

RESOLUTION NO. 2017-\_\_\_\_\_

A RESOLUTION OF THE CITY COUNCIL OF MARINA FINDING THE CURRENT OPERATION OF THE CEMEX MINE MEETS THE ELEMENTS REQUIRED FOR A PUBLIC NUISANCE DUE TO ITS EROSION EFFECTS ON THE SOUTHERN MONTEREY BAY COAST AND FINDING THE CEMEX MINE TO BE IN VIOLATION OF SECTIONS 17.41.260 AND 17.25.030 OF THE MUNICIPAL CODE

WHEREAS, the CEMEX Sand Mine facility, located between Lapis Road and the Monterey Bay in the City of Marina (hereinafter “Lapis Sand Mine”), extracts large volumes of sand from an artificial dredge pond located on the beach adjacent to the shoreline; and

WHEREAS, the CEMEX dredge operations are maintained by mechanical manipulation of the beach dredge pond, which changes shape and location over time to draw in coarse beach sand from the nearshore and public tidelands during high tide events; and

WHEREAS, the coastal dunes and beach on the CEMEX property contain federally threatened and endangered species and habitat that has been designated as Environmentally Sensitive Habitat Area under the Coastal Act; and

WHEREAS, the Lapis Sand Mine operates and maintains sand-moving equipment, moves wet/dry sand, and extracts sand within an environmentally sensitive beach habitat; and

WHEREAS, the Lapis Sand Mine stockpiles its extracted sand in the sensitive coastal dune habitat; and

WHEREAS, the Lapis Sand Mine operations degrade the environment by interfering with sensitive coastal resources and habitat; and

WHEREAS, the southern Monterey Bay coast suffers from extremely high rates of erosion; and

WHEREAS, the Lapis Sand Mine annually extracts an estimated 153,000 to 205,000 cubic meters of sand; and

WHEREAS, the City resolved on March 15, 2016 to authorize the City Manager “to request the California Coastal Commission to assist the City with and/or assume responsibility for, in coordination with the City, any enforcement proceedings that may be pursued relative to possible violations of the California Coastal Act and the Marina Local Coastal Program by the Cemex Sand Mining operations”; and

WHEREAS, on March 17, 2016, the California Coastal Commission issued a Notice of Intent to Commence Cease and Desist Order and Restoration Proceedings and Administrative Civil Penalties Proceedings against CEMEX for unpermitted development, including sand dredging and extraction and related activities and development; and

WHEREAS, on May 16, 2017, the State Lands Commission issued a letter to CEMEX concluding that the Lapis Sand Mine is engaged in unlawful conversion of state public trust resources and indicating that CEMEX must either immediately submit a lease application to the Commission or cease dredge pond operations because of the financial and resource impacts its operations have on the state; and

WHEREAS, the City commissioned Dr. Robert S. Young, Ph.D., Director of the Program for the Study of Developed Shorelines and a Professor of Coastal Geology at Western Carolina University, to independently review the available information and academic literature on coastal erosion in the southern Monterey Bay and prepare an expert report to evaluate the effects, if any, of the Lapis Sand Mine on coastal erosion; and

WHEREAS, Dr. Young concluded that the Lapis Sand Mine constitutes a significant source of sand loss from the southern Monterey Bay littoral cell and, as a result, is causing erosion and significant adverse effects on coastal property, resources, and uses; and

WHEREAS, there is a scientific consensus that the Lapis Sand Mine extracts sand at a level that significantly contributes to high rates of erosion along the southern Monterey coast; and

WHEREAS, erosion due to the Lapis Sand Mine extraction activities causes significant physical and economic injury to public and private property along the southern Monterey coast; and

WHEREAS, the Lapis Sand Mine interferes with the public's access to and use and enjoyment of the beaches along Marina's coastline in a customary manner; and

WHEREAS, section 3479 of the California Civil Code states: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."; and

WHEREAS, section 3480 of the California Civil Code states: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."; and

WHEREAS, the current operations of the Lapis Sand Mine appear to this Council to meet the required elements for a public nuisance under sections 3479 and 3480 of the California Civil Code; and

WHEREAS, section 731 of the California Code of Civil Procedure authorizes the City Attorney, at the direction of the City Council, to bring a civil action in the name of the people of the State of California to abate a public nuisance; and

WHEREAS, section 17.41.260 of the Municipal Code requires “all operators of existing mining operations” to submit to the planning department (1) a brief statement specifying the approximate annual volume of sand being removed and (2) an accurate cronaflex ortho-topographic map by January 1st of every year “[i]n order to establish reference base data for the purpose of determining whether or not any particular mining activity constitutes new mining activity and to monitor shoreline erosion”; and

WHEREAS, City records indicate that the Lapis Sand Mine has not complied with these requirements since 1992, when the prior facility owner submitted extraction levels for year 1991; and

WHEREAS, section 17.25.030 of the Municipal Code requires a coastal development permit for conditional uses, such as dredge ponds, in the Coastal Conservation and Development District; and

WHEREAS, the CEMEX Sand Mine is located in the Coastal Conservation and Development District and CEMEX has not obtained a coastal development permit; and

WHEREAS, this resolution does not enjoin CEMEX from continuing sand mining activities unless and until the City Attorney seeks judicial enforcement of this nuisance declaration and a judicial order enjoining further sand mining; and

WHEREAS, section 17.60.040 of the Municipal Code empowers the City Council to direct the City Attorney to either commence civil action or abatement proceedings for violations of the City’s zoning title, including sections 17.41.260 and 17.25.030; and

WHEREAS, the action below is taken by this Council following careful consideration of a) all written materials submitted by staff, consultants, and members of the public, and b) comments made at the public hearing by staff, consultants, the public, and members of this Council.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Marina does hereby:

1. Approve this Resolution; and
2. Authorize the City Attorney to pursue the possibility of a civil action against CEMEX to declare and abate the Lapis Sand Mine as a public nuisance under sections 3479 and 3480 of the California Civil Code pursuant to California Code of Civil Procedure section 731; and
3. Authorize the City Attorney to pursue the possibility of commencing action or proceedings for abatement under section 17.60.040 of the Municipal Code due to CEMEX’s continued violations of the reporting requirements under section 17.41.260 of the Municipal Code; and

4. Authorize the City Attorney to pursue the possibility of commencing action or proceedings for abatement under section 17.25.030 of the Municipal Code; and
5. Direct the City Attorney, at such time as he deems appropriate, to report back to the City Council, in closed session, with regard to which of the above-listed litigation actions he recommends and has decided to pursue on behalf of the City.

PASSED AND ADOPTED by the City Council of the City of Marina at a regular meeting duly held on the 6th of June, 2017, by the following vote:

AYES, COUNCIL MEMBERS:

NOES, COUNCIL MEMBERS:

ABSENT, COUNCIL MEMBERS:

ABSTAIN, COUNCIL MEMBERS:

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Bruce Delgado, Mayor

ATTEST:

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Anita Sharp, Deputy City Clerk