



Del Monte Dunes, Ltd.

Government is instituted to protect property of every sort . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

— James Madison, Property (1792)

Introduction

At 10:00 a.m. on Thursday, August 29, 1986, Bill Conners, Assistant City Attorney for the City of Monterey, sat in his office reviewing a complaint just served on the City. The Del Monte Dunes, Ltd. development company ("Del Monte") had filed suit in Federal district court, alleging that the City's denial of Del Monte's Tentative Subdivision Map on June 3, 1986 constituted a taking in violation of the United States Constitution.

Bill knew that since the early 1980's, a prior developer, and then Del Monte, had been seeking to build condominiums on the property, which was zoned for residential use. Two years ago the City Council had granted Del Monte a Conditional Use Permit for a 190-unit development, subject to 15 conditions. Based on findings that some of these conditions had not been met, the City Council had denied Del Monte's revised Tentative Map. This was the fifth development proposal for the property the City had denied.

Bill swiveled around in his office chair and opened the bottom drawer of his corner filing cabinet. He wanted to review the record and the current law on regulatory takings. How strong was Del Monte's claim? What were the City's best defenses?

Mary Decker prepared this case study, under the editorial guidance of Meg Caldwell, Lecturer of Law, Director of Environmental and Natural Resources Law and Policy Program, Stanford Law School, as a basis for classroom discussion rather than to illustrate either effective or ineffective handling of an environmental matter. Some or all of the characters or events may have been fictionalized for pedagogical purposes. Copyright © 1998 by the Board of Trustees of the Leland Stanford Jr. University. To request permission to use or reproduce case materials, write to Environmental and Natural Resources Law and Policy Program, Stanford Law School, 559 Nathan Abbott Way, Stanford, CA 94305 or visit www.stanford.edu/group/law/library/casestudies/lawschool.shtml.

Bill Connors, Assistant City Attorney

Bill Connors had been Assistant City Attorney for the City of Monterey for over 12 years. He enjoyed the varied nature of the legal work he did in the two-attorney office. He dealt with legal issues ranging from negotiation of City contracts to advising on First Amendment issues. And in Monterey, a small coastal city that depended heavily on tourism, environmental and land use issues were regular concerns. Bill liked advising City managers, City Council Members, Planning Commission members and agency staff on municipal legal issues. The City Council selected his boss, the City Attorney.¹

As Bill remembered, Del Monte's development project presented three significant problems:

- site access,
- habitat preservation and restoration, and
- grading and sand relocation.

While it was true that in the past, both State and local governmental agencies, including the City, had been interested in acquiring the property for parkland, no plan for acquiring the property had ever been developed. In the last couple years, public opposition to development of the parcel grew, led by residents in the neighboring apartment complex. Bill expected that the site would be developed for residential use, however, once Del Monte satisfactorily addressed the remaining development issues. Bill also understood that the proposed 190-unit development, though dramatically smaller than the 344 units originally proposed, still "pencilled out" for the developer — Del Monte expected to earn a \$1,262,000 profit on the proposed 190-unit development.

The Complaint Allegations

Bill was a little surprised that Del Monte had chosen to file a takings claim now. He knew that the potential for a takings claim existed in virtually all such development projects, but he had expected Del Monte to submit a revised proposal after the City Council's decision on June 3rd. It was clear under existing law that normal administrative delays did not constitute a taking.

Del Monte's complaint alleged that the City's actions had deprived the property:

¹ The Monterey City Council consists of four members that serve staggered, four-year terms. The Mayor serves as the fifth member of the City Council. The City Council appoints the City Attorney and the seven member City Planning Commission. The Monterey city government is organized as a municipal corporation, making the City Council analogous to a Board of Directors and the City's executive managers analogous to corporate officers.

of substantially all of its value, rendering it unmarketable, and forbidding substantially all practical, beneficial or economic use of the Property, and, the creation of a benefit in the public at the cost and expense of the Plaintiffs, causing a de facto taking, without payment of just compensation, or any compensation whatsoever, all in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

Del Monte's complaint further alleged that:

51. The City Council's findings in Resolution No. 86-96 which demand that further, although unspecified, mitigation measures are needed would force the Plaintiffs to choose between the approval of their Tentative Map and their right under the Fifth Amendment to receive just compensation for the taking of their property.

52. Plaintiffs have now secured at least five final denials from the City, including a final denial from Defendant of the minimum number of units necessary to achieve a viable economic use of the Property.

53. Plaintiffs have been finally advised that they may not proceed with this development or, indeed, any reasonable use and development of their Property, and that any attempts to secure such through further formal application would be totally impractical, futile and foredoomed to failure. Based upon this advice, Plaintiffs realized that any further efforts toward development of the Property would be totally impractical and futile, and also that attempts to obtain relief within the internal administrative structures of Defendant would also be futile. The result of any such efforts would be a substantial and unnecessary further expenditure of time and money of Plaintiffs, and of public time and money in dealing with such attempts, when the result thereof is clearly predetermined.

As to damages, Paragraph 62 of Del Monte's complaint asked for an award of damages for a temporary taking "commencing on the date the acts of Defendant herein described, considered in the aggregate, first effected the temporary taking, and ending on the date such temporary taking terminated through the awarding of the relief sought" The complaint alleged such damages should include, at a minimum, "just compensation for loss of property interests," holding costs, ad valorem taxes, planning costs, and market rate interest. See attached Exhibit A for a copy of Del Monte's Complaint.

After reviewing the complaint, Bill pulled out a thick file from his filing cabinet and sat down to work. While he had attended most City Planning Department staff meetings, Planning Commission hearings, and City Council meetings regarding the property since 1981,

when the prior owner, Ponderosa, first submitted a development proposal to the City, Bill wanted to have all the facts fresh in his mind.

The Del Monte Dunes Site

City employees familiar with the 37.6 acre coastal property often refer to it as "the Ponderosa," after the previous developer. Figs. 1 and 2 below show the site location and site terrain. The property consists of a large sandy bowl surrounded on three sides by tall sand dunes. The eastern dunes are tallest, extending about 200 feet above the bowl. The fourth side of the bowl opens directly onto the beach facing Monterey Bay. An apartment complex on Surf Way borders the site to the south. Built in 1967, this housing development pre-dates

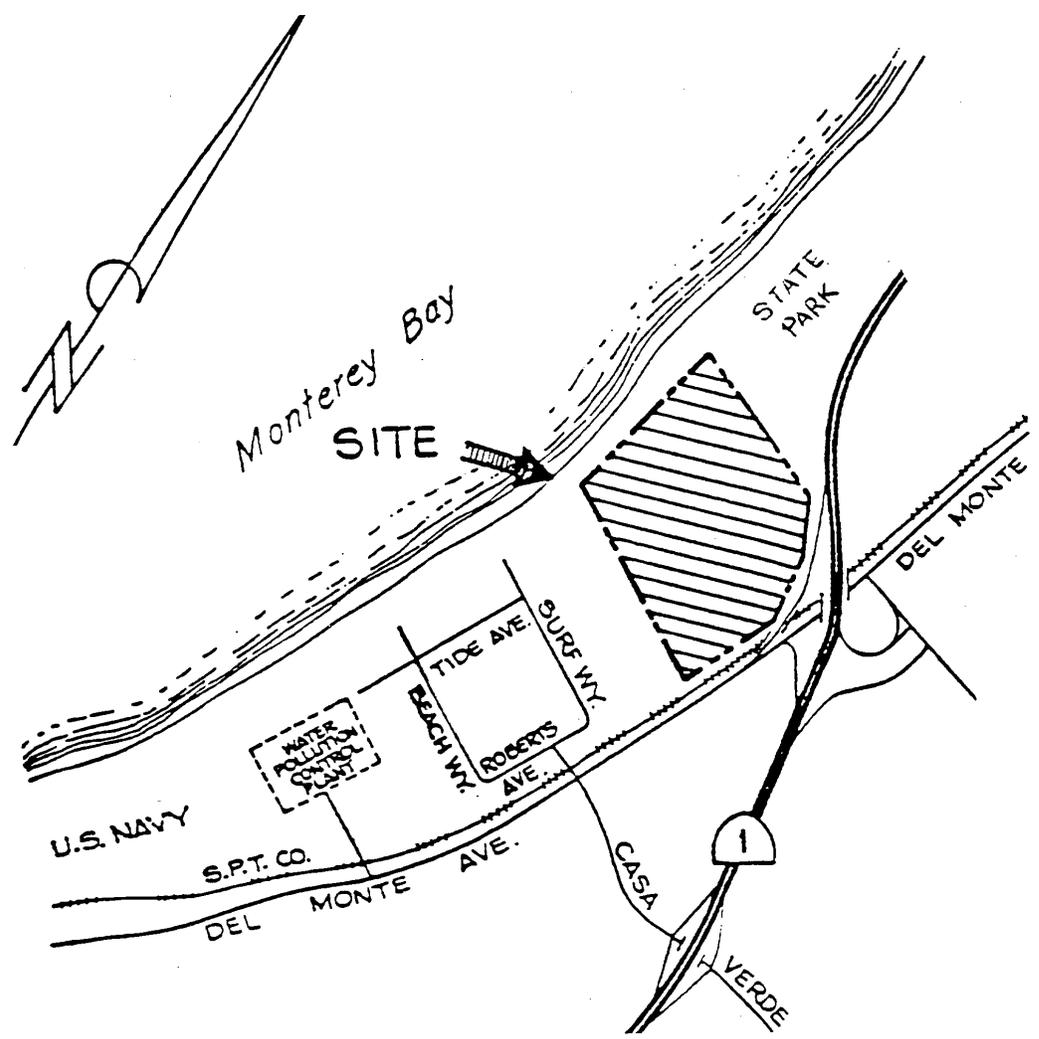


Figure 1. Site Location Map

California's 1972 Coastal Conservation Initiative and the 1976 California Coastal Act. A significant portion of the Del Monte site falls within the 100-year coastal erosion zone,² i.e., the portion of the coast scientist expect will erode over the next 100 years. The neighboring apartment complex built in 1967 is situated partly in the coastal erosion zone. Fifty-foot pylons anchor the complex to bedrock. Del Monte Avenue, a four lane street with a central divider, runs along the eastern site border. A small State park provides the site's northern border. A Route 1 exit ramp borders the site to the northeast. The site has no direct access to any existing public street.

Motorists traveling south on nearby Route 1, a heavily-traveled scenic highway, have a good view of the proposed development site. To help hide the 190-unit development from view, Del Monte proposed extensive grading and sand removal to extend and deepen the bowl area.



Figure 2. Site photograph: taken from the southern boundary, facing north

The property is not environmentally pristine. In fact, a previous owner, Phillips Petroleum, operated a petroleum tank farm there in the 1950's. One of the storage tanks

² None of the development proposals submitted called for construction of seawalls or other retaining structures along the beach. Section 30235.2 of the California Coastal Act prohibits such structures for most land uses and City ordinances also prohibit the building of protective structures on the beach.

exploded, causing a huge fire. Metal fragments from the tank and piping, bits of concrete, and chunks of hardened tar still litter the site. Large circular flattened areas of dark sand now exist where the storage tanks once were located. A small industrial complex still stands in the southeast corner of the property along Del Monte Avenue.

Largely due to the tank farm operations, native flora and fauna at the property have undergone significant changes. As native vegetation disappeared, Phillips Petroleum planted ice plant, an invasive succulent, to help control erosion on the dunes. By 1986, the native buckwheat plant, *Eriogonum latifolium*, that had formerly covered much of the dunes existed in just a few small patches. Since 1981, when Ponderosa submitted the first development proposal for the site, the City had known that the native buckwheat plant provided food for Smith's Blue Butterfly ("SBB"), an insect listed as endangered under the Federal Endangered Species Act. Without a buckwheat plant population large enough to re-seed and sustain itself, the Smith's Blue Butterfly located at the site (if any) would face death by starvation. See the map attached with Exhibit J that shows the site locations of *E. latifolium* colonies and SBB larval collections.

Legal Background: Monterey's Subdivision Ordinance

Monterey enacted its Subdivision Ordinance in July 1981, pursuant to the California Subdivision Map Act. The Ordinance required that developers file a tentative subdivision map with the City, but made no provision for submittal of a *vesting* tentative map.³ Under the Ordinance, the Planning Commission reviews tentative maps and recommends approval or denial, after conducting a public hearing. The City Council then conducts its own review and public hearing and renders a decision on the tentative map. As a legislative body, the City Council has final jurisdiction over the approval of tentative and final subdivision maps and establishment of subdivision design standards. If the tentative subdivision map is denied, the developer must submit a revised tentative map that addresses the concerns raised by the City. Once the tentative map is approved and filed, the developer must satisfy any conditions imposed on the tentative map and file a final map.

To be approved, a tentative subdivision map must be consistent with the objectives, policies, general land uses, and programs of the City's General Plan and the City's zoning, building, and engineering ordinances. The tentative map must also comply with the California Environmental Quality Act ("CEQA") and the California Coastal Act. Under the Coastal Act, development of land in the coastal zone must be consistent with the applicable Local Coastal Program Land Use Plan ("LCP/LUP").⁴ The City Council adopted the Del Monte Beach LCP/LUP in April 1983. Because the California Coastal Commission had not yet certified the

³ Later, in 1984, the California State Legislature adopted Government Code §§664698.1–66498.9, establishing *vesting* tentative maps.

⁴ Under the California Coastal Act, the City must prepare a Local Coastal Program Land Use Plan, or LCP/LUP. The LCP/LUP sets forth requirements for development in the coastal zone, including acceptable locations and density. The City must also get its LCP/LUP certified by the California Coastal Commission, the state agency charged with overall implementation and oversight of the California Coastal Act.

Del Monte Beach LCP/LUP,⁵ after obtaining approval of its project from the City, Del Monte would also have to obtain approval from the California Coastal Commission. Only then could Del Monte apply for a building permit from the City.

Bill noted that the City's Zoning Ordinance designated the property "Garden Apartment – Residential." The R-G zoning classification authorized eight to 30 residential units per acre. But, after considering the zoning designation, the Del Monte Beach LCP/LUP, and the City's General Plan, the Planning Department determined that residential units per acre should be limited to seven. And even with just seven units per acre, the units would have to be clustered together in the bowl area of the property, leaving significant portions of the dunes and the coastal erosion zone undeveloped.

Ponderosa's Development Plans

In 1981, Ponderosa submitted the first development proposal to the City Planning Commission for construction of 344 condominium units on the site. In response to this application, City planning staff requested that Ponderosa prepare an Environmental Impact Report ("EIR"), as required by CEQA. Ponderosa completed a draft EIR for the 344-unit project in January 1982. Bill remembered that the original EIR was not subsequently revised or supplemented, mainly because it was felt that whatever the impacts of the 344-unit proposal were, later proposals involving fewer units would have correspondingly smaller environmental effects.

As required by the State Subdivision Map Act,⁶ and the City's Subdivision Ordinance, Ponderosa prepared a Tentative Map for the project. The Tentative Map showed how the 37.6 acre parcel would be subdivided and where public streets and utilities would be located, among other things. In August 1982, the City Planning Commission denied Ponderosa's Tentative Map for the 344 condominium units.

Bill had noticed that Del Monte's complaint alleged that Ponderosa was told by the Planning Department that the City would view a scaled-down version of the project favorably, i.e., 7 units per acre, or a total of 264 units. But when Ponderosa submitted a revised development proposal for 264 units the City Planning Commission denied that Tentative Map too, finding that:

3. The project as presented does not present a residential environment of sustained desirability and stability, and it is not harmonious with the character of the surrounding area. The number of units clustered in the center of the property creates a pocket of building

⁵ Bill noted that according to a 1984 planning staff memo, the California Coastal Commission had not certified the City's Del Monte Beach LCP/LUP yet because of disagreements in two areas: (1) the development of 22 vacant lots west of Beach Way, and (2) access to the proposed Ponderosa development site from Del Monte Avenue.

⁶ California Government Code §66410 et seq.

mass which is too dense for this site, which is surrounded by beachlands and sand dunes.

4. The unusual topography of the site does not facilitate the proposed placement of the structures. Said placement will impact views of the bay from adjacent roadways and other area within the City.

5. There may exist other factual bases to support denial of this project, however, without a specific plan before the Commission which presents a reasonable density, no analysis of potential impacts can be made, and this Commission reserves the right to conduct such analysis in the future if this plan is modified or amended.

See attached Exhibit B, the Planning Commission's January 10, 1984 Adoption of Findings.

Bill knew that at that time, the City was considering rezoning the property and that the Del Monte Beach LCP/LUP had not been certified by the California Coastal Commission. Both of these factors created uncertainty regarding allowable development. But under the State Permit Streamlining Act,⁷ the City was obligated to act on the Tentative Map within strict timeframes. See attached Exhibit C, a memo from the City Attorney on this subject.

Ponderosa submitted a third development plan for 224 units. The City Planning Commission denied this proposed Tentative Map, recommending a less dense development with increased open space and view corridors to the ocean. Ponderosa appealed this decision to the City Council in early 1984. The City Council responded in March 1984 by adopting Resolution No. 84-51, attached as Exhibit D, which instructed the Planning Commission to consider a 190-unit condominium project. Ponderosa then submitted a 190-unit Tentative Map to the Planning Commission. *It was at this juncture that Del Monte Dunes, Ltd., pursuant to an option agreement, purchased the property in June 1984 for an estimated \$3.7 million.*

Del Monte's 190-Unit Development Proposal

Upon review of the pending 190-unit development proposal, the Planning Commission determined that the information submitted did not constitute a complete Tentative Map application, as required by the local subdivision ordinance. As a result, the Planning Commission reviewed only the *concept* of the 190-unit development proposal based on a site plan that Ponderosa had submitted. On July 24, 1984, the Planning Commission denied approval. The minutes of the Planning Commission meeting on that day are attached as Exhibit E.

Del Monte, as the new property owner, appealed the denial to the City Council. The Planning Director's recommendation to the City Council for *conditional* approval of the site plan, is attached as Exhibit F. On September 13, 1984, the City Council voted to approve a

⁷ California Government Code §65920 et seq.

site plan for Del Monte's project, contingent on Del Monte satisfactorily addressing 15 specified conditions. The conditional approval of the site plan was adopted by the City Council in Resolution No. 84-160, which granted an 18-month conditional use permit for the proposed development. See attached Exhibit G, minutes of the September 13, 1984 City Council meeting, and Exhibit H, City Council Resolution No. 84-160.

Bill has noticed that Del Monte's complaint alleged that the City Council's issuance of the conditional use permit in September 1984 necessarily implied that the proposed development was consistent with the City's General Plan, because City Ordinance 38-204c required that the City Council make such a consistency finding *before* granting any conditional use permit.

Planning Commission Finds Conditions Not Met

Under City Council Resolution No. 84-160, Del Monte had until March 1986 to satisfactorily address the 15 conditions. Attached Exhibit H contains Resolution No. 84-160 and the list of 15 conditions.

In July 1985, the City's Architectural Review Committee approved the site plan *concept*. In August 1985, the Planning Commission held a public hearing on a revised Tentative Map for the 190-unit project. The planning staff's report recommended approval of the Tentative Map, stating that the 15 conditions "have been addressed and substantially met by the applicants' tentative map." The planning staff recommended that the Planning Commission adopt the following specific factual findings:

1. The design or improvement of the proposed subdivision is consistent with the objectives, policies, general land uses, and programs of the City's adopted General Plan and Del Monte Land Use Plan.
2. The site is physically suitable for the type and density of the proposed development.
3. The design or improvements of the proposed subdivision are not likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
4. The design of the subdivision or the type of improvements is not likely to cause serious public health problems.
5. The design of the subdivision or the type of improvements will not conflict with easements acquired by the public at large for access through or use of property within the proposed subdivision.

After two continuances of the matter at Del Monte's request, in January 1986 the Planning Commission *denied* the Tentative Map for the 190-unit development, despite the planning staff's recommendation to the contrary. The Planning Commission made this decision primarily based on the developer's failure to appropriately address: (1) property

access, (2) habitat protection for the endangered Smith's Blue Butterfly, and (3) sand grading and removal.

Access, Habitat Protection, and Sand Relocation

Access Del Monte originally proposed to build an access road to the new development through the adjacent State park to the north. The City and State agencies involved summarily rejected this option. Del Monte then proposed two other options for providing access to the site from Del Monte Avenue. But these options were also problematic. Both proposed access roads would be narrow switchbacks. Both would traverse the high dunes on the eastern edge of the site, an environmentally sensitive area. (The City had discovered endangered native oak trees on the high sand dunes on the eastern property border, right where Del Monte proposed to build the primary access road to the new development.) Both proposed access routes would cross over the City's existing bike and recreation path along Del Monte Avenue. Finally, both would have to cross underneath a Route 1 exit ramp. Cal Trans informed the City that one of the access routes Del Monte proposed would not provide the required clearance for vehicles passing under the exit ramp. The location of the remaining proposed access route is shown in Fig. 3 below. Del Monte proposed that the access road be constructed between the exit ramp support column on the left and the fence on the right side of the photo.

Because the proposed access road would be a narrow switchback, the Fire Department required that Del Monte provide a secondary *emergency* access route to the site. Del Monte proposed an emergency access route through the neighboring apartment complex on Surf Way. This secondary access route would create a new public street connecting Del Monte's development with Tide Avenue. Residents in the Tide Avenue area, as well as the owner of the apartment complex on Surf Way, were vehemently opposed to an access route through their neighborhood. They believed that the proposed road from Del Monte Avenue to the site was inadequate for large moving vans, fire trucks, and other large vehicles, and that this traffic would end up using the emergency route through their neighborhood. A letter from the Del Monte Beach Neighborhood Association to the City Council on this subject, is attached as Exhibit I. The owner of the private property across which Del Monte wanted to construct the emergency road refused to grant access rights to Del Monte. In response, Del Monte asked the City to condemn the private land. The City had refused, urging Del Monte to continue its negotiations with the property owner.

Habitat Protection The Planning Commission was also concerned that the proposed 190-unit development plan did not adequately protect existing habitat for the endangered Smith's Blue Butterfly. Though Del Monte had submitted a proposed habitat restoration plan, including a seven-year program for re-establishment of native buckwheat plants on the dunes remaining after the property was developed, Dr. Richard Arnold, the City's scientific consultant, remained unconvinced that the plants and butterfly populations could be re-established once disturbed. The City also questioned whether an out-of-state developer would carry out a long-term restoration plan effectively. See Exhibit J for copies of correspondence on these matters from the California Native Plant Society, the U.S. Fish & Wildlife Service, and the California Department of Fish and Game.



Figure 3. Proposed access road location under exit ramp

Sand Relocation Issues The Planning Commission still felt that the 190-unit development would create too large a “footprint” on the site. Though Del Monte had reduced the number of proposed units, it had increased the size of the remaining units. As a result, the land area subject to development and requiring grading and sand relocation stayed roughly the same. The City felt that the site could support 190 units, but that the units would have to be clustered to leave more of the site undeveloped. As proposed, thousands of truck loads of sand would have to be removed from the site to accommodate development in the bowl. This truck traffic posed an additional problem due to the unresolved site access problems. The City had already rejected Del Monte’s proposal to simply push the excavated sand into Monterey Bay instead of trucking it off site because of the adverse impact on the marine environment.

City Council Extends the CUP

Del Monte appealed the Planning Commission’s denial of the revised Tentative Map to the City Council. Because its CUP would soon expire, Del Monte also sought a one-year extension from March 1986 to March 1987. The City Council agreed to extend the CUP to June 3, 1986, when the Council would consider Del Monte’s appeal.

The June 3, 1986 Public Hearing

At the June 3rd hearing, the City Council voted to deny the Tentative Map for the 190-unit development. See attached Exhibit K, the Council's June 3rd motion and resolutions denying the Tentative Map and adopting findings. Bill had met in advance of the hearing with the City Council, knowing the Council planned to deny the development proposal. He knew that the Council had concerns about whether Del Monte had satisfactorily addressed the 15 CUP conditions, and was also concerned about the public's growing opposition to the development, especially among neighboring residents.

Conclusion

After reviewing Del Monte's complaint and the record, Bill prepared to evaluate the strength of Del Monte's takings claim. The City's settlement policy prohibited settling any claims except where the City's liability was clear and undisputed.

Bill knew that the analysis of whether a taking had occurred was essentially an ad hoc factual determination. He also knew there were quite a few recent U.S. Supreme Court cases on the subject. To get started he took out his legal pad and wrote down the questions he wanted to analyze:

- (1) How strong was Del Monte's takings claim based on the existing record?
- (2) What were the City's best defenses against the takings claim?
- (3) If Del Monte prevailed on its takings claim, what kind of relief could Del Monte expect to obtain, including monetary damages?

Case Study Exhibits

- Exhibit A: Complaint
- Exhibit B: January 10, 1984 Planning Commission Adoption of findings
- Exhibit C: January 12, 1984 memo from City Attorney
- Exhibit D: March 20, 1984 City Council Resolution No. 84-51
- Exhibit E: July 24, 1984 Planning Commission Meeting Minutes
- Exhibit F: August 30, 1984 Community Development Director memo
- Exhibit G: September 13, 1984 City Council Meeting Minutes
- Exhibit H: September 13, 1984 City Council Resolution No. 84-160
- Exhibit I: April 1, 1986 Del Monte Beach Neighborhood Association letter
- Exhibit J: Three letters re: habitat protection
- Exhibit K: June 3, 1986 City Council motion and related resolutions