

CALIFORNIA COASTAL COMMISSION

CENTRAL COAST DISTRICT OFFICE
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877



February 28, 2005

Supervisor W.B. Lindley, Chair
Monterey County Board of Supervisors
P.O. Box 1728
Salinas, CA 93902

Re: March 1, 2005 Agenda Item S-14: The Pebble Beach Company's Del Monte Forest Preservation and Development Plan (PLN010254, PLN010341, and PLN040160).

Honorable Chair and Supervisors:

We write to urge that you not approve the Pebble Beach Company (PBC) development project because it violates both the Monterey County Local Coastal Program (LCP) and the Commission's Spanish Bay coastal development permit (CDP). The LCP has not been amended by Measure A and thus major components of the project cannot legally be approved. In addition, with or without the certification of Measure A much of the project appears inconsistent with the environmentally sensitive habitat area (ESHA) policies of the LCP, including requirements for wetland protection. The project also directly contravenes the Commission's Spanish Bay CDP forest restoration requirements and associated recorded irrevocable conservation easements. Concerning the adequacy of information for your decision, recent fieldwork by the Commission's biologist suggests that there is more wetland and dune habitat within the project disturbance area than has been identified by the County to date. Similarly, our preliminary review of the legal lot information indicates that there may be fewer legal lots (and thus more proposed subdivision) than identified by the County. Finally, given the substantial evidence that much of the project area qualifies as ESHA under the LCP, your staff recommendation overstates both the "pre-Measure A" development potential under the certified LCP and the project benefits for the Del Monte Forest. This overstatement brings into question the overall rationalization being offered to the public that Measure A and the project will result in less development than would be allowed under the certified LCP.

Project is inconsistent with the certified LCP

We have previously advised that the County not take a final action on any coastal development permits necessary for the project until after the Commission has reviewed Measure A for conformity with the California Coastal Act (PRC 30514(a); also Monterey County LCP Zoning (CIP) 20.06.755 which defines the LCP as the Commission certified version). This is primarily because in the absence of Commission certification of Measure A, major components of the project have no legal basis for approval since they are patently inconsistent with the certified LCP (i.e., without the proposed Measure A LCP amendments). Proposed development that is not consistent with the certified LCP includes: the new Equestrian Center at Sawmill Gulch, which is not allowed in the Open Space Forest (OF) land use designation and Resource Conservation (RC) zoning at this location (nor by a prior CDP and recorded easements, see below); 149 new

visitor-serving units at Spanish Bay and the Pebble Beach Lodge, which are not allowed under Table A of Chapter 3 of the LCP Land Use Plan (LUP); 11 new golf course cottages, which are not allowed under Table A or current zoning; portions of the new golf course which conflict with the OF designation and RC zoning; and, more broadly, all new development proposed beyond a single residence on each legal lot because the B-8 resource constraint zoning that prohibits new development has not been removed: this includes the proposed new golf course, driving range, residential subdivisions, and visitor-serving units.

To address these inconsistencies, the County is proposing to approve the project with a condition that precludes issuance of grading or building permits until the Coastal Commission "has certified the Local Coastal Program changes contained within Measure A." Such an action by the County would be in excess of the County's legal authority, or *ultra vires*.¹ Under the California Coastal Act, the County only has delegated authority to issue coastal development permits that are consistent with its certified LCP (PRC 30604(b)). The certified LCP also requires that all coastal development permits approved by the County be consistent with the policies and ordinances of the LCP (e.g., CIP 20.02.060(A), 20.06.755, and 20.70.050(B)(3)). The County does not have the legal authority to issue coastal permits for developments that are clearly inconsistent with the LCP on a presumption that the LCP will be changed in the future to allow such development. This fundamental lack of authority is not cured by making the approval contingent on the eventual certification of Measure A by the Commission. Moreover, as we have previously observed, the outcome of the Commission's review of the Measure A LCP amendment is uncertain. If the Commission does not certify Measure A as proposed, the County's action will be rendered a nullity.

Project is inconsistent with the certified LCP and a Measure A amended LCP

Commission staff has previously delivered detailed comments to the County questioning the consistency of Measure A and its anticipated land uses with the Coastal Act. We remain concerned that Measure A is not approvable in its current form. Nonetheless, even if the Commission were to certify Measure A as submitted, the PBC project would still not be consistent with the LCP as so amended. The primary reason for this is because there is substantial evidence that undeveloped portions of the project area are predominantly ESHA.²

¹ We note that in prior instances where LCP amendments were required to allow development being considered by the County, the County has only granted conceptual approval of the requisite coastal permits, and has only taken a final action on the coastal permits after Commission review and approval of the necessary LCP amendments (see, for example, the LCP amendments and permits associated with Mission Ranch (amendment 2-91 and CDP PC-7595) and Oak Hills (amendment 1-95 and CDPs SB840-842) that were referenced by the Company in their January 6, 2005 letter on this topic).

² This conclusion is based on preliminary fieldwork and review of the administrative record that has been available to date.

Among other things, ESHA is defined by the LCP as the habitat of rare and/or endangered species, including Federal and State listed species and California Native Plant Society (CNPS) List 1b species (CIP 20.147.020(H); 20.147.020(AA)). The LCP also identifies wetlands, dunes, and riparian habitats as ESHA (Ibid). As is well documented in the project EIR, the undeveloped portions of the project area are mostly made up of large intact tracts of native Monterey pine forest (CNPS List 1b) in association with a variety of sensitive plant (e.g., federally-listed endangered Yadon's piperia) and animal (federally-listed threatened California red-legged frog) species, and include large areas of delineated wetlands, riparian areas, and dunes. Apart from legal definitions, the EIR clearly establishes the biological sensitivity of these species and their habitats. The EIR documents significant impacts to these coastal resources including converting 150 acres of Monterey pine forest to urban use, removing some 15,000 individual Monterey pine trees, and reducing the total known population of Yadon's piperia, an endangered species, by 25% (an estimated loss of 36,000 individual piperia plants).

In analyzing the project to date, the County has relied upon the LCP interpretation that ESHA is only that area containing the habitats and species listed in LUP Appendix A. This narrow reading of the LCP would, if carried forward into action, result in significant adverse impacts to any number of the sensitive species and their habitats in the Del Monte Forest that have been identified and/or listed since certification of the LUP in 1984, including the California red legged frog (threatened), Yadon's piperia (endangered), and many others.³ This interpretation is at odds with the letter and intent of the LCP's ESHA protection provisions, and disregards the fact that the reference to Appendix A is a reference to a list of known examples when the LCP was certified in 1984 (and not a list meant to limit ESHA to Appendix A for all time).⁴ The LCP clearly contemplates that the resources on the ground at the time of proposed development should be determinative of the presence or absence of ESHA for purposes of applying the ESHA protection policies of the LCP. Biological surveys are required at the time of proposed development so that ESHA's might be identified and protected (LUP Policy 12; CIP 20.147.040(A)). In addition, the DMF Land Use Plan (LUP p. 6) clearly notes that the LUP ESHA maps are "to be used as background resource material for decision-making" and that the County "acknowledges that they are not definitive and may contain errors or may be incomplete." Indeed, "challenges" to the accuracy of the maps are encouraged by the County to facilitate updating of the maps and so that "decisions will accordingly be based on the new data."

Consistent with the Coastal Act, the LCP requires that ESHAs be identified, avoided, and buffered (LUP Chapter 2; CIP 20.147.040). Only resource-dependent uses may be approved within an ESHA (e.g., LUP Policy 8; CIP 20.147.040(B)). Subdivisions within ESHA are

³ See the Commission's Draft Periodic Review Findings for the Monterey County LCP, Chapter 3 (2003), for more detail.

⁴ This is clear from the LUP text and policies as well as the overall framing definition of ESHA from CIP Section 20.06.440, an LCP section which is generic to all of the coastal planning areas of the LCP. Section 20.06.440 mimics the Coastal Act Section 30107.5 general definition of ESHAs, and then refers the reader to each land use plan segment for specific examples.

prohibited (e.g., LUP Policy 10; CIP 20.147.040(A)(1)). A *minimum* undevelopable 100-foot buffer around ESHAs, including wetlands, is required (e.g., CIP 20.147.040(B)). As documented in the EIR, the project does not avoid or adequately buffer sensitive habitat areas that should be treated as ESHA under the certified LCP. Except perhaps for some anticipated new trails, none of the development proposed in sensitive habitat areas is resource-dependent.⁵ Thus, much of the proposed development is inconsistent with these ESHA protection requirements of the LCP. The potential certification of Measure A (which doesn't propose any changes to the LCP's ESHA policies) would not resolve these inconsistencies. In short, the implementation of the County's interpretation of the LCP's ESHA policies for the identified sensitive species and habitats of the Del Monte Forest is contrary to law, common sense, the County's own LCP, and numerous Commission and local government actions in other areas on California's coast. We urge the County to reject the staff recommendation to approve non-resource dependent development in areas that qualify and must be protected as ESHA.⁶

Project is inconsistent with the Coastal Commission's Spanish Bay CDP

The Commission's 1985 approval of the applicant's Spanish Bay project, which allowed the construction of the Spanish Bay Resort and golf course, was conditioned upon certain mitigations to address the environmental impacts of that project. But for these mitigation measures (which the PBC agreed to and has, in material respect, implemented when it accepted the permit) the Spanish Bay project CDP could not have been approved. One such mitigation was that all of the Sawmill Gulch site, both upper and lower portions, be restored.⁷ The upper portion was also added to the Huckleberry Hill Natural Habitat Area. To assure implementation of this condition, the PBC recorded an Offer to Dedicate a conservation easement, since accepted by the Del Monte Forest Foundation, for the primary purpose of permanent natural habitat protection *in perpetuity*. As previously noted, all of the Sawmill Site is designated open space forest and zoned resource conservation – a designation and zoning designed to “protect, preserve, enhance, and restore sensitive resource areas in the County of Monterey” (IP 20.36.010).

The PBC now proposes to undo its restoration and conservation commitment by proposing development that is in direct conflict with the mitigation requirements of the Commission's Spanish Bay permit. PBC proposes to put a new equestrian center in Sawmill Gulch. In addition to being prohibited by the certified zoning of the LCP, this development is not allowed by the Commission's Spanish Bay CDP. To address this conflict, the County is proposing to approve the project with a condition requiring the applicant to show that the “Coastal Commission has amended its Spanish Bay Coastal Development Permits to allow for the use of the Sawmill site

⁵ Commission staff acknowledges and supports the proposed formal protection of other sensitive habitat areas (through conservation easements) that also should not be developed pursuant to the ESHA protection policies of the LCP.

⁶ We note that to the extent that there may be a conflict between LCP ESHA policies, LCP section 20.02.060(D) identifies the Coastal Act as the highest prevailing authority for resolving such conflict.

⁷ CDP Conditions 3, 4, 5, and 28.

for the proposed Equestrian Center.” This condition fails to consider the fact that the Executive Director of the Commission is obligated to reject an application for a CDP amendment if he/she determines that the amendment would lessen or avoid the intended effect of the original permit, unless new material information is presented (14 CCR § 13166(a)). In this case, an amendment request to develop the Sawmill Gulch restoration area, an area designed to be set aside and restored as mitigation for Spanish Bay project impacts, and required under the recorded easements to be permanently protected as sensitive habitat *in perpetuity*, would clearly be a weakening amendment that would be rejected. We are not aware of any new information that would support an application to eliminate this or any other requirement of the Commission's Spanish Bay CDP.

Information gaps preclude a finding of LCP consistency

In addition to the fundamental information gap associated with the unknown Measure A and Spanish Bay CDP amendment outcomes, there appear to be significant additional information gaps that make it difficult to fully assess the consistency of the project with the LCP. In particular, as we informed the County in January, recent fieldwork conducted by Commission staff in areas MNOUV has led us to conclude that the EIR has not delineated all areas that would qualify as wetland under the LCP using the methodology that we advised in 2002. In particular, there appear to exist significant areas of wetland in the proposed golf course site that have not yet been delineated and that would render additional areas undevelopable. Similarly, it appears that areas of dune habitat at Signal Hill/Spyglass have not been delineated, and that portions of the proposed golf course are sited on top of dune habitat. Finally, based on our preliminary review of the administrative record for the certificates of compliance that have been issued for the project area to date, the number of legal lots may be overstated, raising questions about the level of proposed subdivision necessary to support the project (see also discussion below). We recommend that the County not take a final action on the PBC project until the wetlands, dune, and lot legality information can be appropriately updated, and the project further modified if necessary. In sum, because of the aforementioned Measure A and Spanish Bay unknowns, and because of these additional information gaps, approval at this time may be illegal since the decision-makers (the Board) do not have before them the necessary information (including the Commission's future actions relative to Measure A and Spanish Bay) to make an informed decision about potential environmental impacts (see, for example, *Sundstrom v. County of Mendocino*).

Development potential under the Del Monte Forest LUP/IP is overstated

PBC and the County staff report for Measure A have presented the project as both reducing the scope and intensity of otherwise allowable development and increasing habitat preservation in the Forest. However, this assertion relies on the unsupported claim that the LCP allows much more development than the proposed project. The LCP does not guarantee the development of the +850 residential units that has been suggested as the Company's entitlement within the project area. Rather, the LCP clearly states that the residential densities identified in various planning areas are maximums that need to be understood in relation to resource and other

constraints, where the actual density allowed by the LCP for any specific project area is dependent on the development constraints under relevant LCP requirements (e.g., LUP Policy 68a; CIP 20.147.090).

For example, the LCP prohibits subdivision within ESHA. As discussed above, there is substantial evidence that the undeveloped project area lands, including areas proposed for "preservation," are predominantly ESHA. As such, their development potential is considerably less than 850 residential units. Within the context of Constitutional takings law, the general requirements of which are reflected in CIP 20.02.040 and 20.02.060(B), the maximum development potential of a residentially-zoned legal parcel that is entirely ESHA under the LCP generally is probably not more than a single house.⁸ As mentioned, we have not concluded our review of the administrative record on this matter and believe that the number of developable legal lots in the project area may be something less than the 41 that the County has certified. Even still, there is no doubt that the development potential of 41 lots substantially comprising ESHA is significantly less than the 850 units that has been suggested. Moreover, to the extent that the proposed preservation areas are ESHA, they are already substantially protected by the LCP. Thus, only that development that must be allowed under the Constitution, such as a single residence on an all ESHA parcel, should be countenanced as a resource protection "benefit" of the project. In short, it is important that the public record reflect a more realistic statement of the development potential of the Del Monte Forest under the certified LCP, particularly to the extent that arguments about the purported reduction in LCP development potential by Measure A and the project, as well as statements concerning the preservation benefits of the project, are being used to rationalize approval of significant new development in environmentally sensitive areas.

Conclusion

There is no doubt that the proposed PBC development, including Measure A, is complex and controversial. We acknowledge and sincerely appreciate the significant commitment that your staff has made to evaluating and processing the project thus far. We look forward to continuing to work with your staff as the process unfolds. Nonetheless, we have serious concerns with the project, particularly with respect to its significant impacts on environmentally sensitive habitat areas and the contravention of the restoration requirements of the Spanish Bay CDP. Conditions of approval proposed by the County are not adequate to address these fundamental LCP and legal inconsistencies. Because Measure A has not been certified, the approval of much of the project is without legal foundation. Finally, information with respect to wetlands and dune habitats, as well as the number of legal lots, appears to be incomplete or uncertain.

There are other issues of project consistency with the LCP, including questions regarding public access, scenic resources, mitigations outside the coastal zone and therefore beyond the applicability of the LCP, water quality protection, and water supply, as well as more detailed

⁸ Such an analysis is case specific. The actual development potential of any particular lot will depend on the transactional history of the parcel, applicable laws and regulations, development context, environmental constraints, etc.

Monterey County Board of Supervisors

March 1, 2005 Board of Supervisors' Agenda Item S-14: Pebble Beach Company's Del Monte Forest Preservation and Development Plan (PLN010254, PLN010341, and PLN040160)

February 28, 2005

Page 7

concerns related to the protection of habitat and wetlands, that may need to be further addressed. But at this point and given the accelerated pace at which this project is now being moved through the County, these further issues are secondary to the fundamental conflicts of the proposed project with the LCP's ESHA protection policies. We recommend that you not approve the project because it is not consistent with the Monterey County certified LCP and the Commission's Spanish Bay coastal development permit.

Sincerely,

Charles Lester
Deputy Director
California Coastal Commission

cc: Ann Anderson, Clerk to the Board of Supervisors
Lew Bauman, Monterey County Administrative Officer
Scott Hennessy, Monterey County Planning Director
Thom McCue, Monterey County Senior Planner
Mark Stilwell, Pebble Beach Company