COAST LAW GROUP LLP

1140 S. Coast Highway 101
Encinitas, CA 92024

Tel 760-942-8505
Fax 760-942-8515
www.coastlawgroup.com

August 5, 2010

Roy Sapa'u
Senior Planner
Civic Center - Council Chambers
505 South Vulcan Avenue
Encinitas, CA 92024

VIA ELECTRONIC MAIL
Rsapau@ci.encinitas.ca.us

Re: Comments of Coastal Environmental Rights Foundation
09-035 MUP/CDP - Blue Curl, LLC. Seawall

Dear Mr. Sapa'u:

Regarding the Encinitas Planning Commission's consideration of Agenda Item 2 - 09-035 MUP/CDP - Blue Curl, LLC. Seawall ("Project"), please accept the following comments on behalf of the Coastal Environmental Rights Foundation (CERF), a nonprofit environmental organization founded by surfers in North San Diego County and active throughout California's coastal communities. CERF was established to aggressively advocate, including through litigation, for the protection and enhancement of coastal natural resources and the quality of life for coastal residents.

We respectfully request that the Planning Commission deny certification of the proposed Major Use Permit and Coastal Development Permit and that the City accept this correspondence as formal notice of CERF's intention to seek a petition for writ on mandamus should the *post hoc* Project approvals move forward as proposed.

The fact that the coast is eroding is not a secret. Every owner of a bluff top residence is keenly aware of this fact, as are the regulators at both the City and Coastal Commission. As such, every bluff owner should be made aware of the likelihood that someday coastal armoring will be desired and/or improved, and as such, California Environmental Quality Act (CEQA) compliance for such projects will be undertaken. Consistent with the City of Encinitas and Coastal Act requirements, the applicant must now thoroughly assess and mitigate the likely significant impacts to result from fixing the back end of an eroding beach.

I. LEGAL CONSTRAINTS TO APPROVAL OF PLAN

For a number of reasons, the City cannot legally approve the project without first undertaking CEQA review.

First and foremost, it is virtually unheard of at this point, for a municipality to seek to approve a coastal development project without any mitigation measures whatsoever. As the

City is well aware, there is an extremely low threshold for requiring preparation of an Environmental Impact Report (EIR) under CEQA. An EIR is required whenever substantial evidence in the record supports a fair argument that significant impacts *may* occur. Even if evidence in the record suggests such impacts will not, an EIR must still be produced.[1]

In the matter at hand, there are a plethora of significant environmental impacts that will occur from this seawall, all of which must be studied in an EIR.[2] These impacts generally include aesthetics, biological resources, geologic stability of surrounding bluffs, recreational impacts on the beach and water, and cumulative impacts.

Most importantly, the Project will have significant impacts resulting from the permanent fixing of the back of the beach. These so-called "passive erosion" impacts are well documented. See e.g. Passive Erosion: Gary Griggs, "California Needs a Coastal Hazards Policy" *California Coast and Ocean, Vol. 14, No. 3*, Autumn 1998:

> "Where such a structure is built along a shoreline that is undergoing long-term net erosion, the effect will be the gradual loss of beach in front of the structure as the shoreline migrates landward beyond it. Private structures may be temporarily saved, but the public beach is lost."

Clearly, the loss of the beach is a significant unmitigable environmental impact warranting production of an EIR. And while the full impacts from passive erosion are indeed unmitigable, there are nonetheless mitigation measures which must be adopted.

For instance, there will be a net loss of sand supplied by the eroding bluffs which will be armored.[3] This amount of sand can be calculated by utilizing any number of reports detailing erosion rates in the region. For instance, the "Report on In-Lieu Fee Beach Sand Mitigation Program: San Diego County", available from the California Coastal Commission at http://www.coastal.ca.gov/pgd/sand1.html, is a starting point. The City of Solana Beach has spent considerable effort developing a model for assessing impacts and mitigation obligations relative to passive erosion. The City is encouraged to contact Solana Beach and investigate further the appropriate framework to be applied in this case.

---

[1] Public Resources Code sections 21100, 21080(c), 21151; CEQA Guideline section 15064; *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego*, (2006) 139 Cal. App. 4th 249, 259 (citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1134–1135).

[2] Should the City fail to require an EIR, this matter will follow the City of Solana Beach in *Surfrider v. Smerican,* San Diego Superior Court, North County Branch, Case No. GIN 020308. The City would be well served to review that case file, as attorneys now with Coast Law Group successfully required preparation of an EIR and payment of attorney's fees.

[3] Previous assertions by consultants that eroding bluffs in San Diego County do not contribute significantly to beach sand quantities has been refuted. See e.g. *Coastal Bluffs Provide More Sand to California Beaches Than Previously Believed,* Science Daily (Oct. 22, 2005), available at: http://www.sciencedaily.com/releases/2005/10/051016085958.htm.

Here, the City's Planning Commission Agenda Report erroneously states that CEQA does not apply to the Project. The report states that "(t)he project has been determined to be exempt from environmental review as per California Environmental Quality Act (CEQA) Guidelines Sections 15269(c) and 15302." Both of these conclusions are incorrect as a matter of law.

A. CEQA Section 15269(c) Exemption is Currently Inapplicable

Consistently, California courts have interpreted the concept of "emergency" narrowly.[4] CEQA section 15269(c) exempts emergency projects from the requirements of CEQA where "(s)pecific actions necessary to prevent or mitigate an emergency. *This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term."* (Italics added). The italicized portion was absent from the staff report; however, it is relevant to the proposed development. This proposed seawall qualifies as a long-term project where, once constructed, it will remain for an indefinite period of time. And because the seawalls are already in place at the site pursuant to an Emergency Permit from the California Coastal Commission (CCC), there is currently an extremely low probability of a bluff failure in the short-term. As identified in the Slope Stability Analysis of the Geotechnical Evaluation, the current repair to the bluff "exceeds (the) accepted factors of safety." Therefore, because the bluff is currently sufficiently stabilized by the authorized structure, there is no current emergency, and no reason to exempt this project from environmental review under CEQA section 15269(c).

B. CEQA Section 15302 Exemption is Currently Inapplicable

In it's entirety, CEQA Section 15302 states:

> Class 2 consists of replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to:
> (a) Replacement or reconstruction of existing schools and hospitals to provide earthquake resistant structures which do not increase capacity more than 50 percent;
> (b) Replacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity.
> (c) Replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity.
> (d) Conversion of overhead electric utility distribution system facilities to underground

[4] Public Resources code section 21060.3 defines an emergency as: "A sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss, or damage to, life, health, property, or essential public services." Emergency exceptions are reserved for when there is a sudden, unexpected occurrence "which the lead agency simply *cannot* complete the requisite paperwork within the time constraints of CEQA. . . For example, if a dam is ready to burst or a fire is raging out of control [the emergency] is appropriate. *Western Municipal Water Dist. v. Superior Court,* 187 Cal. App. 3d 1104, 1111 (1986).

including connection to existing overhead electric utility distribution lines where the surface is restored to the condition existing prior to the undergrounding.

While the above-quoted section may not even apply to seawall structures (as this section appears to apply to a certain class of commercial structures), the photographs show that the walls built under the Emergency Permit are significantly larger and of a different materials than the previously unpermitted walls. Section 15302, however, exempts project which entail alterations which are "minor."[5] Clearly the instant project is much more than "minor".

Furthermore, because the previous seawall was unpermitted the site has never been the subject of environmental review. Courts have held that the existence--or nonexistence --of a prior environmental evaluation is a relevant factor in deciding whether the existing facility exemption should be applied. So, the absence of a prior EIR is a relevant factor weighing heavily against the application of the CEQA exemption.

The Project nevertheless does *not* qualify under either exemption because it is subject to three possible exceptions to the exemptions under CEQA. CEQA Section 15300 provides the"sensitive environment," the "cumulative impact," and the "significant effect" exception: all and any of which would require environmental review of the Project.

C. The Project Does Not Comply With the City's Municipal Code

Contrary to the assertions contained in the staff report, the applicant has failed to demonstrate compliance with Encinitas Municipal Code 30.34.020(c)(2)(b)(3). While the soils and geotechnical report states that no erosion will occur to the north end of the Project as a result of the wall due to the timber wall armoring the property to the north, absent from the report is any statement concerning the erosion that will occur to the property of the south of the Project. Without such inquiry, the City cannot, with any confidence or evidentiary support, find compliance with section 30.34.020(c)(2)(b).

D. The City Has Not Been Presented Evidence to Show the Stairway Pre-Dates the Coastal Act

In addition, there is insufficient evidence to show that the proposed stairway was built before the enactment of the Coastal Act**.** Pursuant to Section 30608 of the California Coastal Act of 1972, a development/structure is considered to be vested if it was permitted and/or constructed on a site *prior to February 1, 1973.* The sole evidence that this stairway was permitted and/or constructed prior to that date is a photograph of the stairway taken ***March 22, 1973.*** This evidence is 50 days too late. A photograph uncovered from 1972 shows that the property did not have the stairway (attached). Without any evidence to show the stairway was in fact built prior to the enactment of the Coastal Act of 1972, the applicant has failed to meet its burden. Thus, the stairway requires a CDP.

[5] *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Wat.,* 52 Cal. App. 4th 1165 (1997).

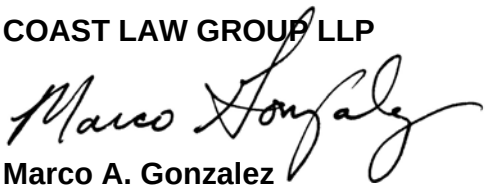
II. Conclusion

For the reasons herein, we respectfully request that the Planning Commission deny issuance of the proposed Major Use Permit and Coastal Development Permit and require the applicant to comply with CEQA and conduct an environmental review of the Project.

Should the City have any questions, please contact Coast Law Group LLP directly.

Sincerely,

COAST LAW GROUP LLP



Marco A. Gonzalez

Livia Borak
Attorneys for
Coastal Environmental Rights Foundation

cc: