January 25, 2011

Honorable Mayor Lesa Heebner
and Members of the Solana Beach City Council
City of Solana Beach
635 S. Highway 101
Solana Beach, CA 92075

Re: Local Coastal Program Land Use Plan – Preservation of the Compromise Plan

Dear Mayor Heebner and Honorable City Council members:

This firm represents the Beach and Bluff Conservancy (“BBC”), the Condominium Organization of South Sierra Avenue (“COOSSA”), and the following condominium homeowner’s associations: Del Mar Beach Club, Solana Beach & Tennis Club, Surfsonic, Seascape Chateau, Del Mar Shores Terrace, Las Brisas, and Seascape Shores (collectively, “Bluff Property Owners”).

We write today to make it known that the Bluff Property Owners vehemently oppose the Coastal Commission’s staff’s suggestion that the LUP should limit permits for Bluff Retention Devices to just 20 years. In addition we request more time to respond to the Coastal Commission’s Staff’s latest round of comments on the City’s Land Use Plan (“LUP”).

The Coastal Act unambiguously requires the approval of seawalls when needed to protect existing structures, protect public structures, and serve coastal-dependent uses, such as the safe use of the beach by beachgoers. There is no law, in the Coastal Act or otherwise, that authorizes the Commission (or the City acting under a certified LCP) to limit seawall permits to 20 years. The Bluff Property Owners made major concessions during the meetings of the Citizen’s LCP Committee meetings, agreeing to LUP provisions that were not required by the Coastal Act. These concessions included, without limitation, agreeing: to allow Bluff Retention Devices to be removed in the year 2081 or sooner; and to give the City the right to acquire Bluff Properties both before and after the Bluff Properties would otherwise be offered for sale to the public. None of these concessions is required by the Coastal Act and, to the best of our knowledge, has ever been incorporated into any other LCP in the State of California.
The Bluff Property Owners reluctantly made these, and numerous other, concessions in the spirit of compromise and in exchange for certain other LUP provisions, the most significant of which was the issuance of permits for Bluff Retention Devices that were to be valid through 2081 (the “Compromise Plan”). Moreover, the PMC fee study and its many complex calculations were based on the Compromise Plan, especially the Bluff Retention Device permit life ending in 2081. If the core component of the Compromise Plan, is now removed from the LUP, then all of the concessions referenced above, and then some, need to be removed from the Draft Land Use Plan and the PMC study – to the extent it is valid – must be substantially reworked.

Shortening the term of a Bluff Retention Device Permit suddenly and capriciously by 50 years would be unjustified, tremendously unfair to the Bluff Property Owners, and a breach of good faith and fair dealing, especially considering the more than 5 years and thousands of hours of effort by the LCP Citizen’s Committee and City Staff. A major premise of the Compromise Plan was the 2081 permit timeframe which gave homeowners enough time to amortize the tremendous cost of removable Bluff Retention Devices and improvements to their Bluff Properties over a reasonable period of time while, concurrently, putting in place a costly mitigation fee program designed to lead to the restoration of the beach.

Therefore, we respectfully request that the City reject the Coastal Commission staff’s suggestion that the City’s LUP should limit Bluff Retention Device permits to 20 years, and instead submit the LUP for certification to the Coastal Commissioners with the Compromise Plan intact. There is no legal basis for limiting seawall permits to 20 years, and Bluff Property Owners will suffer a tremendous loss if the Compromise Plan is eliminated. Doing so would be the kill shot that irreversibly upsets the fragile balance of the current LUP, a balance that was carefully and painstakingly created by the LCP Citizen’s Committee after thousands of volunteer hours spanning almost 5 years. If the Compromise Plan is modified as suggested by the Commission staff, then the entire LUP must be re-opened for further discussion and community input, and perhaps most of the other concessions made by the Bluff Property Owners will need to be substantially modified or removed. These discussions would include, without limitation, completely eliminating any sunset provision for Bluff Retention Devices, deleting the removability requirement, and eliminating all City rights to acquire Bluff Properties.
As the City Council considers the proper course with regard to the future of the LUP, the City is respectfully reminded that the Coastal Act clearly provides that it is the City, not the Coastal Commission, and certainly not the Coastal Commission staff, which has the State legislative mandate to write the City’s LCP and determine the City’s local planning policies. With regard to LCP certification, the Commission’s role is at best secondary to the City’s and is legally limited to merely ensuring that the LCP ultimately complies with the relevant portions of the Coastal Act.

(a) The commission’s review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3 (commencing with Section 30200). In making this review, the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.

(b) The commission shall require conformance with the policies and requirements of Chapter 3 (commencing with Section 30200) only to the extent necessary to achieve the basic state goals specified in Section 30001.5.

Public Resources Code § 30512.2 (emphasis added).

Since there is literally NOTHING in the Coastal Act that supports limiting a seawall permit lifetime to just 20 years, or any timeframe for that matter, the Commission may not deny certification of the City’s LUP because it lacks the 20-year permit limitation that its staff would like to see. In fact, because the Coastal Act does not authorize permit lifespan limitations on the Bluff Retention Devices that are mandatory under Public Resources Code §30235, the Commission would be wrong to deny certification of the City’s LUP even if it contained no permit lifespan limitation whatsoever. Therefore, the City is safe to reject, and should reject, the Commission staff’s suggestion regarding 20-year permits and it should simply proceed to the full Commission for certification with the Compromise Plan intact.

As mentioned above, Public Resources Code §30235 requires the Commission to issue seawalls permits to protect existing structures, such as the homes owned by the applicants herein. There is no language in this section, or elsewhere in the Coastal Act, that authorizes the Commission to impose a time limit on this permit, and doing so would constitute a regulatory taking. As stated by the United States Supreme Court in Nollan v. California Coastal Commission (1987) 483 U.S. 825, the power to impose a permit condition derives from the power to deny the permit. If the Commission has no discretion to deny
the permit, it cannot impose conditions on that permit, unless such conditions are specifically authorized by statute. Where the Commission lacks the power to deny seawall permits mandated by Section 30235, it also lacks the power to whimsically impose a 20-year time limit, and doing so would be a taking in violation of the U.S. and California constitutions.

For all these reasons, we respectfully request that the City hold firm and stand by the LUP that it and its citizens drafted. The City is legally and morally entitled to decide its own future, and the Coastal Commission’s staff cannot be allowed to pursue their own private agenda to eliminate seawalls in their lifetimes. A 20-year limit is not authorized by the Coastal Act, and the Commission cannot deny certification of the City’s LUP just because it elects to reject the Commission’s staff’s suggestion to the contrary.

My clients, who represent over 1400 Solana Beach residents, also need more time to respond to the Coastal Commission Staff’s latest set of LUP comments. This public input is essential and must be heard before the City Staff meets with the Coastal Commission Staff in less than a week. There is too much at stake for the City to reach any conclusions without considering input from the various stakeholders after they have had sufficient time to read, understand and comment on these new changes. Therefore, we also ask that the City postpone its next meeting with the Coastal Commission for at least 4 weeks so that the City’s staff can receive public input.

Respectfully submitted,

THE AXELSON CORN LAW FIRM

By:
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