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## STAFF REPORT AND RECOMMENDATION ON APPEAL SUBSTANTIAL ISSUE DETERMINATION

**Local Government:** City of San Diego

**Decision:** Substantial Conformance

**Appeal Number:** A-6-LJS-19-0198

**Applicant:** City of San Diego Public Works Department

**Location:** Children's Pool Beach, 850 Coast Boulevard, La Jolla, San Diego, San Diego County

**Project Description:** Determination that the after-the-fact approval of a 30 inch tall, 14 ft. long retaining wall substantially conforms to CDP No. 549686, approved by the City for construction of a new lifeguard station.

**Appellants:** La Jolla Community Planning Association and Ken Hunrichs

**Staff Recommendation:** No Substantial Issue

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### IMPORTANT HEARING PROCEDURE NOTE

This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally and at the discretion of the Chair, testimony is limited to 3 minutes total per side. Please plan your testimony accordingly. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify. Others may submit comments in writing. If the Commission determines that the

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

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## SUMMARY OF STAFF RECOMMENDATION

The project site is located at Children's Pool Beach (also known as Casa Beach) in the La Jolla community of the City of San Diego ([Exhibit 1](#)). Children's Pool Beach is a 0.7-acre artificial pocket beach held in place by a breakwater constructed in 1931 ([Exhibit 1](#)). The beach is designated as "Parks, Open Space" in the City's certified Land Use Plan and provides recreational opportunities for swimmers, divers, fishers, tourists, and the general public. The beach is also used by harbor seals, and is closed to public access during pupping season, December 15 to May 15, to protect the seals during their most vulnerable period. The entire sandy beach area of Children's Pool is located in the Commission's original coastal development permit jurisdiction, and the City's jurisdiction begins at the bottom of the lower stairs.

On December 14, 2011, the City of San Diego approved Coastal Development Permit (CDP) No. 549686 for the demolition of the existing lifeguard station and construction of a new lifeguard station with restrooms, showers, and a 10 ft. wide Americans with Disabilities Act (ADA) compliant pedestrian ramp from Coast Boulevard to the restrooms located in the lower level of the lifeguard station and to the breakwater viewing area at Children's Pool. In 2017, Mr. Ken Hunrichs contacted Commission enforcement staff to report that an approximately 30 inch high, 14 ft. long retaining wall had been constructed under the existing emergency access gate on the northwest side of the new lifeguard station ([Exhibit 2](#)). The emergency access gate is closed and locked to prohibit public use of a dilapidated ramp that, according to evidence submitted by Mr. Hunrichs, was eroded by waves and has not been maintained by the City since the 1980's ([Exhibit 8](#)). After reviewing the Notice of Final Action for CDP No. 549686, Commission staff determined that the retaining wall was not included in the project plans ([Exhibit 3](#)) for the City-issued CDP for the lifeguard station and therefore constituted unpermitted development. According to materials provided by City staff, the incorporation of the retaining wall into the approved project ([Exhibit 4](#)) took place during construction of the project, after the Commission received the Notice of Final Action from the City. Thus, the retaining wall was not reviewed by Commission staff when determining whether to appeal the City's action.

Given that construction of the retaining wall is development that requires a Coastal Development Permit, as well as the concern on behalf of interested parties, Commission staff advised the City of the need to properly seek Coastal Development Permit authorization for the retaining wall after-the-fact, which was memorialized in a March 28, 2018 letter from Commission staff to the City ([Exhibit 6](#)). Commission staff met with City staff on May 23, 2018 and October 16, 2018 to discuss the CDP process.

Staff subsequently agreed that the City would proceed with substantial conformance review for the retaining wall, which would be noticed to the public and appealable to the Commission. According to Section 113.0103 of the City's municipal code, substantial

conformance means that a revision to a development that was approved through a permit complies with the objectives, standards, guidelines, and conditions for that permit. The City's Development Services Department (DSD) completed the substantial conformance review for the retaining wall on May 21, 2019. The decision was appealed to the City Council by the La Jolla Community Planning Board on June 7, 2019. On September 17, 2019, the City Council denied the appeal and upheld DSD's approval. A Notice of Final Action for the substantial conformance determination was received at the San Diego Coastal Commission office on September 23, 2019. Following receipt of the notice, the determination was appealed to the Commission by the La Jolla Community Planning Board on September 30, 2019 and Mr. Hunrichs on October 7, 2019.

City staff has indicated that the retaining wall was necessary to support the new ADA ramp from Coast Boulevard to the new restrooms and showers in the lower level of the new lifeguard station, including two ADA-compliant restroom stalls and one ADA-compliant shower stall. Specifically, construction of the ramp required the existing grade to be lowered, which caused the bluff and emergency access gate footings to become exposed ([Exhibit 2](#)). Thus, as a result of the exposure of the bluff and gate footings, the retaining wall was constructed for several reasons: to provide additional support for the existing gate, prevent erosion of the bluff, retain the exposed bluff soil to prevent soil falling onto the ramp, and to act as a safety barrier for the ADA ramp.

The appellants contend that the retaining wall blocks a pre-existing beach access ramp identified on Figure E in the La Jolla Community Plan and Land Use Plan (LUP), which describes physical accessways. However, the City has asserted that its research into the history of the ramp has not uncovered any evidence that this ramp was used for any purpose other than emergency vehicle access, which no longer occurs due to the dilapidated state of the ramp. The exact history of the gate and ramp is unknown; however, based on photographic evidence provided by the appellants, it appears that the public used the ramp as an alternative accessway when the gate was open. Mr. Hunrichs has stated that the ramp was damaged during a series of storms and an attempt to repair the damaged ramp resulted in further deterioration of the ramp, leading the City to permanently lock the gate and prevent access to the ramp. Both the City and the appellants agree that the gate has been permanently locked since the 1990's ([Exhibit 7](#)). The public is able to access Children's Pool beach by stairs, which are located adjacent to and up-coast of the ramp, and the public is able to view the ocean and the beach from the pedestrian walkway located along the top of the breakwater ([Exhibit 1](#)). While a ramp to the beach would improve access by providing an alternative route, construction of the retaining wall below the locked gate has not resulted in a loss of access at the site given that the dilapidated ramp has not been safe for public access for over 20 years, and the stairs and breakwater continue to be available for public access.

The City's LUP includes numerous policies to maintain and improve shoreline access in the community of La Jolla; however, the only reference to the ramp at Children's Pool is in Figure E ([Exhibit 5](#)). In the figure, the ramp is labeled "beach access ramp" and identified as "vertical access (dedicated street or easement)." The City claims that Figure E identifies the ramp as a vertical access point only, which does not indicate general public access is available, and asserts that the City retains rights over all City

accessways. Finally, while the text of the LUP does contain a description of the public access available at Children's Pool, the description identifies only the stair accessway, consistent with existing conditions, and does not include language that identifies the ramp:

Children's Pool. Small (.7-acre) artificial pocket beach held in place by seawall. Lifeguard facilities. Stairway access down bluff. Heavily utilized. In order to protect breeding Harbor Seals, no public access is permitted below the top of the lower staircase leading down to the sand from the sidewalk during seal pupping season.

The appellants also claim that the City's installation of the retaining wall does not address the public's nor former Coastal Commissioner McClure's request for the City to investigate improving ADA access to the site, which was added as Special Condition No. 5 to CDP No. 6-14-0691, for the seasonal closure of Children's Pool during the harbor seal pupping season, and approved by the Commission in August 2014. This claim is not a valid grounds for an appeal. However, for purposes of discussion, Special Condition No. 5 required the City to analyze the feasibility of improving the existing ramp. The City conducted the analysis and determined that it would be infeasible to improve the ramp. Specifically, the existing ramp has a steep slope of approximately 30%, is significantly eroded, and drops off on either side ([Exhibit 2](#)). Given the existing state of the ramp, the City has indicated that they do not support opening the gate for public access due to safety and liability issues. The City has indicated that, in order to open the ramp up to public use, the ramp would need to be improved to ensure compliance with local and state codes for pedestrian ramps. The City claims that performing any alteration that affects the usability of the ramp may trigger the requirement for the ramp to be compliant with the ADA. To comply with current ADA standards, the City asserts it would need to construct a new ramp that would not exceed a 1:12 (or 8.33%) slope (see 36 C.F.R. § Pt. 1191, App. D, § 405.2), which would require over 313 linear feet of ramps and landings and extend onto a significant area of the beach, resulting in a development footprint of approximately 1,500-1,800 sq.ft. (30 ft. wide by 50 to 60 ft. long) ([Exhibit 9](#)). The loss of sandy beach would be significant. Therefore, the City has satisfied the public and Commission's request to investigate the feasibility of providing ADA access at Children's Pool. The study was reviewed and accepted by the Commission with its approval of CDP Amendment No. 6-14-0691-A1 on June 13, 2019, as part of the consideration for the continued closure of Children's Pool during the harbor seal pupping season for an additional 10 years. In addition, the City has identified that the retaining wall was constructed to support the new ADA access ramp that was constructed with the new lifeguard station in order to provide new and improved ADA access to ADA bathrooms and an ADA shower in the lower level of the lifeguard station.

Mr. Hunrichs further contend that the retaining wall blocks the ramp from being used for emergency vehicle access and, as such, does not meet the City's CDP findings that identify that the ramp would be provided for emergency vehicles. While the project description for the lifeguard tower does identify that an emergency access ramp would be constructed to the beach, the project plans approved for the project do not show a ramp leading to the beach and the City has indicated this discrepancy resulted from

miscommunication between the Development Services Department, which prepared the staff report, and the Public Works Department, the project proponent. Instead, the approved plans show a new ADA ramp from Coast Boulevard to the emergency access gate, which is consistent with the ramp, as constructed. The City has also indicated that it no longer uses the emergency access ramp given its dilapidated state; instead, rescue personnel use the existing stairs or breakwater for emergency access to the beach.

Finally, the Mr. Hunrichs contends that the City's approval is not consistent with the CDP finding that the project would not result in undue risk from erosional forces. Based on the City's own explanation for the retaining wall, the ramp as constructed did cause the bluff and gate footings to become exposed, which required construction of the retaining wall landing, in part, to protect and provide additional support for the bluff and gate, prevent erosion of the bluff, and retain exposed bluff soil to prevent soil falling onto the pedestrian path and ramp. Thus, the original project did necessitate limited work to remediate the slope and complete the ADA amenities at the lifeguard station.

In this case, staff agrees with the City's determination that the revision to the development substantially conforms with the objectives, standards, guidelines, and conditions for the original permit. Thus, the City's conformance determination does not raise a substantial issue. Because there are no identified inconsistencies with the City's Local Coastal Program (LCP) and the Coastal Act, and no issues raised of regional and statewide importance, staff recommends that the Commission determine that the project raises no 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

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## EXHIBITS

[Exhibit 1 – Vicinity Map and Aerial View](#)

[Exhibit 2 – Site Photos](#)

[Exhibit 3 – Original Site Plan](#)

[Exhibit 4 – Retaining Wall Plan](#)

[Exhibit 5 – Appeal Forms](#)

[Exhibit 6 – March 28, 2019 Commission Letter](#)

[Exhibit 7 – Photographs Submitted by Appellants](#)

[Exhibit 8 – Letter and News Article Regarding the Maintenance of the Ramp](#)

[Exhibit 9 – Feasibility Study – ADA Alternative](#)

## **I. APPELLANTS CONTEND**

Appellants contend the project as approved by the City does not conform to the City of San Diego's Coastal Development Permit (CDP) No. 549686, the City of San Diego certified Local Coastal Program (LCP), the public access and recreation policies of the Coastal Act, the California Environmental Quality Act (CEQA), or past Commission action with regard to public access, public safety, and erosion.

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## **II. LOCAL GOVERNMENT ACTION**

On May 21, 2019, the City of San Diego Development Services Department determined that the after-the-fact approval of a 30 inch tall, 14 ft. long retaining wall substantially conformed to CDP No. 549686, issued for the demolition and construction of a new lifeguard station. The decision was appealed to the City Council by the La Jolla Community Planning Association on June 7, 2019. The City Council denied the appeal and upheld the substantial conformance determination for the project on September 17, 2019. A Notice of Final Action was received by the Coastal Commission on September 23, 2019.

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## **III. APPEAL PROCEDURES**

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits.

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, 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, if any, any person may testify.

The Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603. (§ 30625(b)(2).) Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue:

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.

The Commission may, but need not, assign a particular weight to a factor.

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 does not raise a substantial issue with regard to the appellants' contentions regarding coastal resources.

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## IV. SUBSTANTIAL ISSUE MOTION AND RESOLUTION

### Motion:

I move that the Commission determine that Appeal No. A-6-LJS-19-0198 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

Staff recommends a **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds No Substantial Issue, the Commission will not hear the application de novo and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

### Resolution:

The Commission hereby finds that Appeal No. A-6-LJS-19-0198 does not present 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

### A. Project Description and Background

The project site is located at Children's Pool Beach (also known as Casa Beach), west of Coast Boulevard and southwest of Jenner Street in the La Jolla community of the City of San Diego ([Exhibit 1](#)). Children's Pool Beach is a 0.7-acre artificial pocket beach held in place by a breakwater constructed in 1931 ([Exhibit 2](#)). The beach is designated as "Parks, Open Space" in the City's certified Land Use Plan and provides recreational opportunities for swimmers, divers, fishers, tourists, and the general public through its provision of lifeguard facilities, access stairway from Coast Boulevard, parking along Coast Boulevard, viewing gazebo along Coast Boulevard, benches, restrooms, pedestrian walkway atop the breakwater, and a dilapidated ramp that has remained closed by the City via a gate. The beach is also used by harbor seals to haul out,

meaning to exit the water onto the sandy beach area for essential biological functions such as rest, thermal regulation, molting, giving birth, and nursing and weaning pups. The beach is closed to public access during pupping season (December 15 to May 15) to protect the seals during their most vulnerable period. Children's Pool Beach is bounded on the north and west by the Pacific Ocean, on the east by Coast Boulevard and Casa de Manana Retirement Community, and on the south by South Casa Beach. Several beaches are located adjacent to or in close proximity to Children's Pool, including La Jolla Shores, Marine Street Beach, La Jolla Cove, Whispering Sands Beach, Shell Beach, South Casa Beach, Ravina, Boomer Beach, and Windansea. The entire sandy beach area of Children's Pool is located in the Commission's original coastal development permit jurisdiction, and the City's jurisdiction begins at the bottom of the lower stairs.

On December 14, 2011, the City of San Diego approved CDP No. 549686 for the demolition of the existing lifeguard station and construction of a new lifeguard station at Children's Pool. The project site is located above the stairs, within the City's permit jurisdiction and the Commission's appeal jurisdiction. The City's approval was not appealed to the Commission and the project was completed in 2016. Specifically, the project included construction of a new three-level, 1,900 sq. ft. lifeguard station with restrooms (including two ADA-compliant restrooms), showers (including one ADA-compliant shower), lifeguard lockers, and a sewage pump room on the lower level; two work stations, and observation room, kitchenette, restroom, and first aid station on the second level; and observation space on the top level. A 10 ft. wide ADA-compliant pedestrian ramp was constructed from the sidewalk at Coast Boulevard to the restrooms at the lower level of the lifeguard station and entrance to the breakwater viewing area. Finally, seating, drinking fountains, landscaping, and irrigation were installed.

In 2017, Mr. Ken Hunrichs contacted Commission enforcement staff to report that an approximately 30 inch high, 14 ft. long retaining wall had been constructed under the existing emergency access gate on the northwest side of the new lifeguard station ([Exhibit 2](#)). The gate is closed and locked to prohibit public use of a dilapidated ramp that, according to evidence submitted by Mr. Hunrichs, was eroded by waves and has not been maintained by the City since the 1980's ([Exhibit 8](#)). Commission staff contacted the City regarding the work and City staff asserted that the retaining wall was authorized as part of CDP No. 549686. However, after reviewing the Notice of Final Action for CDP No. 549686, Commission staff determined that the retaining wall was not included in the project plans ([Exhibit 3](#)) for the City-issued CDP and therefore constituted unpermitted development. According to the materials provided by City staff, the incorporation of the retaining wall into the approved project ([Exhibit 4](#)) took place after the Commission received the Notice of Final Action from the City. Thus, the retaining wall was not reviewed by Commission staff when determining whether to appeal the City's action.

City staff has indicated that the retaining wall was necessary to support the new ADA ramp from Coast Boulevard to the new restrooms in the lower level of the new lifeguard station. Specifically, construction of the ramp required the existing grade to be lowered,

which caused the bluff and emergency access gate footings to become exposed ([Exhibit 2](#)). Thus, as a result of the exposure of the bluff and gate footings, the retaining wall was constructed for several reasons: to provide additional support for the existing gate, prevent erosion of the bluff, retain the exposed bluff soil to prevent soil falling onto the ramp, and to act as a safety barrier for the ramp.

Even prior to the construction of the retaining wall, the status of the emergency access gate and the ramp seaward of the gate has been a source of public contention. Photographic evidence ([Exhibit 7](#)) and public testimony (see Correspondence) indicate that the ramp was historically used by the public and some members of the public maintain that the gate could be re-opened by the City to allow for public and disabled access to the beach via the ramp. Following testimony by members of the public on August 14, 2014, the Commission approved CDP No. 6-14-0691, which authorized the seasonal closure of Children's Pool during harbor seal pupping season for five years, and attached Special Condition No. 5 to require the City to complete a study to address the feasibility of providing Americans with Disability Act (ADA) compliant access to the sandy beach area of Children's Pool. The City completed the study and determined that neither the construction of a new ADA ramp or modification of the existing ramp would be feasible because the slope requirements would necessitate a large footprint on the beach. Additionally, nearby beaches provide disabled access. The Commission agreed that the requirements of Special Condition No. 5 were completed and satisfactory on June 13, 2019 with the approval of CDP No. 6-14-0691-A1 to extend the permit term of the seasonal closure for ten additional years.

However, given that construction of the retaining wall is development that requires a Coastal Development Permit, as well as the concern on behalf of interested parties, Commission staff advised the City of the need to properly seek Coastal Development Permit authorization for the retaining wall after-the-fact, which was memorialized in a March 28, 2018 letter from Commission staff to the City ([Exhibit 6](#)). Commission staff met with City staff on May 23, 2018 and October 16, 2018 to discuss the CDP process. Staff subsequently agreed that the City would proceed with substantial conformance review for the retaining wall, which would be noticed to the public and appealable to the Commission.

Section 113.0103 of the City of San Diego Municipal Code defines substantial conformance as follows:

Substantial conformance means that a revision to a development that was approved through a permit or tentative map complies with the objectives, standards, guidelines, and conditions for that permit or tentative map.

In this case, the objectives, standards, and guidelines are contained in the City's Local Coastal Program (LCP) and the conditions are in the CDP. Thus, the City must find that the change to the approved project plans (i.e., the retaining wall) is consistent with the LCP and the CDP conditions. Section 126.0112(d) requires that a substantial conformance determination for a capital improvement program project (i.e., the lifeguard station) be reached through a Process CIP-Two review. Section 112.0602 allows a

Process CIP-Two review to be approved by a staff person and requires the decision to be noticed to the public and appealable to the City Council.

The City's Development Services Department (DSD) completed the substantial conformance review for the retaining wall on May 21, 2019. The decision was appealed to the City Council by the La Jolla Community Planning Board on June 7, 2019. On September 17, 2019, the City Council denied the appeal and upheld DSD's approval that the retaining wall was in substantial conformance with the original CDP. A Notice of Final Action for the determination was received at the San Diego Coastal Commission office on September 23, 2019. Following receipt of the notice, the determination was appealed to the Commission by the La Jolla Community Planning Board on September 30, 2019.

An appeal was also received by Ken Hunrichs on October 7, 2019. Title 14, Section 13573(4) of the California Code of Regulations requires that appellants exhaust all local appeals to be of standing to appeal a decision to the Commission unless, among other exceptions, the local government charges an appeal fee for the filing or processing of appeals. In this case, the City of San Diego charges \$1,000 to file an appeal of a capital improvement project such as the subject project. In addition, Mr. Hunrichs testified during the City Council's appeal hearing. As a result, Mr. Hunrichs met the standard for exhaustion and is authorized to appeal the City Council's decision to the Commission even though he did not appeal the DSD's initial determination to the City Council.

The appellants contend that the City's approval is inconsistent with provisions of the City's certified LCP, CDP No. 549686, the public access and recreation policies of the Coastal Act, the California Environmental Quality Act (CEQA), and historical public trust records concerning public beach access, Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) access, and emergency vehicle access required for public safety. The grounds for an appeal are limited to claims that the approved development does not conform to the standards in the certified LCP or the public access policies of the Coastal Act. (Pub. Resources Code, § 30603.) As such, many of the claims do not form valid grounds for appeal. The discussion below addresses only the claims of inconsistencies with the governing LCP and the public access and recreation policies of the Coastal Act.

## **B. Public Access and Recreation**

Section 30210 of the Coastal Act states:

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 of the Coastal Act states:

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) of the Coastal Act states, in part:

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...

Section 30213 of the Coastal Act states, in part:

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred...

Section 30214(a) of the Coastal Act states, in part:

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

- (1) Topographic and geologic site characteristics.
- (2) The capacity of the site to sustain use and at what level of intensity.
- (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses...

Section 30220 of the Coastal Act states:

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.

Section 30221 of the Coastal Act states:

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.

The La Jolla Community Plan and Local Coastal Program Land Use Plan contain a number of public access and recreation provisions cited by the appellant, including

general goals to enhance access at Children's Pool, as well as specific policies, as follows:

Shoreline and Access Areas, Policy 3.b. The City shall maintain, and where feasible, enhance and restore the shoreline areas such as Torrey Pines City Beach, Coast Walk, Emerald Cove, Wipeout Beach and Hospital Point, along with the areas of Scripps Park, Coast Boulevard Park, including Shell Beach and the Children's Pool, in order to benefit present and future residents and visitors to these areas.

Parking, Policy 4.b. The City shall maintain, and where feasible, enhance and restore existing parking areas, public stairways, pathways and railings along the shoreline to preserve vertical access (to the beach and coast), to allow lateral access (along the shore), and to increase public safety at the beach and shoreline areas.

Public Access, Policy 5.d. The City should ensure that new development does not restrict or prevent lateral vertical or visual access (as identified in Figure 9 and Appendix G) to the beach on property that lies between the shoreline and first public roadway, or to and from recreational areas and designated public open space easements.

Visual Resources, Policy 2.h. Where new development is proposed on property that lies between the shoreline and the first public roadway, preserve, enhance or restore existing or potential view corridors within the yards and setbacks by adhering to setback regulations that cumulatively, with the adjacent property, form functional view corridors and prevent an appearance of the public right-of way being walled off from the ocean.

Shoreline Areas, Policy 3.i. Maintain, and, where feasible, enhance and restore all existing steps and paved access ramps to beach and shoreline parks, such as those at Marine Street Beach, Tourmaline Surfing Park and La Jolla Strand Park, in order to increase public safety and vertical access to these areas.

Specifically, the appellants contend that the retaining wall blocks a pre-existing beach access ramp identified on Figure E in the La Jolla Community Plan and Land Use Plan (LUP), which describes physical accessways. According to Mr. Hunrichs, the ramp has been in existence since the 1940's, and was put into place by grading, filling, and paving a natural bluff. In addition, Mr. Hunrichs claims that the ramp was open and unrestricted for many years. It is unclear when, but at some point, the gate across the ramp was installed; however, Mr. Hunrichs claims it was locked only when high surf conditions required restricting access for public safety and otherwise remained open. [Exhibit 7](#) includes photographs submitted by Mr. Hunrichs that indicate public access was available via the ramp prior to the 1990's. Mr. Hunrichs has also submitted a letter to the Commission dated July 31, 2014 from Joseph Barnett who identifies himself as a lifeguard at the Children's Pool from 1969 to 1989. In the letter, Mr. Barnett states that the ramp was maintained diligently by the City during his tenure in order for heavy machinery to access the beach to remove kelp and sand from the beach, and to make it

safer and easier for people with disabilities to get to the beach ([Exhibit 8](#)). Mr. Hunrichs has stated that the ramp was damaged during a series of storms and an attempt to repair the damaged ramp resulted in further deterioration of the ramp, leading the City to permanently lock the gate and prevent access to the ramp. A 1983 memorandum to the City Manager from the Deputy Mayor and Councilman (provided by Mr. Hunrichs) requested that City staff be directed to develop a capital improvement project to construct a cement all-purpose ramp since the existing ramp had been subject to severe weathering and erosion ([Exhibit 8](#)). Finally, Mr. Hunrichs correctly identifies that no Coastal Development Permit was issued to close the ramp and claims that repairs to the ramp are a simple, low cost solution to maintaining public access to this beach.

The ramp was built over an existing natural bluff, which is now visible ([Exhibit 2](#)) due to the erosion and deterioration of the ramp. The 1988 news article provided by Mr. Hunrichs ([Exhibit 8](#)) indicates that the asphalt ramp was washed out in the 1980's and attempts by the City to repair the ramp by adding red clay covered by decomposed granite led to water and sand quality issues at Children's Pool. In addition, the ramp was deemed unsafe as the clay left the ramp slippery which could cause the public to slip and wheelchairs to overturn. At that time, the City and public were divided on what to do with the ramp with some arguing that it should be replaced, left to deteriorate, or removed. Presumably, the City did not take any further action on the ramp at that time and the ramp's condition has not allowed for safe access since then.

The City has asserted that its research into the history of the ramp has not uncovered any evidence that this ramp was used for any purpose other than emergency vehicle access (which no longer occurs due to the dilapidated state of the ramp) or that public access was ever authorized, even if the public did use the ramp prior to its degradation. The exact history of the gate across the ramp is unknown, including when it was installed; however, Mr. Hunrichs indicates in his appeal that the gate may have been installed during the construction of the original lifeguard tower in the 1960's. Both the appellants and City agree that the gate has been locked since the 1990's.

Access to the beach at Children's Pool is provided by a set of stairs located adjacent to and up-coast of the ramp, and there is also a pedestrian walkway located along the top of the breakwater that allows public views of the ocean and beach ([Exhibit 1](#)). While a ramp to the beach would improve access by providing an alternative route, construction of the retaining wall below the locked gate has not resulted in a loss of access at the site given that the dilapidated ramp has not been safe for public access since the 1990s, and the stairs and breakwater continue to be available for public access. In addition, the Commission's Coastal Engineer, Dr. Lesley Ewing, has reviewed the project and believes that, should the City later determine that improving the ramp is feasible, the retaining wall could be removed or modified.

The City's LUP includes numerous policies to maintain and improve shoreline access in the community of La Jolla; however, the only reference to the ramp at Children's Pool is in Figure E ([Exhibit 5](#)). In the figure, the ramp is labeled "beach access ramp" and identified as "vertical access (dedicated street or easement)." The City claims that Figure E identifies the ramp as a vertical access point only, and does not indicate general public access is available. Finally, while the text of the LUP does contain a

description of the public access available at Children's Pool, the description only identifies the stair accessway, consistent with existing conditions, and does not include language that identifies the ramp:

Children's Pool. Small (.7-acre) artificial pocket beach held in place by seawall. Lifeguard facilities. Stairway access down bluff. Heavily utilized. In order to protect breeding Harbor Seals, no public access is permitted below the top of the lower staircase leading down to the sand from the sidewalk during seal pupping season. (Subarea E.: Coast Boulevard, Shoreline Access d.)

The appellants also contend that the City's installation of the retaining wall does not adequately address the public's nor former Coastal Commissioner McClure's request for the City to investigate improving ADA access to the site, which was added as Special Condition No. 5 to CDP No. 6-14-0691 (authorizing the closure of the beach during harbor seal pupping season for five years) and approved by the Commission in August 2014. This claim likewise is not a valid grounds for an appeal. However, for purposes of discussion, Special Condition No. 5 required the City to analyze the feasibility of improving the existing ramp. The City conducted the analysis and determined that it would be infeasible to improve the ramp. Specifically, the existing ramp has a steep slope of approximately 30%, is significantly eroded, and drops off on either side ([Exhibit 2](#)). Given the existing state of the ramp, the City has indicated that they do not support opening the gate for public access due to safety and liability issues. The City has indicated that, in order to open the ramp up to public use, the ramp would need to be improved to ensure compliance with local and state codes for pedestrian ramps. The City claims that performing any alteration that affects the usability of the ramp may trigger the requirement for the ramp to be compliant with the federal Americans with Disabilities Act (ADA). To comply with current ADA standards, the City would need to construct a new ramp that would not exceed a 1:12 (or 8.33%) slope (see 36 C.F.R. § Pt. 1191, App. D, § 405.2). That, in turn, would require over 313 linear feet of ramps and landings and extend onto a significant area of the beach, resulting in a development footprint of approximately 1,500-1,800 sq.ft. (30 ft. wide by 50 to 60 ft. long) ([Exhibit 9](#)). The loss of sandy beach would be significant. Therefore, the City has satisfied the public and Commission's request to investigate the feasibility of providing ADA access at Children's Pool. The study was reviewed and accepted by the Commission with its approval of CDP Amendment No. 6-14-0691-A1 on June 13, 2019, as part of the consideration for the continued closure of Children's Pool during the harbor seal pupping season for an additional 10 years.

In addition, as mentioned previously, the existing lifeguard station was constructed in 2016 and includes ADA improvements, including a 10 ft. wide ADA-compliant pedestrian ramp from the sidewalk at Coast Boulevard to the restrooms at the lower level of the lifeguard station and breakwater viewing area, as well as ADA restrooms and an ADA shower. However, the City incorporated the existing public stairway into its design and did not make any modifications to the deteriorated ramp. The City has indicated that the City Attorney evaluated legal requirements to provide access to the beach during the planning of the lifeguard station in 2012; however, the City Attorney at the time opined that the improvements for the replacement of the lifeguard station did



not trigger the need to provide a ramp to the beach and that the project was only required to provide a ramp to the new restrooms on the lower level. Although the City has improved ADA-access by providing a ramp to the new ADA restrooms and shower, there is no existing ADA-access to the beach that would accommodate a person in a wheelchair.

The La Jolla Community Plan identifies three locations in La Jolla with beach access ramps: Children's Pool, Boomer Beach, and just north of Scripps Pier. However, currently the facilities at all three of these locations are not designed to provide ADA access to the beach or water. The City has indicated that it is considering providing ADA accessible ramps to the beach at more feasible locations in proximity to Children's Pool, including Marine Street and Sea Lane, which are located approximately one mile south of Children's Pool; however, they have not yet identified funds to provide the additional ramps.

Although there are currently no ADA accessible facilities at Children's Pool that connect to the beach, there are many San Diego beaches that are easily accessible to beachgoers with disabilities and additionally have Health Department-approved water quality<sup>1</sup>. South Mission Beach has three accessible fixed concrete ramps between San Fernando and West Mission Bay Drive. There are seven locations with removable beach ramps that are available from the second week in May through the third week in September: La Jolla Shores, by the main lifeguard tower; Pacific Beach, in front of the main lifeguard tower at Grand Avenue; Mission Beach, in front of the main lifeguard tower; South Mission Beach, south of the main lifeguard tower; Ocean Beach, in front of the main lifeguard tower; Crown Point, south of the southern comfort station; Bonita Cove, near the southwest parking lot; and at Mission Point Park, at the western end of the park. La Jolla Shores, approximately two miles north of Children's Pool Beach, provides one free beach wheelchair for disabled visitors and is a flat, accessible beach. Beach wheelchairs can also be utilized, free of charge, at Ocean Beach, Mission Beach, and Pacific Beach. The facilities at Crown Point, Bonita Cove, and Mission Point Park allow people to access the calmer waters of Mission Bay. In addition, the public is able to utilize these accessible beaches all year long, including during the five months of

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<sup>1</sup> Special Condition No. 5 of CDP No. 6-14-0691 also required the City to conduct a feasibility study that analyzed sand and water quality and methods to improve sand and water quality at Children's Pool. The study was completed by the City and found that all types of fecal indicator bacteria (FIB) were present in the sand and that concentrations were elevated compared with those of a reference beach. However, Children's Pool has been in compliance with water quality Bacteria Total Maximum Daily Load (TMDL) numeric targets since 2015, with the exception of one exceedance in 2018, indicating an improvement in water quality at Children's Pool. While the City has evaluated options to improve water quality, the options would adversely impact public access and marine resources, and were deemed infeasible. See the staff report findings for additional information: <https://www.coastal.ca.gov/meetings/agenda/#/2019/6>.

pupping season (December 15 to May 15) that beach access is restricted at Children's Pool to protect the harbor seals.

The appellants also contend that the retaining wall blocks the ramp from being used for emergency vehicle access and, as such, does not meet the City's CDP findings that identify that the ramp would be provided for emergency vehicles. While the project description for the lifeguard tower does identify that an emergency access ramp would be constructed to the beach, the project plans approved for the project ([Exhibit 3](#)) do not show a ramp leading to the beach and the City has indicated this discrepancy resulted from miscommunication between the City's Development Services Department, which prepared the staff report, and the Public Works Department, the project proponent. Instead, the approved plans show a new ADA ramp, labeled "ramp to beach" that accommodates emergency vehicles from Coast Boulevard to the emergency access gate, which is consistent with the ramp as constructed. The City has also indicated that City no longer uses the emergency access ramp given its dilapidated state; instead, rescue personnel use the existing stairs or breakwater for emergency access to the beach.

Finally, the appellants contend that construction of the retaining wall has resulted in unidentified impacts to public safety, public coastal access and the community plan that require mitigation under CEQA. The alleged deficiencies of the City's CEQA review are not a valid basis for an appeal to the Commission. As discussed previously, Section 30603(b)(1) states that the grounds for an appeal 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 of Chapter 3 of the Coastal Act.

In summary, the ramp at Children's Pool is eroded and steeply drops off on either side and is therefore unsafe for public use in its current state. While the ramp may have been historically used by the public on an informal basis, it is unclear whether the City formally authorized such access. The gate has been in place for many years and, as City and appellants agree, has been consistently locked since at least the 1990's. The LUP identifies the ramp only on one figure, which is likely indicative of its historical use; however, public access via the ramp has not been available for over 20 years due to its dilapidated state. The City claims that Figure E identifies the ramp as a vertical access point only and does not indicate general public access is available. The remaining language in the LUP does not identify the ramp as a public accessway, and only describes the stairway access down the bluff. As such, installing the retaining wall under the gate has not blocked existing access to the beach and public access to the beach continues to be available via the stairway, as well as visual access from the breakwater. Finally, the City did explore the feasibility of improving the ramp to provide public access and determined that it would be infeasible because the improvements would trigger ADA requirements and result in a design that would take up a large footprint on the sand, thus impacting the beach and the harbor seal rookery that resides there.

Therefore, the Commission finds that the City's determination that the after-the-fact approval of the retaining wall substantially conforms to the City's original approval does not raise a substantial issue with regard to public access or recreation.

### **C. Coastal Hazards**

Mr. Hunrichs contends that the City's approval is not consistent with the CDP findings that the project would not result in undue risk from erosional forces. Based on the City's explanation for the retaining wall, the ramp as constructed did cause the bluff and gate footings to become exposed, which required construction of the retaining wall landing, in part, to protect and provide additional support for the bluff and gate, prevent erosion of the bluff, and retain exposed bluff soil to prevent soil falling onto the pedestrian path and ramp. Thus, the original project has resulted in some erosion at this site; however, the City added the retaining wall to the project during construction in order to mitigate erosion. In this case, the Commission finds that the City's determination that the after-the-fact approval of the retaining wall substantially conforms to the City's original approval does not raise a substantial issue.

### **D. Substantial Issue Factors**

As discussed above, there is adequate factual and legal support for the City's determination that the after-the-fact development substantially conforms to CDP No.549686, and that the development is consistent with the certified LCP and public access and recreation policies of the Coastal Act. The other factors that the Commission may consider when evaluating whether a local government's action raises a substantial issue also support a finding of no substantial issue. The extent and scope of the development is minor. The project will not affect coastal resources, and as a result of the local government's decision will not create an adverse precedent for interpretation of the City's LCP. Finally, the objections to the project suggested by the appellants do not raise issues of regional or statewide significance, but concentrate on purely local issues.

### **E. Unpermitted Development**

Unpermitted development has occurred on the project site, including the construction of an approximately 30 inch high, 14 ft. long retaining wall under the existing emergency access gate on the northwest side of the new lifeguard station and the conversion of two public parking spaces into lifeguard parking. Mr. Ken Hunrichs reported the unpermitted development to Commission enforcement staff in 2017. The City asserted that this work was authorized as part of CDP No. 549686. However, after reviewing the Notice of Final Action for CDP No. 549686, which is within the Commission's appeal jurisdiction, Commission staff determined that neither the retaining wall nor the conversion of public parking spaces were included in the City-issued CDP and therefore constituted unpermitted development. According to the materials provided by City staff, the incorporation of the retaining wall into the approved project took place after the Commission received the Notice of Final Action from the City. Thus, neither the retaining wall nor the parking conversion was reviewed by Commission staff when determining whether to appeal the City's action. In 2018, however, the City replaced the two public parking spaces as part of the Coast Boulevard Walkway Improvements project. Enforcement staff has verified the parking has been restored, thus correcting that issue.

The City's substantial conformance determination addresses the remainder of the unpermitted development described above by authorizing the retaining wall after-the-fact. Finding no substantial issue with the City's substantial conformance determination pursuant to the staff recommendation will result in resolution of the above described violations going forward.

Although development has taken place prior to submission of this appeal, consideration of this appeal by the Commission has been based solely upon the development's consistency with the public access and recreation policies of the Coastal Act and the City's LCP. Commission review and action on this appeal does not constitute a waiver of any legal action with regard to the alleged violations, nor does it constitute an implied statement of the Commission's position regarding the legality of development, other than the development addressed herein, undertaken on the subject site without a coastal permit.

A-6-LJS-19-0198  
City of San Diego

## **APPENDIX A – SUBSTANTIVE FILE DOCUMENTS**

Appeal by La Jolla Community Planning Association dated September 30, 2019; Appeal by Ken Hunrichs dated October 7, 2019; CDP No. 154844; La Jolla Community Plan; Coastal Development Permit No 6-14-0691-A1