

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4402
(619) 767-2370



Th 14a

Addendum

June 6, 2008

To: Commissioners and Interested Persons

From: California Coastal Commission
San Diego Staff

Subject: Addendum to **Item #Th 14a**, Coastal Commission Permit Application
#6-05-140-A1 (San Diego Safety Buoys), for the Commission Meeting of
June 12, 2008

Staff recommends the following changes be made to the above-referenced staff report:

1. On Page 3 of the staff report, Special Condition # 1b shall be revised as follows:

1. Designated Public Swim Area and Public Access Signage. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit for review and written approval of the Executive Director, a signage plan that includes the following:

[...]

b. Signs shall be a minimum of 2' x 18" in size and include the following language:

DESIGNATED PUBLIC AREA

All waters between Roseland Drive and Avenida de la Playa are open to the public, including waters protected by ropes and buoys.

Public beach use permitted seaward of the yellow line ~~depicted~~ shown on the diagram above.

Recreational passage permitted landward of the yellow line along the highest water's edge in event of a high tide.

2. On Page 6 of the staff report, the first incomplete paragraph shall be revised as follows:

extensive negotiations with legal staff and planning staff, an agreement was reached between the Commission, the City and the LJBTC regarding a clear way to demonstrate which portions of the beach are open for public use. The agreed-upon

revisions to the wording on the signage as well as the placement of a yellow flag on the beach resulted in an amendment request, which was considered by the Commission at its April 10, 2008 hearing. Due to concerns raised at that hearing, the matter was continued. The amendment request was further revised to address concerns raised at the hearing by the Commission, which includes revising the proposed signage language (as described below). At this time, the settlement agreement has not been fully executed. As such, Special Condition #3 has been added to require, prior to the issuance of the permit amendment, that the fully executed final settlement agreement be provide to the Commission. The proposed revisions to the approved language of the signage as an amendment to the permit are as follows:

DESIGNATED PUBLIC AREA

All waters between Roseland Drive and Avenida de la Playa are open to the public, including waters protected by ropes and buoys.

Public beach use permitted seaward of the yellow line ~~depicted~~ shown on the diagram above.

Recreational passage permitted landward of the yellow line along the highest water's edge in event of a high tide.

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
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Th 14a

Filed: 1/3/08
49th Day: 2/21/08
180th Day: 7/1/08
Staff: Laurinda Owens-SD
Staff Report: 5/28/08
Hearing Date: 6/11-13/08

AMENDMENT REQUEST
STAFF REPORT AND PRELIMINARY RECOMMENDATION

Application No.: 6-05-140-A1

Applicant: City of San Diego Agent: Glenn Spitzer, City Attorney's Office

Original Placement of buoy markers in the ocean to demarcate safe swimming area
Description: from April 1st to October 31st each year.

Proposed Request to revise language on approved public access signage on the
Amendment: beach along the frontage of the La Jolla Beach & Tennis Club.

Site: Along the beach adjacent to the La Jolla Beach and Tennis Club (2000
Sprindrift Drive), between the western extensions of Paseo Dorado and
Avenida de la Playa, La Jolla, San Diego, San Diego County.

STAFF NOTES:

At its April 10, 2008 Hearing, the Commission opened the hearing on this matter and heard testimony. Due to concerns relative to the proposed signage wording and flag placement, the Commission voted to continue this matter to a subsequent hearing. Since that time, the applicant has revised their amendment request to address the concerns raised by the Commission.

Summary of Staff's Preliminary Recommendation:

Staff is recommending approval of the proposed project. The proposed amendment involves changes to the language on the previously-approved signage on the beach designating a public use area. The proposed change is pursuant to settlement of a lawsuit filed by the La Jolla Beach & Tennis Club (LJBTC). The revised signage is intended to make it clear to the public where the public can recreate and walk along the beach seaward of the LJBTC. Using remote sensing of the beach by LIDAR, scientists at the Scripps Institution of Oceanography plotted the mean high tide line (MHTL) on the beach fronting the LJBTC at various times from spring of 2002 to spring of 2006. These surveys were completed in the fall and spring to capture the maximum (fall) and minimum (spring) beach widths. The proposed line between public and private areas of

the beach is based on these surveys and, as proposed, is landward of the most landward survey line, assuring that the public is afforded the maximum beach access possible. To assure the public is aware of the line, a yellow flag will be plotted and placed on the beach at the apex of the proposed line. In this way, the public moving along the beach from either the north or south will be able to read the signage, view the flag and understand where they can recreate and move along the beach in this location. In addition, the proposed signage makes it clear that if the tides are high such that the water is inland of the proposed line, the public may walk along the highest water's edge to cross the beach in front of the LJBTC.

While it is understood that the MHTL is ambulatory and moves often, as conditioned, the proposed line and signage will only run for the term of the permit, which expires on July 13, 2011. At that time, the applicant will need to apply for an amendment to this permit to maintain the buoys in the water and continue the public access signage. The proposed changes to the signage will not alter the project's consistency with the public access and recreation policies of the Coastal Act. With the revised special condition incorporating the revised language of the proposed signage, the proposed amendment is consistent with all applicable provisions of the Coastal Act.

Standard of Review: Chapter 3 policies of the Coastal Act.

Substantive File Documents: CDP #6-05-140 Revised Findings; CDP# 6-05-140; CDP #6-04-36-VRC; Claim of Vested Rights Application dated 3/29/04.

I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission approve the proposed amendment to Coastal Development Permit No. 6-05-140 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in approval of the amendment as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE A PERMIT AMENDMENT:

The Commission hereby approves the coastal development permit amendment on the ground that the development as amended and subject to conditions, will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit amendment

complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the amended development on the environment, or 2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the amended development on the environment.

II. Special Conditions.

The permit is subject to the following conditions:

The following condition replaces Special Condition #1 of the original permit in its entirety.

1. Designated Public Swim Area and Public Access Signage. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit for review and written approval of the Executive Director, a signage plan that includes the following:

- a. A minimum of four signs shall be installed in a prominent area and visible to the public along the beach. At least one sign shall be installed at each of the following locations: 1) at the north end of the demarcated swim area at the terminus of Avenida de la Playa; 2) at the north end of the demarcated swim area on the wooden barricade that extends west from the terminus of Avenida de la Playa; 3) at the entrance to the Marine Room coastal accessway (near Roseland Drive); and, 4) at the south end of the demarcated swim area on the northern wall of the coastal accessway (at eye-level to assure visibility by the public) adjacent to the Marine Room.
- b. Signs shall be a minimum of 2' x 18" in size and include the following language:

DESIGNATED PUBLIC AREA

All waters between Roseland Drive and Avenida de la Playa are open to the public, including waters protected by ropes and buoys.

Public beach use permitted seaward of the yellow line depicted above.

Recreational passage permitted landward of the yellow line along the highest water's edge in event of a high tide.

The above signage is to also include a picture and/or diagram that demarcates the public access area with a "yellow line" corresponding to that illustrated in Exhibit No. 4. The yellow line shall be drawn from the wood piling closest to the ocean on the upcoast side of the beach to a center point in the beach, and then to the outermost corner (closest to the ocean) of the north wall of the Marine Room

building. The end points of the yellow line are to be marked by a visible yellow marker (e.g., yellow paint, yellow flags, or other appropriate yellow fixtures).

Also included is placement of a yellow flag on a daily basis at the most landward location in the center point of the yellow line as depicted in the picture. This point has been plotted on the beach and surveyed to determine its location from fixed boundaries so as to verify the flag placement on a daily basis. The survey documents that the flag shall be placed 51 ft. west of an "X" placed on the seawall, centered between the northern and southern buildings (32 51 12.62361 Latitude and 117 15 35.92614 Longitude). (ref. Exhibit Nos. 6 & 7 attached).

- c. A written agreement that the signage shall be installed prior to placement of the buoys in the water and maintained and remain in place for the life of the permit. If the applicant chooses to apply for an amendment to renew the permit prior to its expiration on July 13, 2011, the applicant acknowledges that the location of the yellow line will be revisited and may be revised based upon reliable scientific data which indicates that the location of the MHTL on the beach has appreciably changed.

2. Prior Conditions of Approval. All other terms and conditions of Coastal Development Permit No. 6-05-140, as amended, not specifically modified herein, shall remain in full force and effect.

3. Final Settlement Agreement. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit for review and written approval of the Executive Director, a copy of the fully executed settlement agreement in La Jolla Beach and Tennis Club Partners LP et al. v. California Coastal Commission (City of San Diego et al., real parties in interest), San Diego Superior Court Case No. GIC872290.

III. Findings and Declarations.

The Commission finds and declares as follows:

1. **Project History/Amendment Description.** On 1/12/05 the Coastal Commission reviewed and approved a claim of vested rights (6-04-36-VRC) by the City of San Diego for placement of buoys in the water in a portion of a designated public swim area seaward of the LJBTC. Subsequently, the Sierra Club filed a lawsuit against the Commission, the City and the LJBTC, challenging the Commission's decision. A settlement agreement was reached that included several stipulations, one of which provided that the City was to apply for a coastal development permit for placement of the buoys within 30 days of the Court's signing of the stipulated order. The stipulation also permitted the City to place and/or remove the buoys pending the outcome of the coastal development permit as long as the placement of the buoys was consistent with past practice. In compliance with the settlement agreement, the City submitted coastal development permit application #6-05-140, which was reviewed and approved by the Commission on 7/13/06.

The primary concern raised was that the proposed development to place buoys in the water gave the “perception” that the swim area demarcated by the proposed buoys was private and not available to the public as the buoys were placed directly offshore of the private resort. To address this issue, the Commission approved CDP #6-05-140 subject to several conditions, one of which included the placement of the signage to make it clear to the public that public beach access adjacent to the designated public swim area (and the LJBTC) is permitted and that the designated public swim area surrounded by ropes and buoys is open to the public. At the hearing, there was concern expressed regarding the wording of the signage, public access and beach wrack. The Commission approved the permit with revisions to the proposed special conditions and required a minimum of four signs to be installed in prominent areas and visible to the public along the beach. The language of the signage was to read as follows:

Designated Public Swim Area. All waters between Avenida de la Playa and Roseland Drive are open to the public, including waters protected by ropes and Buoys. Public beach access permitted.

At the time of the City’s application and currently, there are two signs in the vicinity. One sign is on the wooden barricade at the terminus of Avenida de la Playa at the north end of the designated public swim area and the other sign is on the southern wall of the Marine Room coastal accessway. Both of these signs were found to be appropriate locations which would be visible to the public. However, the sign on the southern wall of the Marine Room is too high and is not easily visible to the public. The City agreed to relocate this sign to a lower elevation (eye-level) to make it easier for the public to see. It was also agreed that the sign would be better sited if it were on the north wall of the public accessway adjacent to the Marine Room. In addition, the Commission also found that it was important to place a sign at the entrance to the public accessway (on the street side) of the Marine Room and at the terminus of the street end of Avenida de la Playa. Therefore, a total of four signs were required to be installed. Other conditions addressed the timing of placement of the buoys in the ocean, the term limits of the permit (five years from the date of Commission action, with provision allowing the City to apply for a permit amendment to extend the term), and restricting beach grooming/sand removal to allow the removal of trash and wrack but to prohibit the grading and movement or transportation of sand off-site.

In September 2006, prior to the hearing on the revised findings for this permit, the LJBTC filed suit challenging the Commission's conditions of approval for the beach buoy CDP. Sierra Club intervened in the lawsuit. The lawsuit focused on the wording of the sign. The court dismissed the LJBTC’s claims against the Commission with leave to amend. The court, however, allowed LJBTC to proceed with its claims seeking declaratory and injunctive relief to prevent the City from installing the signage.

Subsequently, the parties to the lawsuit (LJBTC, the City, the Sierra Club, the Commission and the State Lands Commission) entered into settlement discussions regarding what portions of the beach in front of the club are open to the public. After

extensive negotiations with legal staff and planning staff, an agreement was reached between the Commission, the City and the LJBTC regarding a clear way to demonstrate which portions of the beach are open for public use. The agreed-upon revisions to the wording on the signage as well as the placement of a yellow flag on the beach resulted in an amendment request, which was considered by the Commission at its April 10, 2008 hearing. Due to concerns raised at that hearing, the matter was continued. The amendment request was further revised to address concerns raised at the hearing by the Commission, which includes revising the proposed signage language (as described below). At this time, the settlement agreement has not been fully executed. As such, Special Condition #3 has been added to require, prior to the issuance of the permit amendment, that the fully executed final settlement agreement be provide to the Commission. The proposed revisions to the approved language of the signage as an amendment to the permit are as follows:

DESIGNATED PUBLIC AREA

All waters between Roseland Drive and Avenida de la Playa are open to the public, including waters protected by ropes and buoys.

Public beach use permitted seaward of the yellow line depicted above.

Recreational passage permitted landward of the yellow line along the highest water's edge in event of a high tide.

The above proposed signage will include a picture and/or a diagram that depicts the public access area with a yellow line. Also proposed is the placement of a yellow flag on the beach at the center point of the yellow line as shown in the picture. The end points of the yellow line are also proposed to be marked by a visible yellow marker such as a yellow paint, yellow flags or other appropriate fixture. (Ref. Exhibit No.4). As the City has indicated, the center point of the line is the center point depicted on Exhibit No. 3.

While the City of San Diego has a certified LCP, the proposed development will occur in an area where the Commission retains jurisdiction. Thus, the standard of review is Chapter 3 policies of the Coastal Act, with the certified LCP used as guidance.

2. Public Access. The following policies are applicable to the subject project:

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or, [...]

Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

One of the most important goals of the Coastal Act is to protect, provide and enhance public access opportunities for all persons to and along the coast (Sections 30210-30214, 30221, 30252 of the Coastal Act). Section 30001.5(c) of the Coastal Act requires that public access and public recreational opportunities be maximized, consistent with sound resource conservation principles.

In the review of the proposed amendment which proposes to revise the language on the permitted signage, one of the key issues in the original permit (6-05-140) was that even though the ocean and beach below the mean high tide line are public, the sense of privacy was heightened by the existence of the buoys in the water “roping off” a swim area directly in front of the LJBTC and signage on the premises which stated “Trespassing Not Allowed”.

However, through the coastal development permit application the City addressed the concern related to public access. The City also improved the signage on the premises. As noted above, for several years, the LJBTC had signage on their premises that heightened the sense of privacy of the beach and waters seaward of it by maintaining no trespassing signs on the adjacent LJBTC structures. Due to their location, the statements “Private Property” and “Trespassing Not Allowed” on the signs affixed to the structures adjacent to the LJBTC were often understood as declaring that the beach and area marked by the buoys is “private property” and that anyone walking or swimming in this area was trespassing. In addition, in conjunction with the adjacent LJBTC signage, the apparent effect of the buoys demarcating only a smaller subset of a designated swim area in front

of the private LJBTC conveyed the perception to the public that the ocean area marked by the buoys was a private swim area for the adjacent LJBTC. Such an effect is inconsistent with State law as the Club does not have the right to preclude the public from swimming in these tidelands.¹

As such, the Commission, in its review of the coastal development permit for placement of the buoys, approved signage which read: “Designated Public Swim Area. All waters between Avenida de la Playa and Roseland Drive are open to the public, including waters protected by ropes and buoys. Public beach access permitted.”

The proposed amendment is the result of a settlement agreement between the Commission, the City and the LJBTC regarding the wording of the signage as approved by the Commission in its action on the coastal development permit for installation of the buoys. During the settlement negotiations, the focus of discussion was on how to determine a measurable line between public and private areas of the beach in front of the LJBTC that would assure the public maximum access and at the same time respect the LJBTC’s private property. Because the mean high tide line (MHTL) is ambulatory, it is hard to determine a “line” that can be used at all times to inform the public of the boundary between public and private property. To address this issue, the Commission enlisted the help of scientists at the Scripps Institution of Oceanography (SIO) in La Jolla. SIO has been involved in a study of the shoreline (Southern California Beach Process Study) that includes acquisition of Light Detection and Ranging (LIDAR) remote sensing imagery. LIDAR data provide information of elevations that can be used to develop topographic maps. With this imagery, SIO scientists were able to plot the MHTL fronting the LJBTC from Spring of 2002 up through Spring of 2006, with a total of 10 plots (ref. Exhibit No. 2 attached). Based on this information, the Commission’s staff Coastal Engineer, Lesley Ewing concluded that:

The LIDAR shorelines show little cross-over, so the seasonal and inter-annual changes at the profiles are generally representative of the whole beach. And the whole beach has a strong seasonal shift and inter-annual erosion trend.

In other words, the MHTL plotted for the area in front of the LJBTC are similar to those up and down coast of the LJBTC, that there is large seasonal variation and, that the beach in this location is eroding. As can be seen on Exhibit No. 2, since 2002, the MHTL in front of the LJBTC has been moving landward. While SIO scientists warn these plotted lines are not “exact” as far as position and elevation, they represent a good depiction of the MHTL for the various years and their trend to move landward over time.

¹ Tidelands include “those lands lying between the lines of mean high tide and mean low tide which are covered and uncovered successively by the ebb and flow thereof.” (*Lechuza Villas West v. CA Coastal Commission* (1997) 60 Cal.App.4th 218, 235). The State owns all tidelands and holds such lands in trust for the public. (*Id.*; *State of Cal. Ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 63; California Civil Code section 670). “The owners of land bordering on tidelands take to the ordinary high water mark. The high water mark is the mark made by the fixed plan of high tide where it touches the land; as the land along a body of water gradually builds up or erodes, the ordinary high water mark necessarily moves, and thus the mark or line of mean high tide, i.e., the legal boundary, also moves.” (*Lechuza*, 60 Cal.App.4th at 235). In other words, the boundary between private property and public tidelands is an ambulatory line. (*Id.* at 242.)

While this information is helpful, the Commission is concerned that the LIDAR surveys do not show the complete picture as the survey data provided by SIO is only for Spring and Fall since 2002. In response to this concern, it has been explained by staff at SIO that the Spring and Fall surveys best represent the highest and the lowest MHTL data. The Fall surveys were typically done around September, which is when beaches along the San Diego coastline can be expected to be the widest due to minimal storm activity over the summer (thus, the beaches accrete). The Spring surveys were typically done around April, which is when the beaches along the San Diego coastline can be expected to be the narrowest as this is just after the winter storms. This information is corroborated by historic tide data available from the National Oceanic and Atmospheric Administration (NOAA) for La Jolla which shows the mean high water (MHW)² to be generally lowest in April and highest in September (ref. Link to NOAA website http://tidesandcurrents.noaa.gov/data_menu.shtml?bdate=19830127&edate=20080328&wl_sensor_hist=W5&relative=&datum=2&unit=1&shift=g&stn=9410230+La+Jolla%2C+Pacific+Ocean+%2C+CA&type=Historic+Tide+Data&format=View+Data).

Based on the LIDAR data provided by SIO, the various interested parties agreed on and plotted a line somewhat landward of the most recent Spring 2006 MHTL (ref. Exhibit No. 3). The line runs from the western edge of the northern wall of the Marine Room building at the south to a center point on the beach, then to the western edge of the western-most wooden pylon on the beach to the north. The purpose of plotting this line is twofold: 1) first, it graphically depicts an imaginary line to guide the public to public access areas and, 2) it shows the Commission that the public, in using this line for guidance, will be afforded maximum use and enjoyment of the public beach in this location. What this line does not do is provide an adjudicated location of the MHTL or convey any property rights. In addition, it does not constitute a determination of the extent of any public trust interest that may exist in this area.³ It is solely for illustrative purposes to guide the public as to where they can use the beach in this location through July 13, 2011, for most beach conditions.

How this will work in practice is that the agreed upon line will be visually depicted on a sign along with the signage language proposed by the City (ref. Exhibit No. 4). The signs will be located up and down coast of the LJBTC and a yellow flag will be placed on the beach at the apex of the line, generally mid point between the north and south LJBTC ocean fronting buildings (ref. Exhibit No. 3 & 4). As the public moves along the beach and encounters the signage, they can look up or down coast, visually locate the yellow flag on the beach and then recreate or move along the beach seaward of an imaginary line drawn between the flag and the up or down coast marker (the western edge of the northern Marine Room wall at the south and the western edge of the western-most wooden pylon on the beach to the north). As noted on the signage, if there is a high tide

² For purposes of this application, the mean high tide line (MHTL) and the mean high water (MHW) are interchangeable.

³ At the April 10 hearing, representatives from Sierra Club objected to the proposed amendment, asserting that the public may have rights to areas landward of the MHTL based on historic use or because they are filled tidelands. To date, no one has brought a prescriptive rights action. The proposed amendment and settlement agreement do not prevent or prejudice anyone from doing so, and until that occurs they provide maximum public access. In addition, this area is within the Mexican grant to the Pueblo of San Diego, and the state is barred from asserting it acquired tidelands under *Summa Corp. v. California* (1984) 466 U.S. 198.

such that the water's edge is inland of this imaginary line, then the public may walk along the water's edge.

Special Condition #1 is attached and replaces Special Condition #1 of the original permit. This condition requires the applicant to submit a signage plan with the approved language and sign locations. In addition, the condition includes a GPS coordinate of the exact location where the yellow flag is required to be placed on the beach (32 51 12.62361 Latitude and 117 15 35.92614 Longitude). This coordinate was based on the agreed upon line and derived from a survey utilizing fixed points which place the flag centered between the northern and southern most buildings and 51 ft. seaward of an "X" placed on the seawall next to the La Jolla Beach and Tennis Club. This location for the flag corresponds to the apex of the plotted line described above as shown on Exhibit No. 7. In reviewing this exhibit, each of the identified numbers corresponds with a fixed survey point which can be used to not only plot the flag location, but also to verify the flag location in the future, as the survey points also include a very accurate GPS coordinate for each point (ref. Exhibit Nos. 6 & 7). As such, the location of the flag is fixed and can be verified by Commission staff in the field or by the public. In addition, the 51 ft. measurement will be utilized for placement of the flag on the beach each day by the City.

As discussed above, with the LIDAR information provided by SIO depicting the MHTL location two times a year since 2002, the Commission is assured that the proposed line to guide the public provides the maximum beach area to the visiting public in this location. Again, the intent of the proposed amendment is to provide guidance to the public in determining which areas of the beach in front of the LJBTC are available for use and enjoyment of the public. The actual location of the MHTL is not being adjudicated nor are any property rights being conveyed. In addition, given that the MHTL is ambulatory and is not being adjudicated with this action, the Commission finds that the agreed upon line should be reviewed again in the future to assure the public is afforded maximum access to the beach at this location. As such, Special Condition #1c requires the applicant to acknowledge that upon renewal of this permit (as a CDP amendment) prior to its expiration on July 13, 2011, the location of the line will be reviewed and, based on reliable scientific data, may be revised if it is determined that the most recent (2007 through 2011) beach conditions have changed the locations of the MHTL such that new areas of beach should be demarcated for public use.

As conditioned to require the installation and maintenance of public access signage to assure the public is aware of what portion of the beach is open and available to the public (Special Condition #1), the project will not result in any significant impacts to public access. Therefore, the Commission finds that the proposed project, as conditioned, is consistent with all of the public access and recreation policies of the Coastal Act.

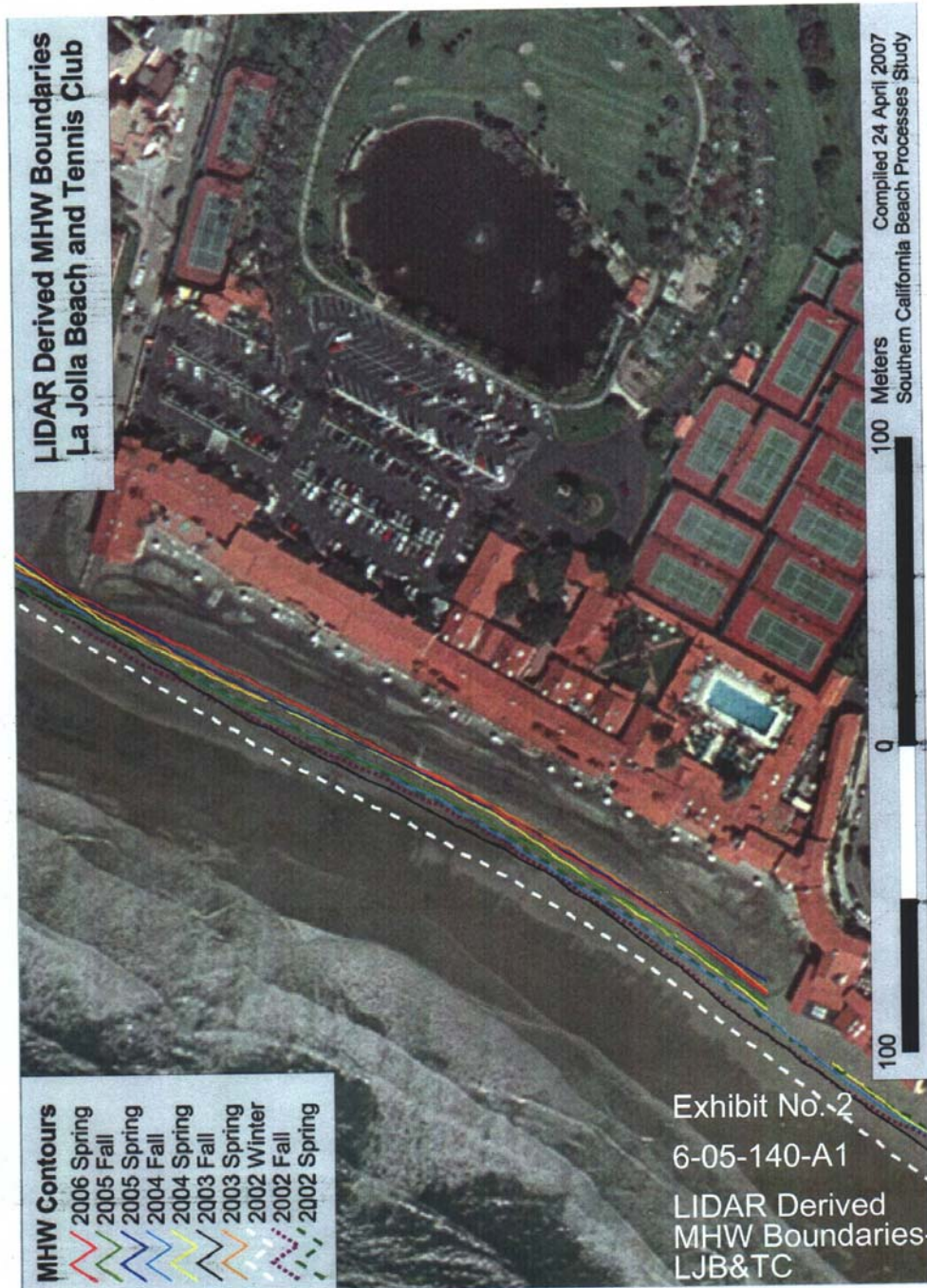
3. Local Coastal Planning. The proposed development will occur in the water and on the beach adjacent to the LJBTC. The proposed revision to the approved signage will make it easier for the public to know where they can walk and recreate on the beach without trespassing on private property. The signage makes clear that all waters in the designated public swim area are open to the public, including the waters protected by

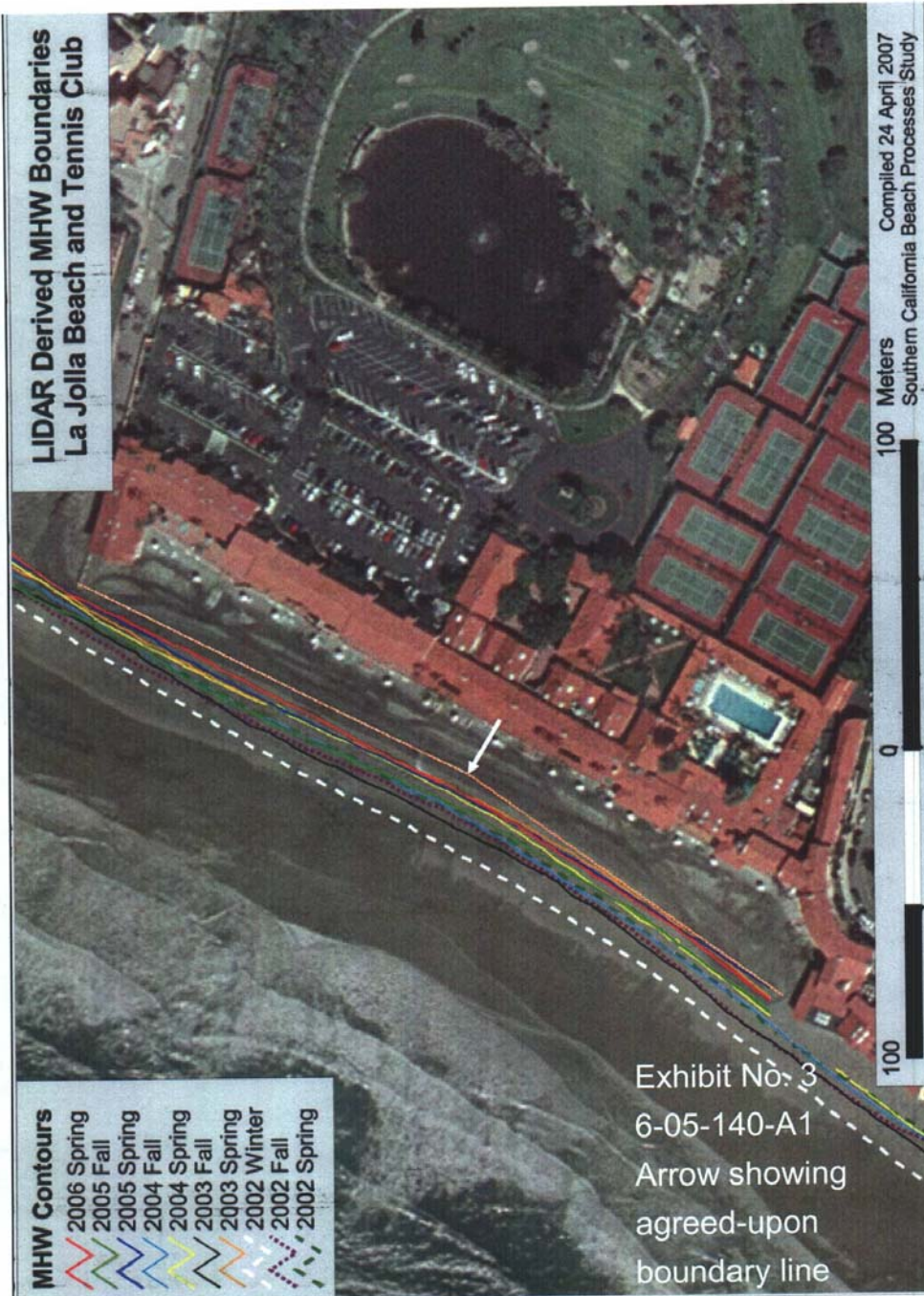
ropes and buoys, as proposed. In addition, the placement of a yellow line on the signage and a flag on the beach in the middle of the imaginary line will help to further demarcate this area. The line is further inland than any of the plotted mean high tide line locations and results in more land area for the public to walk and recreate upon which is an added public benefit. Therefore, the Commission finds that the subject proposal would not prejudice the ability of the City of San Diego to continue to implement its certified LCP for the La Jolla area of the City of San Diego.

4. Consistency with the California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project has been conditioned in order to be found consistent with the Chapter 3 policies of the Coastal Act. Mitigation measures, including a condition addressing the signage that pertains to public access along the shoreline will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and is consistent with the requirements of the Coastal Act to conform to CEQA.









DESIGNATED PUBLIC AREA

All waters between Roseland Drive and Avenida de la Playa are open to the public, including waters protected by ropes and buoys.

Public beach use permitted seaward of the yellow line shown on the diagram above.

Recreational passage permitted landward of the yellow line along the highest water's edge in event of a high tide.

EXHIBIT NO 4
6-05-140-A1
Proposed Revised
Language for Signage

STATE OF CALIFORNIA - THE RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, Governor

CALIFORNIA COASTAL COMMISSION

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 7575 Metropolitan Drive, Suite 103
 San Diego, CA 92108-4402
 (619) 767-2370

Date: January 23, 2008
 Permit Application No.: 6-05-140
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**NOTICE OF INTENT TO ISSUE PERMIT**

(Upon satisfaction of special conditions)

THIS IS NOT A COASTAL DEVELOPMENT PERMIT

THE SOLE PURPOSE OF THIS NOTICE IS TO INFORM THE APPLICANT OF THE STEPS NECESSARY TO OBTAIN A VALID AND EFFECTIVE COASTAL DEVELOPMENT PERMIT ("CDP"). A Coastal Development Permit for the development described below has been approved but is not yet effective. Development on the site cannot commence until the CDP is effective. In order for the CDP to be effective, Commission staff must issue the CDP to the applicant, and the applicant must sign and return the CDP. **Commission staff cannot issue the CDP until the applicant has fulfilled each of the "prior to issuance" Special Conditions.** A list of all of the Special Conditions for this permit is attached.

The Commission's approval of the CDP is valid for two years from the date of approval. To prevent expiration of the CDP, you must fulfill the "prior to issuance" Special Conditions, obtain and sign the CDP, and commence development within two years of the approval date specified below. You may apply for an extension of the permit pursuant to the Commission's regulations at Cal. Code Regs. title 14, section 13169.

On **July 13, 2006**, the California Coastal Commission approved Coastal Development Permit No. **6-05-140**, requested by **City of San Diego** subject to the attached conditions, for development consisting of: **Placement of buoy markers in the ocean to demarcate safe swimming area from April 1st to October 31st each year**, more specifically described in the application file in the Commission offices. **Commission staff will not issue the CDP until the "prior to issuance" special conditions have been satisfied.**

The development is within the coastal zone **immediately offshore of the La Jolla Beach & Tennis Club (2000 Spindrift Drive), between the western extensions of Paseo Dorado and Avenida de la Playa, La Jolla, San Diego, San Diego County.**

EXHIBIT NO. 5
APPLICATION NO. 6-05-140-A1
Notice of Intent/ Special Conditions/ CDP #6-05-140
California Coastal Commission

NOTICE OF INTENT TO ISSUE PERMIT

(Upon satisfaction of special conditions)

Date: January 23, 2008

Permit Application No.: 6-05-140

Page 2 of 4

If you have any questions regarding how to fulfill the "prior to issuance" Special Conditions for CDP No. 6-05-140, please contact the Coastal Program Analyst identified below.

Sincerely,
PETER M. DOUGLAS
Executive Director



By: LAURINDA OWENS
Coastal Program Analyst
Date: January 23, 2008

ACKNOWLEDGMENT

The undersigned permittee acknowledges receipt of this Notice and fully understands its contents, including all conditions imposed.

Date_____
Permittee

Please sign and return one copy of this form to the Commission office at the above address.

STANDARD CONDITIONS

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

NOTICE OF INTENT TO ISSUE PERMIT

(Upon satisfaction of special conditions)

Date: January 23, 2008

Permit Application No.: 6-05-140

Page 3 of 4

3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS:

The permit is subject to the following conditions:

1. **Designated Public Swim Area and Public Access Signage.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the City shall submit for review and written approval of the Executive Director, a signage plan that includes the following:
 1. A minimum of four signs shall be installed in a prominent area and visible to the public along the beach. At least one sign shall be installed at each of the following locations: 1) at the north end of the demarcated swim area at the terminus of Avenida de la Playa 2) at the north end of the demarcated swim area on the wooden barricade that extends west from the terminus of Avenida de la Playa; 3) at the entrance to the Marine Room coastal accessway (near Roseland Drive); and 4) at the south end of the demarcated swim area on the northern wall of the Marine Room coastal accessway (at eye level to assure visibility by the public).
 2. Signs shall be a minimum of 2' x 18" in size and include the following language: "Designated Public Swim Area. All waters between Avenida de la Playa and Roseland Drive are open to the public, including waters protected by ropes and buoys. Public beach access is permitted."
 3. A written agreement that the signage shall remain in place in perpetuity.

NOTICE OF INTENT TO ISSUE PERMIT

(Upon satisfaction of special conditions)

Date: January 23, 2008

Permit Application No.: 6-05-140

Page 4 of 4

The permittee shall undertake the development in accordance with the approved signage program. Any proposed changes to the approved signage program shall be reported to the Executive Director. No changes to the approved signage program shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

2. Timing of Placement of Buoys in Ocean. The proposed buoys shall not be installed in the ocean prior to March 1st and must be removed immediately after October 31st of each year.


3. Condition Compliance. Within 90 days of Commission action on this coastal development permit application or within such additional time as the Executive Director may grant for good cause, the applicant shall satisfy all requirements specified in the conditions hereto that the applicant is required to satisfy prior to issuance of this permit. Failure to comply with this requirement may result in the institution of enforcement action under the provision of Chapter 9 of the Coastal Act.

4. Term of Permit. The permit approved herein shall be valid for five (5) years from the date of Commission action. The applicant may request an amendment to the permit to allow additional time. Development authorized by this permit may continue beyond the five-year term of the permit until the Commission acts on an application to extend the duration of the permit if a complete application for such an extension is filed prior to the end of the five-year term.

5. Beach Grooming/Sand Removal. Routine beach grooming seaward of the La Jolla Beach and Tennis Club is permitted for the purpose of trash and wrack removal. However, no grading, movement or transportation of sand off-site or movement of sand that changes the beach profile, including creation of a perched beach or sand berm for protection from wave run-up, shall be permitted.

LA JOLLA BEACH AND TENNIS CLUB COORDINATE REPORT

PT. NO.	NORTHING	EASTING	LATITUDE	LONGITUDE	DESCRIPTION
3	1891477.483	6251227.941	32 51 09.13049	117 15 39.07540	MARINE ROOM WALL PT
8	1892155.628	6251754.444	32 51 15.89040	117 15 32.98087	INTERSECTION OF CURVED WALL
9	1892224.001	6251693.940	32 51 16.56107	117 15 33.69785	FENCE BOLT
12	1891827.907	6251500.006	32 51 12.62361	117 15 35.92614	FLAG POINT
13	1891802.180	6251544.033	32 51 12.37329	117 15 35.40715	"+" MARK ON SEA WALL
14	1891480.339	6251329.837	32 51 09.16852	117 15 37.88134	PT ON LANDING
665	1894487.550	6253225.690	32 51 39.10258	117 15 15.99842	CITY SD GPS MON 665 PER ROS 14492
666	1894825.920	6255566.840	32 51 42.67265	117 14 48.59163	CITY SD GPS MON 666 PER ROS 14492

EXHIBIT NO. 6
APPLICATION NO.
6-05-140-A1
Survey Coordinates
 California Coastal Commission



APR. 1. 2008 6:30PM

ALLEN MAIKINS

NO. 0308 P. 2

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natisis LLP
Attorneys at Law
Three Embarcadero Center, 12th Floor | San Francisco, CA 94111-4074
Telephone: 415.837.1515 | Facsimile: 415.837.1516
www.allenmatkins.com

James T. Burroughs
E-mail: jburroughs@allenmatkins.com
Direct Dial: 415.273.7482 File Number: L4034-007/SF796362.02

Via Email, Messenger and Fax

April 4, 2008

Patrick Kruer, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Laurinda Owens, staff
California Coastal Commission
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108

Received

APR 08 2008

California Coastal Commission
San Diego Coast District

Re: **City of San Diego Application No. 6-05-140-A1**

Dear Chair Krueger and Commissioners:


On behalf of our client, the La Jolla Beach and Tennis Club ("LJBTC"), we respectfully submit these comments in connection with the City of San Diego's application No. 6-05-140-A1 to amend its permit allowing the placement of buoy markers in the ocean intended to demarcate a safe public swimming area. The City proposes changes to the permit's signage condition that are intended to help guide the public to public access areas. The subject swimming and proposed public access areas are adjacent to the LJBTC facilities.

LJBTC supports the City's application to amend its permit, and supports the Commission staff's recommendation of approval.¹ The City's application is the result of a settlement agreement that resolves an action brought by LJBTC against the Coastal Commission, the State Lands Commission and the City arising out of the Coastal Commission's original approval of the permit that the City now seeks to amend.² The basis for the settlement is an agreement by LJBTC to allow public recreational use of a certain portion of what it contends to be its private beachfront property.

¹ Coastal Commission staff report at <http://documents.coastal.ca.gov/reports/2008/2008.pdf>, last visited on April 4, 2008.

² *La Jolla Beach and Tennis Club Partners L.P., et al. v. California Coastal Comm.* (filed September 11, 2006, San Diego Superior Court, Case Number C

EXHIBIT NO. 8
APPLICATION NO.
6-05-140-A1
Letter of Comment

 California Coastal Commission

APR. 7. 2008 6:30PM

ALLEN MATKINS

NO. 0300 P. 3

Allen Matkins Leck Gamble Mallory & Natis LLP
Attorneys at Law

Patrick Krueger, Chair
Laurinda Owens, staff
April 4, 2008
Page 2

LJBTC's recorded property interest shows property ownership down to the Mean High Tide Line ("MHTL"), and there has never been an adjudication holding otherwise. The location of the MHTL is not a fixed point in the sand, and it is recognized in fact and in law that the MHTL is ambulatory. In front of the LJBTC facilities (and elsewhere, for that matter), the MHTL generally reaches its highest point on the beach in the springtime, and then begins its recession out to sea during the summer and fall months. The inter-seasonal changes in the location of the MHTL are not great, but they are measurable. With reference to the MHTL data provided in the Commission staff report, and depending on where one chooses to measure the location of the spring MHTL in front of the LJBTC facilities, it appears that over the last five years, the MHTL may have slightly moved seaward in some areas (closer to the Marine Room facility at the southern end of the LJBTC facility) and slightly landward on other areas (closer to the northern end of the LJBTC facility).

It was never LJBTC's intent, however, to try to reach a settlement of interests based on a hyper-technical measurement of the location of the MHTL. Instead, in the interests of bringing this long-running dispute over public access to a close, LJBTC has agreed in the settlement agreement to the imaginary "yellow line" in the sand that is illustrated in Exhibit No. 4 of the Commission's staff report. As pointed out by staff, the yellow line is situated landward of the highest measured spring MHTL, according to the data that is referenced in the staff report. LJBTC recognizes that the yellow line is not fixed for all time, and that should the location of the MHTL appreciably change in the future, all parties reserve the right to revisit the location of the yellow line.

LJBTC supports the City's proposed permit amendment because it resolves concerns that LJBTC had with the beach signage condition that was attached by the Commission to the original permit approval on July 13, 2006. It was a permit condition that was not proposed by anyone for consideration until one of the Commissioners suggested its adoption after the close of the public hearing. As adopted, it required the City to post a sign adjacent to the LJBTC privately-held beach that read, in part: "Public beach access permitted." From LJBTC's perspective, a sign posted with this text would serve as an invitation to trespass on LJBTC's private property – even though LJBTC does not believe that was the Commission's intent. Unintentional as it may have been, the effect was immediately noticeable. News organizations began reporting that the Commission had ordered the City "to indicate clearly that the beach in front of the private club and resort [LJBTC] is open to the public."³ At least one member of the public entered LJBTC's private property and refused to leave because the individual had read that the Coastal Commission had acted to make LJBTC's private property into a public beach.⁴ Concerned that this activity would only increase once the actual signs were posted that were required by the Commission's conditions of approval, LJBTC brought a writ action against the Commission and a request for injunctive relief against the City to

³ San Diego Union Tribune, July 14, 2006,
<http://www.signonsandiego.com/news/metro/20060714-9999-7m14buoys.html>

⁴ Personal communication with William J. Kellogg, August 10, 2006.

APR. 7. 2008 6:31PM

ALLEN MATKINS

NO. 0308 P. 4

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

Patrick Kruer, Chair
Laurinda Owens, staff
April 4, 2008
Page 3

abate or prevent a threatened nuisance, and for declaratory relief. The settlement agreement – including the parties agreement to bring the City's proposed permit amendment to the Commission for your review and consideration – is the product of our joint effort to resolve that litigation.

LJBTC is not a permit applicant nor a co-applicant in this pending matter. Like the Coastal Commission, State Lands Commission, and the City, however, it is bound by the terms and conditions of the settlement agreement. LJBTC's obligations in that regard – including its commitment to adhere to the new signage condition that will include the above-referenced yellow line – will be triggered in the event that the Coastal Commission decides to approve the City's amendment application, as proposed, without any material deviation in the proposed conditions of approval. Therefore, LJBTC opposes and objects to any material change or amendment to the City's proposed permit amendment and/or the Commission staff's recommended conditions of approval. Similarly, LJBTC opposes and objects to any motion or decision made by the Coastal Commission to deny the City's amendment application.

LJBTC is aware that the San Diego Chapter of the Sierra Club has submitted written comments opposing the City's proposed permit amendment.⁵ To the extent not already addressed in this letter, we now turn our attention to the remaining points raised in the Sierra Club letter.

We reject the Sierra Club's unsupported assertion that approval of the City's permit will result in "the creation of a private beach on public trust lands." Short of an amendment to the State's Constitution and possibly other legal mechanisms that we are not aware of, it is not legally possible to create a private beach on public trust lands. Certainly this permit action could not have that effect. Nor, indeed, could it even create that perception, since, as noted in the staff report, the "yellow line" is located landward of the highest MHTL, and the beach property landward of the yellow line has never been adjudicated to be public trust property. Sierra Club does not suggest that the tidal and survey data relied upon to draw the yellow line is inaccurate or unreliable in any way.⁶

Sierra Club claims that the proposed signage, color coding and flags are "confusing," but does not explain what is confusing about them, other than to suggest that they might be perceived to mean something other than what they actually mean as a matter of both law and fact. There is no reason to believe that the signage means anything other than what it is drafted to say.

⁵ Letter from Joanne H. Pearson to Chairman Kruer and Commissioners, received by the Coastal Commission on February 6, 2008.

⁶ The Sierra Club's suggestion that the tidal and survey data supporting the proposed action as "scant" is belied by the staff report, which explains the parties' extensive effort, supported by detailed satellite imagery and historical data, to ensure that the yellow line would in fact be situated landward of the highest MHTL.

APR. 7. 2008 6:31PM

ALLEN MATKINS

NO. 0308 P. 5

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

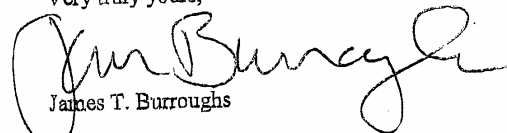
Patrick Kruer, Chair
Laurinda Owens, staff
April 4, 2008
Page 4

The Sierra Club would have the Commission require LJBTC to "[r]emove the wooden barricade," which is the structure at the northern end of the LJBTC beach property that is shown as the terminus of the yellow line on Exhibit No. 4 of the Commission staff report. Sierra Club contends that the structure should be removed on the basis that it "was not reviewed through the CDP process when constructed in the early 1980's [] to replace a former stuccoed concrete wall." In fact, this wooden structure is located on LJBTC's private property that is landward of the MHTL by any measure of the MHTL data that is included in the Commission's staff report. It was built in the early 1980's to replace the referenced concrete wall that was destroyed by a disaster. Major winter storms and associated ocean waves in the early 1980's destroyed the former wall, necessitating its replacement. The replacement structure conformed to all then-existing zoning requirements, was built to serve the same purpose of the destroyed concrete wall in the same location as the former wall, and did not exceed the height or bulk of the former wall by more than ten percent. For this reason, construction of the referenced wooden structure was exempt from coastal development permitting requirements. Pub.Res.Code §30610(g). Furthermore, since this was a project to replace a structure destroyed by a "disaster" (as that term is defined for these purposes at §30610(g)(2)(A)), it did not qualify as "new development" for purposes of requiring public access to the shoreline and along the coast. Pub.Res.Code §30212(b)(1).

Finally, the Sierra Club asks the Commission to remind the public of the "ongoing availability of . . . a Prescriptive Easement action" with regard to LJBTC's private beachfront property. There is some irony in Sierra Club's request, given Sierra Club's contention that LJBTC has been too aggressive over the years in the defense of its property rights. From the beginning, the complaints from the Sierra Club have been peppered by references to LJBTC's "no trespassing" and "private property" signs, and by complaints that LJBTC personnel have asked members of the public who have unwittingly (or not) trespassed on the private property to leave the premises.

In any event, the intent of the settlement agreement and the City's proposed permit amendment regarding the beach signage requirement is to address the concerns raised by all parties involved in this process – the City, the Commission staff, Sierra Club and LJBTC – by providing a clear guide to public access and swimming areas. We believe that the City's proposed permit amendment accomplishes that objective, and therefore urge its approval by the Commission without material deviation in the staff-recommended conditions of approval.

Very truly yours,


James T. Burroughs

cc: William J. Kellogg, La Jolla Beach and Tennis Club

04-03-2008 22:54

PAGE 1



3820 Ray Street, San Diego, CA 92104-3623
 Chapter Chair: Joe Zechman: 619-709-6268
joezechman@hotmail.com
 Chapter Coordinator: Cheryl Reiff 619-299-1741
creiff@sierraclubsandiego.org
 Administrative Assistant: Martha Bertles 619-299-1743
mbertles@sierraclubsandiego.org

RE: Permit No. 6-05-140-A City of San Diego Safety Buoys
 Recommendation: Deny permit as proposed.
 April 3, 2008

Dear Chairman Kruer and Commissioners:

The San Diego Sierra Club requests permit denial as proposed because of detrimental effects permit approval would have on both the public hearing process and public beach access to and along public trust lands.

1. Approval under the Stipulated Agreement would give unprecedented Commission support to the creation of a private beach on public trust lands. Oceanfront property owners, using a scant amount of scientific and tidal data with no winter or summer readings, would now have a Commission-approved precedent to flag and mark their own property.

Approval would be detrimental to the public hearing process. Applicants chose neither to appear nor to submit written documents to the 2005-2006 public hearings on this matter, choosing instead to jump to court. Such action would not only leave the public in the dark, but would set an ominous precedent for wealthy coastal property owners to create an unbearable financial burden on the public hearing process for both the public and the Commission.

2. Install signage language approved by the Commission in July, 2006, at the street end of Av. de la Playa on the north side of the wall of the Beach Club, where the majority of beachgoers enter the beach. Proposed signage is confusing re color coding, private property rights, and flags. Even though the Stipulated Agreement clearly states these do not delineate the MHW line or a private beach for legal purposes, the Map clearly has that impact and effect.

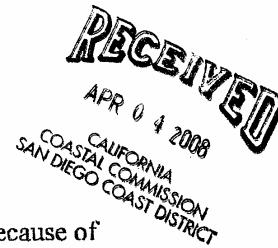


EXHIBIT NO. 9
APPLICATION NO.
6-05-140-A1
Letter of Opposition
California Coastal Commission

04-03-2008 22:54



**SIERRA
CLUB**
FOUNDED 1892

San Diego Chapter

<http://sandiego.sierraclub.org>

3820 Ray Street, San Diego, CA 92104-3623

Chapter Chair: Joe Zechman: 619-709-6268

joezechman@hotmail.com

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Page 2

3. Remove the wooden barricade. It was not reviewed through the CDP process when constructed in the 1980's. Since then, the structure has served either to deter public access entirely, or to force people seaward into the ocean around the western end of the barricade in order to access dry sandy beach to the south. In other words, the barricade serves to block public lateral access to and along the shoreline, creating the perception of a private beach. Thus, we question the use of the seaward end of the barricade as the LIDAR measurement point for determining public access.

The Marine Room/Roseland Ave. access stairway to the south of the beach is steep, narrow, and often under tidal surge. Nor is there public parking other than on-street parking for adjoining residences. Removal of the barricade at Av. De la Playa is therefore all the more important to facilitate public access to the beach.

4. We request the Commission to reiterate the ongoing availability of Section 30211 of the Act re a Prescriptive Easement action, which was raised before the Commission by a member of the public at the 2006 public hearing. We believe such an action remains available to the public in regard to this project as clarified in part by former Commission Chair Meg Caldwell in paragraph 2, Page 556 of the "Ecology Law Quarterly", Vol. 34:533. (Attachment 1).

Thank you for your consideration of these critical public access and public trust issues.

Joanne H. Pearson

Joanne H. Pearson, Chair
San Diego Sierra Club Coastal Committee

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APR 04 2008

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

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9 FINAL CALDWELL 9.6

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556

ECOLOGY LAW QUARTERLY

[Vol. 34:533]

In California, the seminal custom case is the combined ruling in *Gion v. Santa Cruz* and *Dietz v. King*, a 1970 California Supreme Court decision that set forth the basic legal principles.¹¹⁹ In that case, the court explained that while the public can acquire a prescriptive easement over the private dry sand areas of a beach (in essence placing private land under an easement for public use without the owner's permission), "the question is whether the public has engaged in long-continued adverse use of the land sufficient to raise the conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license."¹²⁰ Put another way, those "seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. If the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area."¹²¹ In cases where this can be shown, a prescriptive easement by customary use attaches to the dry sand area of the beach.

Such prescriptive easements, much like the easement associated with the area below the mean high tide line in the public trust, should be able to migrate with the beach. Because prescriptive easements established by custom are historically contingent in California, requiring a showing of genuine past public use, they cannot be used generally to preserve broad swaths of the coast. Instead, they can be used as a focused tool to save particular areas of coastline. Fortunately, the restrictive legal test means that areas qualifying for prescriptive easements will be those long used by the public, and thus custom has an important role to play in preserving areas of the coast that are particularly dear to many Californians.

Although custom's application has been interpreted more narrowly in California than in some states, meaning that California's doctrine will be most useful in saving specific popular beaches rather than the shoreline as a whole, its application to moving shorelines in those states may be relevant here as a supporting principle for restricting development. It is therefore worth examining the use of custom-based easements more generally. Custom has been used to open beaches and to prevent development in, among other states, Oregon, Texas, and Hawaii. Hawaii's use of custom is the most expansive.¹²² There, where ancient Hawaiian customary law and usage has been imported into state common law, principles of "collective existence and community" have been used to broadly allow access to beaches and to prevent interference with public hunting and gathering rights.¹²³ But even states without this rich

119. 465 P.2d 50 (Cal. 1970).

120. *Id.* at 56.

121. *Id.*

122. *Bederman, supra* note 117, at 1417-34.

123. *Id.* at 1433-34.

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CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

SIERRA CLUB
ATT. 1