

CALIFORNIA COASTAL COMMISSION

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W18b

ADDENDUM

February 8, 2021

To: Coastal Commissioners and Interested Parties

From: San Diego District Staff

Subject: **ADDENDUM TO ITEM W18b, APPLICATION #6-20-0200 FOR THE COMMISSION MEETING OF WEDNESDAY, FEBRUARY 10, 2021.**

I. CHANGES TO STAFF REPORT

The purpose of this addendum is to make revisions to the staff report and to respond to a letter of objection from the applicant, as well as one letter of objection to the staff recommendation from Surfrider. Commission staff recommends changes to the staff report dated January 21, 2021 to make the following modifications. These modifications amend one special condition and the findings. Language to be added is shown in underlined text, and language to be deleted is identified by ~~strike out~~.

1. On Page 6, modify Special Condition No. 5 under section III. Special Conditions, as follows:

5. No Future Bluff or Shoreline Protective Device.

- a. *By acceptance of this Permit*, the permittee agrees, on behalf of itself and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 6-20-0200 including, but not limited to the staircase, including in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, liquefaction, bluff retreat, landslides, or other ~~natural~~ coastal hazards in the future, and as may be exacerbated by sea level rise. By acceptance of this Permit, the applicant hereby waives, on behalf of itself and all successors and assigns, any rights to construct such devices that may exist under applicable law ~~Public Resources Code Section 30235~~.

- b. *By acceptance of this Permit*, the permittee further agrees, on behalf of itself and all successors and assigns, that the permittee shall remove the development authorized by this Permit if the City or any other government agency has ordered that the structures are not to be used due to a coastal hazard with legal jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that the structures are currently and permanently unsafe for occupancy or use due to natural hazards and that there are no measures that could make the structures suitable for use without the use of bluff protective devices. The permittee shall obtain a coastal development permit for removal of approved development unless the Executive Director provides a written determination that no coastal development permit is legally required. In the event that portions of the development fall to the public beach before they are removed, the ~~applicant~~ permittee shall remove all recoverable debris associated with the development from the public beach and lawfully dispose of the material in an approved disposal site. ~~Such removal shall require a coastal development permit or amendment to this permit.~~

2. On Page 15, under the first paragraph of the History of Structure section, the following paragraph shall be revised as follows:

Based on photographs from 1972 and excerpts from *The Broken Promise, A Report on Coastal Development in Solana Beach* prepared by the Solana Beach Town Council, Inc., in January of 1973 (see [Exhibit 4](#), attachment to October 30, 2020 Surfrider letter), the subject 51-unit bluff top condominium complex (i.e., Seascape Shores) at the subject site was under construction in 1972, prior to the enactment of the Coastal Act, and permitted by the San Diego County Board of Supervisors Planning Commission. Photographic evidence contained in excerpts of *The Broken Promise, A Report on Coastal Development in Solana Beach*, prepared in 1973 by the Solana Beach Town Council, Inc., show the subject stairway as having completed construction as of November 1972, with the bottom portion destroyed by wave action.

Excerpts from *The Broken Promise* document indicate that two County Planning Commission permits were approved for the subject site. On December 18, 1970, the County approved development of a 39-unit condominium project consisting of 7 buildings, a recreational center, and full subterranean parking (SP-70-15). This decision denied a “proposed ramp for access to the beach.” However, it appears the development was then revised, as on February 18, 1971, the County approved development of the current 51-unit condominium project consisting of ten buildings, a recreational center, and full subterranean park (SP-71-14). This second approval does not include any reference to allowing or disallowing a beach access ramp or a stairway, but it does include a statement that “all construction will take place behind the bluff line.”

Other related documents associated with the approval include a March 8, 1971, Grading Map L5912 approved by the County of San Diego Engineer and Subdivision Map No. 6941 certified by the County Recorder on May 26, 1971, which includes an open space easement located on the westerly-most side of the blufftop lot. Neither of these

documents identify the presence of a stairway on the bluff. Nevertheless, as noted, by the end of 1972, the stairway had been constructed.

According to The Broken Promise Report, at least one retaining wall and two erosion baffles were erected on the bluff and two of the condominium buildings were constructed in violation of County bluff setback requirements and the approved County permit. While these structures were acknowledged by the County Director of Planning and Zoning Enforcement Officer as being constructed in violation of County zoning ordinances and the CD Coastal Overlay zone, the County Planning Commission and Board of Supervisors subsequently approved them at a hearing at some point after October 1972, to prevent further damage to the bluff.

~~In 1980~~ On December 27, 1979, the County of San Diego issued CUP No. P79-066 for the construction of a seawall and notch infill to protect the existing condominium at the top of the bluff from erosion including reconstruction of the stairway to correct existing structural deficiencies. The San Diego Coast Regional Commission then issued CDP No. F9143 on July 11, 1980 for the erosion control measures at the base of the bluff involving approximately 218 feet of seacave/notch infill using concrete that was proposed to be colored and textured to match the surrounding bluff. A seacave that was described as 70ft. in depth and 18ft. high was also filled and a 58ft.- long, 18ft.-high seawall was constructed on the face of the seacave fill. In addition, in order to fill the seacave, a portion of the existing private access stairway was removed and reconstructed with a new caisson footing that was incorporated into the seacave fill/seawall. The Commission action of 1980 was a preventative measure to assure bluff stability and forestall the need for more substantial protective devices, such as large seawalls. CDP No. F9143 also allowed for the existing stairway to be reconstructed with new landing and stair sections. The reconstruction and replacement of the stairway under CDP No. F9143 amounted to approximately 358.50 sq. ft., or 31.8% replacement, not including the replacement of landing No. 5's foundation. The public access findings of CDP No. F9143 found that the proposed concrete filling of the bluff face would not significantly encroach on the beach any farther seaward than the existing bluff face. Reconstruction of part of the stairway was also found to correct structural deficiencies, but that the existing stairway was not open for public usage and would thus not impact public access.

3. On Page 18, after the third paragraph under the Coastal Hazards section, the following paragraph shall be added as follows:

A second geology risk that includes surficial sloughage and small failures is also possible. These risks can cause material to fall from the bluff face, possibly landing on the stairway or hitting people using the stairway. Sloughage and small losses of slope material result from the condition of the bluff itself and cannot be mitigated without major and potentially undesirable design changes such as adding a covering for the stairway, though a certain amount of risk is unavoidable when dealing with a dynamic natural outdoor environment. Accordingly, while the stairway design minimizes risks to life and property and assures stability and structural integrity, the proposed development will occur in a known hazardous location, which necessitates the applicant to assume the

risks associated with the proposed development. Thus, Special Condition No. 4 requires the applicant to assume all risks associated with the development. In addition, Special Condition No. 12 requires the applicant to record a deed restriction imposing the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property or that the CC&Rs be modified to reflect the obligation imposed on the homeowners' association by the permit conditions. The deed restriction ensures that future buyers of the condominium units are aware of the permit and its associated special conditions.

On February 3, 2021, the applicant's counsel, Mr. Lee M. Andelin, submitted a letter in opposition to Special Condition No. 12 (see [Exhibit 5](#) and [Correspondence](#)). The letter requested that staff delete Special Condition No. 12, requiring the HOA to record the permit conditions into the HOA's CC&R (Covenants, Conditions, and Rules) documents for the homeowners.

Commission staff declines the request to delete Special Condition No. 12. The condition is commonly used statewide and is an important tool for informing buyers of coastal development permit conditions on their prospective property. Its importance was illustrated in the case *Feduniak v. California Coastal Commission* ((2007) 148 Cal.App.4th 1346), in which a buyer unaware of the recording in the chain of title built a golf course in sensitive dune habitat. The recording demonstrated the buyer had reason to be informed of the restrictions on their property, helping the Commission avoid liability in the case. Commission staff typically recommend the use of deed restriction conditions whenever staff recommends that the Commission impose any condition involving ongoing requirements that will run with the land, that the landowner must continue to satisfy well beyond construction, and for which it is necessary to take the extra step of ensuring ongoing, actual notice to future owners. Furthermore, by amending the CC&Rs, there is a single recording required rather than one for each homeowner. For example, many HOAs have recorded their amended CC&Rs to satisfy the deed restriction condition, including Seascape Chateau HOA in Solana Beach (see [6-02-039-A1](#)) and Tu Casa HOA in Carlsbad (see [6-14-0351](#)).

4. On Page 19, after the first paragraph and prior to the Conclusion portion under the Coastal Hazards section, the following paragraph shall be added as follows:

The letter from the applicant's counsel also expressed opposition to Special Condition No. 5 (see [Exhibit 5](#) and [Correspondence](#)), first, to delete a sentence in the requirement to waive any rights to shoreline protection for development associated with the permit (SC 5(a)), and second, to suggest edits to the removal condition (SC 5(b) in light of the ruling and remand in *Lindstrom v. California Coastal Commission* ((2019) 40 Cal.App.5th 73). Staff appreciates the comments but declines to follow the suggestions. Staff has recently revised the waiver and removal condition in compliance with *Lindstrom* and those edits are reflected in the strikeout/underline format above for Special Condition 5. This condition is critical because it makes clear and ensures that the entire development recognized and approved by this permit is not entitled to a shoreline protective device now or in the future, and that should the structure be

threatened by coastal hazards in the future, the structure will be removed and the site restored.

5. On Page 24, after the third paragraph under the Coastal Access and Recreation section, add the following response to Surfrider’s letter of objection, as follows:

A letter received from Surfrider dated February 4, 2021 alleges that the stairway is not a legally permitted structure (see Exhibit 6 and Correspondence). Surfrider acknowledges that the condominium project was approved by the County of San Diego Planning Commission in 1970-1971, prior to enactment of the Coastal Act. However, Surfrider cites Planning Commission Proceedings contained in excerpts of *The Broken Promise, A Report on Coastal Development in Solana Beach* that describes approval of a condominium project on the subject site on December 18, 1970, that denied a “proposed ramp for access to the beach” so that “all construction will take place behind the bluff line” (SP-70-15). However, on February 19, 1971, the County approved development of the current 51-unit condominium project (SP-71-14). This second approval does not include any reference to allowing or disallowing a beach access ramp or a stairway, but it does also include a statement that “all construction will take place behind the bluff line.” Nevertheless, by the end of 1972, a stairway had been built.

According to The Broken Promise Report, at least one retaining wall and two erosion baffles were erected on the bluff and two of the condominium buildings were constructed in violation of County bluff setback requirements and the approved County permit. While these structures were acknowledged by the County Director of Planning and Zoning Enforcement Officer as being constructed in violation of County zoning ordinances and the CD Coastal Overlay zone, the County Planning Commission and Board of Supervisors subsequently approved them to prevent further damage to the bluff. There is no indication that the stairway (which at that point would have been constructed or under construction) was considered unpermitted, but the unpermitted development at the site was later approved by the County.

Furthermore, in 1979, the County of San Diego Board of Supervisors approved CUP No. P79-066 for the construction of a seawall and notch infill to protect the existing condominium at the top of the bluff from erosion, including reconstruction of the [existing] stairway to correct existing structural deficiencies [emphasis added]. In CUP No. P79-066, the findings on public beach access state that the proposed erosion control project, including reconstruction of the existing stairway “will not interfere with public rights of beach access or usage. The fact supporting...[this finding] is as follows: A) public beach access was provided when this project was built. B) No structures will be built that will affect or interfere with beach access.” Accordingly, the County findings provide evidence that the stairway was constructed legally since the County made findings that public beach access was provided when the condominium complex was built and no structures from the erosion control project, including reconstruction of the existing stairway, would impact public beach access. This is supported by the Open Space Easement that was recorded by the County in 1971, wherein the public were

authorized to use this lateral easement area for recreational purposes, including “ingress and egress from the adjacent public beaches or public easements”.

Additionally, when the Commission approved F9143 for the same project, the public access findings stated that the stairway was “not open for public usage.” Thus, while the history is not definitive, the Commission subsequently specifically reviewed and approved a project to reconstruct and replace a substantial portion of the stairway. Following issuance of this permit in 1980 by the Commission, CDP 6-04-92 was then approved by the Commission in 2005, in which the staff report reaffirmed that the stairway was “permitted prior to the effective date of the Coastal Act of 1972.” Thus, the stairway is considered to be a legally approved existing structure.

6. On Page 25-26, under the first and second paragraphs under the Coastal Access and Recreation section, add the following:

While it is clear that less than 50% percent of the stairway is proposed to be replaced at this time, it is also clear that the cumulative replacement percentage is more than 50% when taking in to account all prior repairs and replacements since the first initial repair in 1980. A letter submitted from Surfrider (see [Exhibit 4](#)) in November 2020 suggests that the Commission should therefore consider the proposed project to be redevelopment. As a new project, the proposed project would be inconsistent with the policies of the LCP prohibiting new private stairways, unless the project was converted to a public stairway.

However, the certified LUP includes a definition of redevelopment as alterations that occur after the date of certification. Since the City LUP was certified in 2013, the proposed project does not meet the 50% threshold because the proposed project is the first repair and replacement project following the date that the LUP was certified. Since certification of the LUP, the City and the Commission have been monitoring additions and revisions based on this standard. Additionally, the Commission has a legal obligation to consider the proposed project in light of the LUP. Even where an LCP is not completely certified, the Commission must consider a certified LUP as a source of policy and must explain the reasons for deviating from it. (*Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181, 1194-1195). Indeed, as described above, the Commission has relied on the date of the City’s certified LUP as a basis for determining whether a project constitutes redevelopment when the LUP served as guidance and not the standard of review in previous action (ref. [CDP No. 6-12-059](#)). Thus, in light of the certified LUP, the proposed project is not considered redevelopment.

7. On Page 26, prior to and within the first paragraph, add the following:

Surfrider’s letter of objection also suggests that because the stairway is dependent on shoreline protection (i.e., the seacave fill/seawall approved by the Commission in 1980), the proposed repairs are inconsistent with the prohibition on new construction dependent on shoreline protection. The Commission does not disagree that the stairway does rely on these structures; however, the proposed project is not a new stairway, but

repairs and revisions to an existing legally permitted stairway. Thus, consistent with the LUP and the Coastal Act, the stairway can be maintained, but not replaced.

Lastly, the portion of the existing stairway proposed for repair is on sovereign lands subject to State Lands Commission jurisdiction. A General Lease (Lease No. PRC 8660.1) for recreational and protective structure use –including use of the existing beach access stairway– expired in February 2016. This lease made findings based on a mean high tide line survey conducted in March of 2004 that “the existing seacave/notch infill, seawall, and a portion of a private access stairway were located on sovereign lands and advised the Applicant to apply for a lease.” Since the lease has expired, Special Condition No. 3 requires the applicant to obtain a lease renewal authorizing continued use of the subject stairway on public trust lands, prior to issuance of this coastal development permit. Such a requirement underscores Commission staff’s understanding of and agreement with Surfrider’s letter of objection stating that a portion of the stairway is on public lands; however, as discussed above, Commission staff agrees that at the time future repairs to the stairway are necessary that would result in redevelopment, conversion to a public stairway may be appropriate and would be consistent with the LUP prohibition on new private stairways. At this time, however, the proposed repairs to the existing stairway will not result in any significant, long-term impacts to public access, as there is an existing public access easement located at the base of the stairway, and the landing will not directly impede public access. (§ 30212(a)(2).) No new or expanded impacts to public access or recreation will result from the proposed project.

8. On Page 28, add the following records under APPENDIX A – SUBSTANTIVE FILE DOCUMENTS, as follows:

County of San Diego Grading Map L5912 approved by the County of San Diego Engineer on March 8, 1971

County of San Diego Subdivision Map No. 6941 certified by the County of San Diego Recorder on May 26, 1971