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TO: Mayor Pendergrass, Board Members, General Manager

FROM: David C. Laredo, General Counsel

RE: Comments on the Sand City Entitlement Concept Ordinance

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This memo provides comments on the draft concept ordinance that would establish a Water Entitlement for Sand City in connection with the City's desalination project. Although my office has reviewed and caused revision to the concept draft originally proposed by the City Attorney for the City of Sand City, it is to be emphasized that the draft ordinance reflects substantive policy choices as presented by the City of Sand City.

This memo identifies policy considerations not addressed in the concept draft ordinance that require Board consideration, deliberation, and direction. Many of the policy issues presented in the context of this draft ordinance are similar to those previously addressed in Ordinance No. 109 that enabled expansion of the CAWD/PBCSD reclamation project. It is noted that the concept draft ordinance also is proposed to amend District rules dealing with Water Use Permits and make certain definition changes.

Although this memo may be read without reference to any other document, it should be noted that it has been drafted as a companion to the text of the draft concept ordinance. The various sections of this memo are referenced by footnote at the relevant passage in that draft ordinance.

**I. Section One: Findings**

A. Right to Brackish Water

With reference to Finding 4 in the draft ordinance, it should be noted that Sand City's right to produce brackish water is not unlimited. The Seaside Basin adjudication judgment states, "Sand City shall have the right to Produce Brackish Water from the brackish Groundwater aquifer portion of the Coastal Subarea of the Seaside Basin for the purpose of operating its proposed desalination plant, said Production being limited to the Aromas Sands Formation, so long as such Production does not cause a Material Injury."<sup>1</sup>

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<sup>1</sup> *California American Water vs. City of Seaside*, Case No. M66343, Order of Judge Randall dated February 9, 2007  
at 22: 3-15.

This limitation may be significant. A finding of Material Injury could impair the function and productivity of the Sand City Desalination Facility. The concept draft ordinance does not address this issue.

B. The Project May Not Stay Municipally Owned or Operational

Finding 6 recites, "The Project includes the construction of a municipally owned desalination facility in Sand City." While this is an accurate statement initially, there are no controls anywhere in the ordinance to maintain the facility in municipal ownership or to keep it operational. In fact, the City's Application states the Cal-Am System supplies emergency water in case of system failure (Application Answer to Question 12, page 2).

Ordinance 109 imposed a continuing obligation on that Project sponsor to keep the facility operational and defined obligations if an emergency were to exist. The concept draft ordinance does not include parallel provisions. Without a reciprocal obligation, Sand City would receive a guaranteed Water Entitlement to 206 acre-feet per year (AFY) to 2082 but not be required to maintain the facility. The draft ordinance does not include a description of the project life expectancy or its actual cost.

C. Percent of Entitlement for Project Sponsor

Finding 10 recites that total production capacity for the project is 300 AFA, and from this quantity Sand City expects to receive 206 acre-feet (AF) as its Water Entitlement. The entitlement is thus 68% of the entire production capacity, a higher percentage than was used to set the Pebble Beach entitlement. The CAWD/PBCSD facility produced 800 AF of recycled water to reduce current Potable water demand. The Water Entitlement received by the CAWD/PBCSD fiscal sponsors was 380 AF of Potable water. For that project, the District retained control of the remaining 420 AF for public benefit.

D. Future Sand City Allocations are Unaffected

Finding 11 states the Water Entitlement is separate and distinct from the City's Allocation. This finding also states the Water Entitlement "won't affect any future Allocation to Sand City." The Board should confirm that the entitlement shall not affect the City's Allocation.

E. Sand City's Recovery of Capital Costs

Finding 12 states that Sand City can "separately sell and convey portions of the Water Entitlement" for use on the Sand City Sites, through which Sand City will attempt to recover its capital costs for the Sand City Desalination Facility." The District has not received an accounting of capital costs the City needs to recover. The Board may wish to have information on the following questions: 1) Is the City issuing indebtedness to finance the Project and, if so, what are projected costs; 2) What revenue stream must be generated to pay for the Project, both capital and operating and maintenance costs; 3) What contributions are proposed to be made by CAW and how shall this affect its current customers; 4) Does the proposed CAW lease require a higher contribution from CAW customers as compared to Sand City Benefited Properties.

F. Location of Desalinated Water Use

It should be noted that Sand City represented to the State Water Resources Control Board (SWRCB) that the 300 AFY purchased by CAW "will then reduce pumping from the Carmel River by a like amount" at least temporarily. Finding 18 states diversions will be reduced from the Carmel River and the Seaside Groundwater Basin to reduce "CAW's current reliance on its existing sources of water supply." It continues with, "The Project will provide an immediate benefit to the environment by allowing a 300 acre-foot per Water Year reduction of demand on existing sources of water supply for the CAW System at the time the Project becomes operational." The extent to which project water shall address Seaside Basin overdraft or Carmel River extractions should be clarified.

G. Accounting for 94 AF

Finding 18 states the Project provides "permanent reduction of 94 acre-feet of water which is equal to the amount of water supplied to the Sand City Sites by the CAW System during the most recent completed Water Year." There does not appear to be any accounting for the "94 acre-feet of water" from a system perspective. It is unclear how the water currently used by the City is proposed to be "permanently reduced."

**II. Section Two: Purpose**

A. Purpose

From the District's perspective, a key reason to support the Sand City Desalination Facility is that the project shall cause a temporary increase CAW's water supply and allow Carmel River and Seaside Basin extractions to be reduced.

C. Sale of Water Entitlement for Valuable Consideration

The concept ordinance allows Sand City to convey its entitlement "for valuable consideration" without limitation. The original Pebble Beach agreement afforded each Fiscal Sponsor a specific Water Entitlement in return for accepting the obligation to underwrite that project. The second Pebble Beach agreement authorized the Pebble Beach Company to sell a portion of its Water Entitlement to pay for costs to expand the project. Limits were placed on the quantity of entitlement that could be sold and the time period during which the entitlement could be sold. Capital costs associated with that project were known. This ordinance does not include those parameters or limit the sales price.

It is suggested that the Board may wish to determine the cost of the desalinated water made available to CAW as compared to existing sources. For the CAWD/PBCSD project, project costs that exceed CAW's cost of Potable water are paid by the project sponsor.

**III. Section Three: Creation of the Water Entitlement (Add Rule 23.6)**

The concept ordinance establishes a 75-year life for the Sand City Water Entitlement (until December 31, 2082). This does not appear to be consistent with representations by CAW letter

to Victoria A. Whitney, SWRCB, dated December 12, 2005 that characterizes the project. Cal-Am's letter indicated water created by the desalination facility "will be made available for use in the Sand City Redevelopment Area only over the remaining life of the Redevelopment Plan (approximately 25 years)." As drafted, the entitlement is to last for 75 years but be used for development expectations within 25 years. This apparent inconsistency should be reconciled in the draft ordinance

Section A provides that 300 AFA of potable water is to go to California American Water "for so long as the Sand City Water Entitlement continues". This period is defined as extending to December 31, 2082. In contrast, the CAWD/PBCSD reclamation project Water Entitlement requires the fiscal sponsor to pay all capital costs, operating deficiencies, differential costs and maintain other financial guarantees for the life of that project. The concept draft does not place a similar obligation upon Sand City.

### **Conclusion**

The Board should provide policy direction to resolve the substantive issues identified above in order to set this matter for enactment.

David C. Laredo  
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