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9 La Costa Town Square, LLC



7 **BEFORE THE**
8 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10
11 In the Matter of LA COSTA TOWN
12 SQUARE, LLC

**PETITION FOR APPEAL AND
RECONSIDERATION OF THE
DENIAL OF WATER QUALITY
CERTIFICATION 09C-043 BY
THE REGIONAL WATER
QUALITY CONTROL BOARD,
SAN DIEGO REGION**

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15 **I. GENERAL BACKGROUND INFORMATION**

16 **1. Name, address, and telephone number of the petitioner.**

17 La Costa Town Square, LLC ("Petitioner")
18 9799 Balboa Ave.
19 Suite 270
20 San Diego, CA 92123-1538
21 Telephone: 858-204-2098

22 The Petitioner should be contacted through its attorney of record.

23 **2. The specific action or inaction of the regional board which the state**
24 **board is requested to review and a copy of any document issuing or**
25 **denying certification that is referred to in the petition.**

26 On April 21, 2009, Petitioner submitted an application for a Clean Water Act
27 Section 401 Water Quality Certification to Mr. John Robertus, Executive Officer of the
28 California Regional Water Quality Control Board, San Diego Region. (Exhibit A). That

1 request for a water quality certification was for the La Costa Town Square Project in
2 Carlsbad, California ("Project"). In a letter dated July 8, 2009, from Mr. John Robertus,
3 the Regional Board issued a "Denial of Water Quality Certification 09C-043" for the
4 Project with prejudice. (Exhibit B). The Regional Board's decision to deny the
5 certification-with-prejudice is the subject of this appeal

6 **3. The date on which the certification action or failure to act occurred.**

7 The Regional Board's action occurred on July 8, 2009, when the Executive Officer
8 issued the letter denying the Section 401 Water Quality certification with prejudice.

9 **4. A full and complete statement of reasons why the action or failure to
10 act was inappropriate or improper.**

11 See Memorandum of Points and Authorities below.

12 **5. The manner in which the petitioner is aggrieved.**

13 Petitioner is aggrieved because it already has purchased compensatory created
14 wetland mitigation for the Project from the North County Habitat Land Bank at a ratio of
15 3:1 for the impacts of the Project. The Regional Board's denial of the water quality
16 certification and its requirement that any mitigation be "in-kind" mitigation (here, for
17 impacts to ephemeral/intermittent drainages) makes the purchase of those mitigation
18 credits from the Land Bank potentially worthless. Also, reapplying for a new water
19 quality certification will require the Petitioner to expend additional time and money, and
20 will delay or prevent the Petitioner's ability to begin construction of the Project.

21 **6. The specific action by the state board which the petitioner requests.**

22 Petitioner requests that, consistent with Section 3869(a)(3)-(a)(4) of Title 23 of the
23 California Code of Regulations ("C.C.R."), the State Water Resources Control Board
24 ("State Board") set aside the Regional Board's denial with prejudice of Water Quality
25 Certification 09C-043, and direct the Executive Officer of the Regional Board to issue the
26 certification. However, pursuant to 23 C.C.R. Section 2050(d), the Petitioner hereby
27 requests this petition be held in abeyance pending additional discussions with the
28 Regional Board.

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7. A list of persons other than the petitioner and applicant, if not the petitioner, known to have an interest in the subject matter of the petition.

The City of Carlsbad.

8. A statement that the petition has been sent to the appropriate regional board or executive officer.

A copy of this Petition has been provided to the Executive Officer John H. Robertus of the San Diego Regional Water Quality Control Board.

9. A copy of the request to the executive officer to prepare the regional board staff record and any hearing transcript.

A request dated August 10, 2009, was made to the Executive Officer for preparation of the Regional Board staff record on the matter. (Exhibit C).

10. A summary of the manner in which and to what extent the petitioner participated in any process leading to the action or failure to act in question.

This matter did not involve a hearing before the Regional Board, and all communication by Petitioner prior to the issuance of the denial of the Section 401 certification was with Regional Board staff. Those communications were minimal, however, given the short time period between the staff's acknowledgement on June 9, 2009, that it had received the Section 401 application for the Project (the application had been submitted on April 21, 2009) and the Regional Board's issuance of the denial letter on July 8, 2009. The June 9, 2009, letter stated that the application had been deemed "complete" for procedural purposes, but requested (1) additional information on the total impacts to jurisdictional waters, (2) an exhibit that had been mentioned in but not provided with the application, and (3) contact information for other involved regulatory agencies. (Exhibit D). Petitioner's consultants submitted additional information on the project on June 19, 2009, and June 22, 2009 (Exhibit E), but were unable to schedule any

1 meetings with Regional Board staff within the 29 days from staff's initial letter until the
2 denial was issued on July 8, 2009.

3 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

4 **A. Factual Background**

5 On April 21, 2009, the Petitioner submitted a cover letter and form application for
6 a Clean Water Act Section 401 Water Quality Certification for the Project. (Exhibit A).
7 The application described the Project, which has been in the planning stages for a number
8 of years, as consisting of the construction of a community shopping center, two office
9 buildings, 64 single-family homes and 128 condominiums on approximately 83 acres of
10 vacant land that is surrounded by existing or planned residential or commercial
11 developments. The application stated that the Project would impact 0.41 acres of "waters
12 of the United States." These impacts would be primarily to ephemeral/intermittent
13 drainages on the Property as well as to 0.08 acres of wetlands all under the jurisdiction of
14 the Army Corps of Engineers ("Corps"). The application identified an additional 0.03
15 acres of impacts to waters subject only to state jurisdiction. The cover letter stated that
16 the Petitioner planed to mitigate for these impacts through its previous purchase of 1.26
17 mitigation credits from the North County Habitat Mitigation Bank. The purchase of those
18 credits would represent a greater than 3:1 ratio of mitigation to impacts to waters of the
19 United States and the State.

20 The Section 401 application also described the impacts of the Project on water
21 quality and beneficial uses in the watershed, and concluded that the Project ultimately
22 would not have significant impacts on water quality. In addition, the application included
23 an analysis of alternative designs for the Project that might avoid or minimize impacts to
24 these waters. This analysis concluded that it would not be technically or financially
25 feasible to redesign the Project to entirely avoid the impacts

26 Although the application was submitted on April 21, 2009, Petitioner did not
27 receive a response from the Regional Board until June 9, 2009. In a letter dated that day,
28 the Regional Board stated that the application had been deemed "complete for procedural

1 reasons.” However, the letter requested (1) additional information clarifying the impacts
2 to jurisdictional waters of the United States and jurisdictional waters of the State, (2) a
3 copy of “Exhibit 4” to the application (a map of the jurisdictional water) that had been
4 mentioned in but not provided with the application, and (3) contact information for other
5 involved regulatory agencies. (Exhibit D). In response to this letter, the Petitioner’s
6 consultants submitted the requested additional information. (Exhibit E).

7 It must be noted that the June 9, 2009, letter from the Regional Board did not state
8 that the application was incomplete because the proposed mitigation was not “in-kind”
9 mitigation or because all impacts of the project had not been avoided or minimized.
10 Those were the reasons cited in the July 8, 2009, denial letter. Thus, the Petitioner was
11 given no indication that staff might suddenly deny the application with prejudice and the
12 Petitioner was unable to schedule a meeting with Regional Board staff before the denial
13 was issued on July 8, 2009.

14 **B. The Denial Letter**

15 The July 8, 2009, denial letter generally claimed that the Petitioner had failed to
16 “demonstrate that water quality standards will be protected over the life of the project.”
17 The Regional Board then stated that the application was being denied for two specific
18 reasons.

19 The first reason stated was that the Petitioner “has not provided appropriate
20 mitigation for the permanent impacts” of the Project, even though the Regional Board’s
21 letter acknowledged that the Petitioner had purchased 1.26 mitigation credits from the
22 North County Habitat Land Bank, primarily for high-value, created wetlands. The
23 Regional Board refused to accept the purchase of these mitigation credits as
24 compensatory mitigation for the Project’s impacts, claiming that mitigation for the
25 impacts to ephemeral/intermittent drainages had to be “in-kind” mitigation involving the
26 “creation of at least 3,981-linear feet of ephemeral/intermittent streambed on site or
27 elsewhere in the Carlsbad watershed.” The letter did not cite any policy or regulation
28 supporting that claim, but merely stated in conclusory fashion that the “proposed out-of-

1 kind mitigation does not protect the chemical, biological, and physical integrity of the
2 site's first order, arid, ephemeral/intermittent streams." In fact, it appears the decision
3 disregarded past practice which allowed mitigation with out-of-kind higher water quality
4 function and value.

5 ~~Second, the letter stated that the denial also was issued because "the proposed~~
6 ~~project does not show avoidance or minimization of impacts to waters of the State and~~
7 ~~U.S."~~ The letter claimed that the proposal to mitigate impacts of the Project rather than to
8 avoid or minimize those impacts was contrary to the operating guidelines of a number of
9 agencies, including the Corps, Regional Boards, and the State Board. The letter provided
10 no citations to these alleged resource agency "operating guidelines" concerning mitigation
11 of impacts to ephemeral/intermittent drainages such as those present on the site, nor was
12 the Petitioner given the opportunity to meet with staff to discuss its on-site mitigation to
13 protect and enhance water quality through use of bio-swales and settling basins.

14 **C. Legal Analysis**

15 Under the rules of the State Board, a regional board can deny a water quality
16 certification with prejudice only if the activity for which the certification is sought "will
17 result in a discharge which will not comply with applicable water quality standards and
18 other appropriate requirements." 23 C.C.R. § 3837(b)(1). Although the Regional Board's
19 letter denying the Section 401 certification claimed that the Project would not comply
20 with applicable water quality standards or other "appropriate" requirements, the denial
21 letter provided no technical or legal evidence to support that claim. Rather, the Regional
22 Board merely claimed that denial of the certification was warranted because the Petitioner
23 (1) had not provided "in-kind" mitigation for the impacts of the Project, and (2) had failed
24 to avoid or minimize the impacts of the Project on jurisdictional waters. Critically, the
25 Regional Board did not support either of the reasons it cited for denying the certification
26 by citing any properly promulgated legal requirements.

27 Moreover, these issues were not raised in the Regional Board's June 9, 2009,
28 letter, its only formal response to the application. Simply raising those issues in the July

1 8, 2009, denial with prejudice was improper as an applicant can rely on the written
2 comments of a regional board and “assume that they represent all current objections.” *In*
3 *the Matter of the Petition of Carl and Carole Boyett/Boyett Petroleum* (Order WQO
4 2004-0006) at 5.

5
6 **1. The Regional Board’s Denial Did Not Provide a Legal Basis For the**
7 **Requirement That Compensatory Mitigation Had to be “In-Kind”**
8 **Mitigation.**

9 The Regional Board denied the certification because the proposed mitigation of the
10 Project’s impacts did not provide for “in-kind” mitigation through the creation or on-site
11 preservation of ephemeral/intermittent drainages. But although the denial letter described
12 a number of the benefits allegedly provided by such ephemeral/intermittent drainages in
13 general, the denial letter did not (1) provide any evidence that the specific drainages on
14 the Project site provided the claimed benefits, especially as the area around the Project
15 site is almost entirely developed, or (2) cite to any regulation stating that only “in-kind”
16 mitigation was appropriate to mitigate impacts to ephemeral/intermittent drainages.

17 A regional board abuses its discretion when it fails to proceed in the manner
18 required by law, issues a final order not supported by findings, or if it issues findings,
19 those findings are not supported by the weight of the evidence. C.C.P. § 1094.5(b).
20 In this case, the Regional Board first abused its discretion because it denied the Section
21 401 certification without providing any evidence to support its claim that only “in-kind”
22 mitigation was proper for the impacts of the Project. Without evidence that the specific
23 ephemeral/intermittent drainages on the Project site provided benefits that could only be
24 mitigated through “in-kind” mitigation, the Regional Board failed to proceed in the
25 manner required by law and did not support its findings with any evidence.

26 In addition, the Regional Board’s denial letter stated that these “in-kind” mitigation
27 requirements are applicable to any project where ephemeral/intermittent drainages are
28 impacted. Although State Board rules require that compensatory mitigation be identified
by an applicant seeking a water quality certification, the State Board has not issued any

1 rules stating what constitutes appropriate mitigation for impacts to various types of
2 waters. Consequently, the Regional Board's claim that "in-kind" mitigation is required is
3 an underground regulation that never has been properly promulgated nor was any notice
4 or due process provided to the Petitioner concerning this issue.

5 ~~State law is clear that an agency can "issue, utilize, enforce, or attempt to enforce~~
6 any guideline, criterion, bulletin, manual, instruction, order, standard of general
7 application, or other rule, which is a regulation" only if that "guideline, criterion, bulletin,
8 manual, instruction, order, standard of general application, or other rule has been adopted
9 as a regulation and filed with the Secretary of State." Government Code § 11340.5(a). A
10 requirement constitutes a "regulation" subject to this provision if the requirement is an
11 interpretation of a law or determines how a certain class of cases will be decided. *Capen*
12 *v. Shewry* (2007) 155 Cal.App.4th 378, 386; *Tidewater Marine Western v. Bradshaw*
13 (1996) 14 Cal.4th 557, 571.

14 In this case, the Regional Board's denial of the Section 401 certification
15 specifically stated that the compensatory mitigation acreage already purchased by the
16 Petitioner from the North County Habitat Land Bank was inappropriate because it was not
17 "in-kind" mitigation. The letter specifically claimed that the Regional Board requires in-
18 kind compensatory mitigation for ephemeral/intermittent drainages, but it never identified
19 a properly adopted rule for that proposition that would notify a prospective applicant of
20 that specific "in-kind" mitigation requirement. Consequently, the Petitioner had no notice
21 that it would be required to obtain "in-kind" mitigation for these ephemeral drainages, and
22 it was prejudiced by that lack of notice. Providing notice to the regulated community is
23 why the legislature has established specific statutory procedures for the adoption of
24 regulations.

25 Not only is the Regional Board's requirement that only "in-kind" mitigation is
26 proper for impacts to ephemeral/intermittent drainages an invalid and unenforceable
27 "underground" regulation, but it makes no environmental sense. Without any input from
28 environmental professionals, the Regional Board unilaterally concluded that recreating

1 short reaches of ephemeral drainages (at a 1:1 ratio) provides greater water quality
2 benefits than mitigating those impacts by creating more wetland acreage (at a 3:1 ratio) in
3 a habitat bank where a larger continuous area of habitat has been preserved.

4 For these reasons, the Regional Board's action denying the Section 401
5 certification with prejudice was improper. The State Board should direct the Regional
6 Board to reconsider its decision and issue the certification.

7
8 **2. The Petitioner Provided Sufficient Evidence Showing That it Would Be**
9 **Impracticable to Avoid or Further Minimize Impacts to Waters on the**
10 **Project Site.**

11 The Regional Board also abused its discretion by ignoring evidence provided by
12 the Petitioner that the Project could not be redesigned to entirely avoid or to further
13 minimize impacts to waters on the Project site. As described above, the Regional Board
14 improperly based its denial on the allegation that the Petitioner had failed to avoid or
15 minimize the impacts of the Project on jurisdictional waters.

16 First, the Petitioner provided evidence in Alternative One to the form certification
17 application (the "Avoidance Alternative") that redesigning the Project to totally avoid the
18 drainages would require (1) the construction of three new bridges costing approximately
19 \$4,145,060, and (2) the reduction of the planned housing from 64 to 54 units. The
20 analysis concluded that if the Project was redesigned in that manner, it no longer would
21 be economically feasible.

22 The Petitioner also provided evidence that two alternatives to minimize the
23 impacts of the Project also were impracticable. Alternative Two described an alternative
24 to avoid impacts to jurisdictional waters that would require the construction of one bridge
25 at a cost of \$1,009,010. That alternative also would require that the area to be developed
26 for commercial activities be reduced by approximately 70 percent. Although redesigning
27 the project in this manner would not have significantly reduced impacts to waters of the
28 United States and waters of the State, the cost of constructing the bridge, the loss of
income from the reduction in the commercial space, and the costs of redesigning the

1 Project and beginning the entitlement process with the City of Carlsbad again all made
2 this alternative economically infeasible.

3 The application also described an Alternative Three with a redesigned Project that
4 would avoid 0.18 acres of waters by reducing the number single-family dwellings on the
5 Project site by approximately 45 percent. As the analysis stated, the cost of reducing the
6 number of homes on the site and of obtaining necessary amendments to the Project
7 documents while avoiding this small area of waters of the United States also made the
8 alternative impracticable.

9 State Board regulations require that an application for a water quality certification
10 include a “description of any other steps that have been or will be taken to avoid,
11 minimize, or compensate for loss of or significant adverse impacts to beneficial uses of
12 waters of the state.” 23 C.C.R. § 3856(h)(6). The clear language of that rule requires that
13 an application discuss how a project will avoid, minimize or compensate for impacts to
14 beneficial uses of waters of the state. As shown above, the Petitioner provided the
15 required discussion of possible steps to avoid or minimize these impacts, concluded that
16 avoidance or minimization was not possible at the site, and properly proposed
17 compensatory mitigation as a feasible alternative.

18 The State Board’s rules do not specifically define the terms avoid, minimize, or
19 compensate. However, the rules of the Army Corps governing mitigation for impacts
20 under the Clean Water Act Section 404 program (for which the Section 401 certification
21 is required here) do state that “compensatory mitigation” means mitigation to offset
22 “unavoidable adverse impacts which remain after all appropriate and practicable
23 avoidance and minimization has been achieved.” 33 C.F.R. § 332.2. That language
24 indicates that compensatory mitigation for impacts to waters of the United States is proper
25 where avoidance and minimization of those impacts is not “practicable.” The common
26 definition of the word “practicable” is “feasible.” Thus, if minimization or avoidance of
27 impacts is not feasible, compensatory mitigation for the impacts of the project is
28 appropriate.

1 In this case, the Petitioner provided evidence to the Regional Board showing that
2 project designs which would avoid impacts to waters of the United States and waters of
3 the State would render the Project infeasible. Because the Petitioner provided evidence
4 that avoidance or minimization would not be practicable for this Project, the Regional
5 Board's denial of the Section 401 certification was an abuse of discretion. For that reason
6 as well, the Regional Board's denial of the Section 401 water quality certification was
7 improper.

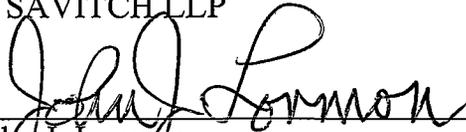
8 III. CONCLUSION

9 Less than 30 days after acknowledging receipt of the Petitioner's application for a
10 Section 401 water quality certification, the Regional Board denied that certification with
11 prejudice. Although the denial letter from the Regional Board claimed that the
12 Petitioner's Section 401 application had been comprehensively evaluated, the short time
13 period raises questions regarding the scope of that review.

14 The more likely reason that the Regional Board denied the certification with
15 prejudice was that it objected to (1) Petitioner's decision to pre-purchase mitigation
16 credits at a mitigation bank and (2) Petitioner's conclusion that it was not feasible to
17 redesign the Project to avoid or further minimize its impacts to waters of the United States
18 and waters of the State. But simply because the Regional Board does not approve of a
19 Project does not allow it to reject the Project without some legal basis. As shown above,
20 the Regional Board did not have the requisite legal basis to deny the Section 401
21 certification with prejudice, and the State Board should overturn that decision and direct
22 the Regional Board to issue the certification.

23
24 DATED: August 10, 2009

PROCOPIO CORY HARGREAVES
& SAVITCH LLP

25
26 By: 

John J. Lormon
Attorney for Petitioner

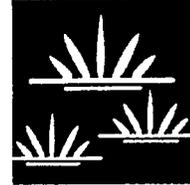
EXHIBIT A

EXHIBIT A

SCANNED

GLENN LUKOS ASSOCIATES

Regulatory Services



April 21, 2009

John H. Robertus, Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123

Subject: 401 Water Quality Certification Application for the La Costa Town Square
Project, Carlsbad, County of San Diego.

Dear Mr. Robertus:

On behalf of our client, La Costa Town Square LLC, attention Mr. Max Stewart, (La Costa LLC), Glenn Lukos Associates (GLA) is submitting the enclosed Section 401 Water Certification form and this cover letter associated with the approximately 83-Acre La Costa Town Square Project (Exhibit 1; Regional Map and Exhibit 2; Vicinity Map).

I. PROJECT APPLICANT/AGENT

APPLICANT

La Costa Town Square LLC
8799 Balboa, Suite 270
San Diego, CA 92123
Contact: Dietmar Schott
Phone: 858-541-4225
FAX: 858/268-0337

AGENT

Glenn Lukos Associates, Inc.
29 Orchard
Lake Forest, CA 92630
Contact: Darlene A. Shelley
Phone: 949-837-0404
FAX: 949-837-5834

II. PROJECT LOCATION

The La Costa Town Square Property (Project) is located at 33°04'56" North Latitude and 117°13'50" West Longitude within Section 6, Township 12 South, and Range 3 West in the City of Carlsbad, San Diego County, California. The Project is bounded by Rancho Santa Fe Road to the northwest, La Costa Road to the south, and a residential community to the east, and encompasses approximately 83 acres. The Project supports no blue-line drainages (as depicted on the U.S. Geological Survey (USGS) topographic map Rancho Sante Fe, California [dated 1968 and photorevised in 1983]).

29 Orchard
Telephone: (949) 837-0404

■ Lake Forest

■ California 92630-8300
Facsimile: (949) 837-5834

III. PROJECT DESCRIPTION

The proposed La Costa Town Square project involves the construction and operation of a mixed-use center that includes an approximately 284,400 square foot community shopping center, two office buildings totaling approximately 55,000 square feet, 64 single-family detached residential units, and a future multifamily residential site to be developed at a later date with approximately 128 condominium homes. The project site encompasses approximately 83.0 acres. The project contains 0.41 acre of waters of the United States of which 0.08 acre is jurisdictional wetlands; all of which will be filled. As part of this proposed project, the applicant has purchased 1.26 credits from the North County Habitat Mitigation Bank, which represents over a 3:1 ratio for impacts to waters of the U. S. [Exhibit 1 and 2 Regional and Vicinity Map.]

IV. EXISTING CONDITIONS

The project site elevation ranges from the low of approximately 260 feet above mean sea level (AMSL) in the canyon north of the La Costa Avenue entrance to a high of approximately 400 feet AMSL on the northern portion of the site. The site slopes generally to the south. Currently, the project site consists of vacant, undeveloped land. The northwest portion of the project site, including the proposed multifamily residential parcels, was previously graded as a part of the realignment of Rancho Santa Fe Road. The project site is surrounded by existing or planned single-family residential communities on all sides, and a small community-serving commercial parcel at the southwest corner of the intersection of La Costa Avenue and Rancho Santa Fe Road. Smaller, local neighborhood parks are scattered throughout the neighborhoods surrounding the site with larger recreation parcels near a secondary school approximately 0.5 miles south of the site. A steep hillside begins approximate 0.3 miles northeast of the project site, separated from the project site by a small residential community, providing a large backdrop of natural open space rising to over 1,000 feet AMSL.

V. IMPACTS TO CORPS JURISDICTION

According to the proposed Project development footprint, the Project will result in the permanent loss of 0.41 acre of potential Corps non-Relatively Permanent Waters (non-RPWs), of which 0.06 acre consists of jurisdictional wetlands. This includes 3,037 linear feet of streambed. Exhibit 4 illustrates impacts to Corps jurisdiction.

Potential Corps Non-RPW Impacts

Drainage Name	Potential Corps Non-RPWs (Acres)	Potential Corps Waters Exhibiting Wetland Characteristics (Acres)	Total Potential Corps Non-RPW Jurisdiction (Acres)	Total Potential Corps Non-RPWs Impacted	Total Linear Feet Of Potential Corps Non-RPWs (Feet)	Total Linear Feet of Potential Corps Non-RPW Impacted (Feet)
Drainage A	0.01	0.00	0.01	0.01	167	167
Drainage B	0.04	0.02	0.06	0.06	877	877
Drainage C	0.14	0.04	0.18	0.18	1,742	1,742
Drainage D	0.01	0.00	0.01	0.01	251	251
Man-Made Water Quality Basin	0.15	0.00	0.15	0.15	N/A	N/A
TOTAL	0.35	0.06	0.41	0.41	3,037	3,037

CDFG Impacts

Drainage Names	CDFG Unvegetated Streambed (Acres)	CDFG Vegetated Riparian Habitat (Acres)	Total CDFG Jurisdiction (Acres)	Total CDFG Impacts (Acres)	Linear Feet of Drainage (Feet)	Linear Feet of Impacts (Feet)
Drainage A	0.03	0.00	0.03	0.03	1,111	1,111
Drainage B	0.04	0.02	0.06	0.06	877	877
Drainage C	0.15	0.19	0.34	0.34	1,742	1,742
Drainage D	0.01	0.00	0.01	0.01	251	251
TOTAL	0.23	0.21	0.44	0.44	3,981	3,981

VI. EFFECTS OF PROPOSED PROJECT ON WATER QUALITY AND BENEFICIAL USES

In compliance with the National Pollutant Discharge Elimination System (NPDES), a Storm Water Pollution Prevention Plan (SWPPP) has been developed to identify specific pollution prevention measures that will eliminate or control potential point and non-point pollution sources on the site during, and following, the Project's construction phase. The SWPPP includes the following Best Management Practices (BMPs), where applicable:

- diversion of runoff around disturbed soils the use silt fencing, sandbags, construction of temporary drains and swales, construction of V-ditches;
- protection of exposed soils and stockpiles from erosive agents (i.e., wind and rain) through the constructing of stockpiles with compacted fill and tracked slopes, and the use of soil binder materials;
- minimization of truck traffic through disturbed areas and regular sweeping of access areas;
- rapid clean up of fuel and chemical spills;
- conservative use and proper disposal of hazardous wastes; and
- conservative use of irrigation water, fertilizers, and pesticides.

Additional BMPs will be followed once construction has been completed. These include, but are not limited to:

- community educational program include but not limited to, management of fertilizers, herbicides and other harmful chemicals, benefits of proper landscaping practices and impacts of over irrigation;
- Storm drain stenciling
- Landscaping
- Home Owners Association has developed, implemented, and funds a litter control program;
- proper recycling and hazardous waste disposal;
- parking lot and street cleaning;
- permanent storm drains, outlet structures, inlet structures, riprap, and terrace drains.

The San Diego Regional Water Quality Control Board's Basin Plan lists the following present or potential intermittent or potential beneficial uses for Primary Hydrologic Unit 904.51 (Encinitas Creek within the San Marcos Creek Watershed Sub Area of the Carlsbad Hydrologic Unit: (1) Agricultural Supply; (2) Contact Water Recreation, (3) Non-Contact Water Recreation, (4) Warm Freshwater Habitat , and (5) Wildlife Habitat.

1. Agricultural Supply: Agricultural supply waters are used for farming, horticulture or ranching. These uses may include, but are not limited to, irrigation, stock watering, and support off vegetation for range grazing. The Project area does not supply water for agricultural purposes. There will be no adverse impact on agricultural supply associated with the project.
2. Contact Water Recreation: Includes uses of water for recreational activities involving body contact with water, where ingestion of water reasonably possible. These include, but are not limited to, swimming, wading, water-skiing, skin and SCUBA diving, surfing, white water activities, fishing, or use of natural hot springs. The Project area does not supply suitable water resources for contact water recreational activities. Therefore, there will be no adverse impact to this beneficial use in association with Project construction.
3. Non-Contact Water Recreation: Includes the uses of water for recreational activities involving proximity to water, but not normally involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, picnicking, sunbathing, hiking, beachcombing, camping, boating, tidepool and marine life study, hunting, sightseeing, or aesthetic enjoyment in conjunction with the above activities. The site is not utilized for any recreational purposes.
4. Warm Freshwater Habitat: Includes uses of water that support warm water ecosystems including, but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish or wildlife, including invertebrates. The drainages are all ephemeral.
5. Wildlife Habitat: Includes uses of water that support terrestrial ecosystems including, but not limited to, preservation and enhancement of terrestrial habitats, vegetation, wildlife (e.g., mammals, birds, reptiles, amphibians, invertebrates), or wildlife water and food sources. The site does not provide water for wildlife, but does contain vegetated open space for some species. See Endangered Species Section VII below.

Through implementation of the SWPPP and monitoring program, Project construction will not result in significant impacts to water quality and will comply with the provisions set forth in the Regional Board's Water Quality Basin Plan. A copy of the Project Drainage Report and Water Quality Management Plan are attached as Appendix H of the Attached Draft Environmental Report [Appendix A] (diskette).

VII. THREATENED OR ENDANGERED SPECIES

The proposed project is included in the Habitat Conservation Plan/On-going Multi-Species Plan (HCP/OMSP) created by the City of Carlsbad, Fieldstone, La Costa Associates, California Department of Fish and Game and the U. S. Fish and Wildlife Service. The plan provides for the conservation of sensitive wildlife and habitat in the context of a proposed large-scale development plan. The HCP/OMSP identifies 66 species of concern and provides an impact analysis of the proposed development in regard to these species. Additionally, the plan provides for the dedication of open space both onsite and offsite as mitigation for impacts to the species of concern and affiliated habitat.

The entire project site is designed for development resulting in 100 percent impact to biological resources. Impacts to the covered species, indicated below, and their habitats are permitted by the HCP./OMSP

The HCP.OMSPO is consistent with the federal and state laws and guidelines including:

- The Federal Endangered Species Act;
- The California ESA and California Natural Communities Conservation Planning Act;
- The Natural Communities Conservation Plan; and
- The federal special 4(d) rule for the coastal California gnatcatcher.

The proposed project is consistent with the information requirements and approval criteria that pertain to the HCP/OMSP:

- An HCP prepared in accordance with Section 10(a) of the federal ESA;
- Supporting documentation for a management agreement under Section 2081 of the California ESA; and
- An OMSP as defined in California's NCCP process Guidelines

Vegetation

Seven sensitive plant species have been observed on the project site: Thrad-leaved brodiaea, Orcutt's brodiaea, California adolphia, southwestern spiny rush, western dicondra, Palmer's grappling hook, and small-flowered microseris. All of these species are covered by the HCP/OMSP

Wildlife

The California gnatcatcher, a federally threatened species, has been observed onsite. Four sensitive bird species have also been observed on the project site: California horned lark, yellow-breasted chat, white-tailed kite, and southern California rufous-crowned sparrow. All of these species are covered by the HCP/OMSP. There are no wildlife movement corridors on the project site.

John H. Robertus
California Regional Water Quality Control Board, San Diego Region
April 21, 2009
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VIII. PROPOSED MITIGATION

As part of this proposed project, the applicant has purchased 1.26 credits from the North County Habitat Mitigation Bank, which represents over a 3:1 ratio for impacts to waters of the U. S.

XI. FEDERAL AUTHORIZATION FOR IMPACTS

The applicant has submitted an application package to the U. S. Army Corps of Engineers for an Individual Clean Water Act Section 404 permit. A copy of the application and cover letter is attached as Appendix B [Second diskette].

X STATE APPLICATION

The Applicant has submitted a California Fish and Game Code 1602 Streambed Alteration Agreement Application concurrent with the 401 Application, to the California Department of Fish and Game for impacts to state jurisdictional waters. A copy of the application is enclosed as Appendix C. [Second diskette]

XII. STORM WATER PERMIT STATUS

A Copy of the Storm Water Pollution Prevention Plan (SWPPP) is included with the application package as Appendix H of the Draft EIR (diskette) [Appendix A] however the Applicant has not yet applied for the storm water permit.

XIII. CALIFORNIA ENVIRONMENTAL QUALITY ACT COMPLIANCE

The City prepared a Draft Environmental Impact Report (DEIR) dated March 19, 2009 [Appendix A First Diskette]. The applicant expects to have a public hearing before the City in June 2009. The final EIR and Notice of Determination will be forwarded to RWQCB once completed.

XIV. ACTIVITY WITHIN THE WATERSHED

The applicant has not had any projects within the watershed for the last five years and other than the proposed project has no future projects planned for the next five years.

Enclosed please find:

- (1) A check for \$640.00;

John H. Robertus
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Page 8

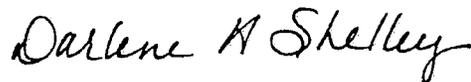
- (2) Water Quality 401 Application form;
- (3) Draft Environmental Impact Statement - Appendix A [first diskette]
- (4) Clean Water Act Section 404 Application – Appendix B [second diskette]
- (5) Streambed Alteration Agreement Application Appendix C [second diskette]

We believe the attached State Application Form and the enclosed documents represent a complete application for a Section 401 Water Quality Certification.

If you have any questions regarding this request for Section 401 Water Quality Certification please contact me at (949) 837-0404 extension 24, or e-mail dshelley@wetlandpermitting.com.

Sincerely,

GLENN LUKOS ASSOCIATES



Darlene A. Shelley
Senior Regulatory Specialist

s:/0620-401cov.doc

(F101)		CHECK DATE: 04/16/09		CHECK NO.: 167488		
Invoice No.	Inv. Date	Amount	Discount	Description	Vchr	Net Amount
	04/16/09	640.00	0.00	La Costa Permit (Water Board)	53619	640.00
		640.00	Prop 610	La Costa Town Square		
TOTAL		640.00	0.00			640.00

(F101)

Wells Fargo (F101) 11-24
1210

SPECTRUM PROPERTY MANAGEMENT CO., INC.
8799 Balboa Avenue, Suite 260
San Diego, CA 92123

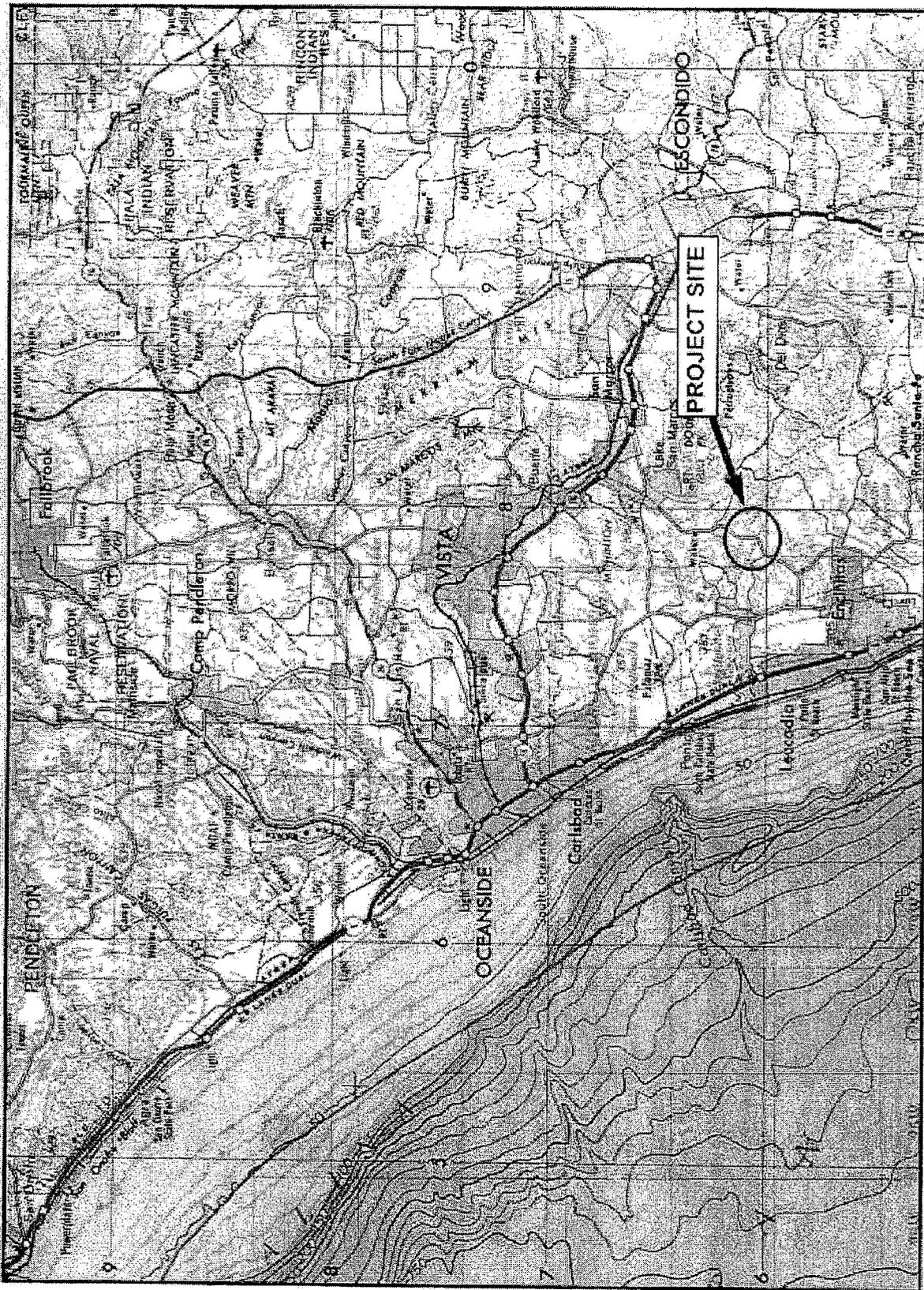
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04/16/09	167488	\$*****640.00*

SIX HUNDRED FORTY AND NO/100 DOLLARS *****

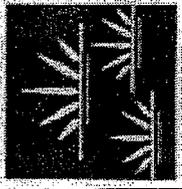
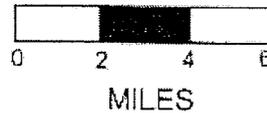
PAY TO THE ORDER OF SWRCB Accounting Office
P.O. Box 1888
Sacramento, CA 95812

Leslie B. Barger

⑈ 167488 ⑈ ⑆ 121000248 ⑆ 4020007852 ⑈



Adapted from USGS San Luis Rey quadrangle

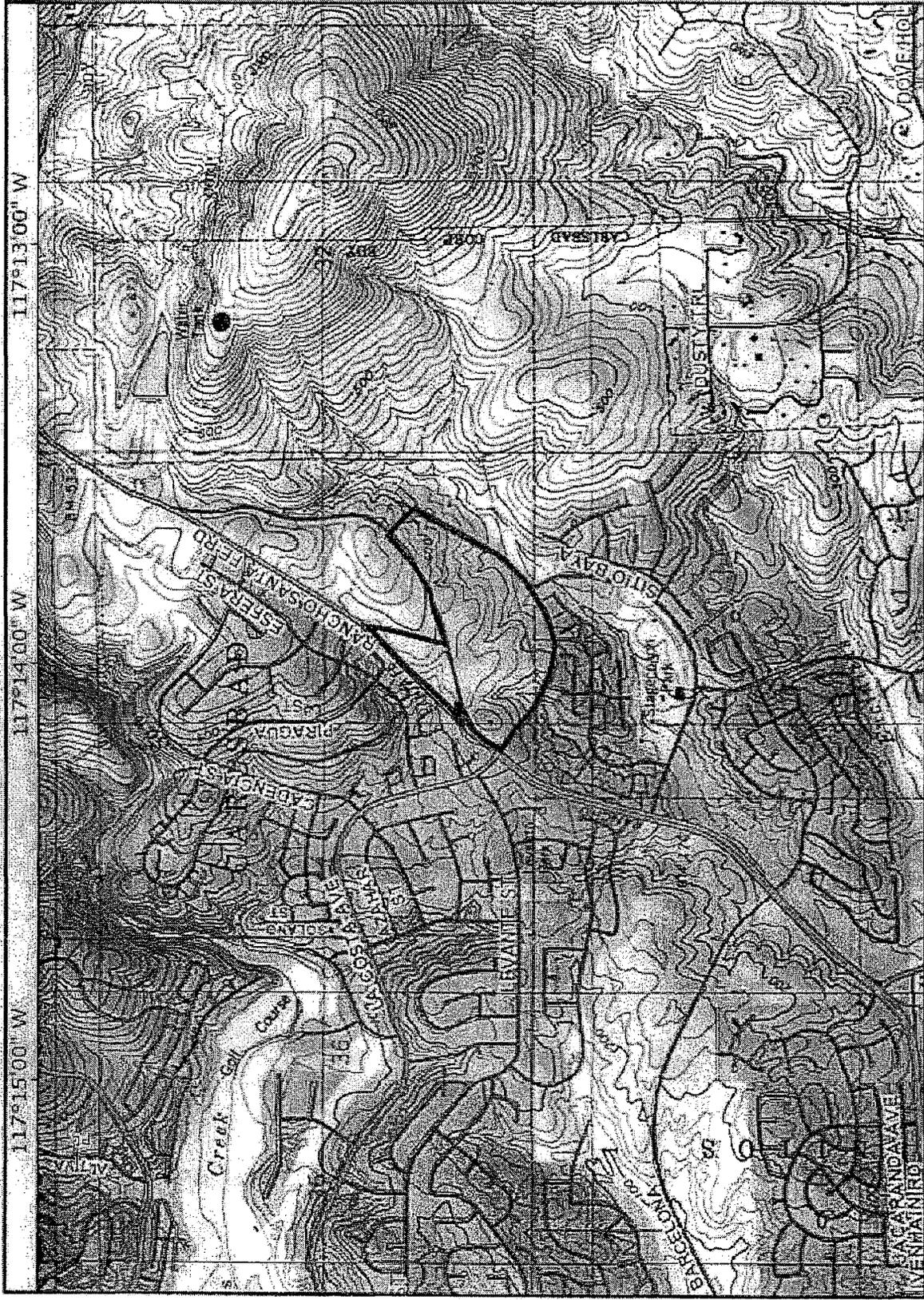


GLENN LUKOS ASSOCIATES

EXHIBIT 1

LA COSTA TOWN CENTER

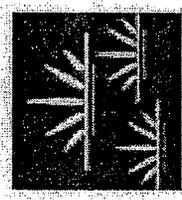
Regional Map



Adapted from USGS San Luis Rey quadrangle



LA COSTA TOWN CENTER
Vicinity Map



GLENN LUKOS ASSOCIATES

EXHIBIT 2

USE AND PARKING SUMMARY:

ITEM	DESCRIPTION	AREA (SF)	TYPE
1	RESTAURANT/RETAIL SHOPS	4,000 SF	1,433 SPACES
2	RESTAURANT	4,000 SF	1,433 SPACES
3	RESTAURANT	4,000 SF	1,433 SPACES
4	RESTAURANTS/RETAIL SHOPS	4,000 SF	1,433 SPACES
5	PAD	4,000 SF	1,433 SPACES
6	PAD	4,000 SF	1,433 SPACES
7	CONVENIENCE STORE	4,000 SF	1,433 SPACES
8	RESTAURANTS/RETAIL SHOPS	4,000 SF	1,433 SPACES
9	RESTAURANTS/RETAIL SHOPS	4,000 SF	1,433 SPACES
10	RESTAURANTS/RETAIL SHOPS	4,000 SF	1,433 SPACES
11	RESTAURANTS/RETAIL SHOPS	4,000 SF	1,433 SPACES
12	PAD	4,000 SF	1,433 SPACES
13	CLUB/STORE	4,000 SF	1,433 SPACES
14	CLUB/STORE	4,000 SF	1,433 SPACES
15	MAJOR WITH DRIVE THROUGH	4,000 SF	1,433 SPACES
16	RETAIL SHOPS	4,000 SF	1,433 SPACES
17	RETAIL SHOPS	4,000 SF	1,433 SPACES
18	RETAIL SHOPS	4,000 SF	1,433 SPACES
19	RETAIL SHOPS	4,000 SF	1,433 SPACES
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21	MINOR	4,000 SF	1,433 SPACES
22	PAD	4,000 SF	1,433 SPACES
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99	CLOCK TOWER/RETAIL SHOP	4,000 SF	1,433 SPACES
100	CLOCK TOWER/RETAIL SHOP	4,000 SF	1,433 SPACES

TOTAL BUILDING AREA: 361,478 SF
 TOTAL PARKING REQUIRED BY CITY: 1,433 SPACES
 TOTAL PARKING PROVIDED: 1,433 SPACES
 10 OFFICE BUILDING: 40,000 SF
 20 OFFICE BUILDING: 40,000 SF
 TOTAL BUILDING AREA: 100,000 SF
 TOTAL PARKING REQUIRED BY CITY: 228 SPACES

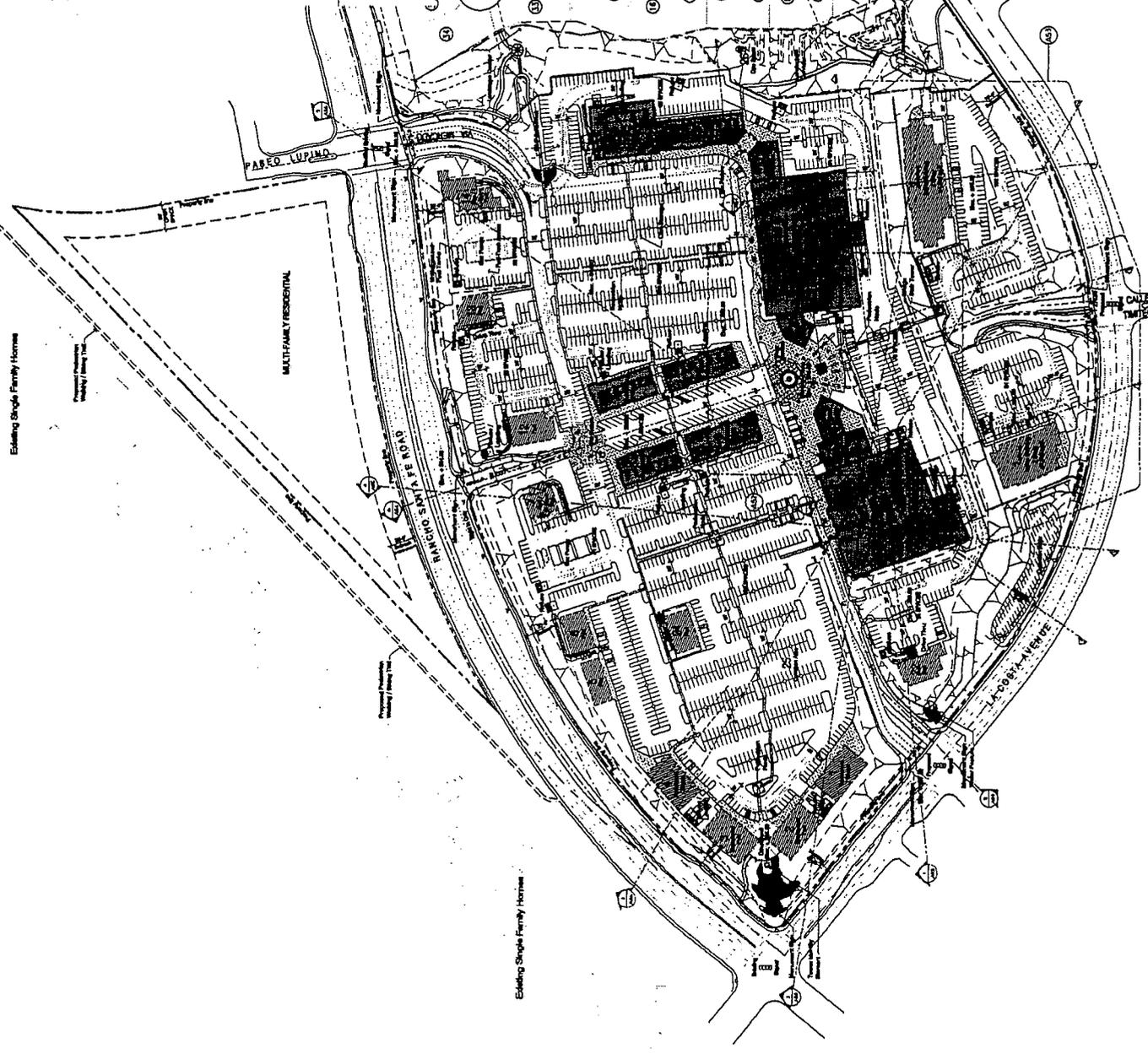
LEGEND

RETAIL SHOPS IN THIS AREA SHALL BE CONSTRUCTED BY PHASE ONLY
 REPAIRS IN THIS APPLICATION TO BE CONTRACTED BY SEPARATE PHASES

ADDITIONAL PARKING CALCULATED AND SHOWN TO BE NECESSARY TO ACCOMMODATE THE PROPOSED DEVELOPMENT TO BE LIMITED TO THE EQUIPMENT IS DESCRIBED BY THE FOLLOWING SUMMARY OF TYPES:

SCALE: 1"=40'-0"

SITE PLAN



Existing Single Family Homes

Existing Single Family Homes

MULTI-FAMILY RESIDENTIAL

SINGLE-FAMILY RESIDENTIAL



California Regional Water Quality Control Board

San Diego Region



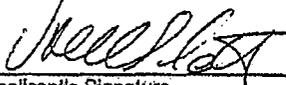
Over 50 Years Serving San Diego, Orange, and Riverside Counties
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 (858) 467-2952 • Fax (858) 571-6972
<http://www.waterboards.ca.gov/sandiego>

APPLICATION FOR CLEAN WATER ACT §401 WATER QUALITY CERTIFICATION

All applicants must provide a complete and detailed response to all sections of the application or the application will be deemed incomplete. Responses should not refer reader to an attachment. Any responses by reference must indicate the specific document(s) and page number(s) (include copies of the entire document). Indicate by Not Applicable (NA) all sections that do not apply, along with an explanation of why the project is exempt from the section.

1. APPLICANT/AGENT INFORMATION	
Applicant's Name: La Costa Town Square LLC Dietmar Schott	Authorized Agent's Name and Title: Glenn Lukos Associates Darlene A. Shelley
Applicant's Address: 8799 Balboa, Suite 270 San Diego, California 92123	Agent's Address: 29 Orchard Lake Forest, CA 92630
Applicant's Phone: 858/541-4225	Agent's Phone: 949/837-0404
Applicant's Phone: Fax: 858/268-0337	Agent's Fax: 949/837-5834
Applicant's Email: dschott@aspen-prop.com	Agent's Email: DShelley@wetlandpermitting.com

STATEMENT OF AUTHORIZATION	
I hereby authorize <u>Glenn Lukos Assoc/D.A. Shelley</u> to act in my behalf as my agent in the processing of this application, and to furnish upon request, supplemental information in support of this permit application.	
	<u>4/21/09</u>
Applicant's Signature (This <u>must</u> be signed by the applicant, <u>not</u> the authorized agent.)	Date

2. PROJECT/ACTIVITY INFORMATION
PROJECT NAME OR TITLE La Costa Town Square