



## Surfrider Foundation, San Diego County Chapter

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February 26, 2013

Delivered via email

Mr. David Ott

City Manager – City of Solana Beach for distribution to City Council

635 S. Highway 101

Solana Beach, California 92075

RE: Summary of Requested Action for LUP

Dear City Manager Ott,

Thank you for the opportunity to participate in our continued vetting of the Land Use Plan (LUP) element of the Local Coastal Plan (LCP) for Solana Beach. We agree with the statements in the proposed resolutions that, “WHEREAS, progress has been made on the LCP/LUP and substantial coordination has occurred with the stakeholders and CCC staff and the number of issues on which there is not agreement continues to decrease; and WHEREAS, City Staff has determined it is unlikely all of the LCP/LUP policies will be endorsed by all stakeholders and CCC staff...” This summarizes precisely the dilemma faced in this process. There has been tremendous progress offset by disagreements on several smaller points. These disagreements however are not worth causing further delay. It is not worth taking this process backwards with a rejection or new submittal of the legally defensible LUP as modified by the CCC in March 2012.

Please approve either options 3 or 6 in the Staff Report dated February 27, 2013, submitted by City Manager David Ott, Subject: Public Hearing – Draft Local Coastal Program Land Use Plan. These options will adopt the LUP as approved by the CCC on March 7, 2012 and allow for amendments if needed to address any issues requiring change in the future. Option 6 goes as far as considering some of the changes the Blufftop Property owners requested over the summer in the form of an amendment after the LUP is approved. Please do not adopt any option that further delays the approval of the LUP or would lead to rejection of the LUP as approved by the CCC. These are options 2,4,5 in the Staff report.

We also want to emphasize that it has been almost 8 years since seawalls pending mitigation have been installed with deposits collected for mitigation, yet we are still

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awaiting certification of the LUP and an 18 month or more delay to get the mitigation in place. Many of these seawalls encroach on our public land and beaches. Per Draft Policy 4.52 this mitigation in itself is subject to an LUP amendment that is 18 long months after adoption of the LUP.

The remaining items in the **2-27-13 Mtg Item B.1 Updated Report #1** are small in impact and mainly provide clarification that would come in the Local Implementation Plan (LIP), the second component of a fully approved Local Coastal Plan. Continued delays proposed by the narrow lens of beach front property owners only serves their own interests while continuing to severely and negatively impact the rest of Solana Beach property owners and the hundreds of thousands of beach visitors. Continued delay in approving an LUP serves to prevent implementation of a Recreation and Lease Fee associated with the long term impacts of seawalls and the use of public land for seawalls.

- 1) We urge you to adopt the LUP as approved by the California Coastal Commission (CCC) in March 2012. In the resolutions provided in the staff report, these are either Option 3, adopting all changes from CCC as approved in March or Option 6, adopting all changes from CCC as approved in March and submitting for review the changes in the **2-27-13 Mtg Item B.1 Updated Report #1** for a 6 week review and a subsequent amendment.
  - a. Adopting one of these 2 options would keep the list of outstanding options manageable and narrow.
  - b. The Land Lease and Recreation Fee is already subject to an amendment as outlined in Policy 4.52 and shown in the footnote<sup>1</sup>. The delays caused by litigation and the process we are now under have further impacted the use of public beach. This negative impact has been made very clear by the lack of capital funding to repair beach access at Del Mar Beach Club.

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<sup>1</sup> LUP Policy 4.52, "Until such time as an approved methodology for determining this fee has been established, and the methodology and payment program has been incorporated into the LCP through an LCP amendment, the City will collect a \$1,000 per linear foot interim fee deposit. In the interim period, CCC will evaluate each project on a site-specific basis to determine impacts to public access and recreation, and additional mitigation may be required. The City shall complete its Public Recreation/Land Lease fee study within 18 months of effective certification of the LUP." The last clause is now at the eleventh hour proposed to be "The City shall submit an updated Public Recreation/Land Lease fee study to the CCC for their use in developing a statewide fee program within 18 months of effective certification of the LUP." This has grave consequences.

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- i. It is also evident that additional funding is needed for beach access and recreation in light of the Draft Environmental Impact Report (EIR) by the Army Corps of Engineers (ACOE) that surf breaks in Solana Beach at Table Tops, Pillbox and Cherry Hill have increased backwash due to seawalls. These same breaks will also likely be converted from reef breaks to beach breaks as a result of a perceived need to fix the back of the beach to retain coastal property at its present location. Thus the impacts of not having funding for recreation and access improvements with the lack of an approved LUP and LCP are even more significant than even what was known at the March 2012 CCC hearing. The environmental community is anxiously awaiting its own amendment for Land Lease and Public Recreation Fees as was outlined in the March 2012 approval. Amendments are the best way for the City and all parties to move forward and affect all parties. Not just property owners.
- 2) In the past, the Coastal Commission identified an LUP adoption with LUP amendments as needed as the best course of action.
- 3) Adoption of the LUP will move us closer to the City's ability to issue permits under a Local Coastal Program so that all residents of the City can avoid costly permits from the CCC as well as the time for a permit approval or waiver approval from the CCC. Delays caused by the lawsuit and lack of an approved LUP impacts all development permits in Solana Beach. Right now all developments requires 2 stop shopping – one Permit at the City and one at the CCC. If this is approved, most permits would be one stop approval at City Hall. All development in Solana Beach is in the Coastal zone and due to a lack of an LCP, residents and developers must apply to the CCC for either a Coastal Development Permit, waiver of Coastal Development Permit and simple Administrative Permits invoke a hearing and costly fee. The fee schedule from the CCC shows a simple De minimis waiver invokes a fee of \$531 and an Administrative Permit costs \$2,653. Review of these waivers and permits is costly in time to residents and developers.
- 4) Adopting the March 2012 LUP minimizes litigation costs to the City. Submitting a new LUP will mean rejecting the LUP adopted in March 2012. This exposes the City to

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litigation risks similar to the lawsuits filed by the BBC and Joseph Steinberg against the CCC. The City would benefit from adopting the March 2012 CCC approved LUP as any lawsuits would target the CCC, rather than the City, and the protections provided by the Attorney General under:

a. "Section 30334 Powers'

The commission may do the following:

(b) Sue and be sued. The Attorney General shall represent the commission in any litigation or proceeding before any court, board, or agency of the state or federal government.

b. Further Section 30353 of the Coastal Act provides that "(e) Litigation costs which, but for the operation of a certified local coastal program, would not have been incurred may be paid. Where an action is brought against a local government and such action states as a principal cause of action the operation of such local government's local coastal program and the local government prevails in such action, litigation costs may be paid to the extent such costs are not assessed against the party bringing the action." It is our understanding that the CCC does not have funding for Section 30353 at this time. However, if the intent of Section 30353 were combined with Section 30334, it is quite possible the City may recover significant litigation costs with in-kind services from the Attorney General.

5) Additional litigation threats were made by Seascape One, in January in the midst of the negotiations. In the material submitted to Council by Del Mar Beach Club these threats were further perpetuated. While we sympathize with their situation, their threat is baseless. Beach stairways are non-conforming uses to the present Coastal Act section 30251 and 30253. It is also unclear if the stairways are subject to easements or were developed in areas that prohibited development on the bluffs at the time of such development and were either completed over public access easements or encroached on areas where development was prohibited.

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- 6) Approving the March 2012 CCC approved LUP limits the legal exposure of the City. If the City rejects the LUP and decides to adopt a new LUP, the litigation risk include:
  - a. The entire LUP is under review again. The approval from the CCC in March 2012 is no longer valid. The scope of consolidation of areas of contention is now limited. It would be unwise to open the Pandora's box by adopting Option 2 or Option 5, rejection of the March 2012 LUP, and a new submittal with the October 2012 LUP or some portion of the October 2012 LUP.
  - b. It is likely that what was in the October 2012 LUP will not be approved in light of our negotiations.
  - c. Even approving some of the October changes and a new submission as in Option 4 runs a huge risk based on the bad faith actions of the Coastal Property owners during negotiations.
  - d. Permits approved under the Master EIR for the Shoreline Ordinance and the original LUP in the interim process by the city and their associated lease fee deposits are exposed to litigation.
  - e. Individual permit approvals going forward may require an EIR and will expose the City to litigation on individual cases.
- 7) Option 1 or Option 7. Taking no action at this time is not advisable. It is time to make a decision. We have had seawalls for years and no protection for others with an LUP. The mitigation is only further delayed as outlined above.
- 8) Option 4, adoption of the March 2012 approved LUP and submittal of the October 2012 LUP is not advisable given the progress made in negotiations and the associated risks of a rejection.

### Specific Policy Matrix Comments

We offer some additional comments with respect to the Policy Matrix as it existed in the Staff report.

Policy 4.39: Maximize the natural, aesthetic appeal and scenic beauty of the beaches and bluffs by avoiding ~~or~~ and minimizing the size of bluff retention devices, preserving the maximum amount of unaltered or natural bluff face, and minimizing

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encroachment of the bluff retention device on the beach, to the extent feasible, while ensuring that any such bluff retention device accomplishes its intended purpose of protecting existing principal structures in danger from erosion.

We object to the change from “and” to “or” as being inconsistent with Coastal Act Policies

Avoid language basis – 30253 ” New development shall do all of the following:

... (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. “

Minimize basis – 30251 requires “Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.”

If the avoid language cannot remain, then “avoid if practicable” may be an acceptable compromise.

With respect to mitigation fees impacted policies (4.37, 4.52 and 4.72)

The term “near term ...project” is indefinite and troublesome. A definition is needed. Capital improvement projects for access such as stair replacement, conversion of parklands such as the one at Ocean Street and at the southern border must be funded over the long term. Thus it is not clear that these important projects would qualify as “near term....project(s)”. Acquisition and renting of blufftop property for funding of ultimate removal are additional projects with long time lines.



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We strongly believe that Sand Mitigation fees must only be used for restoring lost sand and that Land Lease and Recreation Fees only be used for these impacts. There is a nexus to these specific impacts. If the city were to allow discretion for Recreation Fees to be used for sand then the converse should also be true. Sand Fees could be used for access. In fact, the funding for the stairs project at Del Mar Shores (Rockpiles) is a near term project that might benefit from the sand fees if they were made available.

The delay of not adopting the LUP continues to prevent use of the mitigation since this Fee is pending adoption of the LUP from March 2012.

Policy 4.52 must be clear that mitigation fees apply to all types of coastal structures including notch fills, upper bluff retention, and seawalls. References specifying assessment of such fees must be included in the specific sections for approval all such structures.

Lastly and most important, with no internal discussion a proposed change in the date for completion of the Fee Study is now proposed from "The City shall complete its Public Recreation/Land Lease fee study within 18 months of effective certification of the LUP." to be "The City shall submit an updated Public Recreation/Land Lease fee study to the CCC for their use in developing a statewide fee program within 18 months of effective certification of the LUP." This has grave consequences. The Fee is further delayed as is the mitigation associated with this fee. We seemed to appease one faction while doing nothing for the other. The original language in the Citizen's LCP submitted in July 2005 with consensus from all parties was that, "The Land Lease Rate shall be determined by the City by July 1, 2006, and shall be applied retroactively to the date of completion of construction of a Coastal Structure or Infill requiring mitigation approved by the City after adoption of these policies guidelines." We now have hundreds of feet of seawalls subject to these fees with no justice or mitigation for the impacts in the foreseeable future.

Policy 4.54 – In a previous version of the proposed language, City staff voiced concern that "Upon further review, there is a question as to why Policies 4.51 (coastal structures which would include seawalls) and 4.54 (upper bluff systems) do not include a section similar to 4.50(c), setting forth financial and mitigation

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requirements for the applicant.” Any coastal structure should be subject to fees and encroachment permits.

Bluff Top Redevelopment definition – Omitting Interior Load Bearing Walls from the “Bluff Top Redevelopment” definition is problematic. We prefer that it is more inclusive, and this is consistent with what the Coastal Commissioners envisioned at last year’s hearing. The language as drafted may allow a savvy owner to avert the intent by using footings tied to headers that provide significant redevelopment without altering the overall foundation or exterior framing significantly.

Regards,

Jim Jaffee

Advisor San Diego County Chapter of the Surfrider Foundation

Resident of Solana Beach

Kristin Brinner

Beach Preservation Committee Communications Chair, San Diego County Chapter of the Surfrider Foundation

Resident of Solana Beach

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