent feasible." (General Plan Policy NR 23.1; CLUP Policy 4.4.3-8; emphasis added). Further, less intrusive alternatives (that do not require substantial excavation) clearly exist. Based on the foregoing, the Project will result in significant land use impacts and the DEIR's conclusions to the contrary are not

⁴ While the logic of this passage is not entirely clear, it seems to suggest that the excavation activities will somehow constitute a Project benefit because evisceration of the bluff will result in less bluff erosion in the future. This, of course, defies common sense and cannot be relied upon as a justification for Project approval.

⁵ The DEIR does not identify the square footage of the site's existing residential structures and therefore fails to provide an adequate baseline for evaluating Project impacts.

supported by substantial evidence.

2. Visual & Aesthetic Impacts

10-10

Given the bulk and scale of the proposed condominium structure, the Project will result in significant visual and aesthetic impacts under CEQA. The overall building height of the residential structure will be increased by approximately nine feet over the existing multiple-family structure and 17 feet over the existing single family residence. (DEIR, p. 4.5-3) As noted above, the resulting Project consists of a 61,000 square-foot high-rise structure which is entirely inconsistent with the surrounding community in terms of both architectural style and overall mass⁶

10-11

Relevant here, the CLUP states that the City must "[c]ontinue to regulate the visual and physical mass of structures consistent with the unique character and visual scale of Newport Beach." (CLUP, Policy 4.4 2-2). Despite this clear mandate, the DEIR fails to provide a reasoned analysis of the Project's compatibility with the surrounding neighborhood (such as a comparative square footage analysis of other residential structures on Carnation Avenue).

Instead, the DEIR repeatedly states that the Project will not result in a significant aesthetic impact because "it would be smaller than the Channel Reef Development located to the south" (DEIR, p. 4.1-35). Given the DEIR's conclusory discussion of this issue, approval of the Project will be subject to challenge as an abuse of discretion.

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The foregoing deficiencies are equally at issue with respect to the scope of the proposed dock structure. The dock, which will total approximately 3,500 square feet (CRM Eelgrass Survey, p. 21), will accommodate nine vessels, including a 100-foot yacht. While the DEIR does not provide any details regarding the height and bulk of the vessels expected to be moored on-site, there is no question that their presence will directly impact views of Carnation Cove and the adjacent rock outcroppings that form its southwestern boundary.

10-13

With respect to this issue, the General Plan states: "Preserve cliffs, canyons, bluffs, significant rock outcroppings, and site buildings to minimize alteration of the site's natural topography and preserve the features as a visual resource." (General Plan, NR 23 1; p. 10-40, emphasis added). Likewise, the CLUP identifies rock outcroppings as significant landforms that must be protected. (CLUP, p. 4-77)

10-14

In attempting to reconcile the dock structure with the foregoing policies, the DEIR states, "Although some views of the cove and rock features below the bluff from some vantages in the harbor would be partially or totally obscured by the proposed dock facility, the obstruction would be brief and intermittent only as one travels in and out of the harbor" (DEIR, p. 4.1-16; see also p. 4.5-8)

This conclusion is not supported by substantial evidence, as it fails to consider the Project's impacts on stationary views *from the Peninsula*. Indeed, the dock system has been sited directly adjacent to the two rock outcroppings such that they will be completely obscured from cross-channel vantage points. (See DEIR, Ex 3-17, depicting extent to which outcroppings will be obscured). By the same token, the DEIR fails to evaluate potential impacts to views from

⁶ See e.g. visual simulations at Exhibits 4.5-7 and 4.5-8.

Carnation Cove to the Harbor and Channel. (See CLUP Policy 4.4.1-1, requiring protection of public views to and along the bay and harbor).

10-15 With respect to glare, the DEIR fails to adequately consider the drastic increase in reflective surface area resulting from the Project's design. (See DEIR, Ex. 4-15, 3-16). In that regard, the DEIR should evaluate potential view impacts from Harbor and Peninsula vantage points during times of maximum sun reflection.

3. Noise Impacts

10-16 While the DEIR recognizes that noise impacts will be significant and unmitigable with respect to construction of the proposed residential structure, it fails to adequately consider dock-related impacts.⁷ The DEIR states, "Construction of the dock is scheduled from May 2012 to July 2012 and is estimated to have a duration of 40 days." (DEIR, p. 4.4-20). Given this time-frame, the DEIR must evaluate potential noise impacts to recreational uses within Carnation Cove, as the beach area is most frequently visited during summer months.

10-17 Moreover, the DEIR deliberately understates dock-related construction impacts on neighboring residences. The DEIR states that impacts from drilling noise will reach 71dB and 68 dB at 101 Bayside Place and 2495 Ocean Boulevard, respectively. (DEIR, p. 4.4-20). However, these figures represent average noise impacts. The dock construction noise study prepared by Wieland Acoustics states that maximum noise levels at those locations will reach 83 dB and 77 dB, respectively. (Wieland Acoustics Study, App. E, p. 12). These figures clearly exceed the standard 65 dB threshold of significance for assessing residential noise impacts. (See DEIR, p. 4.4-1).

10-18 By the same token, the DEIR completely omits any reference to noise impacts associated with installation of the concrete piles (which will reach 80 dB at the closest residence). (*Id.*). The failure to include this information constitutes a prejudicial abuse of discretion, as the DEIR does not disclose the full extent of the Project's environmental impacts.⁸

4. Vibrational Impacts

10-19 With respect to vibrational impacts, the DEIR states that the "analysis of potential short-term vibration impacts was evaluated at both the closest distance that would occur as well as the average distance" (DEIR, p. 4.4-23). However, this does not appear to be accurate, as the vibrational study attached to the DEIR only states that impacts were assessed from a distance of 80 feet. (See Planning Center Study, DEIR App. F, p. 57). In any event, neither the DEIR nor the vibrational study identifies the actual distance between the anticipated impacts and the closest residence.

⁷ Regarding construction of the residential structure, the applicable noise study did not consider impacts associated with crane operations on the grounds that use of the rig would be intermittent (Planning Noise Study, App. F, pp. 31-32). However, as is the case with construction traffic, intermittent impacts can result in significant noise impacts. As such, the crane's impacts must be properly evaluated in the Final EIR.

⁸ The DEIR also fails to disclose noise impacts to residential structures across the Channel. Notably, drilling-related noise levels will reach 65dB at 2222 Channel Road (Wieland Acoustics Study, App. E, p. 12). Because this borders the 65 dB threshold, the impact must be disclosed.

Because the Project requires a setback variance to accommodate excavation activities, the impacts are likely to occur within several feet of adjacent residences. As such, the DEIR must address potential vibrational impacts in terms of both cosmetic and *structural* damage. This applies with respect to construction of the condominium structure as well as the dock facility, as "the risk of structural damage still exists even at relatively low vibration levels." (Wieland Acoustics Study, App. E, p. 7). Notably, the study prepared to measure dock-related vibrational impacts does not address this issue. The report states:

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Because it is outside our area of expertise, the risk (if any) of structural damage due to transmitted vibrations or dynamic settlements has not been evaluated in this study. This risk should be analyzed and assessed by qualified structural and geotechnical engineers

(Wieland Acoustics Study, App. E, p. 15; emphasis added).

This issue must be adequately analyzed in the Final EIR and to the extent any significant impacts will result the DEIR must be re-circulated. The analysis must give due consideration to site conditions, including the hard rock material prevalent in the Monterey Formation (see DEIR, pp. 4.9-1, 4.9-7), as well as the age and physical condition of neighboring structures⁹. Also relevant, the evaluation must be based on peak particulate velocity (PPV) threshold standards. PPV "is most appropriate for evaluating potential building damage since it is related to the stresses that are exerted upon the buildings." (Wieland Acoustics Study, App. E, p. 6)¹⁰

The DEIR's analysis of vibrational impacts on human perception is likewise deficient, and fails to accurately disclose the findings of the applicant's own reports. Notably, "when groundborne vibration exceeds 72 to 80 VdB, it is usually perceived as annoying to occupants of residential buildings." (*Id.* at p. 8). Per the CEQA Guidelines, a significant impact will be assessed if the project will result in "[e]xposure of persons to, or generation of, excessive groundborne vibration or groundborne noise levels. This impact will occur if any construction activity causes the vibration velocity level (Lv) to exceed 72 to 80 VdB at an adjacent residential building." (*Id.*; emphasis added). Here, development of the condominium structure will result in the following impacts at the nearest structures:

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- | | |
|--------------------|--------|
| • Loaded Trucks: | 90 VdB |
| • Caisson Drill: | 97 VdB |
| • Large Bulldozer: | 97 VdB |
| • Ram Hoe: | 97 VdB |

(Planning Center Study, App. F, p. 59, fn. 2).

Based on the foregoing, the Project's construction impacts will exceed the applicable threshold by a substantial margin. As such, the Project will result in significant vibrational impacts to

⁹ See Wieland Acoustics Study, App. E, p. 6 ("The level of ground vibration experienced at any location depends mainly on the construction method, soil medium, distance from the vibratory source, and the structural dynamics of the building").

¹⁰ See also *Transportation- and Construction-Induced Vibration Guidance Manual*, California Department of Transportation (June 2004), p. 27. The Planning Center Study does not explain why differing standards were applied with respect to evaluating potential cosmetic damage.

neighboring residents and the Final EIR cannot be certified without a statement of overriding considerations on this issue

5. Eelgrass Impacts

Eelgrass beds are considered habitat areas of particular concern because they attract "many marine invertebrates and fishes and the added vegetation and the vertical relief [they] provide enhances the abundance and diversity of the marine life compared to areas where the sediments are barren." (DEIR, pp. 4.7-7, 4.7-14). The beds also serve as a nursery for various juvenile fish species (*Id.* at 4.7-7; CLUP, p. 4-9). Further, eelgrass is a major food source in nearshore marine systems, and serves numerous beneficial physical roles (such as reducing wave action and erosion, stabilizing sediment and improving water clarity). (Southern California Eelgrass Mitigation Policy (revision 11), p. 1).

Given the foregoing, the "loss of eelgrass as a result of coastal development is considered to be a significant environmental impact, and any potential impacts to this resource must be avoided, minimized or mitigated." (CLUP, p 4-58; emphasis added) In that regard, the CLUP sets forth a number of eelgrass protection policies, including the following:

10-22 4.1.4-1: Continue to protect eelgrass meadows for their important ecological function as a nursery and foraging habitat within the Newport Bay ecosystem.

4.1.4-3: Site and design boardwalks, docks, piers, and other structures that extend over the water to avoid impacts to eelgrass meadows. Encourage the use of materials that allow sunlight penetration and the growth of eelgrass.

4.2.5-1: Avoid impacts to eelgrass (*Zostera marina*) to the greatest extent possible. Mitigate losses of eelgrass at a 1.2 to 1 mitigation ratio and in accordance with the Southern California Eelgrass Mitigation Policy. Encourage the restoration of eelgrass throughout Newport Harbor where feasible.

(CLUP, pp. 4-40, 4-41, 4-60; emphasis added)

The Southern California Eelgrass Mitigation Policy (Mitigation Policy), in turn, "requires all eelgrass patches to be protected or replaced, regardless of its size, location, or habitat value or the extent of eelgrass coverage within the harbor." (CLUP, p 4-59). However, as a threshold matter, the Mitigation Policy states that transplant mitigation shall only be considered after policies for avoidance and minimization "have been pursued to the fullest extent possible prior to the development of any mitigation program." (Mitigation Policy, p 1).

With respect to "boat docks and related structures," the Mitigation Policy expressly reiterates the need to avoid eelgrass impacts from the outset, as follows:

10-23 Boat docks, ramps, gangways and similar structures should avoid eelgrass vegetated or potential eelgrass vegetated areas to the maximum extent feasible. If avoidance of eelgrass or potential eelgrass areas is infeasible, impacts should be minimized by utilizing, to the maximum extent feasible, construction materials that allow for greater light penetration (e.g., grating, translucent panels, etc.).

(Mitigation Policy, p. 2; emphasis added)

These avoidance measures are necessary due to "the time (i.e., generally three years) necessary for a mitigation site to reach full fishery utilization" (*Id.* at p. 3; emphasis added). The Mitigation Policy also sets forth detailed mapping requirements. It states:

The project applicant shall map thoroughly the area, distribution, density and relationship to depth contours of any eelgrass beds likely to be impacted by project construction. This includes areas immediately adjacent to the project site which have the potential to be indirectly or inadvertently impacted as well as potential eelgrass habitat areas.

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(*Id.* at p. 2; emphasis added)

With respect to these last requirements, eelgrass mapping surveys shall only be valid "for a period of 60 days with the exception of surveys completed in August - October." (*Id.* at p. 3). In addition, *potential* eelgrass habitat areas must be mitigated at a ratio of 1 to 1 (*Id.*)

In this case, construction of the proposed dock facility will violate the CLUP's protective policies and will therefore result in significant eelgrass impacts. Further, the DEIR's proposed mitigation measures are wholly inadequate, as they fail to comply with the basic requirements of the Mitigation Policy.

As a preliminary matter, the prevalence and current location of eelgrass beds in the Project vicinity are not known with sufficient accuracy because the DEIR continues to rely on the March 2007 eelgrass survey (DEIR, p. 4.7-16). While the applicant's eelgrass survey was apparently updated in March of this year, it continues to rely on the survey activities conducted in March of 2007 (CRM Eelgrass Survey, p. 6).

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Per the Mitigation Policy, the 2007 survey is no longer valid and the DEIR therefore relies on outdated information in purporting to assess potential eelgrass impacts. In that regard, a current survey must be performed to evaluate the extent to which the southern eelgrass bed has extended further north into the dock area. (See CRM Eelgrass Survey, Fig. 4). Likewise, the status of the eelgrass patch adjacent to the northern property boundary line must be evaluated.¹¹

With respect to the substantive policies set forth above, the Project violates the CLUP because the dock has not been sited and designed to avoid impacts to eelgrass meadows "to the greatest extent possible." (CLUP, 4.1.4-3; 4.2.5-1). Indeed, the dock's design and proposed location will result in direct impacts to the eelgrass meadow located to the south of the cove. With respect to vessel-related impacts, the DEIR states that propeller scarring and prop wash associated with the construction barge and support vessels could adversely impact eelgrass vegetation. To mitigate this impact, the DEIR states as follows:

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Support vessels and barges shall maneuver and work over eelgrass beds only during tides of +2 feet mean lower low water (MLLW) or higher to prevent grounding within eelgrass beds, damage to eelgrass from propellers, and to limit water turbidity.

¹¹ The survey must also satisfy the Mitigation Policy's requirements with respect to surveying density and identifying/mitigating impacts to *potential* eelgrass habitat areas (see Mitigation Policy, p. 2).

(DEIR, p. 4.7-16; emphasis added)

10-25
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However, the DEIR fails to address the significant impacts that will result from boats owned by the residents themselves. As reflected in Figure 5 of the applicant's eelgrass survey, all boats using the dock's southern slips must travel directly through the adjacent eelgrass bed to access the dock. Because no tide-related access restrictions apply, these activities will result in significant eelgrass impacts. The DEIR is legally deficient because it fails to evaluate or otherwise consider this impact.

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Further, the Project not only violates the CLUP, it fails to comply with the express provisions of the Mitigation Policy. The policy states that docks are to be sited and designed to "avoid eelgrass vegetated or potential eelgrass vegetated areas to the maximum extent feasible." (Mitigation Policy, p. 2; emphasis added). The surface area of the proposed dock system totals approximately 3,500 square feet (CRM Eelgrass Survey, p. 21), and the DEIR provides no discussion as to why such a massive structure is required.

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Because the dock system can be eliminated outright or limited to its current size, there is no basis to conclude that eelgrass meadows have been avoided to the maximum extent feasible. Indeed, the elimination of the dock's southern slips could potentially avoid impacts to the cove's eelgrass bed. As such, the scope of the dock must be appropriately reduced before transplanting measures may be implemented under the Mitigation Policy. (See Mitigation Policy, p. 1)¹²

6. Impacts to Carnation Cove

Carnation Cove supports "an extremely diverse assemblage of plant and animal life due to its location near the Harbor Entrance Channel and the combination of rocky outcrops and fine sands-to-silt substrates." (DEIR, p. 4.7-8). As such, the Cove is "an important marine sandy tidal flat that displays features that while once present and common, no longer exists in other areas of Newport Bay." (*Id.*; emphasis added). These shallow areas support a significant intertidal sand dollar population which is now unique and rare within the Bay. (*Id.*) "If the sand dollar population that exists in the cove is removed, it is unlikely that it would establish itself at another site because similar conditions do not exist elsewhere in the bay." (*Id.* at p. 4.7-17). The sandy sediment also provides viable bottom habitat for numerous snail species. (*Id.*)

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Given the Cove's inherent biological value, disturbances of the "intertidal and shallow subtidal habitat, eelgrass, and sand dollar bed within the cove would be considered a significant adverse impact to on-site resources." (CRM Eelgrass Survey, p. 22; DEIR, p. 4.7-17).

Although the Cove's tidal habitat is expressly recognized as "unique and rare," the DEIR fails to provide any meaningful discussion as to how dock construction impacts will actually be mitigated. This deficiency is due, in large part, to the fact that the DEIR provides an entirely inadequate project description with respect to dock removal and construction activities. Because the DEIR fails to provide this critical information, the Project's impacts cannot be accurately assessed.

¹² To the extent transplanting measures will apply, the DEIR does not provide sufficient information as to how they will be implemented.

For instance, the DEIR's dock-related project description consists of less than one full page. With respect to dock removal, the DEIR simply states that six support piles will be removed and the existing 20-foot gangway will be replaced by a 60-foot long gangway. Regarding dock construction, the DEIR states that 19 piles will be required to support the new dock and that the four steel piles supporting the gangway platform will be repaired or replaced. (DEIR, p. 3-26)

As to construction activities *within the Cove itself*, the DEIR merely states that the timber walkway will be replaced in-like-kind and "existing concrete piles supporting the walkway will be repaired in the form of concrete repairs." (DEIR, p. 3-26; emphasis added).

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Notably, the pier and walkway structure will pass over one of the Cove's rock outcroppings and directly into the sensitive tidal habitat discussed above. (See DEIR, Ex. 3-17). As such, construction activities will take place on the beach and within the sand dollar habitat. Notwithstanding this fact, the DEIR does not provide any meaningful discussion (either in the project description or biological resources section) as to the construction equipment that will be required, the manner in which pier supports and timber replacement will be delivered to the Cove, the manner in which the pier/walkway supports piles will be installed without impacting the sand dollar population, the number of vessels that will be working on-site, and so on.

With respect to mitigation measures, the DEIR states that the tidal area will be adequately protected because construction workers will be instructed to avoid the area. (DEIR, p. 4.7-17). However, the DEIR does not explain how this is possible given the need for "concrete repairs" to the supporting piles themselves. Nor does the DEIR explain how silt curtains can be deployed to protect the tidal habitat from these direct impacts. Likewise, the DEIR states that turbidity plumes will be reduced because piles will be removed and replaced using "Best Available Technology" (*Id.* at p. 4.7-18). Yet the DEIR does not provide any explanation as to what technologies will actually be used.

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Moreover, there is no basis to conclude that the remaining "protective" measures (notifying residents of the Cove's sensitivity, placing debris bins on-site, and removal of debris from the seafloor) will adequately mitigate construction impacts. Indeed, the fact that construction debris will need to be removed from the bottom indicates that impacts will in fact occur.

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Given the foregoing, the DEIR contains a legally deficient project description and fails to adequately evaluate the Project's impacts on Carnation Cove. Further, the findings associated with the aforementioned mitigation measures are not supported by substantial evidence.¹³

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7. Special Status Plant Species

Under CEQA, the deferral of environmental assessment to a future date runs counter to the statute's express policy which requires that environmental review be conducted at the earliest feasible stage in the planning process. *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 307 (citing Pub. Resources Code, § 21003.1).

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Here, the DEIR improperly defers the assessment of whether any special status plant species exist on-site. Per the DEIR, nine such species have the potential to exist at the Project site (DEIR, p. 4.7-2), but the extent to which they are actually present remains unknown. In that

¹³ The DEIR states, "sand transport impacts are not anticipated as a result of the placement and configuration of piles in a single row that is parallel and not perpendicular to the direction of sand transport." (DEIR, p. 4.7-17). Given the sensitive nature of the Cove, such speculation is improper under CEQA and sand transportation must be adequately studied and evaluated in the Final EIR.

regard, the DEIR states that surveys will be performed to acquire this information "during the appropriate blooming window identified for each species" (DEIR, p. 4.7-13). To the extent any special status species do exist on-site, an incident take permit must be obtained prior to issuance of a grading permit. (*Id.*)

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Deferral of the impact assessment in this manner is entirely improper under CEQA. Notably, all nine species are currently within their blooming window (DEIR, p. 4.7-2). As such, the presence and extent of any impacts must be assessed now so appropriate mitigation measures may be assessed during the CEQA review process. To the extent any such impacts will occur, the DEIR must be re-circulated for public review.¹⁴ Similarly, the DEIR must assess the extent to which dock construction activities will impact the southern coastal bluff scrub community existing on the rock outcroppings. (See DEIR, p. 4.7-1).

8. Traffic and Parking Impacts

The DEIR's discussion of parking and traffic impacts fails to satisfy CEQA's informational purpose. For instance, the DEIR fails to adequately consider potential impacts related to off-site construction parking and shuttle transportation, and improperly defers review with respect to the location of anticipated parking sites. The DEIR states that "the applicant will secure one or more binding off-site parking agreements to accommodate the varying number of workers needed for each construction phase." (DEIR, p. 1-9). The DEIR further states that these "off-site parking location(s) will be located within a five-mile radius of the site." (*Id.*)

10-34

Because the DEIR defers the identification of parking sites to a later date, it inappropriately circumvents the public's opportunity to comment on any related impacts - *particularly the concerned residents and businesses that will be located in close proximity thereto*. Notably, the DEIR does not identify how many construction workers are anticipated to park off-site during each phase, the number of parking spaces that will be required, potential sites with sufficient capacity to meet those needs, and the traffic conditions in the site(s)' vicinity. Upon completion of this analysis, the DEIR must be re-circulated to afford an adequate opportunity for public review and comment.

10-35

The DEIR is similarly deficient with respect to the identification and analysis of the heavy vehicle staging/queuing areas that will be necessary to ensure that only one truck is present at any given time at the Project site. (See RCPG Policy 4.04 - "Transportation control measures shall be a priority.")

10-36

Further, the DEIR fails to adequately consider road and safety impacts associated with heavy truck activities. Notably, the roadways in the Project vicinity are antiquated and in poor condition. The surface condition of adjoining streets will be adversely affected by the thousands of heavy truck trips that will occur over the 32-month construction period. In that regard, the DEIR fails to specify the anticipated tonnage per truck or otherwise evaluate road deterioration and safety concerns.

10-37

Finally, the DEIR fails to adequately consider potential fire safety concerns associated with the underground parking facility and the extent to which fire personnel will be able to access the same in cases of emergencies.

¹⁴ By the same token, deferral of the analysis prohibits an accurate determination of whether the Project will result in significant land use impacts. See CLUP Policy 4.4.3-15; General Plan Policy NR 23.7 (requiring that new development be designed and sited to "minimize the removal of native vegetation"). The same deferral deficiencies apply with respect to the scope of shading impacts on eelgrass beds.

9. Floor Area Ratio

10-38

Because floor area ratio (FAR) is a measurement used to determine development intensity and is based on *developable land space*, areas that cannot be developed or improved are not to be included in net lot area. With respect to the proposed condominium structure, the applicant has inappropriately included the site's submerged lands in the FAR calculation. Doing so has resulted in a project that is not compatible with the surrounding neighborhood in terms of size, bulk and scale. Because FAR regulations are intended to ensure that new construction remains consistent with existing development and community character, the violation thereof will result in a significant land use impact under CEQA.

10. Setback Variance

10-39

While the City is afforded discretion in justifying variances and modifications, its discretion is subject to significant limitations. In that regard, a variance may be proper where the harms that the regulatory scheme is intended to prevent would not otherwise occur. In this case, the requested setback variance will result in significant unmitigable impacts to the underlying coastal bluff. As such, approval of the Project as currently proposed will severely compromise the integrity of the City's land use regulations and policies. The request is therefore improper and should be denied.

11. Miscellaneous

10-40

The DEIR is further deficient because it fails to consider (i) the extent to which kayak/small boat access to Carnation Cove will be obstructed during summer dock construction activities, (ii) the Project's impacts on waste disposal capacity as a result of dumping 25,000 cubic yards of bluff material into the Brea Olinda Landfill; and (iii) the extent to which the expanded dock facility (and associated construction activities) will impact channel navigation and recreation.

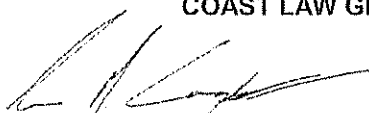
12. Conclusion

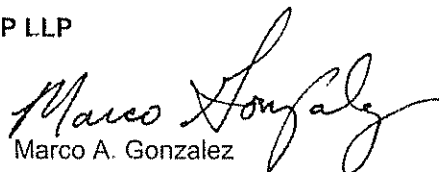
10-41

As detailed above, the Project will result in a number of significant environmental impacts in addition to those relating to construction noise. By failing to adequately evaluate those additional impacts up front in the DEIR, the City improperly limited the scope of environmental review. Likewise, the massive size, bulk and scale of the Project is not compatible with the surrounding community, as reflected by the structure's excessive square footage and the resulting need to eradicate the underlying coastal bluff. Based on the foregoing, the Project is not legally defensible and approval of the EIR in its current form will constitute an abuse of discretion.

Sincerely,

COAST LAW GROUP LLP


Ross M. Campbell


Marco A. Gonzalez

CC: Client
Karl Schwing, California Coastal Commission (by e-mail)



California Regional Water Quality Control Board Santa Ana Region



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Linda S. Adams
Secretary for
Environmental Protection

RECEIVED BY
PLANNING DEPARTMENT Arnold Schwarzenegger
Governor

May 5, 2009

James Campbell
City of Newport Beach Planning Department
3300 Newport Boulevard
Newport Beach, CA 92658-8915

CITY OF NEWPORT BEACH

DRAFT ENVIRONMENTAL IMPACT REPORT, AERIE DEVELOPMENT, CITY OF NEWPORT BEACH, SCH# 2007021054

Dear Mr. Campbell:

Staff of the Regional Water Quality Control Board, Santa Ana Region (Regional Board) have reviewed the Draft Environmental Impact Report (DEIR) for the proposed Aerie Project, located on a marine terrace overlooking the Entrance Channel of Lower Newport Bay. The Project is located on a 1.4-acre area between the ends of Bayside Place (101 Bayside Place) and Carnation Avenue (201-207 Carnation Avenue) at its intersection with Ocean Boulevard. A 14-unit apartment building and single-family house will be demolished and replaced with a multi-level, eight-unit condominium complex. An existing dock with four slips and piers will be replaced by a pontoon dock with nine slips. The dock area and pathway were built on rocky exposures that surround a small cove and beach (Carnation Cove), which the DEIR states will not be disturbed by the Project.

We believe that the EIR should incorporate the following comments in order for the Project to best protect water quality standards (water quality objectives and beneficial uses) contained in the Water Quality Control Plan for the Santa Ana River Basin (Region 8 Basin Plan, 1995, as amended):

Clean Water Act Section 401 Certification

11-1

1. The Biological Resources Section (p.4.7-5-7) uses wetlands determination criteria (including emphasis on African umbrella sedge) to decide that a Clean Water Act (CWA) Section 404 Permit from the U.S. Army Corps of Engineers (USACE) is not necessary for the Project's dock revision. However, any construction of new docks, bulkheads, etc. in bay and other saltwater settings is commonly associated with dredge-and-fill disturbances, and therefore requires consultation with the USACE regarding issuance of the 404 Permit and discussion of the prerequisite CWA Section 401 Water Quality Standards Certification (Certification) issued by the Regional Board. The USACE and Regional Board should be listed in Table 4.6-2 (Water Quality Regulatory Agencies) as agencies likely to require the 404/401 permitting process, in addition to the other stated agency requirements.

11-2

2. Projects subject to Certification are evaluated for their direct, indirect, and cumulative impacts to waters of the U.S., specifically, that construction and operation of the

Mr. James Campbell

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May 5, 2009

11-2
CONT

Project will not adversely affect state water quality standards. Such impacts must be mitigated to receive a Certification. The EIR should identify likely mitigation concepts to restore and protect water quality objectives and applicable beneficial uses of these receiving waters. A general example of on-site mitigation would be the enhancement of the noted eelgrass bed to the south of the disturbed dock area, as well as the enhancement and protection of the rocky cove habitat for the noted remnant populations of sand dollar, whelk, sea cucumber, and lobster species. The likely impacted beneficial uses (Region 8 Basin Plan) supported by the seawater at this site would include Marine Habitat (MAR); Spawning, Reproduction, and Development (SPWN); Wildlife Habitat (WILD); Water Contact Recreation (REC1); Non-Contact Water Recreation (REC2); Navigation (NAV) and potentially, Rare, Threatened, or Endangered Species (RARE). Applicability of the Shellfish Harvesting (SHEL) and Commercial and Sportfishing (COMM) beneficial uses to such areas are currently under review. Information concerning Certification can be found at http://www.waterboards.ca.gov/santaana/water_issues/programs/401_certification/index.shtml.

Best Management Practices and TMDLs

11-3

3. The DEIR Drainage and Hydrology Section (p.4.6-6-11) discusses a new system of Best Management Practices (BMP) for stormwater capture and treatment that will improve upon the current 1) localized sheet-flow of stormwater and dry-weather flows into the Bay, and 2) drainage of the neighborhood watershed through a 10-foot-wide catch basin (catch basin), part of a 24-inch reinforced concrete pipe system beneath Carnation Avenue discharging to the Bay (Carnation Avenue Drain). However, this Section does not provide helpful, conceptual drawings of this proposed system aside from the small-scale map view of Exhibit 4.6-2.

11-4

We understand that almost all stormwater from the completed site will be directed to a vault at the southern corner of the structure (vault) and pumped to the Carnation Avenue Drain, at an unspecified connection point. The Project will enlarge and retrofit the Carnation Avenue catch basin to filter both Project and neighborhood flows. We understand that the retrofitted catch basin would contain, as variously described, "a storm filter and bacteria treatment system" and "appropriate urban runoff filtration elements" (p.4.6-8), or more specifically, "a proprietary StormFilter unit" followed by "an Abtech Smart Sponge Plus drain insert for treatment of bacteria" (p.4.6-10). We believe the EIR may also consider an additional treatment BMP for the vault itself. This Section should consolidate these descriptions into a more specific discussion with exhibits, and explain who will maintain the filtration system after construction. Although a Conceptual Water Quality Management Plan (WQMP) has been prepared for the Project and is incorporated by reference (p.4.6-9), we prefer that the EIR include the WQMP text "up-front" to the maximum extent possible.

11-5

4. The above-referenced BMPs (and other structural/nonstructural BMPs described in the EIR) must be established to protect the water quality standards discussed in Comments 1 and 2, above, in conformance with: 1) the State Water Resources Control Board's Water Quality Order No. 99-08-DWQ, "General Permit for Storm Water Discharges Associated with Construction Activity" (web site http://www.waterboards.ca.gov/water_issues/programs/stormwater/) and 2) the Orange County Drainage Area Management Plan (DAMP) and Water Quality

Mr. James Campbell

- 3 -

May 5, 2009

Management Plan (WQMP), both required by the Regional Board's "Orange County MS4" permit¹

11-6

Further, the BMP discussions should reflect targeted compliance with Total Maximum Daily Loads (TMDL) and support of the recent Orange County Newport Bay Fecal Coliform Source Management Plan. This plan is meant to provide compliance with the fecal coliform/pathogen TMDL adopted for Lower Newport Bay and Upper Newport Bay. The EIR should incorporate reference to these additional TMDLs:

- a. The Siltation (sediments) and Nutrient TMDLs adopted for Lower Newport Bay, Upper Newport Bay, San Diego Creek Reach 1, and San Diego Creek Reach 2 (see http://www.waterboards.ca.gov/santaana/water_issues/programs/tmdl/index.shtml)
- b. The future TMDLs anticipated for selenium and metals (Lower and Upper Newport Bay), selenium and fecal coliform (San Diego Creek Reach 1), and specified metals (San Diego Creek Reach 2). A TMDL for organochlorine compounds (particularly DDT, chlordane, and PCBs) is anticipated for Lower Newport Bay, Upper Newport Bay, and San Diego Creek Reaches 1 and 2.

Dewatering

11-7

- 5. The EIR should reflect that if any groundwater dewatering is necessary for the Project, then please contact the Region 8 Permitting Section staff at (951) 782-4130. Dewatering discharges into Upper or Lower Newport Bay require coverage under Order No. R8-2004-0021 (amended by R8-2006-0065), NPDES No. CAG998002².

If you have any questions, please contact me at (951) 782-3259, or grobertson@waterboards.ca.gov.

Sincerely,

Glenn Robertson
Engineering Geologist
Regional Planning Programs Section

- cc: State Clearinghouse
 U.S. Army Corps of Engineers, Los Angeles - Stephanie Hall
 U.S. Fish and Wildlife Service, Carlsbad -- Jonathan Snyder
 California Department of Fish and Game, Los Alamitos -- Erinn Wilson
 California Coastal Commission -- Fernie Sy
 Orange County RDMD, OC Watersheds/OC Public Works -- Amanda Carr
 Orange County RDMD, Flood Control, Santa Ana - Andy Ngo

X:Grobertson Magnolia/Data/CEQA/CEQA Responses/ DEIR- City of Newport Beach- AERIE.doc

¹ Waste Discharge Requirements for Orange County (NPDES Permit No. CAS618030, Order No. R8-2002-0010, Areawide Urban Storm Water Runoff Permit for the County of Orange, Orange County Flood Control District, and Incorporated Cities of Orange County within the Santa Ana Region), also known as the Orange County municipal separate storm sewer system, or "Orange County MS4 permit" (please see web site at http://www.waterboards.ca.gov/santaana/himl/oc_permit.html).

² "General Waste Discharge Requirements for Short-Term Groundwater-Related Discharges and *De Minimus* Wastewater Discharges to Surface Waters Within the San Diego Creek/Newport Bay Watershed." This general permit establishes a waste discharge management program applicable to the project area, for the purpose of reducing selenium, sediment, nutrients, pesticides, and other pollutants. This permit is available at: http://www.waterboards.ca.gov/santaana/board_decisions/adopted_orders

May 5, 2009

Mr. Jim Campbell
CITY OF NEWPORT BEACH
3300 Newport Boulevard
Newport Beach, CA 92660

RE: **ASSESSMENT, INPUT AND QUESTIONS—PROPOSED AERIE CONDOMINIUMS**
DEIR – PA 2005-196 – City of Newport Beach, CA

Mr. Campbell:

The purpose of this correspondence is to underscore my previous on-record, written serious concern regarding the proposed Aerie condominiums, so that these concerns may become part of the current formal Draft Environmental Impact Report process, as I understand the City is presently undertaking.

My previous correspondence on the subject, dated August 13, 2008, was submitted and formally acknowledged in receipt by the Newport Beach Mayor and City Council members. While the document was acknowledged for receipt, the City did not address its content in any formal way. Please find a copy of this correspondence enclosed for your review, consideration and specifically requested response.

It is my understanding the DEIR process must address such written communications at this time.

In brief, the enclosed document summarises a specific review of City of Newport Beach (CNB) land use criteria that is clearly "in conflict" with itself, and as such, allows a kind of "tortured" interpretation by the applicant in creating what is clearly a completely out-of-scale-with-the-local-neighborhood building mass. The same document includes a more reasoned interpretation of the conflicting land use criteria, which yields a more rational, in-context-with-the-neighborhood application of the standards. The reasonable application of City of Newport Beach land use criteria would deliver a building mass approximately 50% of the proposal.

Whether the methodology offered in the letter herein is "more correct" than the interpretation by the applicant is not attempted herein. These two conclusions, emanating from the same set of criteria, only serves to underscore the essential point: that the CNB land use criteria is in conflict, and in need of serious resolution BEFORE proper evaluation of this proposal can be properly undertaken.

I would like to submit this cover letter and copy of my August 13 submittal for its inclusion into the formal DEIR review for this project, and request a formal response from the City.

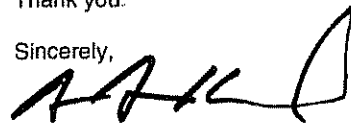
It would seem to me the CNB should be interested in better-clarifying its land use criteria when such vast variances can be "interpreted" by its current definition. My questions for this process (in addition to those outlined in the enclosed letter) are as follows:

1. Do you believe it appropriate that one set of CNB land use criteria can allow a 50% variance of building yield, based on "interpretation?" If yes, why and how does this best serve the citizenry of Newport Beach?
2. With such a wide variance of interpretation, does the furtherance of the Aerie proposal not only establish a dangerous precedent for future land use interpretations, but also essentially make meaningless all CNB land use criteria.

Thank you for the opportunity to submit this information for your consideration. I look forward to your specific written reply.

Thank you.

Sincerely,



A. David Kovach
ADK:ae

12-1

August 13, 2008

Mayor Edward D. Selich
CITY OF NEWPORT BEACH
3300 Newport Boulevard
Newport Beach, CA 92660

RE: PROPOSED AERIE CONDOMINIUMS -- A MATTER OF POLICY

Mr. Mayor:

In beginning this correspondence I would like to offer my sincere appreciation to yourself and the other City Council (CC) members (copied herein) for the generous giving of your time and energies to the City of Newport Beach. We residents are indeed fortunate to have such learned and caring individuals working for all of us so thoughtfully.

A year has passed since I first became aware of the Aerie proposal. I found it noteworthy at the time, as it seemed incomprehensible such a clearly over-built structural mass could have found its way so deeply into the approval system of the City of Newport Beach. That the proposal further so obviously works to destroy the natural coastal bluff it is bound by legislation to protect, and is still nearing approval today, quite frankly, is a clear indicator something is very "amiss" within the City's entitlement approval system.

In my 30+ years of experience as a large scale community building and land development executive, I am not certain I have seen such an egregiously offensive interpretation of planning and zoning criteria so well navigate a governmental approval process. I attended the year-ago CC meeting really just to see how the Applicant presented its advocacy, the interaction with and response by the CC and where the situation stood then.

While I found the Applicant's advocacy that evening to be a singularly stilted, if not "tortured" interpretation of applicable planning and zoning criteria, I was very surprised to see any receptivity by the CC. But there was some apparent receptivity. Nonetheless, it appeared at the time an ultimate vote could go "either way" in the future. Somehow, by the July 22, 2008 meeting, it appears the proposal is strongly headed toward approval. Just how can this happen?

Following this 12-month period of study and evaluation, I believe I have a fairly strong sense of both the "why" and the "how" this clearly excessive, inappropriate and environmentally destructive proposal is so close to approval. If I might, I would be pleased to share these views with you all now, as follows:

1. Brief background to my perspective and advocacy:

There are two important aspects before you now regarding Aerie that are of particular interest to me professionally:

- a. The long-term and lasting qualitative impact of the built environment to the larger community; and
- b. The proper *interpretation* of all guidelines and stakeholder inputs leading to optimal new buildings.

And while definition of "optimal" is also interpretive, there are certain qualities to which most professionals might concur. Beyond a positive economic return, these would include the principles of context, balance, and harmony as well as rationality, in my view.

The built environment is a critically important aspect of any community, for it has the literal power to directly impact people's lives on an emotional level, either inspirationally, in an ambivalent way, or unfortunately in many cases, negatively.

This principle places even more importance on sites like Aerie, the latter being so visually prominent (not only to residents, but visitors and other stakeholders as well), and will make an important statement about, and have influence over, the City for years to come.

"We shape our buildings. Thereafter they shape us." Winston Churchill

2. Regarding the current Aerie proposal, the CC has the opportunity to take back a leadership role in determining and asserting appropriate policy regarding this prominently-located proposed land use.

From my evaluation, it would appear the Applicant has aggressively wrested policy-making leadership from the CC. Two references here:

- a. At the August 2007 meeting, it was my testimony to the CC to emphasise statements from the City Attorney earlier in said meeting wherein she underscored the Applicant's "lead" in determining its own P.L.O.E.D., and how this point in the process was a moment where the City "should have" instead, made policy for the Applicant to respond.

I specifically remember seeing Councilmember Rosansky directly and pointedly asking the City's Planning Director earlier in the same meeting, what determination or interpretation or recommendation he (as the Director) was providing to the CC regarding the P.L.O.E.D. The Planning Director basically refused to answer the question, saying it was really subject to an "interpretation."

This is important information the CC needs from staff to make proper decisions. However, I would surmise, as in all organizations, the leadership (i.e., the CC) is responsible for appropriate staffing.

- b. The Applicant has utilised conflicting City land use policy in interpretive advocacy of its current proposal. Typically, this is policy determination that should rest solely with the CC. Said "conflict" is as follows:
 - Specifically, there is the City's "residential development density standard" of 2,178 square feet of development area per unit. We understand this standard is to apply to the specific "development area" of a specific property.
 - As well, with regard to determining a property's development yield, it appears another standard is available, which is "floor area ratio" (FAR). The City's FAR for this property is 1.5. However, when using the FAR standard, apparently it is allowed to be applied within an entire property boundary, and not just the "building area."
 - Because of this conflict, and Aerie's aggressive interpretations, the current over-built, over-massed proposal is before you. This conclusion is supported by the following rationale:
 - Approximately 66% of Aerie's total land either is un-buildable by being either submerged (i.e., 28,414 square feet or 46% of the site area) or in slope area greater than 50% (i.e., 11,926 square feet or 20% of the site area).
 - I believe with a high degree of probability any independent professional planning assessment of this property would deem utilization of the entire site boundary (in the

spectre of so much un-buildable land) inappropriate as a methodology for determining appropriate, contextual building mass on the "buildable" portion of the property, which is 20,942 square feet, or about 34% of the total site area.

- Therefore, if one were to apply, let's say in an effort to be "liberal" in interpretation, both the City's residential density criteria and the FAR to the "buildable" area of Aerie, this would be the result:

Residential Density of: 10 homes (20,942 sq. ft./2,178 sq. ft.), and
FAR of: 31,413 sq. feet (20,942 sq. ft x 1.5 FAR)

c. The CC has an obligation to utilise all codes and General Plan policies, not just some of them.

- There seemed to be a sentiment expressed by some of the CC members at the July 22 meeting indicating because of the proposal's "conformance" with "a" zoning code (despite what is clearly an unintended consequence of using submerged and 50% slope [unbuildable] land for purposes of maximizing allowed floor area), the CC is somehow "obliged" to approve the proposal.

It seems only appropriate the authority and responsibility of the CC should be to ensure this (and any) proposed development complies with ALL codes and General Plan policies, not just some of them.

If there was any consistent public input to the recent General Plan update, it was to counter the disturbing trend toward "mansionization" (i.e., overbuilding) that dwarfs existing structures, the very structures that form the essence of neighborhood and community character.

There are two General Plan land use policies NOT being complied with, with regard to Aerie:

- Land Use Policy 3.2 – Enhance existing neighborhoods, districts and corridors, allowing for re-use and infill with uses that are COMPLEMENTARY in type, form, scale and character."

It is difficult to imagine Aerie's proposed "real world" FAR of 2.9 (60,681 sq. ft. proposed floor area divided by 20,942 sq. ft. of buildable area) being "complementary" to any structure(s) found within the immediate relevant neighborhood, of like buildable area, with a protective coastal bluff overlay legislation. Merely contrast this with the City's own recommended FAR standard of 1.5. This is DOUBLE what is appropriate.

- Land Use Policy 5.1.1 – Establish property development regulations for residential projects to create compatible and high quality development that contribute to neighborhood character.

Using one provision of the zoning code (FAR to entire property boundary), which has not yet been updated to address the new policies of the General Plan, to justify or approve this proposal disrespects the will of the voters that authorized the current General Plan.

Finally, from the City's website, we note it is a stated "PRIORITY" of the CC for 2008 to "Align The City's Codes, Regulations and Policies with the General Plan." There is a huge opportunity to make Aerie a great example of meeting this priority!

CONCLUSIONS AND RECOMMENDATIONS

1. In short, the Applicant has “worked the system” to its advocacy of placing 60,000 square feet of building on a buildable land area approximating 20,000 square feet.

Further, this over-built condition brings with it total destruction of the specific natural coast bluff it is legislated to protect and preserve.

The Applicant should not be admonished for taking such action, for it is only acting in what it believes is in it's best interest.

The CC has the interests of the entire City at its responsibility

2. While the current Aerie proposal closely approximates the above-calculated residential yield (i.e., the eight (8) proposed homes), the “mass” (as measured by FAR) is about **double** of what I am confident would be considered reasonable and appropriate for such a property. Miss by a little, miss by a lot.

For the allowable building mass to be a function of land that is of no livable consequence to the immediate neighborhood environment in which it sits, is clearly inappropriate. This is where proper policy definition is the responsibility of the City.

The important recommendation from the assessment herein would be to provide “more appropriate” density and FAR criteria and significantly restrict building mass to something reasonable (as suggested above, yielding approximately 31,413 square feet). And in the process, the natural bluff would be better served.

3. From the July 22 CC meeting it seems evident the CC is tired from the grueling process that has emerged with regard to this controversial proposal. The CC seems so tired from the experience that it “just wants it over with,” as underscored by your comments and questions to ensure “no more new testimony” is allowed at the September meeting.

It is my perception this process has been as contentious as it has, has protracted as long as it has, because the City delegated its policy responsibility to the Applicant. The result is now painful for all—the “poor” developer, the caring, opposing residents, and the City, simply because appropriate policy was not implemented at the right time. And the opposing elements, of which I am clearly one, only want something reasoned, balanced, and appropriate for the setting.

4. All of this has gone on, for months and months, if not longer, and still, the one seemingly sacrosanct planning criteria for the proposal—the “preservation of the coastal bluff”—has been “wordsmithed-” and “parsed-” around to the point the criteria effectively does not exist at all, in any “on-the-ground,” real-world reference to the proposal. The bluff will be destroyed to allow construction of the building, and the former natural bluff area remaining unbuilt will be replaced with artificial materials intended to “resemble” the natural conditions that were to be protected.

5. Mr. Mayor, two closing points in this section for your consideration:

- a. With regard to operating and implementational land development assessments, it is my experience The Moot Group has more relevant experience, by volumes, than the Applicant custom-home architect, no matter the latter's deep and well-respected custom home-design experience “along the coast.”

It would be my recommendation the CC do some “homework” with regard to this conclusion prior to your final decision in September. The potential failure of the land, as expressed by as serious, experienced professionals as Moot should be considered within the “abundance of caution”

environment this rare and precious site deserves. In this case Moote, and not the project architect should be considered as "best evidence "

- b. And finally, making any comparison, with regard to the underlying land condition between the "Portobello" house and Aerie is without much merit in my opinion, from a physical standpoint.

CLOSING

Mr. Mayor, thank you for whatever consideration you and the council members may give to this input.

With so much at risk—the precedent being set for future development within our precious historic neighborhoods vis-à-vis their contextual natural resources; the very real potential for slope failure; the severe traffic impacts for construction (please carefully listen to the Moote testimony regarding this element alone); the opinion of the Coastal Commission as to the City's ability to administer to issues such as these (i.e., vis-à-vis the LCP process); and simply what is "right" for all residents of the City with regard to this extremely visible property—it would seem more than prudent to carefully weigh this decision, for what appears to be, one last time.

Based on the July 22 meeting, my sense is the CC will approve the Aerie proposal, as is, largely as a function of your leadership, subject to the comparatively arcane remaining issues being "studied." This is a decision that will affect not just the developer or even the local residents, but the entire residential and workplace populations of the City and its visiting tourists.

Worst case, this "experience" may be instructive as you pursue the aforementioned "Council Priority for 2008."

In closing, I would ask one last question for your consideration:

1. What is the most appropriate residential yield criteria that should be applied to Aerie?

No reasoned professional would determine 60,000 square feet of buildable on 20,000 square feet of building area. Not in this historic and balanced neighborhood setting.

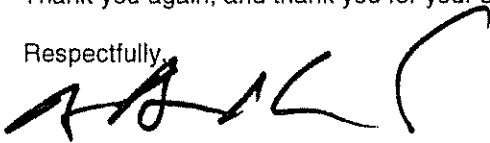
Not what the developer thinks is best, what you all think is best, for the City of Newport Beach, long-term.

I believe the responsibility of the CC is greater than merely assessing and/or agreeing with developer-advocated City policy.

It is never too late to do the right thing.

Thank you again, and thank you for your service.

Respectfully,



A. David Kovach

ADK:ae

Mayor Edward D. Selich
PROPOSED AERIE CONDOMNIUMS – A MATTER OF POLICY
August 13, 2008
Page 6 of 6

Distribution Via E-mail

Mr. Henn, District 1
Mr. Rosansky, District 2
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