Jim Jaffee

January 25, 2011

Mayor Leesa Heebner and City Council of Solana Beach, City Manager David Ott

Dear Mayor Heebner and Council and Mr. Ott,

Please place these comments in the record in regard to item C2 on the agenda.

Although I have not comprehensively reviewed the Coastal Commission's Staff's latest round of comments on the City's Draft Land Use Plan ("LUP"), I agree with the general nature of comments they provided. In one area, I believe that they may be premature in giving up on the ability of this City to implement the forward thinking Draft LUP's ability to remove seawalls from the beach and mitigate their adverse impacts to shoreline access.

The Financing Plan envisioned in the Draft LUP was meant to provide the funding mechanism to implement mitigation. This mitigation is possible. The fact that the Financing Plan has not been pursued vigorously is now causing a significant bottleneck in the approval process at the California Coastal Commission (CCC).

Comments from CCC staff on page 227 of the 1-26-2011 Agenda Item C2 staff report from Diana Lilly letter of August 16, 2010 correctly point out:

"We understand that the City is reluctant to proceed with undertaking a costly Financing Plan without the assurance that the Commission will agree to support the proposed policies in the LCP. But we hope the City understands, and in fact shares Commission staff's reluctance to codify and implement policies without any assurance that the objectives which the policies are intended to achieve are feasible. Not only is there currently no assurance that the numbers will "pencil out" and support the purchase of bluff top lots, to the contrary, the policies of the LUP (specifically, the vague but broad provisions for a mitigation fee offset credit), strongly suggest that adequate money will not be available. However, this is all conjecture at this point without the financial study."

The Financing Plan and the complementary Logistics Plan, are part of the mechanisms to ensure mitigation in buying out property and ensuring access to the beach. To give up on these before trying.

As a reminder, LUP Draft Policy 4.51 discusses the Financing Plan:

_Policy 4.51: To identify, evaluate and pursue all feasible potential sources of revenue as part of the Financing Plan. Fundamental fairness dictates that the costs of the LCP's programs be allocated and shared in proportion to the benefits realized by the affected_
parties, including the public, the City, and the Bluff Property Owners, respectively. Potential sources of funding may include, without limitation:

- Regional Sediment Management and opportunistic sand funding sources.
- Use of monies held by SANDAG from previous CCC mitigation fees collected for Bluff Retention Devices in the City.
- Sand Mitigation Fees, which may be expended for sand replenishment and retention.
- Land Lease/Recreation Fees, which may be expended for sand replenishment and retention, and public access and public recreation improvements.
- City fees directly related to actual costs incurred by the City shall be established for the processing and issuance of permits, the use of City facilities and staff, and reasonable third party costs.
- Rental income from the leasing of City-owned Bluff Properties.
- Government grants (e.g., Federal Land and Water Conservation Fund, Army Corps of Engineers, Coastal Conservancy, State Tidelands Oil Revenue Fund, Oceanside Harbor mitigation fund, State Parks Bond, Open Space Bond Act, Park Land Bond Act, etc.).
- Bond financing.
- Parking revenues, beach fees, etc.
- Two percent of the existing, and any dedicated increases in, Transient Occupancy Tax; sales tax; or other dedicated taxes.
- Environmental mitigation fees (paid by third parties outside of the Beach and Bluff District such as port districts, utility companies, developers, etc.).
- Funds from other parties responsible for loss of sand on the beach (e.g., water districts, sand mining companies, Caltrans, Amtrak, NCTD and all other property owners in the watershed, etc.) utilizing Assessment Districts or other equitable funding mechanisms.
- The creation of an RDA in the Beach and Bluff District should be investigated and aggressively pursued to generate significant tax increment financing and act as an independent entity, which can fund projects such as those outlined in Policy 4.54.

Policy 4.44 outlines the Logistics Plan that contains the mechanisms to acquire property and to maintain access to the beach.

Policy 4.44: To ensure that the LIP addresses, without limitation, how the costs and logistics associated with relocation or protection of City Facilities, City Infrastructure, Non-City-Owned Utilities, the acquisition of Bluff Homes, the impact on affected Bluff Property Owners, and other affected property owners will be handled over the long term, including, without limitation, provisions for payment of just compensation where required; how to adapt City Facilities, City-owned Bluff Properties, City Infrastructure, and City beaches to rising sea levels, shoreline erosion and other associated coastal hazards, and how access to the beach and to public and private property will be maintained. It should also include a complete inventory of all City Facilities and City Infrastructure.
I would add that the City in response to the I-5 North Coast Corridor Expansion Project (File 0830-30) prepared a very well researched and correct assessment of the responsibility of a lead agency in mitigating a significant environmental impact. These comments essentially request that mitigation measures be in place and identifiable in order to reach the proper conclusions under CEQA.

“CEQA also requires an EIR to identify specific mitigation measures that will avoid or reduce the significant impacts of a proposed project. (14 CCR § 15126.4.) Proposed mitigation measures must be sufficiently specific to ensure they are enforceable and effective. (Vineyard Area Citizens/or Responsible Grow/h, etc. v. Cilco/Roncho Cordova (2007) 40 CalAth 412.) Vague, incomplete or speculative mitigation measures are insufficient under CEQA. (Federation a/HillSide & Canyons Assn. v. City o/Los Angeles 2000) 83 Cal.AppAth 1252, 1260.)

The DEIR/EIS fails to comply with the basic requirements of CEQA for effective and enforceable mitigation. ...Few, if any, of the recommended measures identify who is to perform the mitigation, what action is required, when the mitigation must be performed, or how it is to be accomplished.”

The City has been approving seawalls under CEQA with a plan for mitigation from the Draft LUP. If now the City is to believe that this mitigation is not possible, we have a big problem with CEQA compliance.

To have identified mitigation measures that are not even attempted and then new ones substituted is not a good approach.

We must implement the Financing Plan and the Logistics Plan. Some of the steps needed immediately are:

1. Complete the Land Lease Mitigation Fee Study. This is a significant portion of the Financing Plan.
   a. If the Fee is deemed not equivalent to the impact by the CCC review or by the City’s review, begin negotiations directly with property owners for leasing the City’s Land. The seawalls are built on City Land. Negotiate the price that will mitigate the impact.

2. Direct the Army Corps of Engineers project to include a Locally Preferred Alternative that is consistent with its LUP and General Plan. The Locally Preferred Alternative. Army Corps projects are Storm Damage Reduction Projects. Storm Damage Reduction is measured by the value of the property it protects. Since the ratio of protection to costs is on the order of 1, the cost of the Army Corps projects is roughly equivalent to the cost of acquiring blufftop property.

3. Implement a program that allows the City to begin acquiring blufftop property under its First Right of Refusal and other mechanisms provided in the LUP.
4. Establish a program to rent property acquired by the City under the Financing Plan. This would create a revenue stream to acquire even more property.
5. Direct SANDAG Shoreline Preservation Committee to include removal of seawalls and property threatened by erosion as part of its Regional Sediment Management Strategy consistent with the Financing Plan.
6. Investigate existing Deed Restrictions on Blufftop properties in relation to shoreline armoring.
7. Contact the State Coastal Conservancy for Grants to improve beach access which may include the purchase of blufftop property and the acceptance of offers to dedicate that may exist with blufftop properties.
8. Any other measures in Draft LUP policies 4.51 and 4.44 that would lead to a tangible result of Mitigation for the impact of seawalls that could be submitted to the CCC.

In response to the BBC letter by attorney Jon Corn, I offer some very brief responses.

The BBC and Mr. Corn assert:

"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."

This is false and misleading. The Coastal Act 30235 requires approval of seawalls "...when designed to eliminate or mitigate adverse impacts on local shoreline sand supply."

Section 30235 is not the only governing Section of the Act or for that matter the Draft LUP. All permits for development, including seawalls, must comply with Chapter 3 of the Coastal Act, which requires that they do not impact public access and enjoyment of the beach under section 30210 and 30211.23

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1 Section 30235: "Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible."

2 From Chapter 2 Section of the Draft LUP (p21 of the Item C2 Staff Report) agreed to by Mr. Corn and the BBC. "A broad policy goal of California's Coastal Management Program is to maximize the provision of coastal access and recreation consistent with the protection of public rights, private property rights, and coastal resources as required by the California Constitution and provided in Section 30210 of the Coastal Act. Several additional policies contained in the Coastal Act, which are herein incorporated into the Land Use Plan, work to meet this objective. The Coastal Act requires that development not interfere with the public right of access to the sea (Section 30211); provides for public access in new development projects with limited exceptions (Section 30212); encourages the provision of lower cost visitor and recreational
In addition, the City owns or controls by easement or regulation much of the bluff area where seawalls are constructed. The City is under no obligation to allow the use of its land for seawalls irrespective of the Coastal Act. This matter has been litigated in Del Mar (Scott v. City of Del Mar, 58 Cal. App. 4th 1296). Recent permits in Solana Beach where bluffs are owned by the State Parks Department have also been denied. The basis for this decision is not in the Coastal Act but in property ownership. The Coastal Commission has supported these decisions.

Section 30235 does not make mention of the “safe use of the beach.” This is an incorrect legal conclusion proposed by Mr. Corn and the BBC. It is also in contrast to the opinion of CCC Staff. From Item C-2 Staff report page 223 and Diana Lilly’s letter of October 27, 2010

“As an example, the repeated inferences that shoreline armoring primarily serves to protect public safety, as opposed to principally serving to protect blufftop development, cannot be accepted under the Coastal Act. While we certainly recognize private property interests, such interests must be balanced against other public needs for access and recreation, as well as habitat and scenic resource protections. In addition, the need to provide shoreline protection must be limited to current property interests and existing development.”

At this time I have no opinion on if the CCC suggestion of limiting the lifetime of the seawall permits to 20 years is a good approach. I do opine that if the City and CCC felt that is needed to mitigate the impacts of seawalls, they would be within their rights to do so due to ownership and rights of the land where seawalls are built and under Chapter 3 of the Coastal Act policies that require development to mitigate impacts to recreation.

In closing, please implement the measures I outlined above and repeat here for emphasis so at long last we can mitigate the adverse impacts of seawalls.

We must implement the Financing Plan and the Logistics Plan. Some of the steps needed immediately are:

1. Complete the Land Lease Mitigation Fee Study. This is a significant portion of the Financing Plan.
   a. If the Fee is deemed not equivalent to the impact by the CCC review or by the City’s review, begin negotiations directly with property owners for facilities (Section 30213); addresses the need to regulate the time, place, and manner of public access (30214); specifies the need to protect ocean front land suitable for recreational use (Section 30221); gives priority to the use of land suitable for visitor-serving recreational facilities over certain other uses (Section 30222); requires the protection of upland areas to support coastal recreation, where feasible (Section 30223); and encourages recreational boating use of coastal waters (Section 30224).”

3 Also see p25-28 of the Item C2 Staff Report which list the many policies related to access that development permits including seawalls are subject to.
leasing the City's Land. The seawalls are built on City Land. Negotiate the price that will mitigate the impact.

2. Direct the Army Corps of Engineers project to include a Locally Preferred Alternative that is consistent with its LUP and General Plan. The Locally Preferred Alternative. Army Corps projects are Storm Damage Reduction Projects. Storm Damage Reduction is measured by the value of the property it protects. Since the ratio of protection to costs is on the order of 1, the cost of the Army Corps projects is roughly equivalent to the cost of acquiring blufftop property.

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6. Investigate existing Deed Restrictions on Blufftop properties in relation to shoreline armoring.

7. Contact the State Coastal Conservancy for Grants to improve beach access which may include the purchase of blufftop property and the acceptance of offers to dedicate that may exist with blufftop properties.

8. Any other measures in Draft LUP policies 4.51 and 4.44 that would lead to a tangible result of Mitigation for the impact of seawalls that could be submitted to the CCC.

Sincerely,

Jim Jaffee