



June 30, 2023

Manuel Nieto
2717 Via de la Valle
Del Mar, CA 92014

Sent via U.S. Postal Service and Email to mnieto.nce@gmail.com

SUBJECT: Second Review of Application CDP23-008 and Associated Materials Submitted for the Proposed 259 Multi-Unit Residential Development and Density Bonus Request (referred to as “Seaside Ridge”) at 929 Border (APN #'s 298-241-06, 298-241-07, and 299-030-14).

Dear Mr. Nieto:

Thank you for your resubmittal of materials associated with the above-cited entitlement, received by the City on June 1, 2023. The City of Del Mar Planning and Community Development Department has reviewed the submitted materials and responses to the comments and requests provided in the City’s initial review letter dated April 27, 2023. Staff have reviewed the requested new information and have determined that the subject Application continues to be **INCOMPLETE** for reasons more fully described below. In order to be deemed “complete” the following issues still must be addressed to the satisfaction of the Planning and Community Development Director. Here and in consultation with the City Attorney, the City will also address the legal positions taken by the legal representative for the Seaside Ridge Project (“Seaside”). It is important to note from the outset that an Applicant cannot dismiss the requirements of the California Coastal Act, California Environmental Quality Act (CEQA), or modify local municipal codes by their own motion. Nor may an Applicant develop their own permit fee structure under the faulty legal premise that the City’s California Coastal Commission certified Local Coastal Program does not apply to the Seaside Ridge project site. Required fees total \$39,088.00 and must be submitted for the City to continue the review process. The City will timely and effectively review and process the Seaside Ridge project once deemed complete. The Applicant must recognize the City’s Coastal Commission certified LCP applies to the site, and the City’s Housing Element Implementation Overlay Zone (HEI-OZ) does not apply to the proposed project site, and that an Applicant cannot prescribe their own permit fee schedules. Moreover, an LCP amendment requires additional application materials that are not set out in the Government Code and these Coastal Act documents are needed before the Application can be deemed complete.

In sum, the Seaside project does not comply with the density or the coastal resource protection standards found in the City's certified LCP and therefore the LCP must be amended to accommodate the proposed high-density 259 housing unit project. And because amending the LCP is a discretionary act, full CEQA review is required.

Regarding the Applicant's requested reliance on the HEI-OZ, the Overlay Zone was adopted by the City and approved by the Coastal Commission to apply to one specific site location (comprised of two legal parcels). Neither of these parcels included the Seaside Ridge parcels. A legislative action by the Del Mar City Council to rezone the Seaside Ridge project site to utilize the HEI-OZ would be necessary and would also require CEQA compliance and Coastal Commission approval.

Finally, because the project has increased by more than 28% from the time that the original Preliminary Application was filed, that application is ineffective in applying the processing benefits of SB 330. Moreover, the Builder's Remedy only applies at the time that an application is deemed complete, and the subject application remains incomplete.

1. The Preliminary Application is Deemed "Not Submitted" Because the Project Increased More Than Twenty Percent (Repeated Comment)

The Seaside Ridge project has increased building area and has been substantially revised by more than 28% from the Preliminary Application. The April 27, 2023 correspondence from the City stated that Preliminary Development Application PDA22-001, submitted on October 4, 2022, had been substantially revised to include an entirely new parking level that caused the project to exceed the preliminary square footage of proposed construction by more than 20 percent. The October 2022 Preliminary Development Application proposed a Housing Development Project consisting of 308,968 "square-feet of construction." However, the Coastal Development Permit (CDP) application materials submitted to the City on March 30, 2023, proposed a Housing Development Project consisting of 396,259 square-feet of construction. Under SB 330, this significant increase to the building area results in the Preliminary Application being ineffective.

Your response claims that the building area growth was a result of a "clerical error." This assertion is unfounded and is not supported by the record or the application materials submitted to the City, which include the State-required "checklist." This assertion also runs counter to the original project description, which failed to take in account two large areas of planned construction. These two construction areas, along with the added garage level represent a change in the "building area" as defined by the California Building Standards Code. Applying the Building Standards Code results in an overall increase in buildable area of 28 percent. As a consequence, the project exceeds the allowance provided by the Government Code.

Your response claims that these additional areas were accurately described in the October 2022 data tabulation form found on Plan Sheet A-0.0. However, this data was un-tabulated and the proposed building area was provided to the City in three key areas: (1) The narrative project description contained in the construction plans; (2) the separately submitted three-

page “Expanded Project Description;” and (3) the SB 330 Preliminary Development Application form/checklist. Moreover, the record demonstrates that the Preliminary Development Application submitted to the City described the Housing Project as consisting of “308,968 square-feet of buildings.” None of above-mentioned documents reflect a clerical error, because they are consistent in reflecting the 308,968 square-feet of building area proposed to the City as the preliminary project’s total square footage, complete with a representative Floor Area Ratio calculation based on that number.

2. The Seaside Application Misapplies and Misstates State Housing Laws, CEQA, the California Coastal Act, and the Application of the City’s HEI-OZ (Repeated Comment)

The City has reviewed the Applicant’s response to this comment as originally provided on April 27, 2023, continues to disagree as explained below, and therefore, cannot “administratively” process the project as requested.

Similar to the above, this section responds to the legal position provided on June 15, 2023 concerning how the Seaside housing project should be processed. Your resubmittal information again asserts that State Housing laws allow for complete and total non-discretionary approval of their Project without regard to the California Environmental Quality Act (“CEQA”) and the California Coastal Act. In addition, the resubmittal claims that City of Del Mar Municipal Code Chapter 30.92, “Housing Element Implementation Overlay Zone (HEI-OZ),” applies to the Seaside Ridge project. As the City does not agree with these legal theories, the Seaside application remains incomplete. Here, we address why these legal conclusions are incorrect and why they continue to impede the timely processing of the Seaside project. To be clear, it is the City’s intent to timely and efficiently process the Seaside Application upon receipt of the requested information noted within this letter, which would enable the application to be deemed complete.

In sum, State law provides that the Builders Remedy only applies when an application is deemed complete and that State Housing laws have not exempted or superseded the application of the California Coastal Act or the California Environmental Quality Act (“CEQA”). Additionally, the Del Mar Municipal Code Section 30.92.020 does not apply to the proposed project site parcels as a matter of right because it is not included in the Areas of Applicability as required by the Code. (See below analysis).

The City’s HEI-OZ Does Not Apply to Seaside Ridge Project Site

A foundational premise of the Project’s legal justification materials is that the City’s HEI-OZ applies to the proposed project site parcels and, as previously stated, it is the City’s determination that it is clearly not the case. City of Del Mar Municipal Code Section 30.92.020 defines the “Areas of Applicability” which has very limited application. This Code provision only includes two parcels and neither involve the North Bluff Seaside site. DMMC Sec. 30.92.020 only applies to two specific parcels: APN: 299-100-47-00 and APN: 299-100-48-00. Both of these parcels are commonly referred to as the “Watermark Housing Project” site and both are located in the North Commercial zone, which has no applicability to the North Bluff. As previously stated, the HEI-OZ ordinance and Zoning

Map would have to be amended to include the proposed project site in order for the objective criteria of that Chapter to apply for this project application.

Moreover, expanding or amending the application of DMMC Sec. 30.92.020 is a legislative act that is vested with the City Council. Amending this section of the Municipal Code first requires the adoption of a new ordinance by the City Council and requires amending the City's Local Coastal Program. These legislative acts are foundational to amending the Code and all involve discretionary actions, public notice, and public hearings.

3. A Local Coastal Program Amendment Is a Required Action for the Approval of the Seaside Project

Because the Seaside project is located on the North Bluff and because the HEI-OZ does not apply to this site a Local Coastal Program Amendment is necessary. The North Bluff (including the proposed project site) is wholly within the Coastal Zone and Chapter 3 of the Coastal Act states that cities are to prepare a Local Coastal Program ("LCP") which is certified by the California Coastal Commission. The LCP is the planning implementation arm of the California Coastal Act. (CA Public Resources Code Div. 20 Sec. 30200). As such, the City's LCP is the controlling standard for development of the Seaside Ridge project site. The LCP's development standard calls for very low-density development in order to minimize impacts to sensitive coastal resources found at this bluff-top location. To further comply with the Coastal Act, a "Coastal Development Permit (CDP)" must be issued for all new development with the foundational standard being that the CDP is consistent with the requirements found in the City's LCP. Therefore, each proposed housing development in the City requires processing of a CDP which must demonstrate consistency with the City's certified LCP along with the other provisions of the California Coastal Act. The assertion that an administrative CDP is warranted because the HEI-OZ applies to the proposed project site is contrary to the City's Coastal Commission certified LCP and is not accepted by the City without an amendment to the HEI-OZ ordinance, Zoning Map, and LCP.

4. The North Bluff Property is Not Needed to Meet the City's RHNA

The assertion that development of the Applicant's property with the proposed project is needed in order for the City to meet its Regional Housing Needs Assessment ("RHNA") is inaccurate. The City's 6th Cycle Housing Element clearly identifies several properties in the City, including the State Fairgrounds site as adequate sites that meet RHNA obligations consistent with State Housing Law.

Chapter 4 of the 6th Cycle Housing Element defines the City's obligations to meet the RHNA. The Applicant's property is addressed in this Chapter as a contingency site not as a candidate site, there the Housing Element states:

Housing Program 1E: Rezone of Vacant North Bluff and/or South Stratford Properties (**This contingency program is required only if Program 3A is**

not timely implemented). (Emphasis added). The Housing Element proposes to develop at least 54 affordable units on the State Fairgrounds property through a binding agreement with the State (Program 3A). By April 2024, the City must either achieve a binding agreement or implement this rezone program. For this rezone program, the City Council will take action to consider which sites to rezone (of the nine total sites listed in Program 1E) as needed to address the deficit of 54 lower income affordable units. The rezone action would be addressed by applying the Housing Element Implementation Overlay Zone to accommodate development of housing at 20-25 dwelling units per acre “by right” per Government Code Sections 65583.2(h) and (i). The rezone action will apply to as many of the nine candidate sites on the North Bluff and/or South Stratford as necessary to demonstrate sufficient capacity to meet the City’s RHNA for lower income units. Implementation of this contingency program is anticipated to address the City’s RHNA and fair housing needs for extremely low-income households in a manner that will integrate lower income units into the overall development and demonstrate connectedness to the greater City of Del Mar community.

Timeframe: By April 2024, the City must either achieve a binding agreement or implement this rezone program. Timely implementation of Program 3A (Fairgrounds Housing) by April 2024 will release the City of the requirement to carry out the Program 1E contingency rezone.

Responsible Agency: City of Del Mar, State of California General Services Department, 22nd District Agricultural Association, and California Coastal Commission

Funding Sources: City General Fund (target FY23 & 24)

Projected RHNA Accommodation: 54 lower income dwelling units, including extremely low-income units.

Here, the proposed project site is not a “candidate site,” it is instead a “contingency site” and is only required in the event that the binding agreement with the State is not in place by April 2024. HCD recognized this approach and approved this in its May 31, 2023, determination that the City’s 6th Cycle Housing Element is in “substantial compliance” with State Housing Element laws. Further, as part of that determination, HCD required more robust monitoring and reporting to ensure that the Fairgrounds site is not only achievable but can be timely implemented.

5. State Housing Laws Do Not Supersede the California Coastal Act

The Applicant’s legal argument not only misapplies the City’s Municipal Code and Coastal Commission certified LCP, but it also neglects to recognize that all State Housing laws remain protective of environmental and coastal resources. The State did not allow its

mandated housing programs to override the State's long lineage of protecting coastal resources and sensitive environmental habitats. Each housing law clearly states that neither the California Coastal Act nor CEQA is to be superseded.

The legal analysis submitted to the City specifies that the proposed project is not subject to full CEQA review, nor is it subject to the California Coastal Act. This ignores the mandates of the Coastal Act and CEQA, resulting in the City's finding that the application is incomplete. In accordance with CA Gov. Code Sec. 65589.5 (e), which is cited below, both CEQA and the California Coastal Act do apply to the Seaside Ridge project.

“Nothing in this section shall be construed to relieve the local agency from complying with the *** California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

Additionally, protection of coastal resources is clearly safeguarded under the Density Bonus Act and the California Coastal Act is not “superseded” under the CA Gov. Code Sec. 65915 (m), which states:

“This section does not supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). Any density bonus, concessions, incentives, waivers or reductions of development standards, and parking ratios to which the Applicant is entitled under this section shall be permitted in a manner that is consistent with this section and Division 20 (commencing with Section 30000) of the Public Resources Code.” (CA Gov. Code Sec. 65915(m)).

6. The Builder's Remedy Does Not Apply to an Incomplete Application

The Builder's Remedy only applies when an application is deemed complete. (CA Gov. Code Sec. 65589.5(h)(5)). The Seaside application remains incomplete due to the mistaken belief that the LCP, as the implementation vehicle of the California Coastal Act, does not apply to the project. For the proposed project site, it is the LCP that defines the density standards and is the controlling Coastal Act standard that cannot be unilaterally waived. Moreover, it is not an Applicant that decides which parts of the California Coastal Act applies to their project, it is the City and ultimately the California Coastal Commission that enforces the mandates of the Coastal Act.

The applications, studies, documents, and verifications of data that the City has requested directly relate to its obligation to carry out the mandates of the California Coastal Act. As stated in the City's prior incomplete letter, numerous studies are needed, information

requires validation, information clarifications are needed, and correct fees need to be paid. With these missing elements the application will not be deemed complete until these foundational documents are delivered and correct fees are paid.

7. Applications Required for Compliance with the City's Local Coastal Program due to Non-Applicability of the HEI-OZ

Given the project's lack of compliance with the City's certified LCP and the City's determination that the HEI-OZ does not apply to the project site, the documents listed below are required along with deposit of the correct fees associated with these discretionary actions: (Note that the listed deposit and fee estimates will be effective on July 1, 2023).

- a) **Rezoning Application (Has Not Been Submitted)** – As stated above, a rezoning is a legislative action that cannot be processed administratively. Therefore, your application request for an “Administrative Rezoning” is rejected and subject property is not eligible for “by right” housing development. Use and applicability of the HEI-OZ for implementation of the Housing Element is at the discretion of the Del Mar City Council and is not required, by ordinance or otherwise. If you would like to apply for a legislative action to rezone the subject site properties (APN 298-241-06, 298-241-07, & 299-030-14), then please prepare a separate letter of request to accompany the Uniform Development Application that provides the request, justifications for the rezoning, and proposed findings for approval as are required in accordance with DMMC Section 30.86.220 (C). Exhibit shall also be prepared and submitted that identifies existing zoning designations and proposed zoning designations.
Required Deposit: \$10,925 (This is an initial working deposit; additional funds may be required as deemed necessary)
- b) **Local Coastal Program Amendment (Has Not Been Submitted)** – Rezoning of the subject site would require an LCPA, adopted by the City Council, and Certified by the California Coastal Commission. Proposed/revision text revisions and map exhibits of the City's LCP are required with an LCPA application submittal.
Required Deposit: Included with the above-required Rezoning deposit.
- c) **General (Community) Plan Amendment (Has Not Been Submitted)** – Amendment of the City's General (Community) Plan is required for any changes to the Very Low Residential Density Land Use Designation (located in the North Bluff District) to allow - multi-unit development on lots identified with the Assessor's Parcel Numbers 298-241-06, 298-241-07, and 299-030-14. Proposed/revision land use maps and Community Plan text revisions are required with the application submittal.
Required Deposit: Included with the above-required Rezoning deposit.
- d) **Environmental Assessment Application (Has Not Been Submitted)** – The proposed project is subject to compliance with the California Environmental Quality

Act (CEQA). The Project is inconsistent with the California Coastal Act and the City's certified LCP. Therefore, a discretionary Local Coastal Program Amendment is required in order for the Project to be found consistent with the existing LCP. Accordingly, an Environmental Assessment (EA) application is required to determine the appropriate level environmental review that would be required for the project.

Required Deposit: \$1,090 (Additional funds will be required once a consultant from the City's on-call environmental consultant list has been contracted to perform the Initial Study). To facilitate the processing of the re-submitted application additional technical information/reports will be required regarding the following areas of environmental concern:

- Public Coastal View Impact Analysis
- Air Quality Impacts
- Energy Conservation and Impact Analysis
- Greenhouse Gas Emissions Impacts Including during construction
- Hazards and Hazardous Materials Usage and Impacts
- Noise Impact Analysis
- Full Paleontological Report
- Tribal/Cultural Resources Impact
- Climate Change Impacts to the North Bluff
- Environmental Justice Analysis
- Proposed Roadway Impact Analysis
- Public Coastal Access Impact Analysis
- Conformity with LCP Impact Analysis

Upon completion of the required Initial Study, and in order to address significant environmental impacts, additional technical reports and/or information may be required.

- e) Design Review Permit Application (Has Not Been Submitted) – Discretionary Design Review Permit approval is required for all development in the City of Del Mar not otherwise exempted. As it is the City's determination that the subject Housing Development Project is not subject to the provisions of AB 1398, discretionary development applications and approvals are required in accordance with DMMC Chapter 23.08. The Applicant shall submit an unaltered City of Del Mar Design Review Permit Application and Submittal Checklist.
Required Application Fee: \$11,380
Required General Plan/Zoning Code Update Charge (10%): \$1,138
DRB Public Notice Fee: To be determined and required at the time of public notice distribution.

- f) **LCP Environmentally Protective Overlay Zones Apply to the Project Site**
Because the project site is located in the Coastal Commission approved Coastal Bluff Overlay Zone, the Bluff, Slope and Canyon Overlay Zone, and Lagoon Overlay Zone, as well as the proposed grading that would be required to adequately access to the housing units, the following discretionary permit applications are required under the provisions of the current and certified LCP:
- i. Conditional Use Permit Application (Has Not Been Submitted)
Required Application Fee: \$2,595
Planning Commission Public Notice Fee: To be determined and required at the time of public notice distribution.
 - ii. Coastal Development Application – A CDP Supplemental questionnaire was submitted on March 30, 2023. However, as previously indicated in the City’s incomplete letter dated April 27, 2023, the Coastal Development Permit required for this project is a discretionary permit, not administrative permit. The required Application Fee is: \$3,185.
 - iii. Land Conservation Permit Application (Has Not Been Submitted)
Required Application Fee: \$3,185
- g) Tree Removal Permit Application (Application Submitted)
Required Application Fees are due: \$550
- h) Boundary Adjustment/Certificate of Compliance Application (Has Not Been Submitted)
Required Fees: \$3,550 (Planning Application Fee)
 \$1,490 (Engineering Review Fee)
 TBD (Public Notice Fee, determined at time of submittal)

Total Fees Owed: \$39,088. In accordance with the City’s Planning and Engineering Fee Schedules, payment of these fees is required for the continued review and processing of the Seaside permit applications.

8. The following items must be resubmitted:

- All required forms and applications, and
- All other requested materials emailed to mbator@delmar.ca.us.
- A written response to each of the comments provided in this letter
- Submittal of all fees as identified herein (upon receipt of City invoice)

If you have any questions, please contact me at (858) 755-9313, ext. 1158, or by email at mbator@delmar.ca.us.

Sincerely,

A handwritten signature in cursive script that reads "Matt Bator". The signature is written in black ink and is positioned above the typed name.

Matt Bator, AICP
Principal Planner