

# Midcoast Community Council

An elected Municipal Advisory Council to the San Mateo County Board of Supervisors

Serving 12,000 coastal residents

Post Office Box 248, Moss Beach, CA 94038-0064

<http://mcc.sanmateo.org>

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March 15, 2011

Honorable Carole Groom, Supervisor, District 2, President  
Honorable Don Horsley, Supervisor, District 3  
Honorable Rose Jacobs Gibson, Supervisor, District 4  
Honorable Adrienne Tissier, Supervisor, District 5  
400 County Center  
Redwood City, CA 94063

Re: Big Wave Development Agreement

Dear President Groom and Fellow Supervisors,

The Midcoast Community Council (MCC) hereby reaffirms our opposition to the Big Wave Project as expressed in both the DEIR and FEIR that we have reviewed and commented on extensively in prior correspondence. Put simply, Big Wave in all of its various iterations is the wrong project for the wrong location and has been badly mishandled in its public review. We are writing separately to address the merits of the appeal itself. **This correspondence specifically addresses the merits of the Development Agreement as a component of the decision reached by the Planning Commission to certify the DEIR as the FEIR.**

(1) Term

As we previously identified in our comments to both the DEIR and FEIR, the project proposal is fundamentally flawed in that it consists of contingent component parts, and yet was not reviewed as a Program EIR (PEIR) but rather as a singular EIR. This concern is now manifest in the Development Agreement which seeks to set dangerous precedent by establishing a 20 year term for a project that, unlike any other project under the purview of County Planning staff, is not subject to a 5 year term of expiry.

In fact, there are multiple discrete phases, each contingent on conditions precedent in prior phases. For this reason, there can be no singular Development Agreement for the proposed project. Instead, it requires a 5 (five) year development agreement encapsulating phases 1-3, two separate development agreements of consecutive five year terms for phase 4, and four consecutive development agreements for phase 5, the office park, all running in series.

(2) Transferability

The Development Agreement should not be transferrable or assignable to third party non-signatories other than those identified in (2) of 14.3 as those of an affiliated or related company or entity and this condition itself should further be expressly defined such that affiliated or related is defined to mean wholly owned by, or in which a majority interest and control is held by, the undersigned developer. Should the developer fail to fulfill the terms of, or otherwise default, on the Agreement, the parcels identified in the agreement should revert back to their prior designations. No rights granted to this developer should be assignable to non-signatory third parties under subsection 14.1.

(3) Enforceability

Under subsection 12.3 the language currently says that in the event of the developer's default on the Agreement, the County (1) "may" give written notice of termination, (2) "may" propose a modification of the Agreement, or (3) "may" institute legal proceedings. In fact, the County should be required to provide written notice of intent to terminate and within a 30 day period following the notice of default, commence legal proceedings. As such, the "may" permissive language in 12.3 should be changed to a legally binding "shall" and the Agreement should not be subject to modification other than by condition of force majeure identified in subsection 18.

(4) Lack of Binding Language

In every instance in which either the developer or the County is designated as undertaking a material obligation, the language of "will" should be changed to "shall" such that the obligation is rendered legally enforceable.

(5) Lack of Deed Restrictions

Although subsection 15 states that the Agreement "Runs with the Land" per Civil Code section 1468, absent a deed restriction, there is no practical way to bind subsequent successors in interest to the agreement that are themselves not signatories of the agreement. For this reason, any Development Agreement that does not specify deed restrictions that are recorded against the parcels fails to adequately bind successors in interest.

(6) Fundamental Inequity and Precedent

Because the County is being asked by this development agreement to acquiesce to material exceptions to its well established planning and zoning policies, it would be opening itself to liability for suit by homeowners, builders, and developers that have been held to a more stringent standard. Further, the County opens itself up to legal challenge by subsequent developers in the event that the County seeks to hold future projects to more stringent standards than those set forth in this agreement.

For these reasons, and the inadequacies we have separately identified regarding the merits of the project proposal, **we ask that the appeal be granted and the certification of the Big Wave FEIR be denied.**

Sincerely,

[SIGNED]

Len Erickson  
Chair, Midcoast Community Council

Cc:  
Midcoast Community Council