

Cox, Castle & Nicholson LLP  
2049 Century Park East, 28<sup>th</sup> Floor  
Los Angeles, California 90067-3284  
P 310.277.4222 F 310.277.7889

July 1, 2011

File No. 47864

VIA EMAIL

Samuel Unger, Executive Officer  
California Regional Water Quality Control Board  
320 W. 4<sup>th</sup> Street, Suite 200  
Los Angeles, CA 90013

Subject: Item No. 12 on the July 14<sup>th</sup>, 2011 Board Hearing/Tentative MOU  
Between City of Malibu and RWQCB

Dear Mr. Unger,

Our firm represents Malibu La Paz Ranch, LLC ("La Paz") whose property is located at 23465 Civic Center Way (APN# 4458-022-023 & 024) in the Phase 1 area of the tentative Memorandum of Understanding ("MOU") between the City of Malibu ("City") the Los Angeles Regional Water Quality Control Board ("RWQCB") and the State Water Resources Control Board ("SWRCB"). La Paz generally supports the tentative MOU, subject to the following comments.

The tentative MOU phasing map<sup>1</sup> depicts La Paz's property as one of the parcels to be assessed in Phase 1 of the plan (Phase 1 properties are shown in yellow on Exhibit A of the proposed MOU). This assessment upon La Paz's property is mandated by the provisions of the MOU to occur no later than September 30, 2013. Additionally, the MOU would require La Paz to physically connect to the City's Centralized Wastewater Treatment Facility (CWWTF) no later than November 5, 2015. These provisions of the tentative MOU appear to breach the City's obligations pursuant to its Development Agreement<sup>2</sup> ("Agreement") with La Paz and are likewise inconsistent with the adopted Basin Plan Amendment ("BPA"),<sup>3</sup> as hereafter explained.

#### The Proposed MOU Would Breach the City's Agreement with La Paz

Pursuant to Section 5.10 of the Agreement, the City can neither mandate La Paz's connection to the CWWTF nor cause La Paz to be assessed, except on the terms set forth in Section 5.10.

Section 5.10 provides that La Paz cannot be required to hook up to, nor be assessed for, the City's CWWTF unless the CWWTF is fully permitted and operational before La

<sup>1</sup> Refer to Exhibit A of the Tentative MOU

<sup>2</sup> Please refer to the attached Section 5.10 of the Final Development Agreement between the City and La Paz which was approved by the Malibu City Council on November 10, 2008 and formally attested to by then Mayor Sharon Barovsky and City Attorney Christi Hogin on February 2, 2010.

<sup>3</sup> Refer to State Water Resources Control Board Resolution 2010 – 0045, adopting BPA

Paz receives the final grading permit for its wastewater treatment facility. Under those circumstances, La Paz may within its sole discretion opt to connect to the City's CWWTF and be assessed accordingly; however, as noted, La Paz may not be assessed for, nor mandated to connect to, the City's CWWTF except as specified in the Agreement. Therefore, to the extent it breaches Section 5.10, the tentative proposed MOU is inconsistent with the Agreement and La Paz objects to it.

The Proposed MOU is Inconsistent with the Adopted Basin Plan Amendment and La Paz's WDR/WRR

The La Paz Project is a zero discharge project. The Project's WDR/WRR, as you may recall, was approved after the adoption of the BPA and was found to be consistent with the BPA because the Project did not propose to "discharge wastewater" into State receiving waters. Both the State and Regional Water Boards thus determined that La Paz was not subject to the provisions of the BPA.

La Paz's WDR/WRR (Order No. R4-2010-0107) was adopted by the RWQCB on July 8, 2010. The order states in pertinent part as follows:

***"30. Future Civic Center Connection:***

*The Executive Officer may choose to re-open the WDR/WRR for a material change allowing or requiring La Paz to accept specified Civic Center effluent when the irrigation capacity at La Paz is not met and potable water would otherwise be applied..*

**J. PROHIBITIONS**

1. Sewer Connection: Effluent from system upset which cannot be stored or used for irrigation must be discharged to a centralized facility when constructed by the City of Malibu. La Paz is in the Malibu Civic Center Onsite Wastewater Disposal System prohibition area, and is subject to the Basin Plan Amendment, if it is in effect."

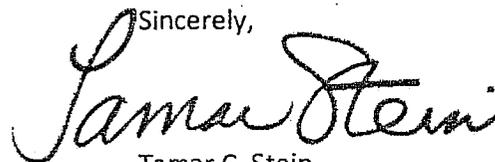
Both the State Board and the RWQCB were clear that La Paz's wastewater system as designed would not require future connection to the CWWTF unless the system failed to comply with the provisions in Order No. R4-2010-0107. This is reflected in La Paz's WDR/WRR as well as in the meeting minutes that reflect Board discussions on July 8, 2011 (date of adoption of Resolution Approving Order No. R4-2010-0107 by the RWQCB)<sup>4</sup>. The SWRCB made similar observations and comments<sup>5</sup> during its meeting on September 21, 2010 when the SWRCB adopted Resolution Number 2010-0045 approving the BPA. The SWRCB acknowledged that La Paz's Project as designed and engineered was consistent with the BPA and outside the scope of the BPA's coverage.

<sup>4</sup> Those comments are reflected in the meeting minutes for said meeting which are incorporated by reference and intended to be made part of the record for the pending MOU.

<sup>5</sup> Those comments are reflected in the meeting minutes for said meeting which are incorporated by reference and intended to be made part of the record for the pending MOU.

The tentative MOU therefore conflicts with La Paz's WDR/WRR and the City's Agreement with La Paz. La Paz requests that the tentative MOU be revised so that it is made consistent with the provisions of the La Paz Development Agreement and La Paz's WDR/WRR.

Having expressed our concerns, La Paz is pleased to see that the RWQCB and the City have been working cooperatively to determine how best to implement the Basin Plan Amendment (Prohibition). Except for its comments above, La Paz supports that effort.

Sincerely,  
  
Tamar C. Stein

cc: Mr. Donald Schmitz  
Mr. Christopher Deleau.

EXHIBIT A

and demand, interest rates, absorption, completion and other similar factors. In *Pardee Construction Co. v. City of Camarillo (Pardee)*, 37 Cal.3d 465 (1984), the California Supreme Court held that the failure of the parties therein to provide for the timing or rate of development resulted in a later-adopted initiative restricting the rate of development prevailing as against the parties' agreement. CITY and LA PAZ intend to avoid the result in *Pardee* by acknowledging and providing that LA PAZ shall have the right to develop the Property in such order and at such rate and times as LA PAZ deems appropriate solely within the exercise of its subjective business judgment, but LA PAZ shall have no obligation to develop the Project or the Property.

5.8.1 In furtherance of the Parties' intent, as set forth in this Section 5.8, no future amendment of any existing CITY ordinance or resolution, or future adoption of any ordinance, resolution or other action, that purports to limit the rate or timing of development over time or alter the sequencing of development phases, whether adopted or imposed by the City Council or through the initiative or referendum process, shall apply to the Property or the Project.

5.8.2 Moratorium. The CITY shall not impose a moratorium on the Property or Project unless the CITY has made legislative findings that there is a current and immediate threat to the public health, safety or welfare and that the approval of the entitlement sought by LA PAZ would result in that threat to public health, safety or welfare, and provided that the CITY has otherwise complied with all applicable law.

5.9 Pedestrian and Bike Path Plan. LA PAZ will coordinate and cooperate with the CITY in the development of a pedestrian and bike path plan that will serve the Preferred Project. LA PAZ agrees that these paths may be utilized by golf carts, as well as pedestrians and cyclists.

5.10 Wastewater System. At the City's request, LA PAZ shall grant to the CITY an easement to build, maintain and dispose on LA PAZ's property unless the CITY finds an alternative means of disposing without the LA PAZ property.

The CITY may in the future approve and implement a municipal centralized wastewater treatment facility for the Civic Center area. If the CITY builds such a centralized wastewater treatment facility and it is fully permitted and operational before LA PAZ receives its final grading permit for construction of its wastewater treatment facility for either the Alternative or Preferred Project, whichever occurs first, LA PAZ will hook up to the CITY's centralized municipal facility and pay an amount equivalent to that paid by other property owners that have hooked up to the system. If the CITY's centralized wastewater treatment facility is not fully permitted and operational when LA PAZ receives its grading permit, LA PAZ shall have the right to go forward with its wastewater treatment facility and shall not be required to hook up to the CITY's facility nor to contribute thereto, unless LA PAZ elects to hook-up to the CITY's facility, in which case LA PAZ may be required to pay an amount equivalent to that paid by other property owners that have hooked up to the system.

5.10.1. Separate City Wastewater Treatment Plant & Corresponding Easement: CITY wishes to reserve its right to construct and maintain its own centralized or on-site wastewater treatment facility on Parcel C. In the event CITY opts to construct such a

separate wastewater plant on Parcel C, LA PAZ agrees to grant CITY an easement for the dispersal of effluent only, onto LA PAZ's property not to exceed 600 gallons per day. How and where the effluent is dispersed onto LA PAZ's property shall remain within the exclusive control and discretion of LA PAZ in accordance with and subject to all applicable laws. The Easement shall only permit the dispersal of excess municipal wastewater treated in compliance with Division 4 of TITLE 22 of the California Code of Regulations. All excess municipal wastewater to be disposed of on the La Paz property shall have been processed in a Title 22 wastewater treatment plant approved by, if such approval is otherwise required by law, the City of Malibu, the California Department of Public Health, the Los Angeles County Regional Water Quality Control Board and any other responsible public agency, as well as performing the required daily monitoring of effluent quality. Only Title 22 compliant waters shall be delivered to La Paz.

5.10.2. Overburdening: The easement is intended to permit excess wastewater disposal onto the La Paz property only in amounts commensurate with that generated by the development of a 20,000 sq. ft. City Hall Office Building housing a maximum of 200 employees (approximately 4000 Gallons per day gross code flow wastewater generation prior to reduction from reuse); any development that exceeds these flow parameters will be deemed to be an overburdening of the easement unless CITY and LA PAZ agree in writing and amend this Agreement to so provide. The City, prior to utilizing its easement for disposal on La Paz's property, shall make all reasonable efforts to recycle and reuse its wastewater for in-building toilet reuse and landscaping on its property (85% anticipated reuse potential from in-building toilet reuse alone). CITY shall install dual plumbing (Purple pipe) in whatever municipal structure(s) that may be constructed in order to provide for the intended recycling and reuse potential in compliance with TITLE 22 and applicable law.

## 6. DEVELOPMENT OF PARCEL C

6.1 LA PAZ's obligations with respect to Parcel C are limited to the following:

6.1.1 Land Conveyance. After the Preferred Project has received all discretionary approvals from all agencies, including without limitation, the CITY and the California Coastal Commission, and the time has passed for a referendum, and all statutes of limitations have expired as to legal challenge to all of the discretionary approvals from all agencies, or all litigation shall have terminated in final judgment favorable to LA PAZ and the CITY, including all appeals, or litigation has ended in a settlement acceptable to LA PAZ in its sole discretion, LA PAZ shall convey Parcel C to the CITY. Such conveyance is exempt from the Subdivision Map Act, Government Code § 66410 *et seq.*, pursuant to § 66428(a)(2), as a conveyance to a public agency.

6.1.2 Cash Contribution. After the Preferred Project has received all discretionary approvals from all agencies, including without limitation, the CITY and the California Coastal Commission, and the time has passed for a referendum and all statutes of limitations have expired as to legal challenge to all of the discretionary approvals from all agencies, or all litigation shall have proceeded to final judgment favorable to LA PAZ and the