LAW OFFICE OF MARC CHYTILO

ENVIRONMENTAL LAW

August 1, 2008

Ms. Catherine Schlottmann, Chair
Santa Barbara Local Agency Formation Commission
105 East Anapamu Street
Santa Barbara CA 93101

By hand delivery
and by email to
braitman2@everdream.com

RE: Alleged Duty to Record Dos Pueblos Golf Links Reorganization, Item 11 of the August 7, 2008 LAFCO Agenda

Chair Schlottmann and LAFCO Commissioners,

This office represents the Gaviota Coast Conservancy (Conservancy or GCC) in this matter. The Conservancy is dedicated to preserving the rural character of the Gaviota Coast by, *inter alia*, ensuring that projects proposed on the Gaviota Coast receive thorough and appropriate environmental review prior to agency decisions impacting the invaluable resources of the Gaviota Coast. GCC has specific concerns regarding the annexation of rural agricultural lands into urban service districts, due to both direct impacts from residential development and the growth inducing impacts upon on other Gaviota Coast rural lands.

The Makar interests (CPH Dos Pueblos Associates, LLC and Makar Properties, LLC, referred to collectively as Makar) have sought annexation of various portions of their properties to the Goleta Water District (GWD) on more than one occasion. Initially, Makar sought annexation of one large lot and twenty five smaller lots which are part of the Naples Townsite, in order to develop a golf course. An essential part of LAFCO's 1998 consideration of the golf course was Makar's voluntary commitment to merge the 25 Naples lots before the annexation would be recorded. Makar never fulfilled its voluntary commitment to merge the Naples lots, even after LAFCO granted several extensions to the statutory one year period to complete the annexation. Significantly, Makar's golf course project involved a large volume of reclaimed water, and a minimal allotment of potable water. Over 10 years after the initial annexation request, and many years after the prior annexation lapsed by operation of law, Makar directed GWD to reapply to LAFCO to annex the Makar lots for an entirely different project involving 26 residential parcels on agriculturally zoned lands.

Makar's application to the County Planning and Development Department proposes two very large single family residential complexes. The County determined these developments would cause significant impacts, and ordered preparation of an EIR. In response to GWD's proposed annexation of Makar's lands, GCC has contended that the GWD must conduct environmental review prior to making application for this new annexation of Makar's lands. Alternatively, GWD and LAFCO must defer any action on the annexation of Makar's land until the County has completed environmental review. LAFCO's Executive Officer recommended this course of

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action in the Staff Report on this item for the June 5, 2008 LAFCO hearing. This remains the most sound course of action.

Implicitly recognizing their duty to comply with CEQA before pursuing the annexation, GWD withdrew its application to LAFCO. Now, in an overt effort to circumvent environmental review, Makar has demanded that LAFCO simply record the lapsed golf course annexation. Makar's claim has many weaknesses and no case law to support it. We believe it would be entirely improper for LAFCO to record this annexation so many years after it has lapsed and when the conditions have changed so substantially. CEQA requires environmental review before any such decision may be made. As a matter of fairness, Makar is seeking to avoid their prior commitment to merge the Naples lots and evade LAFCO's independent review of this different residential project. The public, including GCC, has relied on the fact that Makar failed to raise this challenge during the applicable statute of limitations and has elected to pursue a very different type of project from what had been previously considered by LAFCO. For these reasons we urge the Commission to not file the certificate of completion as requested by Makar.

1. LAFCO Has No Duty to Record the Dos Pueblos Golf Links Reorganization

The Dos Pueblos Golf Course Reorganization was set to lapse on September 2, 1999. The project applicant and GWD sought three extensions, two of which LAFCO granted. LAFCO did not grant the third extension, and the annexation expired as commanded by the statute on September 2, 2003. Exhibit 1. Makar and GWD expressly acknowledged that the extension was necessary to avoid lapsing under Gov. Code § 57001. *See* Exhibits 2 and 3. Not only did the Applicant abandon the annexation process and fail to merge the lots as promised, the Applicant never perfected the golf course entitlement approval and did not challenge to final judgment their appeal of the golf course project's denial. The golf course project was overtly replaced by the proposed residential development project several years ago. Makar now argues that the golf course annexation did not lapse and may now be finalized with the simple filing of a ten-year old certificate of completion, years after its expiration. This position is based on a novel interpretation of the Cortese-Knox-Hertzberg Act which would allow annexations to survive indefinitely and be finalized years later, despite changing conditions. This interpretation lacks foundation in law or fact, and moreover creates a result which contravenes LAFCO policy, evades CEQA and facilitates the development of over two dozen new residences on prime agricultural lands. Further, Makar's argument that LAFCO must now record the certificate requires Makar to abandon their prior commitment to merge their Naples lots. Numerous laws and legal principles preclude Makar from challenging this voluntary commitment a decade after they agreed to it.

a. There Is No Duty to Record Under the Statutory Scheme

Makar contends that LAFCO somehow has a duty to perfect the ten-year old annexation by recording the certificate of annexation despite the statute's limitation of a pending annexation to

a one year life and despite Makar's own failure to complete the merger act they themselves agreed to. Makar asks to be rewarded by LAFCO in defiance of a 30 day statute of limitation to challenge committments Makar now opposes and in spite of their conduct accepting the one year period for the annexation's effectiveness.

i. The Dos Pueblos Golf Links Reorganization Lapsed

The Cortese-Knox Act does not, and did not provide that where conducting authority proceedings are waived, the annexation does not lapse in one year. Indeed Makar does not argue that the Act so provides, rather reaches its conclusion based solely on 'operation of law.'

In a February 29, 2008 letter to the Executive Officer of LAFCO, Mr. Kaufman, attorney for Makar, refers to Government Code § 57001, as it read in 1998, which provides that a proceeding would be deemed abandoned if not completed within one year. Kaufman Letter p. 1. Kaufman argues this section does not apply, reasoning that it only applies if conducting authority proceedings remained to be completed at the end of one year, and that GWD waived conducting authority proceedings entirely, as reflected in Resolution 98-11. Kaufman reasons that "[w]ith no requirement for additional proceedings, the annexation was deemed approved by operation of law after Commission approval and the one year deadline would not have applied."

Kaufman provides no support for this contention, and a close examination of the statute governing LAFCOs, the Cortese-Knox-Hertzberg Act, reveals that no support exists. Kaufman relies on the version of the statute in effect in 1998[1], which he quotes as saying "if the conducting authority does not complete [the] proceeding within one year after the commission approves a proposal for that proceeding"[2] the proceeding would be deemed abandoned. Kaufman Letter p. 1.

Neither prior nor current versions of the Act provide that where conducting authority proceedings are waived, the annexation does not lapse, in one year or otherwise. The Act unambiguously provides that an annexation is not complete until the Executive Officer records the certificate of completion with the county recorder. Gov. Code § 57202. Without a lapsing provision, an annexation could stay 'alive' for an indefinite period, and then be completed without regard to changed circumstances. This interpretation defies logic, and indeed LAFCO has consistently and unambiguously interpreted the one-year limitation as applicable to the annexation proceeding itself, regardless of waiver of conducting authority proceedings. *See e.g.* LAFCO 95-17: Refiled Dos Pueblos Annexation to Goleta West Sanitary District (Glen Annie Golf Course), Recorded 7/23/96. If LAFCO were now to reverse course and interpret the Act as Kaufman has, Courts may not defer to LAFCO's interpretation of the statute (*see Motor Vehicle*

[1] The version in effect in 1998 was the Cortese-Knox Local Government Reorganization Act of 1985.
[2] The language currently in effect reads "If a certificate of completion for a change of organization or reorganization has not been filed within one year after the commission approves a proposal for that proceeding, the proceeding shall be deemed abandoned..." Gov. Code § 57001.

Manufacturers v. State Farm (1983) 463 U.S. 29, 42-43.), and even if they accord deference, an abrupt change in course may indicate that the new interpretation is arbitrary and capricious (*see National Cable v. Brand X* (2005) 545 U.S. 967, 982). We therefore urge the Commission to maintain consistency in its interpretation of the governing statute and in its determination that the Dos Pueblos Golf Links Reorganization has lapsed.

ii. Makar Failed to Adhere to their Commitment to Merge the Naples Lots

The certificate of completion for the Dos Pueblos Golf Course Reorganization was withheld pending Makar's voluntary merger of its Naples lots. *See* LAFCO Executive Officer's Report dated September 2, 1998. To date, Makar has not merged the lots and therefore the certificate has been rightly withheld. Makar has argued however that LAFCO had a duty to record the Dos Pueblos Golf Course Reorganization after it was approved because the commitment that Makar merge its Naples lots was somehow invalid. In fact, this voluntary commitment flows directly from the express purposes of LAFCO. LAFCOs are tasked with discouraging urban sprawl, preserving open-space and prime agricultural lands, and efficiently providing government services. Cal. Gov. Code § 56301; SB LAFCO Policies Encouraging Conservation of Prime Agricultural Lands and Open Space Areas, Policy # 1.

Recording the certificate per Makar's demands will result in Makar's large lot and 25 Naples lots becoming a part of the Goleta Water District. When LAFCO considered and approved the annexation, the entire property was to be used as a golf course utilizing principally reclaimed waste water. The potential for growth inducement however remained due to the presence of 26 separate legal lots, each one of which could theoretically be built upon in the future. Makar's commitment to merge its Naples lots directly addressed this growth inducement threat. Without this commitment, LAFCO may not have approved the golf course annexation, let alone a proposal which would provide domestic water service to 26 vacant lots, enabling future development. Indeed, when Makar came forward a second time, requesting annexation of all 26 lots in connection with the proposed residential development on the two large lots, LAFCO's Executive Officer recommended excluding all 25 Naples lots from the annexation. *See* Executive Officer's Report, March 6, 2008.

iii. Makar Failed to Object Within the Statutory Period

The Cortese-Knox-Hertzberg Act provides that "[a]ny protest or objection pertaining to the regularity or sufficiency of any proceedings or commission proceedings shall be in writing, clearly specify the defect, error, irregularity, or omission to which protest or objection is made and shall be filed within the time and in the manner provided by this division." Gov. Code § 56105. Any objection to merger of the Naples lots or other aspects of LAFCO's determination must have been filed within 30 days from the adoption of the resolution. *See* Gov. Code §§ 56105 and 56895. Makar's failure to so object as required by statute bars Makar's claim that the requirements of annexation are not enforceable or that LAFCO must record the certificate as

demanded. Given the statute's clarity, a decision by LAFCO to capitulate to Makar's demands would exceed LAFCO's statutory authority.

2. Makar Is Precluded from Demanding Recordation Due to Waiver, Estoppel and the Passage of Time

Makar's arguments rely on the basic theory that LAFCO lacked the jurisdiction to withhold filing of the certificate until merger occurred. We maintain that LAFCO had the jurisdiction under the Cortese-Knox-Hertzberg Act to only approve the Dos Pueblos Golf Links project on the basis of the Applicant's pledge to merge the lots and to withhold filing of the certificate on that basis. However, if this Board were to determine that LAFCO acted beyond its jurisdiction, this would not invalidate the committment or LAFCO's past actions regarding this project because "an act in excess of jurisdiction[3] is valid until set aside, and a party may be precluded from setting it aside, due to waiver, estoppel or the passage of time." *People v. Mendez* (1991) 234 Cal. App. 3d 1773, 1781; *In re Stier* (2007) 152 Cal. App. 4th 63, 77. The facts presented in this case make it clear that, regardless of potential initial claims about the validity of the merger committment, Makar is now precluded from challenging LAFCO's prior actions due to statute of limitations, waiver, estoppel and the passage of time.

a. Makar Is Barred By the Statute of Limitations

The Cortese-Knox-Hertzberg Act provides that "[a]ny protest or objection pertaining to the regularity or sufficiency of any proceedings or commission proceedings shall be in writing, clearly specify the defect, error, irregularity, or omission to which protest or objection is made and shall be filed within the time and in the manner provided by this division. Any protest or objection pertaining to any of these matters which is not so made and filed is deemed voluntarily waived." Gov. Code § 56105 (emphasis added). Where LAFCO has adopted a resolution making determinations, the written request must be filed within 30 days of the adoption of the resolution. Cortese-Knox-Hertzberg Act, Gov. Code § 56895. Makar failed to file such a written request within the 30 day period, and therefore any objections to the merger commitment are deemed voluntarily waived under the Act. *See* Gov. Code § 56105. Furthermore, if Makar sought to compel recordation of the certificate, the appropriate challenge is a petition for a writ of mandamus within the applicable statute of limitations period. *See Hills for Everyone v. LAFCO* (1980) 105 Cal. App. 3d 461, 467; *Bozung v. LAFCO* (1975) 13 Cal. 3d 263, 272; California Code of Civil Procedure §1094.6 (b).

[3] An act in excess of jurisdiction is an act beyond the court's power as defined by statute or decisional rule, as opposed to the lack of jurisdiction in its most fundamental or strict sense: an entire absence of power to hear or determine the case. *People v. Mendez*, 234 Cal. App. 3d at 1781.

b. Makar Waived Its Objections

Furthermore Makar cannot challenge a condition after acquiescence in it either by "specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits" afforded by the annexation. *See Ojavan v. California Coastal Commission* (1994) 26 Cal. App. 4th 516, 527, quoting *Rossco Holdings Inc. v. State of California* (1989) 212 Cal. App. 3d 642, 654. The court in *Ojavan* directly addressed the issue of improper merger conditions in distinguishing the facts at hand from those in *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, which invalidated the conditioning of a development permit upon merger as violating the Subdivision Map Act. Specifically the *Ojavan* court states "[t]he petitioners in *Morehart* who applied for a coastal development permit did not obtain [a permit] because they did not agree to any merger of their parcels; instead they petitioned for a writ of mandate. In contrast, [appellants] were granted their permits and appellants' predecessors in interest agreed to the mergers." *Ojavan,* 26 Cal. App. 4th at 528. Because the appellants in *Ojavan* had not challenged the validity of the condition at issue, and had accepted the benefits of the permits, the Court determined they had waived any right to a subsequent challenge. *Id.* at 527.

Makar specifically agreed to merge its Naples lots (*see* Exhibits 2 and 3), failed to challenge the validity of this commitment, and accepted the benefits afforded by the annexation. Makar accepted the annexation approval subject to the merger commitment, substantially increasing the value of their property and enabling subsequent processing of entitlements for development approvals sought by Makar. Had Makar merged its Naples lots, it would have obtained water for all of its lots, allowing for future development. If it had not agreed to merge its Naples lots, the annexation request may well have been denied, and Makar would not have been eligible to receive water from the District. In other words, Makar offered and accepted the commitment to secure Board approval which otherwise may not have been forthcoming. In this context applicable case law precludes Makar from now challenging the merger as an invalid condition, and demanding recordation of the annexation on that basis. *Ojavan,* 26 Cal. App. 4th at 527; *Rossco Holdings*, 212 Cal. App. 3d at 654.

c. Makar is Estopped from Challenging the Annexation

"Where judicial review is not sought and the administrative decision becomes final, application of traditional principles of res judicata and/or collateral estoppel require that the property owner be precluded from re-litigating the validity of the Commission decision or seeking alternative forms of relief in a different proceeding." *California Coastal Commission v. Superior Court of San Diego* (1989) 210 Cal. App. 3d 1488, 1493; *People v. Torch Energy Services, Inc.* (2002) 102 Cal. App. 4th 181 (where permit conditions were preempted by federal law, the company was nonetheless estopped from challenging their validity because it accepted the benefits of the permits). As discussed above in the context of waiver, Makar accepted the benefits of the annexation: it secured the ability to obtain District water. Therefore, pursuant to the above cited cases, Makar is estopped from seeking relief now before LAFCO or in a court of law.

d. Makar's Claims Are Barred by the Passage of Time

If Makar wished to challenge the merger condition or other aspects of LAFCO's determination, it should have protested in writing to LAFCO within 30 days from the adoption of the resolution. *See* Gov. Code §§ 56105 and 56895. Further, if Makar sought to compel recordation of the certificate it must have filed a petition for Writ of Mandate with the Superior Court within 90 days from the day the 30 day reconsideration period expired. Code of Civil Procedure § 1094.6 (b). In this case, Makar neither protested in writing to LAFCO within 30 days of the adoption of the resolution, nor filed for a writ of mandate within 120 days of the adoption of the resolution. Because of this failure, Makar cannot now sustain a court challenge to compel LAFCO to file the certificate. *See* Code of Civil Procedure § 1094.6 (b).

Further, even if the statute of limitations did not apply, or had not yet run, a court could nonetheless bar Makar's claims under the doctrine of laches. Under the equitable doctrine of laches, a court may deny relief to a claimant who has unreasonably delayed in asserting a claim, and in so doing caused prejudice to the opposing party. *Fountain Valley Regional Hospital v. Bonta* (1999) 75 Cal. App. 4th 316, 323-324. Makar's failure to assert their claim that a certificate of completion must be issued until after they had requested multiple extensions from LAFCO constitutes an unreasonable delay. Further, GWD, on Makar's behalf, submitted a new application for annexation because the first annexation had obviously lapsed. Not only did GWD waste public resources in filing this new application, but a subsequent court challenge by GCC against GWD for non-compliance with CEQA is now ostensibly moot due to Makar's decision to demand recordation of the certificate intended for the golf course. Makar's actions in this regard caused GCC prejudice in the loss of time and resources invested in the GCC v. GWD litigation. As a watchdog of lands on the Gaviota Coast, GCC has monitored the status of Makar's lands, and relied on the idle annexation status of Makar's lands in GCC's allocation and prioritization of resources. Other members of the public, such as the Surfrider Foundation, relied to their detriment on the lapsing of Makar's annexation application.

3. LAFCO May Not Record the Dos Pueblos Golf Links Reorganization

The lapsing provision of the Cortese-Knox-Hertzberg Act provides a one-year time-frame for completing annexations. *See* Gov. Code § 57001. This provision ensures that annexations are completed in a timely manner, before circumstances have appreciably changed. As discussed above, LAFCO has consistently and unambiguously applied this lapsing provision regardless of whether it waived conducting authority proceedings. If LAFCO now changes its interpretation of the statute and revives and records the lapsed golf course annexation, a court may not afford deference to LAFCO's determination or may find that the determination is arbitrary and capricious. *See Motor Vehicle Manufacturers,* 463 U.S. 29 at 42-43 and *National Cable,* 545 U.S. at 982. If however LAFCO adheres to its previous position that this and other similarly situated annexations lapse in one year if not renewed, courts will defer to LAFCO's position.

See City of Livermore v. LAFCO (1986) 184 Cal. App. 3d 531, 543; *see also Chevron v. NRDC* (1984) 467 US 837, 843.

Makar is demanding recordation of the certificate five years after the annexation lapsed, notwithstanding its failure to object as required by statute. Circumstances have changed considerably, both during this five year period, and during the period since LAFCO issued Resolution 98-11. The annexation will not serve a golf course with primarily reclaimed water as intended, but will provide potable water for the express purpose of enabling the development of up to 26 residences on agricultural lands. Consequently, the Resolution no longer reflects the purpose of the annexation. Further, the Resolution states that "the Commission heard, discussed and considered all oral and written testimony related to the proposal including…the Executive Officer's report and recommendation, the environmental document or determination…" This oral and written testimony, the Executive Officer's report and recommendation, and the environmental document are no longer germane to the situation on the ground.

Conveniently for Makar, recording this lapsed annexation circumvents LAFCO's reconsideration of the GWD's annexation request under existing circumstances. To approve a new annexation request, LAFCO would need to examine this project's consistency with applicable policies, including those which discourage urban sprawl and encourage preservation of open-space and prime agricultural lands. *See* SB LAFCO Policies Encouraging Conservation of Prime Agricultural Lands and Open Space Areas, Policy # 1 and Policies Encouraging Orderly Urban Development and Preservation of Open Space, Policy #3; *see also* Gov. Code § 56301. LAFCO would also have to consider the environmental impacts of the proposed residential development. *See Bozung,* 13 Cal. 3d at 281. Given that the environmental review document now being prepared by the County reveals numerous potentially significant impacts associated with the proposed development (*see* Exhibit 5), it is demonstrably to Makar's benefit to attempt revival of the golf course annexation, even though that is a dramatically different project. Moreover, Makar's approach would entirely avoid any consideration of the environmental impacts associated with annexing 25 Naples lots to an urban service provider.[4] Reviving the lapsed golf course annexation to meet the Applicant's goal of evading CEQA and review of the replacement project, given these circumstances, is arbitrary and contrary to law.

Further, numerous entities have relied to their detriment on the lapsing of this annexation. The public, including GCC and Surfrider, has relied on the fact that Makar failed to raise this challenge during the applicable statute of limitations, apparently abandoned the prior project, and elected to pursue a very different type of project from what had been previously considered by LAFCO. Additionally both LAFCO and GWD have wasted considerable time and public resources processing Makar's second annexation request. Under these circumstances, a court could reasonably find that recording the certificate amounts to a prejudicial abuse of discretion.

[4] The golf course would have included the Naples lots, hence reducing the likelihood that the annexation would facilitate urban sprawl and the EIR prepared for the golf course expressly relied on the fact that the golf course project lacked a housing component in its assessment of growth inducing impacts. *See* Exhibit 4.

4. LAFCO's Decision to Record the Certificate Without Further Environmental Review Would Violate CEQA

LAFCO's consideration of annexations is ordinarily subject to CEQA's environmental review process. *Bozung,* 13 Cal. 3d at 278-279. In considering the Dos Pueblos Golf Links Reorganization, LAFCO relied on an environmental impact report (EIR) and addendum prepared specifically for the golf course project. *See* LAFCO Resolution 98-11. That EIR relied on the fact that the golf course project lacked a housing component in its assessment of growth inducing impacts. *See* Exhibit 4. The golf course spanned the entire Makar property including the Naples lots, and thus, as proposed, presented no opportunity for residential development in the reasonably foreseeable future.

Residential development on the Makar property involves potentially significant impacts that were not considered previously. Exhibit 5. As water is perhaps the key factor limiting development outside the urban limit line, annexing 25 agriculturally-zoned parcels to an urban water district outside the urban limit line is expected to generate substantial growth inducement impacts. Further, the cumulative impact associated with facilitating potentially 25 additional homes on the resource sensitive Gaviota Coast, within the 'special problems area' of Naples none-the-less, is a potentially significant impact associated with the annexation. The Santa Barbara Ranch EIR established that development on the original Naples lots involves Class 1 visual impacts. These and other potential impacts must be considered by LAFCO before it takes any further action that would result in the annexation of these parcels to the GWD. This constitutes new information of a significant new project impact that triggers recirculation of a prior EIR under Guidelines § 15162.

LAFCO may not cloak its exercise of discretion as some sort of ministerial settlement of threatened litigation or otherwise evade CEQA's mandate that LAFCO's action be informed by the environmental review process. Any decision to capitulate to Makar's demands would plainly involve the exercise of discretion, and would trigger a series of direct and indirect physical impacts from the up to 27 large homes that could not be readily built in the absence of annexation. Just as the GWD could not apply to annex Makar's lands for the foreseeable residential project without conducting environmental review, neither can LAFCO approve a "settlement" that would accomplish the same outcome without similarly conducting CEQA's environmental review. Notably, such review is unnecessary if LAFCO simply defers action on Makar's annexation until the County has completed its environmental review process and LAFCO acts in the capacity of responsible agency.

LAFCO's staff has recently recommended this exact course of action and we implore LAFCO to follow it. Defer any action on Makar's demands and the GWD's annexation request until the

County analyzes the environmental impacts of Makar's residential project. LAFCO can then determine whether to approve the annexation for this project, including any conditions on development imposed by the County. To act otherwise breaches LAFCO's responsibilities under the Cortese-Knox-Hertzberg Act, undermines the certainty that the legislature intended should accompany annexation decisions, and entails an evasion of CEQA's requirements. LAFCO should deny Makar's demand.

Respectfully submitted,

Marc Chytilo

(by AC)
Marc Chytilo
Attorney for the Gaviota Coast Conservancy

Exhibit 1: Letter from Bob Braitman to Kevin Walsh of GWD (August 1, 2003)

Exhibit 2: Letter from R.W. Hollis of Makar to Kevin Walsh of GWD (July 8, 1999)

Exhibit 3: Letter from Kevin Walsh of GWD to Bob Braitman (July 22, 1999) and attached letter from R.W. Hollis of Makar to Mr. Walsh (July 14, 1999)

Exhibit 4: Final EIR for the Arco Dos Pueblos Golf Links Project (February 1993) (selected pages)

Exhibit 5: EIR Scoping Document, Paradiso del Mare Ocean and Inland Estates (excluding Attachments 3-6) (March 19, 2008)