



September 26, 2023

VIA EMAIL AND U.S. MAIL

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

SUBJECT: Third 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 August 28, 2023. The City of Del Mar Planning and Community Development Department, along with the City Attorney, have reviewed the submitted materials and responses to the comments and application status determination provided in the City’s second application status letter dated June 1, 2023. While the Applicant has submitted some of the items previously identified as required, such as Boundary Adjustment Application materials, associated fees, and the application processing fee for a Tree Removal Permit, most of the of the previously required items, including specific entitlement applications, information, and fees were not submitted to the City and therefore, it is staff’s continued determination that the subject Application is **INCOMPLETE**. The Applicant must submit the documentation requested by this Incomplete Letter and the two previous Incomplete Letters to gain “Complete” status. Additional justifications for this determination, which were provided in the City’s June 1, 2023, application status are reiterated below along with a listing of the information that would be required for the City to deem the project complete and process the proposed development project. Further, given the Applicant’s continued reliance on legal positions not supported by the City, a response to the Applicant’s legal counsel has been prepared by the City Attorney’s Office and provided as “Attachment A” to this letter.

It is the City’s continued position that the subject development project cannot be processed as proposed for the following reasons, as previously indicated and explained in the Incomplete letters provided by the City on April 27, 2023, and June1, 2023.

- The Preliminary Application is Deemed “Not Submitted” Because the Project Increased More Than Twenty Percent (Repeated Comment)

- The City's HEI-OZ Does Not Apply to Seaside Ridge Project Site
- A Local Coastal Program Amendment, Community Plan Amendment, and Rezone Is a Required Action for the Approval of the Seaside Project
- The Builder's Remedy Does Not Apply to an Incomplete Application

Applications, Materials and Fees Still Required:

Given the project's lack of compliance with the City's Community Plan, Zoning Designations, and certified Local Coastal Program (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 those discretionary actions. Please note, while the Tree Removal Permit and Boundary Adjustment applications and required materials/fees have been filed with the City, they are part of the project as a whole under CEQA and the project is deemed incomplete until all items identified below are submitted to the City.

- a) **Rezoning Application (Has Not Been Submitted)** – As stated in previous reviews, a rezoning is a legislative action that cannot be processed administratively. Therefore, your application request for an "Administrative Rezoning" is rejected and subject project parcels are 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. If the Applicant would like to apply for a legislative action to rezone the subject site parcels (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 in accordance with the City's adopted Fee Schedule).
- b) **Local Coastal Program Amendment (LCPA) (Has Not Been Submitted)** – Rezoning and modifying the land use designation of the subject site would require an LCPA, adopted by the City Council and Certified by the California Coastal Commission. Proposed/ revised 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/ revised land use

maps and Community Plan text revisions are required with the application submittal. Required Deposit: Included with the above-required Rezone 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 for the City 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 Del Mar Municipal Code (DMMC) Chapter 23.08. The Applicant must 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 the housing units, the following discretionary permit applications are required under the provisions of the 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. A new CDP Supplemental Questionnaire without reference to the HEI-OZ. The required Application Fee is: \$3,185.
 - iii. **Land Conservation Permit Application (Has Not Been Submitted)**
Required Application Fee: \$3,185

Total Fees Owed: \$33,498. In accordance with the City’s Adopted Planning and Engineering Fee Schedules, payment of these fees is required for the City to process the proposed Seaside Ridge project.

The following items must be submitted to mbator@delmar.ca.us:

- All required forms, applications, and other requested materials
- 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) 704-3643, or by email at mbator@delmar.ca.us.

Sincerely,



Matt Bator, AICP
Principal Planner

Attachment A – City Attorney Legal Response

Introduction

Put forth in Seaside Ridge's three application submissions are a number of legal propositions that are proffered to distort the legal requirements found in current housing laws. These arguments were also provided to HCD in a formal complaint alleging that the City of Del Mar failed to meet its responsibilities under housing laws. Upon it completing its complaint review process, HCD declined to further investigate Seaside's allegations. We believe the Seaside Ridge legal positions are without merit.

In the above Incomplete Letter, the City of Del Mar has responded to Seaside Ridge's third attempt to process their application by ministerial actions, and it is therefore apparent that it is actually Seaside Ridge's legal position that is a significant barrier to moving the project forward, not the City. As a result, our Office provides the following brief analysis.

In short, the Coastal Act has not been superseded by the State's housing laws, there is no legal support for an administrative amendment to the City's LCP, and there is simply no legal process for the issuance of an administrative Coastal Development Permit for a project that is inconsistent with the City of Del Mar's LCP. Contrary to Seaside Ridge's assertions, the Planning and Community Development Director has not been delegated the authority to amend ordinances and apply the HEI-OZ to the Seaside Ridge project site. Despite these legal shortcomings, it appears that Seaside Ridge would rather litigate these issues instead of adhering to the current state of law and, as a result, the project is likely to languish in the courts for years versus the timelier avenue of following the standard procedures for ordinance and LCP amendments.

We strongly encourage the Applicant to submit the documentation requested by this Incomplete Letter and the two previous Incomplete Letters provided to the Applicant.

In summary, the application proposes a 259-housing unit project located on an environmentally sensitive bluff that supports habitat for numerous coastal species, serves as a major scenic view corridor, and has and will be subject to continuous erosion as a result of climate change. Additionally, the Seaside Ridge project location provides a major linkage for the public to access coastal resources and the site is unlikely to accommodate the significant vehicular traffic generated by the project. Given the possibility that the proposed project will have significant unmitigable environmental and public health impacts there is no foundation in law that erodes the application of the California Coastal Act or the California Environmental Quality Act ("CEQA"). Nowhere in housing law is the Coastal Act subservient to housing projects. Yet, the Applicant continues to believe that they can self-determine what provisions of the Coastal Act applies to their project.

The Applicant has continued to self-invent a Coastal Commission and City approval process that is simply non-existent and certainly not consistent with the California Coastal Act. The Applicant continues to argue that the HEI-OZ applies to the Seaside Ridge project when it clearly does not. Of the many flaws in Applicant's legal reasoning is that they, as a developer, have the right to invent the administrative process required under the California Coastal Act and self-determine what provisions of the Coastal Act apply to the Seaside Ridge project. Nowhere in State housing law does the legislation abolish the application of the California Coastal Act nor does the legislation allow for an applicant to choose what elements of the California Coastal Act do or do not apply to a housing project. Nor may an applicant by their own motion avoid a clearly defined legislative process of applying a new zoning classification to a project site. For the HEI-

OZ to apply to the project, the City Council must amend its HEI-OZ ordinance and apply it to the properties that make up the project site. Neither of these legislative actions are discretionary, nor do they qualify for legislative exemptions, therefore, environmental review under CEQA is mandated.

The New Parking Level

The Applicant states that the City has ignored certain application materials and that it is the City's role to correct faulty or inconsistent documents found in the application materials. (Applicant's Response Letter Aug. 28, 2023, Pg. 3).

It is not the role of the City to correct errors made by an applicant. As stated in the City's second "Incomplete Letter" there was no error in calculating square footage stemming from the addition of a new parking level. The new parking level appeared in several areas of Applicant's plans and as a result, the project grew more than 28% from the time the plans were originally submitted. Moreover, contrary to the Applicant's assertions, the City carefully reviewed the submitted materials, as it does in every review process, and as a result it was clear that a new parking level was added to the project.

In a stark contradiction, the Applicant at the same time now asserts that the change in density, from adding a new parking level, is now a sought after wavier under the Density Bonus Act. This post rationalization is not supported by the previously submitted wavier and concession requests. We do, however, concur with the Applicant's statements that the Seaside project is likely to cause significant increases in on-street parking resulting in impacts to public access to coastal resources and would therefore be inconsistent with the City's LCP and the Coastal Act.

HEI-OZ

As stated in the previous Incomplete Letters, the HEI-OZ ordinance was drafted specifically for the property known as the "Watermark Site." The objective design standards were also specifically tailored to impose design standards for the that specific development site.. In fact, the ordinance specifically identifies the application of the ordinance to two specific Assessor Parcel Numbers ("APN"). These APNs are directly tied to the Watermark site, not the North Bluff property where the proposed Seaside Ridge project is situated. Expanding the application of the HEI-OZ to the Seaside Ridge project would require public notice, CEQA review, public hearings, findings, and ordinance. In short, it is a discretionary legislative process that has not been uprooted by State housing laws. Again, while the Applicant has self-determined that no new significant environmental impact would result from this action, it is not the role of a lead agency to pre-determine the outcome of the environmental review process. While we agree with Applicant that HEI-OZ could be used to apply to other housing site locations, that does not abdicate the City's legislative process or the requirements of CEQA.

Finally, the Applicant now asserts that the City's Planning Director can by her vested powers apply the HEI-OZ to the project site. And while this is certainly a creative interpretation of the City's Planning Director authority it is not the case. Further, given that the HEI-OZ was drafted to apply to the Watermark parcels and the specific circumstances and location of that development site, the HEI-OZ would have to be revised to apply to the Seaside Ridge site, address its design issues, and ensure conformity with other applicable overlay zones that ensure protection of coastal resources. The City Council has not delegated this legislative authority to City staff, nor would it be lawful to do so.

Adherence to the LCP

There are significant density differences between the Seaside Ridge project and the City's existing LCP. The LCP clearly identifies the North Bluff site as a low-density single-dwelling residential community. When the City and the Coastal Commission approved the City's LCP, both agencies recognized that the North Bluff is surrounded by sensitive coastal resources, provides public access to significant coastal resources, determined that public parking is limited, and that public views should remain protected. These foundational planning goals are inapposite to what has been proposed by the Seaside project. The Seaside Ridge project is a high density, multi-dwelling project, with a combination of market rate homes and homes priced for lower-income households which could result in significant impacts to sensitive coastal resources, impede public access to coastal resources, and block public viewing areas. In order for the Seaside Ridge project to be found consistent with the City's LCP an amendment would be necessary. Amending the City's certified LCP is a legislative action requiring CEQA review, City Council approval, and Coastal Commission certification.

We strongly disagree that an applicant can propose mitigation measures designed to address a few coastal resource protection issues and then self-certify that the project is consistent with the California Coastal Act. Again, State legislation does not disregard the mandates of the California Coastal Act, and, in fact, in passing the most recent legislation the legislature again codified the importance of the California Coastal Act. This premise is clearly stated in CA Gov. Code Sec. 65589.5 (e):

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

“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)).

CEQA and the California Coastal Act were all but ignored by the Applicant's most recent response. Until the Applicant complies with the documentation and processing fees required for an amendment to the City's LCP, the application will remain incomplete.

Contrary to Applicant's assertions, there is simply no "Administrative Coastal Development Permit" process available for amending an LCP. While it certainly would be beneficial and expeditious for a developer of a project to self-determine what provisions of the Coastal Act apply to their project, that is not how housing law, the California Coastal Act, or CEQA is written. Further, given the stark density difference between the current LCP and the density found in the Seaside Ridge project, an amendment to the LCP is mandated by the California Coastal Act.

The amendment of the City's LCP is a discretionary action that requires CEQA review and given the likelihood of significant environmental impacts that may be generated by the Seaside Ridge project, legislative exemptions are not warranted. And while the Applicant has declared that all environmental impacts have been reduced to a level of insignificance, this developer position is not binding on a lead agency. The role of a lead agency is to independently determine if the project may result in any significant environmental effects and independently review those impacts. Neither the City nor the Coastal Commission can abdicate these independent reviews and abide by the determinations made by an applicant.

Unfortunately, Seaside Ridge's third set of legal responses is highly misleading, misstates applicable law, and is devoid of documentation requested by the City. To remedy these shortcomings, it is advisable for the Applicant to provide the documentation requested by the City. The City will in turn diligently process the application consistent with the City's Community Plan, Municipal Code, State housing laws, the California Coastal Act, and CEQA.

Ralph T. Hicks
Assistant City Attorney
City of Del Mar