PACIFIC LEGAL FOUNDATION

December 7, 2017

Executive Director John Ainsworth
Chair Dayna Bochco & Commissioners
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

VIA E-MAIL John.Ainsworth@coastal.ca.gov
AND FIRST-CLASS MAIL

Re: December 14, 2017 Agenda Item #Th19a City of San Clemente LCPA

Dear Director Ainsworth, Chair Bochco, and Commissioners:

We write on behalf of Pacific Legal Foundation to express our opposition to Coastal Commission Staff's suggested modifications to the City of San Clemente's LUP, requesting that the city define "Existing Development" as "a structure that was legally permitted prior to the effective date of the Coastal Act (January 1, 1977) and has not undergone a major remodel since then."

Pacific Legal Foundation (PLF) is the nation's most experienced public interest law firm dedicated to the defense of property rights. It is a nonprofit, tax-exempt foundation organized under the laws of California, founded in 1973. During the past several decades PLF has litigated numerous cases against the Coastal Commission asserting constitutional and statutory rights of individual homeowners threatened by unlawful actions of the Commission. We have litigated these matters in both trial and appellate courts, including the United States Supreme Court (e.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)). The undersigned attorneys are members of PLF's Coastal Land Rights Project who have particular expertise in the Coastal Act and the rights of coastal landowners.

Staff's suggested modification to the City of San Clemente's certified LUP would add a definition of the term "Existing Development" within the city's certified LUP. This would codify Staff and Commission's preferred interpretation of existing development as those houses build before January 1, 1977, and not subsequently modified. The most significant effect of this modification would be to deny shoreline protection (such as seawalls) to property owners of homes and other structures built after January 1, 1977, even when such permits are necessary to defend their homes against storms, erosion, and other natural hazards.

Article I, Section 1, of the California Constitution recognizes an individual right to protect property, including from natural hazards. Section 30235 of the Coastal Act codifies this right by requiring the Commission to approve permits for the construction of shoreline protective devices to safeguard existing structures in danger from erosion, with certain conditions. Historically "existing structures" has been

understood to mean structures existing at the time a permit application is made for a shoreline protective device. The Commission has itself defended that meaning of Section 30235 in various court actions in the past, but has in recent years reversed course and taken the legally untenable position that "existing structures" in Section 30235 means structures existing at the time of the enactment of the Coastal Act in 1977. And as the Staff Report makes clear, the City of San Clemente opposes the Commission's preferred definition on the grounds that the January 1, 1977, date is not the best interpretation of the Coastal Act's text.

This redefinition is a radical change to the Coastal Act that unfairly burdens individual homeowners, will generate litigation, will subject the State and municipalities to liability when homes deprived of shoreline protection are destroyed, and offers no real benefit to the public in terms of coastal access or enjoyment. The Commission presumably favors this strained interpretation of Section 30235 because it better supports the agency's aggressive policy of "managed retreat" (i.e., requiring private property owners to helplessly abandon the coast and their homes to destruction in the face of natural hazards rather than take sensible actions to protect and preserve the safety and value of their property).

A recent attempt to codify the Commission's interpretation of Section 30235, AB 1129, failed in the State Assembly. Staff now seeks to impose an errant interpretation of Section 30235 onto cities through the LUP amendment process.

The staff report for Agenda Item Th19a makes clear Staff's position:

> Going forward, staff has recommended the Commission interpret "existing structures" to mean that structures built after 1976 pursuant to a coastal development permit are not "existing" as that term is intended to be understood relative to applications for shoreline protective devices, and that the details of any prior coastal development approvals should be fully understood before concluding that a development is entitled to shoreline protection under Section 30235.

Indeed, the Staff Report notes that "[t]his LUP update provides an opportunity to clarify the distinction . . . between existing and new development on CDP approvals." However, this substantial change in policy has never been subjected to rulemaking procedures under the Administrative Procedure Act, raising the question of whether it constitutes an unlawful underground regulation.

Homeowners along California's 1,100 miles of coastline have built, restored, or enhanced their coastal properties since 1977, relying on Section 30235's promise of

shoreline protection for existing structures. These homes were built with permits issued by the Coastal Commission or municipalities operating under Commission-approved Local Coastal Programs. The destruction of these homes that will inevitably result from a LUP amendment incorporating the Commission's desired new policy will subject the State and local governments to liability when individual homes are damaged.

Finally, denying shoreline protection to structures built or substantially modified after January 1, 1977, will not produce any material benefits to the public in terms of coastal access or preservation of coastal resources. Eliminating the right of homeowners to protect their property from destruction by forces of nature will not, in fact, improve California's beaches. Storms, erosion, and other natural hazards will continue to occur. Those natural forces that destroy bluffs and deplete the beaches of sand, not shoreline protection of private property, are the enemies of the public's enjoyment of the coast. Far from presenting any public harm, shoreline protective devices built to protect private property—at private expense—preserve the public property that borders private spaces. There is a harmony of interests in this regard between the public and private property along the coast. People can walk more safely on beaches below bluffs when those bluffs are secured by protective devices; seawalls that buffer land from the encroaching sea also protect the walkways, streets, access paths, and other public resources enjoyed by the general public. Additionally, the existing language of Section 30235 gives the Commission all the power necessary to deny, condition, or mitigate proposed shoreline protective devices that may pose a bona fide risk to public resources.

In short, the Commission's desired policy of defining "existing structures" as those built before January 1, 1977, will result in great harm to private property owners along the coast, and will subject the State to liability, while ignoring the public benefits that arise from private action to preserve a stable shoreline in areas where natural forces threaten erosion and other damage. The Commission should not shift the political accountability for this policy; it should not require the City of San Clemente to adopt a definition of "existing structures," which has no support in the plain language of the Coastal Act and is sensibly opposed by the City.

Sincerely,

LAWRENCE G. SALZMAN JEREMY TALCOTT

cc: Effie Turnbull-Sanders, Vice Chair
Dayna Bochco, Chair
Mary Luévano, Commissioner
Donne Brownsey, Commissioner
Sara Aminzadeh, Commissioner
Mark Vargas, Commissioner
Ryan Sundberg, Commissioner
Aaron Peskin, Commissioner
Carole Groom, Commissioner
Erik Howell, Commissioner
Roberto Uranga, Commissioner
Steve Padilla, Commissioner
Belinda Faustinos, Alternate for Dayna Bocho
Trent Orr, Alternate for Mary Luévano
Nidia Garcia-Erceg, Alternate for Mark Vargas
Maricela Morales, Alternate for Carole Groom
Christopher Ward, Alternate for Stephen Padilla
Cecilia Gallardo-Daly
Scott Smith
City Council
John Corn