

**CALIFORNIA COASTAL COMMISSION**

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Filed: 05/08/17  
 49th Day: 07/14/17  
 Staff: A. Llerandi-SD  
 Staff Report: 6/22/17  
 Hearing Date: 07/13/17

**STAFF REPORT AND RECOMMENDATION ON APPEAL  
 SUBSTANTIAL ISSUE DETERMINATION**

**Local Government:** City of San Diego

**Decision:** Claim of Exemption to Coastal Development Permit Requirement

**Appeal Number:** A-6-LJS-17-0025

**Applicant:** City of San Diego Park and Recreation Dept.

**Location:** La Jolla Cove, La Jolla, San Diego, San Diego County

**Project Description:** Installation of two new approx. 3-ft. high pedestrian gates on the two existing public beach access stairs.

**Appellants:** Chair Bochco and Commissioner Shallenberger

**Staff Recommendation:** Substantial Issue

**IMPORTANT HEARING PROCEDURE NOTE**

The Commission will not take testimony on this “substantial issue” recommendation unless at least three commissioners request it. The Commission may ask questions of the applicant, any aggrieved person, the Attorney General or the executive director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally and at the discretion of the Chair limited to 3 minutes total per side. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing.

If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which it will take public testimony.

## **SUMMARY OF STAFF RECOMMENDATION**

Staff recommends that the Commission, after public hearing, determine that a substantial issue exists with respect to the grounds on which the appeal has been filed because the locally approved development does not qualify for an exemption and requires a local coastal development permit from the City of San Diego. The City's decision is based on a claim that construction of the gates is exempt from coastal development permitting requirements because the gates are repair and maintenance, and are necessary to abate a public nuisance. However, the two proposed new pedestrian gates constitute "development" as defined in Section 113.0103 of the certified Local Coastal Program (LCP), and do not qualify for exemptions from the permit requirement described in Section 126.0704(b) and (f) regarding repair and maintenance and public nuisance abatement, respectively. The gates do not qualify as repair and maintenance because they are not repairing any existing damage to the public access stairs, nor are they restoring any previously existing form or function of the stairs. The gates likewise do not constitute nuisance abatement because the City has not submitted sufficient evidence to demonstrate the existence of a public nuisance or that these gates are the minimum actions necessary, both in kind and scale, to address the purported nuisance. Therefore, the proposed project is non-exempt "development" as defined in the Coastal Act.

Because of the above-described inconsistencies with the LCP and the Coastal Act, staff recommends that the Commission determine that the project raises a substantial issue regarding conformance with the certified LCP and the Chapter 3 policies of the Coastal Act.

Standard of Review: Certified City of San Diego Local Coastal Program and the public access and recreation policies of Chapter 3 of the Coastal Act.

## TABLE OF CONTENTS

<b>I. APPELLANTS CONTEND.....</b>	<b>4</b>
<b>II. LOCAL GOVERNMENT ACTION .....</b>	<b>4</b>
<b>III. APPEAL PROCEDURES.....</b>	<b>4</b>
<b>IV. SUBSTANTIAL ISSUE MOTION AND RESOLUTION.....</b>	<b>7</b>
<b>V. SUBSTANTIAL ISSUE FINDINGS AND DECLARATION .....</b>	<b>8</b>
A. PROJECT DESCRIPTION.....	8
B. SUBSTANTIAL ISSUE ANALYSIS .....	8

### APPENDICES

[Appendix A – Substantive File Documents](#)

### EXHIBITS

[Exhibit 1 – Vicinity Map](#)

[Exhibit 2 – Aerial Photo](#)

[Exhibit 3 – Site Photos](#)

[Exhibit 4 – City Exemption](#)

[Exhibit 5 – May 15, 2017 City Letter](#)

[Exhibit 6 – May 8, 2017 Appeals](#)

## **I. APPELLANTS CONTEND**

The project as approved by the City does not conform to the City of San Diego's certified Local Coastal Program (LCP), with regard to the type of development that can be exempted from the coastal development permit requirement.

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## **II. LOCAL GOVERNMENT ACTION**

In July of 2016, City staff contacted Commission staff regarding the subject gates. Commission staff, believing that the project area was in the City's jurisdiction, advised the City that the gates would require approval of an appealable coastal development permit. However, the City's Development Services Department determined that the project was exempt from coastal permit requirements under Section 126.0704(b) and (f), which address repair and maintenance of existing structures and public nuisance abatement, respectively. On October 19, 2016, the City of San Diego granted an exemption to the development. The City did not formally send notice of the exemption to the Coastal Commission until April 24, 2017. Upon formal notification, Commission staff informed the City that the ten day appeal period had started and requested background on the City's action. In response the City forwarded complaints and photos from City Lifeguard staff regarding the presence of sea lions on the public access stairs, lifeguard station, and viewing decks overlooking La Jolla Cove. Chair Bochco and Commissioner Shallenberger filed a timely appeal. City staff has since further indicated they believe the action is exempt from coastal development permit requirements in a letter dated May 15, 2017 ([Exhibit 5](#)). Section 30625 of the Coastal Act allows for Commission appeals of claims of exemption.

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## **III. APPEAL PROCEDURES**

### Location of Appealable Actions & Grounds for Appeal

After certification of Local Coastal Programs, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits and claims of exemption. Developments approved by cities or counties may be appealed if they are located within the appealable areas, such as those located between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide of the sea where there is no beach, whichever is the greater distance. Furthermore, developments approved by counties may be appealed if they are not designated "principal permitted use" under the certified LCP. In addition, any local government action on a proposed development that would constitute a major public work or a major energy facility may be appealed, whether approved or denied by the city or county (Coastal Act Section 30603(a)).

Section 30625 provides that any "claim of exemption from coastal development permit requirements" may be appealed to the Coastal Commission. Section 30625 of the Coastal Act states as follows:

*(a) Except as otherwise specifically provided in subdivision (a) of Section 30602, any appealable action on a coastal development permit or claim of exemption for any development by a local government or port governing body may be appealed to the commission by an applicant, any aggrieved person, or any two members of the commission. The commission may approve, modify, or deny such proposed development, and if no action is taken within the time limit specified in Sections 30621 and 30622, the decision of the local government or port governing body, as the case may be, shall become final, unless the time limit in Section 30621 or 30622 is waived by the applicant.*

*(b) The commission shall hear an appeal unless it determines the following:*

*(2) With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.*

*(c) Decisions of the commission, where applicable, shall guide local governments or port governing bodies in their future actions under this division.*

This action is appealable because the subject site is located between the sea and the first public road, is within 300 feet of the mean high tide line of the sea, and is within 300 feet of the inland extent of the beach.

#### Hearing Process and Qualifications to Testify before the Commission

Section 30603(b)(1) of the Coastal Act states:

*The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.*

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

*With respect to appeals to the commission after certification of a local coastal program that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.*

If the staff recommends "substantial issue" and no Commissioner objects (or fewer than three object), the Commission will proceed directly to the de novo portion of the hearing on the merits of the project, then, or at a later date. If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, those allowed to testify at the hearing will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of

Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project then, or at a later date, reviewing the project de novo in accordance with sections 13057-13096 of the Commission's regulations. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable standard of review for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program (LCP).

In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act. In other words, in regard to public access questions, the Commission is required to consider not only the certified LCP, but also applicable Chapter 3 policies when reviewing a project on appeal.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

#### Factors to be Considered in Substantial Issue Analysis

Section 30625 of the Coastal Act states that the Commission shall hear an appeal of a local government action unless it finds that no substantial issue exists with respect to the grounds on which the appeal has been filed. The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question as to conformity with the certified local coastal program" or, if applicable, the public access and public recreation policies of Chapter 3 of the Coastal Act (Cal. Code Regs., tit. 14 section 13115(b)). In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to the Code of Civil Procedure, section 1094.5.

The City of San Diego has a certified Local Coastal Program (LCP), and the subject site is located in an area where the Commission retains appeal jurisdiction because it is located between the first public road and the sea. Therefore, before the Commission considers the appeal de novo, the appeal must establish that a substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603. In this case, for the reasons discussed further below, the Commission exercises its discretion to determine that the development approved by the City raises a substantial issue with regard to the appellant's contentions regarding coastal resources.

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#### **IV. SUBSTANTIAL ISSUE MOTION AND RESOLUTION**

The staff recommends the Commission adopt the following resolution:

**MOTION:**     *I move that the Commission determine that Appeal No. A-6-LJS-17-0025 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

#### **STAFF RECOMMENDATION:**

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the Commissioners present.

**RESOLUTION:**     *The Commission hereby finds that Appeal No. A-6-LJS-17-0025 presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.*

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## **V. SUBSTANTIAL ISSUE FINDINGS AND DECLARATION**

The Commission finds and declares as follows:

### **A. PROJECT DESCRIPTION**

The City proposes the installation of two new approximately 3-ft. tall pedestrian gates on the two existing public access stairs leading down to the sandy beach area of La Jolla Cove, a popular pocket beach area in the La Jolla community of San Diego that receives high levels of activity from both visitors and resident wildlife, namely the California sea lion (*zalophus californius*). One gate would be located approximately 10 feet landward of the terminus of the southern access stair and the other gate would be located approximately 20 feet landward of the terminus of the northern access stair. The two gates are proposed in response to complaints from City lifeguard staff regarding the presence of sea lions on the two public access stairs, the La Jolla Cove lifeguard station, and the public viewing decks overlooking La Jolla Cove. City lifeguards report that at times the sea lions may physically block pedestrians from utilizing the stairs and defecate on the stairs or decks, creating a public safety hazard and discouraging use of the beach. The City states that the gates would be propped open during the day, are designed to be the minimum height necessary to preclude the sea lions from ascending the public access stairs, and would not block public pedestrian access to the beach at any time.

### **B. SUBSTANTIAL ISSUE ANALYSIS**

The City's determination the development is exempt from coastal development permit requirements may be appealed to the Commission. In addition, the effects of the City's action for which no coastal development permit was required must be considered on the grounds of whether it conforms to the certified Local Coastal Program and with the public access and recreational policies of the Coastal Act.

In making the substantial issue assessment, the Commission typically considers whether the appellants' contentions regarding the inconsistency of the local government action with the certified LCP or the Coastal Act raise significant issues in terms of the extent and scope of the approved development, the support for the local action, the precedential nature of the project, whether significant coastal resources would be affected, and whether the appeal has statewide significance.

The grounds for this appeal are that the project is not repair and maintenance of an existing structure nor is the minimum development necessary for nuisance abatement and is therefore non-exempt "development" as defined in the certified Local Coastal Program (LCP) for the City of San Diego. The appellants claim that a local coastal development permit should therefore have been required.

Section 126.0702 of the LCP requires that anyone wishing to perform or undertake any development within the City's coastal zone shall obtain a coastal development permit. Development is broadly defined by Section 113.0103 of the LCP, which states:



*“Development” means, the act, process, or result of dividing a parcel of land into two or more parcels; or erecting, placing, constructing, reconstruction, converting, establishing, altering, maintaining, relocating, demolishing, using, or enlarging any building, structure, improvement, lot, or premises; of clearing, grubbing, excavating, embanking, filling, managing brush, or agricultural clearing on public or private property, including the construction of slopes and facilities incidental to such work; or of disturbing any existing vegetation.*

When the City’s Park and Recreation Department approached the City’s Development Services Department regarding the installation of the two pedestrian gates, DSD exempted the project under Section 126.0704(b) and (f), which address repair and maintenance of existing structures and public nuisance abatement, respectively.

Section 126.0704(b) and (f) state, in relevant part:

*Exemptions from a Coastal Development Permit*

*The following coastal development is exempt from the requirement to obtain a Coastal Development Permit.*

*[...]*

*(b) Repair or maintenance activities are exempt except if the repairs or maintenance activities involve any of the following:*

- (1) Repair or maintenance of a seawall, revetment, bluff retaining wall, breakwater, groin, culvert, outfall, or similar shoreline work that involves substantial alteration to the foundation of the protective work including pilings and other surface or subsurface structures; the placement, whether temporary or permanent of rip rap, artificial berms of sand or other materials, or any other forms of solid materials on a beach or in coastal waters, streams, wetlands, estuaries or on a shoreline protective work, unless destroyed by a natural disaster; the replacement of 20 percent or more of the materials of an existing structure with materials of a different kind; the placement, whether temporary or permanent, of mechanized construction equipment on any sand area, coastal bluff, or within 20 feet of coastal waters or streams, except that the use of such equipment solely for routine beach and park maintenance shall not require a Coastal Development Permit.*
- (2) Any repair or maintenance to facilities or structures or any work located within a wetland, any sandy beach area, within 50 feet of a coastal bluff edge or wetland, or within 20 feet of any coastal waters or streams that include: the placement or removal, whether temporary or permanent, of riprap, rocks, sand or other beach materials or any*

*other forms of solid materials or the presence, whether temporary or permanent, of mechanized equipment or construction materials.*

[...]

*(f) Any action necessary to abate a public nuisance as provided under California Public Resources Code Section 30005(b).*

[...]

Section 3005(b) of the Coastal Act states, in relevant part:

*No provision of this division is a limitation on any of the following:*

[...]

*(b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances.*

[...]

Applying the five factors listed in the Section III above clarifies that the appeal raises “a substantial issue” with respect to the Coastal Act’s exemption provisions and therefore with Chapter 3 of the Coastal Act.

The first factor is the degree of factual and legal support for the local government’s decision that the development is exempt from CDP requirements. With regards to the exemption granted to the development on the basis of repair and maintenance, the repair and maintenance of an existing structure constitutes restorative action taken to return a structure to its previous, original form or to restore a function that was previously offered but for whatever reason has ceased. The proposed gates do not constitute repair and maintenance because the public access stairs, which are pre-coastal structures, never had pedestrian gates installed on them in the past. Thus, the gates are not a restoration of the stairs to their original form, but constitute a new improvement being installed on them, one that will change the manner in which the stairs appear and function. Furthermore, the gates constitute the placement of solid material within 20 feet of coastal waters, which is specifically excluded from exempt repair and maintenance. Therefore, the project cannot be exempt repair and maintenance.

With regard to the City’s statement of the existence of a public nuisance, the City has provided little factual support for such an assertion. The City’s claim that the installation of gates on a public access stairway because the action is abating a public nuisance raises significant questions with regards to need, impacts, and alternative measures. The presence of wild animals on and around a natural beach can create conflicts and inconveniences, but is nevertheless a common part of a visit to the shoreline. The subject site is a popular beach destination with passionate and involved local constituents, who have not previously hesitated to contact local and state officials when impediments to beach access arise. But the City has been unable to provide any public testimony or

accounts of public safety issues or impacts to public access or recreation due to the presence of sea lions around the staircases.

The second factor is the extent and scope of the development as approved or denied by the local government. The full extent and scope of the locally approved development is not entirely clear because there are no plans available to determine the specific characteristics of the gates, although the City has provided sketches (Exhibit #\*). For example, it is not clear how the gates would be kept open during the day, or if the gates would have a latch that could be locked (either by City personnel or illicitly by members of the public). Nevertheless, the extent and scope of the proposed development is clearly significant. Public access and recreation are among the Coastal Act's highest priorities. The legislature expressly stated in Section 30001.5 of the Coastal Act that one of the state's primary goals in the coastal zone is to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone." Limiting such uses must be very carefully considered and only the minimum limitation necessary to protect public safety or other valid need should be allowed.

The third factor is the significance of the coastal resources affected by the decision. This factor is directly tied to the Chapter 3 policies of the Coastal Act. Here, the primary coastal resource that could be affected by the locally approved project is public access and recreation, which are high priority coastal resources. If the project is returned to the City for a coastal development permit, the proposed development would be reviewed for consistency with the public access and recreation policies of the certified LCP. Nevertheless, it is well established that La Jolla Cove is a particularly popular recreational beach, especially with swimmers. The City recently rebuilt and upgraded the La Jolla Cove lifeguard station to address the large number of crowds that utilize the beach, especially during the summer months. The sandy beach at La Jolla Cove is surrounded by steep rocky bluffs, and without the stairs public access to the sand would be very difficult, if not impossible for less-abled members of the public. The installation of gates has the potential to create physical and psychological impediments to utilization of the beach area. The presence of gates can serve as an inducement to either the local government or a member of the public to place a lock on the gate, and the appearance of a gate generates an appearance of exclusivity or limitation, which can dissuade members of the public from venturing down to the beach area, even if the gate is unlocked. Thus, the coastal resources affected by the decision are significant.

The fourth factor is the precedential value of the local government's decision for future interpretations of its LCP. The City currently has a certified LCP. It is important to establish that issuing exemptions for new development that directly impacts public access and recreation circumvents the coastal development permit process and its requirement for public participation, and sets a bad precedent. The City has not established that there is an urgent public safety nuisance that must be addressed outside of the permit process. The City's action does raise significant questions of new precedents with regard to future interpretations of the LCP. The City's assertion that implementing development that could limit public beach access does not constitute development requiring a permit raises significant issues for future actions. The presence of sea lions in and around a beach is a

natural circumstance, which can on occasion create inconvenient interactions between the wildlife and the public. If other localities were to seek to similarly circumvent Coastal Act permitting requirements, the Commission's ability to carry out its duty to ensure that Coastal Act and LCP policies protecting public access and recreation are implemented will be significantly constrained. Thus, the appeal does raise a substantial issue with regard to future interpretations of the LCP.

The final factor is whether the appeal raises local issues, or those of regional or statewide significance. Although this appeal raises specific local issues, potentially exempting projects from the coastal development process that are not exempt pursuant to policies of the provisions of the Coastal Act will have potential negative and cumulative impacts to the coast if other local governments in the coastal zone apply their exemption authority in a similar manner. New development, particularly structures located between the sea and the first public roadway which affect public access must be properly reviewed through the local coastal development permit process and monitored by the City in order to protect coastal resources. Properly interpreting the scope of the exemptions contained in Coastal Act 30610 and its implementing regulations is unquestionably an issue of statewide significance. Therefore, the City's approval does raise issues of statewide significance. The appeal thus meets the substantiality standard of Section 30625(b)(1).

The specific substantive issues raised by the appeal, such as claims that the gates will adversely impact public access, are not a proper basis for appeal at this time, given that there is not a coastal development permit application for review, but would be relevant to a coastal development permit application processed by the City. That process should consider the potential impact to public access of installing any kind of gate, the appropriate size and functionally (e.g., the potential for locking) of any gates, and the need for signage addressing public access and public safety. The legally appropriate and required process to address these issues is the coastal development permit application process.

Therefore, the appeal raises a substantial issue as to conformity with the Chapter 3 policies of the Coastal Act because the development, which did not obtain a CDP, was erroneously processed as an exemption and has not yet been reviewed for conformity with the Chapter 3 policies of the Coastal Act.

**APPENDIX A**

**SUBSTANTIVE FILE DOCUMENTS:**

- Appeal by Chair Dayna Bochco dated May 8, 2017;
- Appeal by Commissioner Mary Shallenberger dated May 8, 2017;