December 20, 2023

VIA EMAIL AND U.S. MAIL
Manuel Nieto
2717 Via de la Valle
Del Mar, CA 92014

SUBJECT: Fourth Review of Application Materials Submitted for CDP23-008 (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 the November 22, 2023 fourth resubmittal of materials associated with the above-cited entitlement. The current submittal and the three previous submittals continue to be unresponsive to the documentation requested by the City. The Applicant continues to provide argumentative legal analysis instead of providing the documentation required to process the subject project. As a result, the City of Del Mar Planning and Community Development Department and the City Attorney have reviewed the submitted materials listed below and determined the subject Application continues to be INCOMPLETE.

November 22, 2023, Application Materials Submitted to the City:

1. Cover Letter
2. Legal response to the City's September 26, 2023, Incomplete Status Determination

On December 11, 2023, the City Attorney's Office sent via certified mail/email, a response to the Applicant's legal response (listed as #2 above). For your convenience, the City Attorney's letter is again included as Attachment A. For the Applicant to receive a "Complete" status for this project, they must submit the documentation requested as follows in this Incomplete Letter and the previous (September 26, 2023) Incomplete Letter. As indicated in previous correspondence, the project materials submitted thus far will be deemed filed but will remain Incomplete until the project entitlement materials identified in this status letter are submitted. These materials are required in order for the City to fully evaluate the proposed project in accordance with City regulations and to assess potential environmental impacts as required by the California Environmental Quality Act and the California Coastal Act.

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.

a) Rezone Application **(Has Not Been Submitted)** – As stated in previous reviews, a rezone is a legislative action that cannot be processed administratively. Therefore, your application request for an "Administrative Rezone" 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 rezone, 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 Rezone 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

cc: Joshua M. Caplan, Esq.
Dylan K. Johnson, Esq.

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December 6, 2023

VIA EMAIL AND U.S. MAIL
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Whitney Hodges, Esq.
SHEPPARD MULLIN RICHTER & HAMPTON, LLP
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Re: *Fourth 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). Legal Response Prepared By Assistant City Attorney to Sheppard, Mullin, Richter, & Hampton LLP*

Dear Ms. Hodges and Mr. Nieto,

The City of Del Mar has received what the Applicant has classified as their fourth application submission for the Seaside Ridge Housing Project ("Seaside"). The Applicant has again chosen to repeat their previously stated legal positions which were articulated in all previous application submissions and instead off complying with the application documentation that the City has requested in its three previous incomplete letters. It again appears that the Applicant's legal position serves as a substitute to the application materials the City has requested. The City in its three previous incomplete letters has been clear as to what documentation is needed to complete the Seaside development application. In all cases the City has encouraged the Applicant to conform to the requirements of the California Coastal Act and the legislative processes required to change City ordinance. In turn, the Applicant has insisted that the project be approved as a "by-right" development because at the time it submitted its preliminary application, the City had not yet been served with formal notice from HCD that its Housing Element was in substantial compliance. No matter the timing, the California Coastal Act has not been superseded by state housing laws and the Seaside project requires a Local Coastal Program amendment in order for the project to proceed.

However, between the time that the preliminary application and the project's full application was received, the project grew over 28%, rendering the preliminary application ineffective. Shortly thereafter the City's 6th Cycle housing Element was found to be in substantial compliance. The Applicant incorrectly contends that the City's Planning Director has authority, under state housing laws, to unilaterally amend its Local Coastal Program, amend a City housing ordinance that was specifically drafted for another

affordable housing project site, and issue all major discretionary land use permits without City Council or Coastal Commission approval.

In sum, the City does not believe that state housing laws have superseded the California Coastal Act and we do not believe that a city's planning director has the ability to amend a city's LCP by their own motion. Instead, both require the approval of the Coastal Commission and the affected local government. Finally, we do not support the position that city staff can upend a clearly defined legislative process vested in local and state policy makers.

The Applicant proposes a 259-housing unit project that is principally comprised of market rate units with a small percentage of affordable units. The project is 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 location of the Seaside project provides a major linkage for the public to access coastal resources and the site is unlikely to accommodate significant vehicular traffic which would be generated by Seaside's new residents. The City has a certified Local Coastal Program (LCP) which specifically defines the Seaside project site as a low-density residential site and imposes strict development standards in order to preserve coastal resources, protect public views, and protect public coastal access. Given the Project's density and location in the Coastal Zone, it is highly likely to have significant, unmitigable, environmental and public safety impacts. The City believes that there is no foundation in law that erodes the application of the California Coastal Act or the application of the California Environmental Quality Act ("CEQA") for legislative process that may result in significant environmental impacts to the Coastal Zone.

As stated in the City's three previously incomplete letters, the California Coastal Act was not superseded nor were its effects lessened by the State's new housing laws. The Applicant asserts that State law requires the City to administratively make wholesale changes to its certified Local Coastal Program and that the City's Planning Director, on her own motion, may change a local ordinance in order for the Seaside project to benefit from its by-right provisions. Again, nowhere does State housing laws provide for such a novel approach in securing project approval within the Coastal Zone and on a project site that contains is surrounded by sensitive and protected coastal resources.

Here, we believe the Applicant's legal letter is more directed to the State Department of Justice ("DOJ"), and not the City, given the continued repetition of its legal content and the failure to submit the proper application materials. We also assume that the Applicant has reached out to the DOJ as a result of the Applicant's failed efforts with the complaint they previously filed with HCD. There, HCD reviewed and considered the same legal arguments that the Applicant continues to argue here, and HCD declined to further investigate the matter or proceed with any action against the City. It now appears the Applicant turns to DOJ to seek relief from having to comply with the California Coastal Act.

In the Applicant's torturous legal analysis, that teeters on the absurd, they pin their legal framework on the misstated fact that their application was submitted just prior to the City's 6th Cycle Housing Element substantial compliance finding by HCD. However, what the Applicant neglects to state clearly is that soon after their pre-application submission, their project grew by more than 28%. This growth was part of the full application submission made to the City on March 30, 2023. The significant square footage growth was attributed to the addition of a new parking level to their project. It is important to note that under the Government Code Section 65941.1(c) the "preliminary application shall not be deemed submitted' should the project grow by more than 20% between the time of the preliminary application and the project's full application. (Cal. Gov. Code §65941.1(c)).

Because of the timing and growth of the project, the Applicant forfeited all by-right approvals relating to rezoning under the City's Community Plan. However, at no time are applicants entitled to by-right approvals to amend a coastal city's LCP, nor is an applicant allowed by-right re-drafting of a city's ordinance. These are both legislative processes and in the case of the Coastal Act the Legislature clearly drafted housing laws so as not to supersede the Coastal Act's resources protection provisions or its legislative processes. (Cal. Gov. Code §65915 (m)).

As background, under the City's 6th Cycle Housing Element, the Seaside project is not a project that the City needs to meet its obligations under the Regional Housing Needs Assessment. The Seaside project is one of many ways the City can meet its obligations under the 6th Cycle Housing Element. However, according to Seaside's legal position, all candidate sites and other housing strategies should be on equal footing with a city's primary housing objectives and should be pursued in parallel with its main housing objectives. This nonsensical reasoning would mean that all cities would have to triple their planning staff to pursue fallback housing projects at the same time they pursue their main housing project objectives. Clearly, if the Legislature desired to impose such unreasonable burdens on local government, they would have done so in their recent actions in reforming state housing laws. In short, there is no legal or practical basis to support Seaside's argument that fallback sites should be treated equal to a city's main housing objectives.

To properly frame the practical effects of the Applicant's legal position the following is a partial list of the actions the City's Planning Director would have to approve on her own motion without City Council or Coastal Commission oversight or approval:

1. The City's Community Plan would have to be substantially modified to transform a low-density site to a high density site. The Community Plan's FARs, height restrictions, coastal resource protections, public safety, coastal access, and public view corridors provisions would all have to be changed without the benefit of public hearings or CEQA review;
2. The City's Local Coastal Program ("LCP") would have to be changed to transform a low-density site to a high density site. The LCP's stated FARs, height restrictions, coastal resource protections, public safety elements, coastal access, public view corridors, Climate Change provisions, and the Coastal Zone Overlay zones provisions would all have to be changed

without the benefit of the California Coastal Commission approving these amendments to the LCP and public hearings and CEQA review would be disallowed;

3. A city ordinance would have to be modified to allow by-right development at this location and for this project without City Council approval or without any public hearings;
4. A significant encroachment permit would have to be approved without City Council action or public hearings;
5. A Major Conditional Use Permit would have to be approved without City Council action or public hearings;
6. A land dedication would have to be approved without public hearings or City Council approvals; and
7. A major grading permit would have to be approved without any public hearings and without City Council approval.

These seven actions, that the Applicant believes state housing law has vested in a Planning Director, have no foundation in law.

For example, there are significant density differences between the Seaside project and the City's existing LCP. The City's current LCP clearly identifies the North Bluff proposed project site as a low-density single home residential community. When the City and the Coastal Commission approved the City's LCP, both agencies recognized that the North Bluff site is surrounded by sensitive coastal resources, provides public access to a very popular beach, has limited public parking, and its 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, muti-family 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 the coastline and block public viewing areas. In order for the Seaside 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. The State legislation did not disregard the mandates of the California Coastal Act, and, in fact, in passing the most recent housing 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)).*

However, it is Applicant's position that the City's Planning Director, based on housing laws, is vested with the authority to change the City's Community Plan and its standards, amend the City's LCP without public hearings and Coastal Commission oversight, amend a City ordinance, dedicate City property to the developer, issue a major Conditional Use Permit, issue a major encroachment permit, and issue a major grading permit for a project site that is not needed for the City to meet its obligations under the Regional Housing Needs Assessment and has secondary status in the City's approved 6th Cycle Housing Element.

Even if the Seaside project had priority status in the City's Housing Element, and the project did not grow over 20%, and if the City's Housing Element was not deemed approved by HCD, then the only mandatory revision to the above list of major actions would be the City's Community Plan. All other actions (amending the City's LCP, amending a City Ordinance, issuing a major CUP, issuing a major encroachment permit, making a land dedication, and issuing a major grading permit) are legislative actions. Legislative actions are not immune from CEQA review and the City's Planning Director is not vested with the authority to provide such approvals in contravention of state and local law.

In short, the Coastal Act has not been superseded by the State's housing laws and there is no legal support for an administrative amendment to the City's LCP. There is simply no legal process for the issuance of an administrative Coastal Development Permit for a project that is inconsistent with a LCP, there is no legal support for a department head to change an existing city ordinance and issue major land use permits at the request of a developer.

Unfortunately, the Applicant in its past four application submissions continues to self-invent a Coastal Commission and City approval process that does not exist and certainly is not consistent with the California Coastal Act and state housing laws. The Applicant continues to argue that a by-right City housing ordinance applies to the Seaside project when it clearly does not. That ordinance was drafted for a very specific project specifically tied to two parcel numbers for a completely different project and at a different location within the City.

Of the many flaws contained in the Applicant's legal reasoning, they believe that as a developer, they have the right to invent administrative processes under the California Coastal Act and

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then self-determine what provisions of the Coastal Act apply to their 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 pick and 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 for applying for a new zoning classification for a project site. For a city ordinance to apply to a project, the City Council must amend the impacted ordinances to conform ordinance to the project. Neither of these legislative actions are discretionary, nor do they qualify for legislative CEQA exemptions, therefore, environmental review under CEQA is mandated.

In conclusion, the developers legal counsel has set fourth legal responses that are highly misleading, misstates applicable law, and are devoid of the documentation requested by the City. The City strongly desires to find the Seaside application complete once all the necessary documentation has been provided. As a fourth request, and to remedy the application submission shortcomings, it is advisable that Applicant provide the documentation requested by the City. As the City has clearly indicated, it will in turn diligently process the application consistent with State housing laws, the California Coastal Act, the City's legislative processes, and CEQA.

Respectfully,

Ralph T. Hicks
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RTH/ams

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