City of San Clemente
Community Development

Cecilia Gallardo-Daly, Community Development Director
Phone: (949) 361-86106 Fax: (949) 361-8309
gallardo-dalyc@san-clemente.org

December 8, 2017

Ms. Dayna Bochco, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

SUBJECT: City of San Clemente LCP Amendment No. 1-16 (LCP-5-SCL-16-0012-1 Comprehensive LUP Update) - Response to Staff Report Recommendation for Item 19a, Thursday, December 14, 2017

Dear Chair Bochco and Honorable California Coastal Commissioners:

The City of San Clemente (City) has received and reviewed the Coastal Commission's (Commission) staff report, dated November 30, 2017, for an initial public hearing and discussion on the City's proposed comprehensive Land Use Plan (LUP) update. Collaboration between our staffs on this comprehensive LUP update has been ongoing since 2014 pursuant to a Local Coastal Program (LCP) grant approved by the Commission. We are also currently developing an Implementation Plan for certification by the Commission to allow the transfer of permit authority. The City appreciates the hard work and diligence of your staff and is pleased to have this item heard by the Commission. The City is in agreement with many of the suggested modifications (as listed in Exhibit 1 of the staff report) in part due to extensive coordination and collaborative work efforts to date. However, some suggested modifications remain unacceptable to the City because they raise legal issues for the City and/or may result in significant conflicts with the City's existing policies, regulations and long term goals and vision for its community.

The six major areas of concern we would like the Commission to address are listed below. There are additional policy issues requiring resolution and these are summarized in Attachment A.

The City's major concerns and issues include the following:

1. The suggested modifications impermissibly add a definition for "existing development."

The City did not propose to include a definition of "existing development" in its LUP amendment submittal. Nevertheless, Commission staff has suggested a modification to add a definition for "existing development" to Chapter 7 (Acronyms and Definitions) of the LUP, which also carries

through to numerous other policies throughout the document. The suggested modification states that "'Existing Development' means a principal structure, e.g. residential dwelling, required garage, or second residential unit, that was legally permitted prior to the effective date of the Coastal Act (January 1, 1977) and has not undergone a Major Remodel since that time." (11/30/17 staff report, Exhibit 1, CCC Staff Suggested Modifications, pg. 258 of 274).

The net effect of this policy would be that no development built in the last 40 years would be considered "existing". On its face, this seems unreasonable. While we are aware of the Commission's thinking regarding defining this term in this way, particularly as it relates to shoreline protection and Section 30235 of the Coastal Act, the City cannot support the proposed modification. The term "existing development" is reflected in several suggested new and modified policies throughout the LUP, such as policies HAZ-18 (Limits on Bluff or Shoreline Protective Devices), HAZ-19 (No Future Bluff or Shoreline Protective Device), HAZ-20 (Bluff/Shoreline Protective Device), HAZ-21 (Restrict Bluff/Shoreline Protective Devices), HAZ-22 (CDP Application for Bluff or Shoreline Protection Devices), HAZ-23 (CDP for Bluff or Shoreline Protective Devices – Findings and Conditions for Approval), and LU-13 (Existing Legal Non-conforming Structures). (11/30/17 staff report, Exhibit 1, CCC Staff Suggested Modifications, pgs. 212-215 of 274 and pg.50 of 274).

In addition, the following are the most recently adopted LCPs that do not have a definition for existing development tied to 1977:

- City of Solana Beach (2013)
- City of Seaside (2013)
- City of Newport Beach (2017)
- Santa Monica Mountains Segment (2014)
- City of Redondo Beach (2010)

There are also recent LCPA's with amendments to definitions but did not add existing development:

- Imperial Beach LCPA (2017)
- Oceanside LCP A No. LCP-6-ocn-16-004201 (2017)
- Santa Barbara County LCPA No. LCP-4-STB-16-0038 (2017)
- Santa Cruz County LCPA Vacation Rental Ordinance Update (2015)
- Santa Cruz County LCPAs (2012 and 2014)

a) The Coastal Act and Title 14 of the California Code of Regulations do not define "existing development."

City staff opposes using the City's LUP as a test case for a new definition of "existing development." The staff report acknowledges that, "it is true that the Coastal Act does not explicitly define what qualifies as an "existing structure" for the purposes of Section 30235." (11/30/17 staff report, pg. 10.) The staff report then explains Commission staff interprets the legislative intent of Coastal Act Sections 30235 and 30253 was to disallow protective structures built after the Coastal Act was passed. (11/30/17 staff report, pg. 10.)

It is unreasonable to require the City to incorporate a definition for "existing development" that is not required by the Coastal Act or mandated by the Commission's implementing

regulations. Doing so, would likely force the City to defend this definition in court when challenged, even though the definition is based on debatable interpretation that contradicts the Commission's own prior position on the matter as discussed in the next section. The standard of review that the Commission uses in reviewing the adequacy of a proposed amendment to the LUP portion of a certified LCP is whether the LUP as amended would be consistent with, and meet the requirements of, the policies of Chapter 3 of the Coastal Act. Recently, the Commission has approved amendments to other jurisdictions' LCPs without imposing the proposed definition of "existing development." The proposed definition of "existing development" is not required for consistency with, and to meet the requirements of, the Coastal Act Chapter 3 policies.

b) In an appellate court case, the Commission has explicitly argued against Commission staff's currently proposed definition of "existing development."

The staff report states that "[n]otably, no appellate court decision addresses whether the term 'existing structure' in this context includes only structures built prior to the Coastal Act or instead includes structures in existence at the time the Commission acts on an application for shoreline protection, or otherwise addresses the interplay between Sections 30235 and 30253, so no binding legal precedence sheds light on the issue." (11/30/17 staff report, pg. 11.) Although no reported appellate decision directly addresses the definition of "existing development," the Commission, in a case resulting in an unreported appellate decision, successfully argued against the definition now proposed by Commission staff.

In its appellate brief for *Surfrider Foundation v. California Coastal Commission* (Cal. Ct. App., June 5, 2006, No. A110033) 2006 WL 1530224, the Commission called "meritless" the other party's assertion that "existing development" means "'existing as of January 1, 1977.'" (Commission's appellate brief, pg. 14.) The Commission explained that "[t]he Commission's interpretation follows the plain language of the statue: 'Existing' means 'existing' and [the applicant's] house legally existed on the date he applied for the seawall," and pointed to other uses of "existing" in the Coastal Act. (Commission's appellate brief, pgs. 14-19.) The Commission further explained that "the Commission has consistently interpreted section 30235 to refer to structures that exist at the time of the application" as evidenced by the Commission's chief counsel's confirmation of this position at the public hearing at issue. (Commission's appellate brief, pg. 20.) (See Attachment B for the Commission's appellate brief.)

c) The Commission's proposed definition of "existing development" conflicts with the definition under CEQA.

The Commission's proposed defining of "existing development" conflicts with the definition of under the California Environmental Quality Act (CEQA). CEQA defines "existing" as that which is on the ground at the time of the environmental review. (State CEQA Guidelines § 15125(a).) Since Commission's process for development review was certified by the California Secretary of Resources as a "functional equivalent" to the CEQA process (State CEQA Guidelines § 15251), two radically different definitions of "existing" would create

inherent conflicts for applicant, cities, and the Commission.

City staff requests that the suggested modification to define "existing development" be deleted in its entirety as the Commission's interpretation is not legally required by the Coastal Act, the Commission itself has argued against the proposed definition in court, and no other City has been required to implement this modification as part of an LCP amendment approval.

2. The suggested modifications require a waiver of rights to future shoreline/bluff protection that was struck down by a trial court decision in the City of San Clemente.

Commission staff has proposed suggested modifications, below, to add HAZ-18 and HAZ-19 to impermissibly limit rights that exist under Coastal Act Sections 30235 and 30253 for shoreline or bluff protection for existing development (as defined therein) and to require a deed restriction to expressly waive any future right that may exist. CCC staff's proposed suggested modifications are as follows: (11/30/17 staff report, Exhibit 1, CCC Staff Suggested Modifications, pgs. 212--213 of 274):

> *HAZ-18 Limits on Bluff or Shoreline Protective Devices.* Limit the use of protective devices to the minimum required to protect coastal-dependent uses, or existing development or public beaches in danger of erosion, and prohibit their use to enlarge or expand areas for new development. "Existing development" for purposes of this policy shall consist only of a principal structure, e.g. residential dwelling, required garage, or second residential unit, which was legally permitted prior to the effective date of the Coastal Act (January 1, 1977) and has not undergone a Major Remodel since that time and shall not include accessory or ancillary structures such as decks, patios, pools, tennis courts, cabanas, stairs, landscaping, etc.
>
> *HAZ-19 No Future Bluff or Shoreline Protective Device*. No bluff or shoreline protective device(s) shall ever be constructed to protect new development, including development and Major Remodels, except when such development is coastal-dependent development and threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, ground subsidence, or other natural hazards in the future. A condition of any CDP issued for new development including Major Remodels in hazardous areas shall require the property owner to record a deed restriction on the property that expressly waives any future right that may exist pursuant to Section 30235 of the Coastal Act to seek a bluff or shoreline protective device to protect the development. This condition shall also require the removal of any structures as required pursuant to HAZ-35 if relocation is infeasible.

In *Capistrano Shores Property LLC vs. California Coastal Commission* (Super. Ct. Orange County, 2016, No. 30-2015-00785032-CU-WM-CJC) Capistrano Shores Property LLC successfully challenged the Commission's imposition of the very same CDP permit condition waiving the applicant's rights under Coastal Act Section 30235. (8/22/16 Order, pg. 2.) The Court struck the condition, explaining that "[i]t appears to be overreaching to have the [applicant] give up any rights to possible repair or maintenance of the device, under PRC sec. 30235, which [the applicant's] membership in the Capistrano Shores Inc. association may yield. The waiver seems unreasonably

broad and contrary to the above guidance from *Nollan* [(1987) 483 U.S. 825] and *Whaler's Village* [(1985) 173 Cal.App.3d 240]." (8/22/16 Order, pg. 2.)

Given that the trial court struck this condition of approval for a CDP imposed by the Commission in this very City, it is unreasonable for the Commission to now require City staff to impose this very same condition through proposed HAZ-19. Therefore, City staff requests that HAZ-18 be modified to include only the first sentence and request that HAZ-19 be modified to include only the first sentence.

3. The suggested modification requiring a special condition for removal of development in hazardous areas is overbroad and not required at this time because the City is currently conducting a sea level rise vulnerability assessment, after which new adaptation policies will be developed and incorporated into the LCP.

Similar to this issue of waiver of rights, is the Commission's suggested modification in HAZ-35 to require a special condition for removal of development in hazardous areas under certain circumstances. The new policy states (11/30/17 staff report, Exhibit 1, CCC Staff Suggested Modifications, pgs. 219 of 274):

HAZ-35 Removal of Development. Except for coastal-dependent development, new development, including major remodel, in hazardous areas shall be conditioned to require that the development shall be removed and the affected area restored to its previous or natural condition if: (a) any government agency has ordered that the structures are no longer allowed to be occupied due to coastal hazards, or if any public agency requires the structures to be removed; (b) services to the site can no longer be maintained (e.g., utilities, roads); (c) the development is no longer located on private property due to the migration of mean sea level and the location of public trust lands and the development significantly impairs public trust resources; (d) removal is required pursuant to LCP policies for SLR adaptation planning; or (e) the development requires new and/or augmented shoreline protective devices.

This policy is overbroad and subject to interpretation; therefore, too burdensome for the City to implement. Any additional necessary coastal hazards policies based on the City's vulnerability assessment (currently in development) will occur at a later date through an LUP Amendment.

4. The suggested modifications add too much detail in the LUP that more properly belong in the IP and do not take into account unique local conditions, preferences and local circumstances in retention/mitigation requirements for lower and moderate cost overnight accommodations.

Suggested modifications in policies LU-42 (Overnight Accommodations), LU-43 (High-End Overnight Accommodations), and LU-44 (Lower and Moderate Cost Accommodations) add new language requiring any proposal to retain existing low and mid-range overnight accommodations and requires any proposal to demolish overnight accommodations to demonstrate that rehabilitation of the units is not feasible. Further, LU-43 requires new overnight accommodations or limited use overnight visitor accommodations to include at least 25% of units at low or mid-range or the payment of an in-lieu fee.

Commission staff's proposed suggested modifications are as follows: (11/30/17 staff report, Exhibit 1, CCC Staff Suggested Modifications, pgs. 59-60 of 274.):

~~*LU-44*~~ *LU-42* *Overnight Accommodations*. Retain existing low- and mid-range overnight accommodations and provide a full range of overnight accommodations. Any proposal to demolish existing overnight accommodations shall be required to demonstrate that rehabilitation of the units is not feasible. Protect, encourage and, where feasible, provide lower cost overnight accommodations in the Coastal Zone, including the possibility of a youth or elder hostel.

LU-43 High-End Overnight Accommodations. Any proposal to demolish existing overnight accommodations shall be required to demonstrate that rehabilitation of the units is not feasible. New overnight accommodations or limited use overnight visitor accommodations such as timeshares, fractional ownership and condominium hotels shall include at least 25% of the units priced at low- and/or mid-range and can be located on- or off-site of the project location or can be provided through the payment of an in-lieu fee which shall be used for the provision of low- and mid-range overnight accommodations.

~~*LU-45*~~ *LU-44* *Lower and Moderate Cost Accommodations.* ~~*Opportunities*~~. Prohibit the loss of existing lower cost facilities, including lower cost hotel, motel or inn units, or campsites~~, unless they are replaced with comparable facilities, mitigation, or in-lieu fees are provided.~~ Any proposal to demolish existing overnight accommodations shall be required to demonstrate that rehabilitation of the units is not feasible. New development proposed to eliminate existing lower cost accommodations shall provide lower-cost overnight accommodations commensurate with the impact of the proposed new development on lower cost overnight accommodations or pay an "in-lieu" fee in an amount to be determined through the CDP process that shall be disbursed to entities that provide lower-cost overnight visitor accommodations. Mitigation shall be required for the loss of existing low cost overnight accommodations if they are not replaced on- or off-site prior to or concurrent with the demolition of the existing low cost overnight accommodations. In-lieu fees may also be used to provide other lower-cost overnight visitor accommodations in the Southern California coastal zone area.

The City understands the Commission's objectives to provide affordable lower and moderate cost accommodations in the coastal zone. However, as demonstrated in the accommodation inventory included as part of the proposed LCP amendment submittal materials, the City has an abundance of lower and moderate cost accommodations. Also, with short term apartment rentals and short term lodging units, the inventory of publicly-available lower cost overnight accommodations has corrected due to market forces and has radically changed the availability of supply such that there is now significantly more supply on the low-mid cost end and mitigation is not necessary.

The proposed "one size fits all" policy language proposed in suggested modifications for policies LU-42, LU-43, and LU-44 does not take into account the local circumstances and preferences in the City. Our policy language, as proposed, seeks to prohibit the loss of existing lower cost accommodations and provide appropriate mitigation based on circumstances of each proposal at the time of the proposal. The City wants to retain our City Council approved policy language, as submitted, for policies LU-42 and LU-44 (with the exception of title revisions) and we request

deletion of the proposed modification adding policy LU-43. The City's proposed LUP language in these policies as well as in policies LU-46 (Affordability Classification), LU-47 (Range of Pricing), LU-48 (Conversion), and LU-49 (Timeshares (Fractional/Limited Use) Accommodations) gives the City flexibility to add more details in the Implementation Plan, as necessary. (11/30/17 staff report, Exhibit 1, CCC Staff Suggested Modifications, pgs. 60-61 of 274.) The suggested modifications add too much detail in the LUP and does not allow enough context-specific consideration. The City would prefer to address any necessary details through the IP.

5. The suggested modifications in policies that require the City to ensure public access through private communities that may be too onerous and far-reaching for the City to implement.

In particular, PUB-54 requires that, if City approves a development permit for one property in the certain private residential communities, then the City must engage the entire residential community to create an access management program ensuring public access:

~~*PUB-52*~~ *PUB-54 Access Management Program.* ~~For the private beach areas an~~ Access management programs for the private beach areas north of Capistrano Shores, La Ladera, Cypress Shores and Cotton's Point private communities shall be prepared when development in a private community is required, as established by PUB-~~40~~39, to set up a plan/program to dedicate or offer to dedicate public access in accordance with the City LCP and State requirements…

The City acting on this requirement would likely lead to challenges that an access management program for an entire community is without a nexus and is not roughly proportionate to the approval for a single property.

Suggested modifications in policies PUB-46 (Public Access in Gated Communities), PUB-54 (Access Management Program), and PUB-55 (Public Access to Privately Owned Beach Parcels) place too much of a burden on the City to implement. (11/30/17 staff report, Exhibit 1, CCC Staff Suggested Modifications, pgs. 123-126 of 274.) For example, to implement PUB-46 below, the City would need to collect substantial evidence regarding public access impacts to establish the appropriate nexus for implementation of mitigation and would be subject to anticipated legal challenge by property owners.

PUB-46 Public Access in Gated Communities. Require public access consistent with public access policies for any new development in private/gated communities causing or contributing to adverse public access impacts if appropriate nexus is established, the public access mitigation is roughly proportional to the extent of the development's adverse public access impacts, if it can be reasonably accommodated and there is not another public access point located in close proximity.

The City does not have such resources (staff, money or time) to accomplish this for any new development. The City recently when through an exhaustive effort with Coastal Commission and the Railways to significantly increase our public access to the shoreline to 15 access points. This was accomplished through the City's Beach Trail project which took approximately ten years and was a significant financial investment costing several million dollars. Furthermore, "close proximity" is not defined and may be different in each circumstance. Similarly, the suggested modifications to policy

PUB-54 and PUB-55 place the same burden on the City to collect substantial evidence to implement.
6. The suggested modifications unreasonably require beach curfew restrictions to require a CDP which does not align with City procedures.

PUB-59 Public Beach Access. Any closure of a public beach, or modification of any existing closure, including an overnight curfew imposed at City beaches, established after January 1, 1977 requires an approved CDP, except for temporary closure under emergency circumstances. Public access to the water's edge and at least 20 feet inland of the wet sand of all beaches shall be permitted at all times.

For purposes of public health, safety and welfare, the City has maintained a restriction on visitors to the Pier in the overnight hours between midnight and 4am. This restriction has been in effect since 1979 and was adopted by the City Council under Ordinance No. 749. It remains the preference of the City to keep the existing regulations in place and the City has not received any complaints of limited access that has been in effect since 1979 therefore there is no reason to change the existing regulations in effect at the City.

Additional Policy Item and Information – Short Term Rentals

Commission staff has noted that public correspondence has been received concerning the City's regulation of short-term rentals in the Coastal Zone. The City studied the impacts of transitory lodging uses to determine if there were negative external impacts common to transitory lodging uses that would necessitate regulation.

The City concluded that there were identifiable nuisance effects related to transitory lodging uses generally as well as a conversion of long-term residential properties to vacation rentals, which result in a reduction of available housing and displacement of residents. From the study, the City began an effort to identify areas appropriate for transitory lodging uses to preserve housing for long-term residents and ensure short-term rentals were located near complimentary uses, such as higher density housing, public transportation facilities and commercial amenities.

The City created a new "short term lodging unit" or "STLU" zoning definition and "short term apartment rental" or "STAR" definition. The City established zones where an STLU and STAR may be located and also established regulations to improve the STLU and STAR compatibility with neighborhoods developed for long-term residents.

These regulations address parking, occupancy, trash, noise, and 24-hour management contact information as well as posting of occupancy, emergency phone numbers and operating standards at the STLU or STAR.

Conclusion

These major policy issues, as well as other issues that remain to be resolved, are listed in Attachment A. We believe that these issues are significant enough for the City Council to reject the Commission's suggested modifications and hope that further discussion will ensure that the LUP, as

ultimately approved by the Commission, will be ultimately acceptable to the San Clemente City Council. Thank you for considering the City's requested changes to the staff modifications.

Sincerely,

Cecilia Gallardo-Daly,
Community Development Director

Attachment A – Summary of LUP Policy Issues by Chapter
Attachment B – Commission's appellate brief (*Surfrider Foundation v. California Coastal Comm'n)*

cc: San Clemente City Council
Jack Ainsworth, Executive Director, California Coastal Commission
Karl Schwing, South Coast District Director, California Coastal Commission
Charles Posner, South Coast District Supervisor, California Coastal Commission
Liliana Roman, Coastal Program Analyst, California Coastal Commission
James Makshanoff, San Clemente City Manager
Scott Smith, San Clemente City Attorney
Amber Gregg, City Planner, City of San Clemente
Leslea Meyerhoff, Project Management Consultant, City of San Clemente

ATTACHMENT A – CITY OF SAN CLEMENTE LUP: KEY ISSUES SUMMARY

Chapter 1 - Introduction

- Chapter needs a Severability clause at the end.

Chapter 2 - Land Use and New Development

- Table 2.1 Allowable Uses – Too much detail in table, LUP details will be in IP; changes to Visitor-Serving Commercial District too restrictive, deleted entire land use category for Planned Residential District (PRD)
- LU 13 - 1977 reference for Existing Development
- LU 14 – Creates a new threshold for LUP compliance, beyond redevelopment
- LU 42 - Overnight accommodation retention/feasibility/mitigation
- LU 43 - Overnight accommodation retention/feasibility/mitigation
- LU 44 - Overnight accommodation retention/feasibility mitigation
- LU 45 - Mitigation for loss of accommodations
- LU 46 - Affordability Classifications

Chapter 3 - Public Access and Recreation

- PUB 9 – Railroad removal. Rail Facilities and Programs - added mod "to the extent such retention can be consistent with the hazard policies in Ch. 5 of the LUP" which singles out rail facilities
- PUB-35 - Parking Fees CDP required for changes to public parking hours/rates
- PUB 46 - Public Access in Gated Communities – new policy added to require public coastal access via private lands
- PUB 54 - Access Management Program through private property has no nexus
- PUB 55 - Public Access to Privately Owned Beach Parcels has no nexus
- PUB 58 - Pier and beach closure hours have been in effect since 1979
- PUB 59 - Public Beach Access – Public safety related closure of pier/beach from 12pm-4am overnight needs CDP; existing conditions should be built into LUP
- PUB 79 - Railroad relocation; not in City purview

Chapter 4 - Land and Marine Resources

- WQ Policies in general – City and CCC still working on policy refinements.
- RES 55 – Sand Dunes – CCC requires southern foredunes/backdunes to be ESHA if identified as part of a biological survey; no other criteria are added, such as level of disturbance, etc. and would likely preclude public use, beach grooming, beach nourishment, Adaptation Strategies and other maint. actions
- RES 59 – Buffer Maintenance, no fuel mod. allowed in ESHA buffer; fire hazards
- RES 71 – Coastal canyons, private properties, regulatory takings concerns
- RES 72 – Same issues as RES 71
- RES 76 – Removal of policy agreed to with staff in meeting; need to delete policy
- RES 89 – RES-89 Native Trees and RES-90 Native Tree Protection – requires 4:1 mitigation of any native tree removed not just on public or undeveloped lands

Chapter 5 - Hazards

- HAZ 13 - Shoreline Management Plan requirement is similar to and could be in conflict with Beach Management Plan in Chapter 4, Policies RES 5
- HAZ 18 - Limits on Shoreline Protective Devices; 1977 reference to "existing"
- HAZ-19 No Future Bluff or Shoreline Protective Device - Deed restrictions/waiver of rights to future shoreline protection for major remodels or new development and conflicts with 30235 which is why CCC wants future waivers
- HAZ-21 CDP Application for Bluff or Shoreline Protective Devices - Mitigation for shoreline protection devices added in
- HAZ- 22 Restrict Bluff Shoreline Protective Devices, 1977 reference and conflicts with CCA 30235
- HAZ-23 CDP for Bluff or Shoreline Protective Devices- Findings and Conditions for Approval. "Existing development" shall consist only of a principal structure, e.g. residential dwelling, required garage, or second residential unit, which was legally permitted prior to January 1, 1977
- HAZ-35 Removal of Development – requires condition for new development or major removal to require removal of development/site restoration at certain trigger points, including if the development requires new and/or augmented shoreline protective device
- HAZ-41 Blufftop Setback - Increased setbacks for new bluff top development and no use of caisson foundation within 25 ft. of bluff edge. Reductions in front yard setbacks need to be built into policy; don't require a variance
- HAZ-47 Canyon Setbacks – mods to proposed policy language to include the "greater of" XYZ, does not provide City with flexibility to consider conditions unique to the site
- HAZ 49 – Beach Front Setback – mods include "greater of" are unclear

Chapter 6 - Visual, Cultural, and Historical Resources

- VIS 12 – Visual simulation requirement for all projects, not reasonable
- VIS 14 – Clarity needed that this applies to public lands only

Chapter 7- Acronyms and Definitions

- Suggest delete Figure 7-1 as not useful and possibly confusing
- Coastal Canyon and Coastal Bluff definitions - threshold is 10' rise
- Demolition – definition excludes accidental / natural forces too
- Emergency – definition differs from CEQA definition
- ESHA buffers – nothing allowed beyond native plants so more ESHA is created
- Existing Development – Only what was existing as of 1977
- Intensification of Use – A parking increase is not necessarily an intensification
- Major Remodel – 1977 is the threshold instead of "Redevelopment"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

SURFRIDER FOUNDATION, **Petitioner and Appellant,** **v.** **CALIFORNIA COASTAL COMMISSION,** **Defendant and Respondent,** **WALTER CAVANAGH, et al.,** **Real Parties In Interest and Respondents.**	Case No. A110033

San Francisco County Superior Court No. CPF 03-503643
The Honorable James L. Warren, Judge

BRIEF OF RESPONDENT CALIFORNIA COASTAL COMMISSION

BILL LOCKYER, Attorney General
of the State of California
TOM GREENE
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOSEPH BARBIERI SBN 83210
ALICE BUSCHING REYNOLDS SBN 169398
Deputy Attorneys General
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2139
Facsimile: (510) 622-2270

Attorneys for Respondent
California Coastal Commission

B. The Commission's Interpretation of Section 30235 Is Compelled by Both the Language of the Statute and the Legislature's Intent to Allow Seawalls Where Necessary to Protect Life and Property.

In the face of this, Surfrider maintains one argument. It contends that the word "existing" as used in section 30235[5/] (and implicitly LCP policy S-6) means "existing as of January 1, 1977," the date that the Coastal Act went into effect; in other words, the Commission may approve a seawall only to protect structures that existed on January 1, 1977. Because Cavanagh's house did not exist until 1998, Surfrider contends that, as a matter of law, the Commission had no discretion to approve his seawall.

This argument is meritless. The Commission's interpretation follows the plain language of the statute: "Existing" means "existing" and Cavanagh's house legally existed on the date that he applied for the seawall.

The Commission's interpretation makes sense and comports with the Legislature's intent. Protective shoreline devices are disfavored under the Coastal Act, but the Legislature did not ban them. Even Surfrider concedes that, at least as to structures that predated the Coastal Act, section 30235 allows the Commission to approve protective devices in appropriate circumstances. As proof of this, Surfrider does not challenge the Commission's decision to approve a seawall to protect the 121 Indio residence that predated the Coastal Act. (Surfrider Br. at p. 7, fn. 7.)

The question implicitly raised by Surfrider—but one that it scrupulously

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5. Section 30235 provides in part:

> 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

avoids asking—is whether the Legislature intended that, as a matter of law, the Commission may not approve seawalls to protect structures that were legally built after the enactment of the Coastal Act regardless of how much life and property might be lost if the structures were not protected. Although Surfrider nods in the direction of legislative intent, its abstract conception of legislative intent is divorced from reality and common sense. As the trial court pointed out, section 30235 protects a wide range of existing structures, not just private residences. (CT 317, fn.6.) Assume, for example, that the Commission in the 1980's approved a state park facility that included a parking lot, restrooms, landscaping, public walkways and stairs that were later severely damaged by winter storms. In Surfrider's view, the Commission would be precluded from approving a seawall to protect this public park facility regardless of how endangered it might be. But Surfrider does not demonstrate that the Legislature would have intended such a harmful result.

Although Surfrider asserts that the Commission's interpretation of section 30235 conflicts with section 30253 (Surfrider Br. at pp. 34-39), the Commission's interpretation harmonizes the two statutes because it gives effect to the Legislature's wish to avoid the harmful impacts of seawalls as well as its wish to protect legally existing structures in danger from erosion. Section 30253 provides in part that:

> New development shall: . . . [¶] (2) 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.

Section 30253 requires that new development be constructed in a way that does not require the later construction of protective devices. It does not govern already existing development. Read together, sections 30235 and 30253 nicely complement each other. Section 30253 assures that new development is constructed and sited in a way that avoids the future need for a seawall. Section

30235 recognizes that, despite the best efforts to avoid the later need for seawalls, it may sometimes be necessary to protect lives and property endangered by erosion. Therefore, the Commission may approve seawalls for post-Coastal Act structures where the effort to avoid a seawall has failed and the new structure is in danger from erosion.

C. When the Word "Existing" Is Used in Chapter 3 of the Coastal Act, It Refers to Currently Existing Conditions Because Permit Applications Are Typically Evaluated Under Conditions That Exist at the Time of the Application.

When a word or phrase has been given a particular meaning in one part of a law it typically is given the same meaning in other parts of the law. (*Stillwell v. State Bar of California, supra,* 29 Cal.2d at p. 123.) The manner in which the word "existing" appears throughout the Coastal Act confirms the Commission's interpretation.

The word "existing" appears frequently in the Coastal Act but one reference stands out. Section 30236 limits the approval of flood control projects to the situation "where no other method for protecting existing structures in the flood plain is feasible and where such protection is necessary for public safety or to protect existing development." Once again, the Legislature balanced the need to protect the public from physical harm with the need to avoid the adverse impacts of a particular type of development (flood control projects). As in section 30235, the Legislature found that it could prevent the destruction of post-Coastal Act development by permitting the erection of protective structures but adopting strict standards calibrated to avoid environmental harms.

The use of "existing" in the last sentence of section 30235 makes a similar point. This sentence provides that "[e]xisting marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out

or upgraded where feasible." Suppose that the Commission in 1978 approved a permit for a marine structure that today is causing water stagnation and pollution despite the imposition of permit conditions in 1978 designed to avoid those impacts. The polluting marine structure should be treating as "existing" and phased out, even though it was constructed after the Coastal Act's passage.

The Legislature's use of the word "existing" in the remainder of Chapter 3 of the Coastal Act also provides powerful confirmation of the Commission's interpretation of the word "existing." Chapter 3 (Pub. Resources Code, §§ 30200-30265.5) contains the resource policies that the Commission applies when reviewing permit applications. (*Id.*, § 30604(a).) The word "existing" appears throughout Chapter 3 and each time refers to conditions as they exist at the time of the application, not at the time of the Coastal Act's passage. In addition to sections 30235 and 30236, the references to "existing" in Chapter 3 include:

- Providing additional berthing space in "existing harbors" (Pub. Resources Code, § 30224);
- Maintaining "existing" depths in "existing" navigational channels (*id.*, § 30233(a)(2));
- Allowing maintenance of "existing" intake lines (*id.*, § 30233(a)(5));
- Limiting diking, filling and dredging of "existing" estuary and wetlands (*id.*, § 30233(c));
- Restricting reduction of "existing" boating harbor space (*id.*, § 30234);
- Limiting conversion of agricultural lands where viability of "existing" agricultural use is severely limited (*id.*, §§ 30241, 30241.5);
- Restricting land divisions outside "existing" developed areas (*id.*, § 30250(a));
- Siting new hazardous industrial development away from "existing"

development (*id.*, § 30250(b));

- Locating visitor-serving development in "existing" developed areas (*id.*, § 30250(c));
- Favoring certain types of uses where "existing" public facilities are limited (*id.*, § 30254));
- Encouraging multicompany use of "existing" tanker facilities (*id.*, § 30261); and
- Defining "expanded oil extraction" as an increase in the geographical extent of "existing" leases.

These Chapter 3 provisions logically refer to conditions that exist at the time of a permit application. It would make little sense to evaluate permit applications under conditions as they existed thirty or more years ago and ignore the considerable changes that have taken place along California's coast since the Coastal Act's passage. Consistent with the use of "existing" throughout Chapter 3, section 30235 should be construed to refer to currently existing structures.

Outside of Chapter 3, there are a number of other Coastal Act provisions that treat "existing" as currently existing. (See Pub. Resources Code, § 30705(b) ["existing water depths"]; § 30711(a)(3) ["existing water quality"]; § 30610(g)(1) ["existing zoning requirements"]; *id.*, 30812(g) ["existing administrative methods for resolving a violation"].) In addition, the Legislature twice used specific dates when it intended "existing" to mean something other than currently existing. Section 30610.6 limits the section's application to any "legal lot existing . . . on the effective date of this section." Similarly, section 30614 refers to "permit conditions existing as of January 1, 2002." (*Id.*, § 30614.)

Surfrider's response is anemic. Surfrider points to four Coastal Act sections where, it contends, the word "existing" refers to conditions existing on

the date of the Coastal Act's passage. (Surfrider Br. at pp. 25-26 [citing sections 30001(d), 30004(b), 30007 and 30103.5(b)].) Sections 30001(b) and 30007 juxtapose "existing" with references to future developments and future laws, expressing the Legislature's specific intent that "existing" in those provisions refers to conditions on the date of the Coastal Act's passage. Moreover, Surfrider's citations are mostly found in the "findings" section of the Coastal Act, in which the Legislature would be expected to refer to conditions as they then existed to explain the need for the Act. None of the provisions upon which Surfrider relies (other than section 30235 itself) are found in Chapter 3 of the Coastal Act.

The Commission's harmonious construction of the Coastal Act confirms that the Legislature intended that section 30235 be applied to structures that existed on the date of the permit application.[6/]

D. The Court Should Defer to the Commission's Interpretation of Section 30235 and the LCP.

Surfrider incorrectly contends that the Commission's interpretation of section 30235 is "vacillating" and not entitled to deference. (Surfrider Br. at pp. 41-45.) The Commission's interpretation of section 30235 has been consistent, and provides more weight to support the Court's interpretation.

Courts "must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities." (*Mason*

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6. Three years ago, the Legislature considered adding the specific language that Surfrider seeks to read into section 30235. AB 2943, if adopted, would have defined "existing structure" in section 30235 to mean "a structure that has obtained a vested right as of January 1, 1977, the effective date of the California Coastal Act of 1976." (CT 119-120 [Sen. Amend. to Assem. Bill No. 2943 (2001-2002 Reg. Sess.) Aug. 26, 2002].) AB 2943 died on the Senate inactive file on November 30, 2002. (CT 122.) Although "only limited inferences can be drawn from [unpassed bills]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795), the Legislature's rejection of AB 2943 undermines Surfrider's interpretation of section 30235.

v. Retirement Board of the City and County of San Francisco (2003) 111 Cal.App.4th 1221, 1228 (Jones, J).) "Consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight." (*Ibid.*)

Here, the Commission evaluated the seawall project for conformity with the City's LCP that the Commission previously had certified. (See Pub. Resources Code, §§ 30512, 30512.1, 30512.2.) The Commission's interpretation of a certified LCP is entitled to deference because, when an appeal reaches it, the Commission is charged with putting the LCP into effect. (*Mason v. Retirement Board of the City and County of San Francisco, supra*, 111 Cal.App.4th at p. 1228; see also Pub. Resources Code, § 30625(c) [Commission decisions shall guide local government actions under the Coastal Act].) The Commission's interpretation of section 30235 is entitled to no less weight, because the Commission alone is responsible for administering the Coastal Act.

In addition, the Court should accord the Commission's interpretation of "existing structures" great weight because the Commission has consistently interpreted section 30235 to refer to structures that exist at the time of the application. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) As proof of this, the Commission's chief counsel confirmed at the public hearing that the Commission has "interpreted existing structure to mean whatever structure was there legally at the time that it was making its decision." (11 AR 2018-2019.)

Surfrider contends that the Commission has "vacillated" because in two previous permit decisions the Commission found that it did not need to reach the issue whether the term "existing structure" was limited to pre-Coastal Act structures. (Surfrider Br. at pp. 41-45.) The Commission's decision to refrain from reaching an issue that was not raised by a pending permit application

reflects judicious decisionmaking, not vacillation. (See *id.* at p. 44 [conceding that the issue was not before the Commission].)

Surfrider also cites the chief counsel's testimony as an additional indication that the Commission has "vacillated" in its interpretation of "existing structure." (Surfrider Br. at p. 45.) Surfrider, however, has inaccurately quoted the chief counsel's testimony, improperly inserting the parenthetical "[of existing structure]" into the quotation. (Cal. Style Manual (4th ed. 2000) § 4.16 [may not use brackets to rewrite quotation].) Surfrider then misconstrues the testimony, suggesting that the Commission has previously determined that the term "existing structure" in section 30235 applies only to pre-Coastal Act structures. Instead, the complete text of the chief counsel's statement demonstrates that the "change" to which he referred was the Commission's recent practice of incorporating a "no future seawall" condition in permits for new bluff-top development, not a change in the interpretation of "existing structure." (11 AR 2018-2019; see *post,* at p. 24.)

The Commission is not aware of a single instance in the history of the Coastal Act in which it has determined that "existing structures" in section 30235 refers only to structures that predated the Coastal Act. The Court should defer to the Commission's construction of section 30235 and the corresponding LCP provisions.

III. NONE OF SURFRIDER'S REMAINING ARGUMENTS HAVE MERIT.

Most of Surfrider's arguments have been addressed. There are a few others, but none have merit.

1. Surfrider repeatedly states that the Commission's interpretation would "entitle" or "guarantee" a seawall to any completed structure. (E.g., Surfrider Br. at pp. 4, 37, 39, 47, fn. 9.) This is a gross misstatement. The Commission's interpretation of section 30235 does not entitle or guarantee anyone a seawall.

The Commission may approve a seawall only if, at a minimum, the applicant establishes that a structure is in danger of erosion and that the seawall is designed to eliminate or mitigate the seawall's impacts on sand supply. (Pub. Resources Code, §§ 30235, 30604(a).) The applicant also would be required to satisfy numerous other conditions designed to mitigate project impacts on public access and other coastal resources. The California Environmental Quality Act also requires the Commission to evaluate feasible alternatives and mitigation measures. (Pub. Resources Code, § 21080.5(d)(2)(A).)

2. The Commission agrees that the Coastal Act should be liberally construed in favor of protecting coastal resources. (Surfrider Br. at pp. 12-13.) That rule of construction does not come into play here because the language of section 30235 and rules of statutory construction support the Commission's interpretation. The Commission's interpretation both protects coastal resources and fulfills the Legislature's intent to protect endangered structures in appropriate circumstances.

3. Surfrider argues that the legislative history of the Coastal Act supports its interpretation. (Surfrider Br. at pp. 28-32.) This argument has two components. First, Surfrider argues that the Legislature rejected the "developer friendly" coastal legislation and enacted the bill favored by environmentalists. Surfrider never explains why an "environmentally friendly" Coastal Act would necessarily require that the Commission deny seawalls to protect endangered post-Coastal Act structures.

Second, Surfrider argues that, shortly before the Coastal Act's passage, the Legislature amended SB 1277 to include the word "existing" before structures in section 30235. (Surfrider Br. at p. 32.) Surfrider provides no other evidence about this amendment. Nevertheless, Surfrider says that there was "no rational reason" why the Legislature would have added this word unless to clarify that section 30235 applied only to structures that predated the Coastal Act.

Actually, there is a very rational explanation. Had the Legislature not included the word "existing" in section 30235, applicants could apply to build seawalls to protect a future proposed structure, rather than be forced to site the proposed structure so that it would not necessitate a seawall. Far from making the word "existing" in section 30235 "surplusage," as Surfrider contends (Surfrider Br. at pp. 33-34), the Commission's interpretation harmonizes sections 30235 and 30253. Section 30253 requires that proposed new development be designed so that it does not require a seawall; without the word "existing," section 30235 could have been construed to allow a seawall for a proposed structure that would have been forbidden by section 30253.

4. Surfrider mistakenly relies on Public Resources Code section 30007.5 when arguing that the Court should resolve doubts in its favor. (Surfrider Br. at pp. 14, 15, 38.) Section 30007.5 provides that conflicts among Coastal Act policies should be resolved in a manner that on balance is most protective of coastal resources. Section 30007.5 is a mechanism for resolving policy conflicts that the Commission must employ when reviewing permit applications. (See, e.g., *Sierra Club v. California Coastal Comm'n* (1993) 19 Cal.App.4th 547, 562 [section 30007.5 authorized Commission to resolve conflict] .) It is not a directive to the courts about how to interpret provisions of the Coastal Act, but guides how the Commission should implement conflicting Coastal Act policies as they apply to a specific project. In this case, the Commission found that the project met the criteria in section 30235, and there was no conflict among applicable policies.

5. The Commission's interpretation of section 30235 does not make the "mandatory setback provisions" of section 30253 "meaningless." (Surfrider Br. at p. 4.) Enforcement of section 30253's setback provisions for new structures is meaningful because it makes seawalls unnecessary in most instances. It is only on those infrequent occasions that bluff retreat drastically exceeds its

predicted retreat that a seawall may become necessary.

6. Surfrider argues that landowners would have an incentive to mislead the Commission into approving structures through the use of "purchased science" that would misstate erosion rates with the hope of later qualifying for a seawall, and it suggests that happened here. (Surfrider Br. at pp. 39-41.) Surfrider's insinuations are misguided. There is no evidence that the applicants' experts intentionally tried to mislead anyone; the unchallenged evidence demonstrated that the bluff rate was caused by the unforeseen El Niño storms. Moreover, anyone who intentionally supplies false evidence may be subject to a permit revocation. (Cal. Code Regs., tit., §§ 13104-13108.5.) And, because no one is "guaranteed" a seawall, anyone who plays the high-stakes game proposed by Surfrider risks having their seawall application turned down.

7. Finally, Surfrider contends that the Commission's imposition of a "no new seawall" condition on recent permits for new structures exceeds the Commission's power because this condition would force the Commission to deny seawalls that might otherwise be entitled to a permit under section 30235. (Surfrider Br. at p. 47.) This case does not involve a "no new seawall" condition, and there is no reason for the Court to offer an advisory opinion about whether the Commission might impose one.

Moreover, this is a strange argument for Surfrider to make. The Commission has imposed a "no future seawall" condition on new bluff top development so that property owners will not seek a shoreline protective device in the future. (11 AR 2019.) The Commission's approach deters applicants from circumventing section's 30253 setback requirements and minimizes the need for new seawalls in the future—an approach that is consistent with the philosophy that Surfrider purports to advocate. The Commission's reasoned approach, however, undermines the need to adopt the extreme position advocated by Surfrider, which may explain Surfrider's criticism.

CONCLUSION

The trial court's judgment should be affirmed.

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Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
TOM GREENE
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
ALICE BUSCHING REYNOLDS
Deputy Attorney General

JOSEPH BARBIERI
Deputy Attorney General

Attorneys for Respondent
California Coastal Commission