CALIFORNIA COASTAL COMMISSION
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W18b

6-20-0200

(SEASCAPE SHORES HOMEOWNERS ASSOCIATION)

FEBRUARY 8, 2021

CORRESPONDENCE

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Coastal Property Rights, Land Use & Litigation

February 3, 2021

VIA EMAIL

Daniel Nathan, Coastal Program Analyst
California Coastal Commission
455 Market Street, Suite 300
San Francisco, California 94105
Daniel.Nathan@coastal.ca.gov

Re: App. No. 6-20-0200 (Seascape Shores, Solana Beach)

Dear Daniel:

I am writing to you as counsel for the applicant, Seascape Shores Maintenance Corporation ("Seascape Shores"). Thank you for the excellent work you have put into reviewing our application and drafting the staff report. While we support staff's recommendation of approval, we object to the newly proposed Special Condition No. 12. We also object to certain wording in proposed Special Condition Nos. 5.A and 5.B as they are currently drafted. The latter objections can be resolved, while fulfilling what we believe to be the intent of these conditions, with some minor revisions to the language.

Proposed Special Condition No. 12

Proposed Special Condition No. 12, which was added after the original staff report was published and resulted in the delay of the hearing scheduled for November 5, 2020, would require Seascape Shores to either (a) record a deed restriction imposing the permit's special conditions on the title of *each* of the 51 individual condominium units, or (b) amend its CC&Rs to incorporate the special conditions.

It is not possible for Seascape Shores to record a deed restriction on the title of each of the individual condominium units. The deeds to the individual condominium units were originally conveyed from the developer/builder to the original owners of the units. Seascape Shores is not involved in drafting, repairing, or recording individual deeds or any attachments to such deeds. This is unlike a new condominium development in which the developer/builder could simply incorporate the special conditions into the declaration of CC&Rs or the deed conveyances to the initial purchasers. Being that the development in this case is nearly 50 years old, there is no longer a developer or builder involved. Any transfer of an individual condominium unit by deed

is a private transaction solely between the seller and the buyer, and does not involve Seascape Shores.

We are not aware of any law that would allow a homeowners association to mandate deed restrictions in an owner's existing deed or in future transfers to a third party. Nor do the CC&Rs give Seascape Shores such power. Thus, Seascape Shores does not have the ability to impose or mandate terms or restrictions in individual owners' deeds. And if Seascape Shores were to record deed restrictions on the deeds without the consent of all owners (which would be practically impossible to obtain), the purported deed restrictions would have no legal effect and could subject Seascape Shores to liability for slander of title.

The alternative of amending the CC&Rs is impractical and an extreme burden on Seascape Shores and its members. Any amendment would require, at a minimum, that an attorney draft the amendment and that the board provide notice to each of the individual owners, vote on the amendment, print ballots, mail the ballots, collect the ballots, and count and certify the ballots. The process is made more difficult by the fact that many of the individual owners do not reside in the development. To obtain ultimate approval, a majority of the owners would affirmatively have to sign and return their ballots. Many owners might not be inclined to read the ballot carefully or might be unable to understand its significance without further explanation. The board would thus need to expend significant resources to educate the owners about the amendment and follow up to ensure that a sufficient number of owners return their ballots. Expenses would be significant and would include legal and other professional fees, printing costs, and mailing costs. Prior amendments to the CC&Rs have taken years to accomplish. If Special Condition No. 12 is imposed, Seascape Shores could find itself in a situation where the permit expires before Seascape Shores can amend its CC&Rs.

And what benefit would come from all this effort? The Coastal Commission has the power to enforce permit conditions against Seascape Shores and any successor-in-interest, regardless of whether the conditions are recorded in the deeds or CC&Rs. The Coastal Act provides: "If the executive director determines that *any person* or governmental agency has undertaken, or is threatening to undertake, any activity that … may be inconsistent with *any permit* previously issued by the commission, the executive director may issue an order directing that person or governmental agency to cease and desist." (Pub. Res. Code, § 30809(a) [emphasis added]; see also *id.*, § 30810(a).)

The only justification suggested for Special Condition No. 12 is that it "ensures that future buyers of the condominium units are aware of the permit and its associated special conditions." (Staff Rpt., p. 18.) But any reasonably diligent buyer can easily look up permits issued to Seascape Shores. Further, the behavior of unit owners, present or future, is unlikely to be affected by knowledge of Seascape Shores' permit conditions. A unit owner has no authority to unilaterally perform development on common areas, and it seems absurd to think that a unit owner would even try such a thing. Any development on common areas would have to be undertaken by Seascape Shores as a body. The Seascape Shores board and officers are well aware of the permit conditions and have every incentive to plan any future development to conform with applicable permit conditions. If the intent of Special Condition No. 12 is to put

potential buyers on notice more generally that the bluff environment is potentially hazardous and that future redevelopment may be restricted, Seascape Shores is confident that all such buyers understand this.

Proposed Special Condition No. 5.A

Our objection to proposed Special Condition No. 5.A. is narrower but still important. The first sentence of the condition states: "*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 in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future." Seascape Shores has no objection to this language. The second sentence goes on to state, however, that "[b]y 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 Public Resources Code Section 30235." This language is overbroad in that it might be interpreted as waiving any right the applicant has to protect *any* structures on its property, including the existing residential structures. We do not believe the Commission has the right to require such a waiver with respect to the residential structures, which predate the Coastal Act, and we do not believe this is the intent.

We therefore suggest, respectfully, that the second sentence of Special Condition No. 5 should be deleted because it is unnecessary in light of the prohibition stated in the first sentence. Alternatively, the second sentence should be clarified by inserting "to protect the development approved pursuant to Coastal Development Permit No. 6-20-0200" after the word "devices." The second sentence would thus read: "By acceptance of this Permit, the applicant hereby waives, on behalf of itself and all successors and assigns, any rights to construct such devices to protect the development approved pursuant to Coastal Development Permit No. 6-20-0200 that may exist under Public Resources Code Section 30235." As modified by this or other language to the same effect, we would have no objection to Special Condition No. 5.A.

Proposed Special Condition No. 5.B

The California Court of Appeals recently examined a permit condition nearly identical to proposed Special Condition No. 5.B and found it to be "overbroad" and "unreasonable" because it puts essentially no limits on the government's ability to order removal of the structure and does not allow for due process. (*Lindstrom v. California Coastal Commission* (2019) 40 Cal.App.5th 73, 107–112.) I am surprised that Coastal Commission staff is proposing such language so soon after the court's clear and specific direction. I worked with the Commission's legal team in the *Lindstrom* case to draft a condition that would meet the standard set forth by the court, and the language was ultimately approved by the full Commission. We would propose using the same or similar language for Special Condition No. 5.B, as follows:

> By acceptance of this Permit, the applicant agrees, on behalf of itself and all successors and assigns, that it is required to remove

> all or a portion of the development authorized by this permit and restore the site if the City or any government agency with jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that the structure is currently and permanently unsafe for occupancy or use due to damage or destruction from waves, flooding, erosion, bluff retreat, landslides, or other hazards related to coastal processes, and that there are no feasible measures that could make the structure suitable for occupancy or use without the use of bluff or shoreline protective devices.

I would be happy to work with the Commission's legal staff to revise the language of Special Condition Nos. 5.A and 5.B accordingly. For the reasons stated above, however, Special Condition No. 12 cannot be reworded in any way to make it acceptable to Seascape Shores. Special Condition No. 12 should be stricken in its entirety.

Thank you again for your time and attention to this matter.

Very truly yours,

AANNESTAD ANDELIN & CORN LLP

Lee M. Andelin

cc: Diana Lilly
Erin Prahler
Walter Crampton
Vince Amela

February 4, 2021

Delivered via email

To: Steve Padilla, Chair, California Coastal Commission
Karl Schwing, District Director, San Diego Coast

Re: Item W18b, Application No: 6-20-0200, Applicant: Seascape Shores Homeowners Association

Dear Chair Padilla and District Director Schwing,

We are writing to oppose approval of a Coastal Development Permit (CDP) to repair and reconstruct a portion of a private beach access stairway for the Seascape Shores condominiums. We opposed the application for extensive repairs made to the City of Solana Beach in 2018, and continue to oppose this project as it violates the Coastal Act and the intentions of Solana Beach's certified Land Use Plan (LUP). We object for the following reasons:

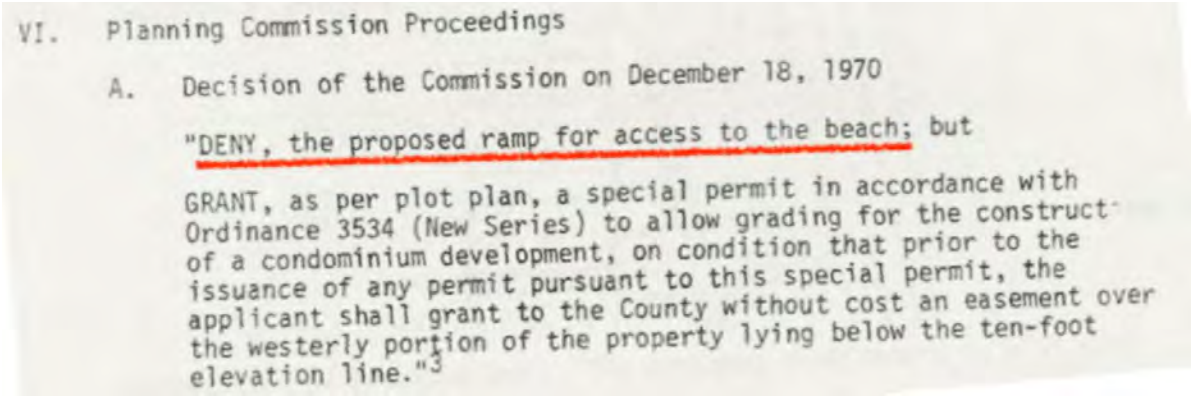
1. The original, pre-Coastal Act staircase was illegally built in violation of county permits.
2. The current private stairway is a new stairway that does not predate the effective date of the Coastal Act; therefore, it should not be considered 'existing' development. Additionally, this new stairway relies on a seawall, which is not allowed per the Coastal Act.
3. The new, post-Coastal Act private staircase is located on public lands.
4. If the CDP is granted, then it must include a condition requiring public access to the stairway. Adding a public stairway is consistent with the guidance in the Solana Beach Land Use Plan (Policy 2.60.5).
5. Because Solana Beach does not have a Certified Local Coastal Plan, the standard of review is the Coastal Act.

The original, pre-Coastal Act staircase was illegally built

Any characterization of the original staircase as 'permitted' ignores the history of this condo association. The 'History of Structure' portion of the staff report misses this important point:

"Based on photographs from 1972, the existing 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.... " (page 15, staff report)

It is true that the condo complex was approved for construction in 1970, prior to enactment of the Coastal Act. However, the Planning Commission explicitly denied the condo complex a private beach access as part of that original permit[1]:



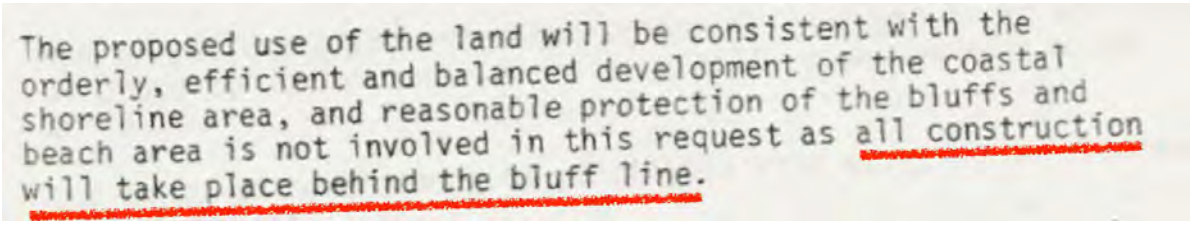
VI. Planning Commission Proceedings

A. Decision of the Commission on December 18, 1970

"DENY, the proposed ramp for access to the beach; but

GRANT, as per plot plan, a special permit in accordance with Ordinance 3534 (New Series) to allow grading for the construct of a condominium development, on condition that prior to the issuance of any permit pursuant to this special permit, the applicant shall grant to the County without cost an easement over the westerly portion of the property lying below the ten-foot elevation line."[3]

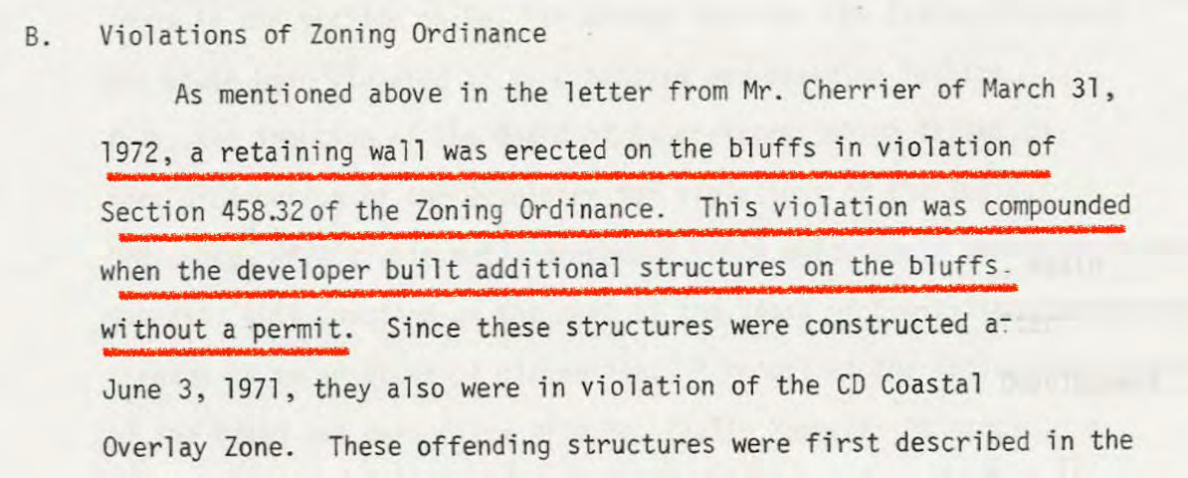
The Commission further clarified its reasons for its decision with the understanding that '*all construction will take place behind the bluff line*':



The proposed use of the land will be consistent with the orderly, efficient and balanced development of the coastal shoreline area, and reasonable protection of the bluffs and beach area is not involved in this request as all construction will take place behind the bluff line.

Despite this explicit restriction, the condo complex directly violated the terms of the 1970 permits by illegally building a private beach access. By 1972, the condo association further violated these agreements by illegally constructing an erosion retaining wall and two erosion baffles without applying for appropriate permits.[2]

[1]Staff report Appendix A: Excerpts of The Broken Promises (page 49)
[2]Staff report Appendix A: Excerpts of The Broken Promises (page 52)



B. Violations of Zoning Ordinance

As mentioned above in the letter from Mr. Cherrier of March 31, 1972, a retaining wall was erected on the bluffs in violation of Section 458.32 of the Zoning Ordinance. This violation was compounded when the developer built additional structures on the bluffs without a permit. Since these structures were constructed a- June 3, 1971, they also were in violation of the CD Coastal Overlay Zone. These offending structures were first described in the

It is important to recognize the history of violations that have gotten us to this point. After-the-fact permits for the illegal seawall and bluff structures were granted by the Planning Commission over the objections of the Solana Beach Town Council. As The Broken Promise document explains: '*the illegal actions….were excused….no punitive action has been taken against the developer, thus encouraging the flouting of the Zoning Ordinance…*'[3].

The staff report cites LUP Policy 4.14 to support repair and maintenance of this staircase:

> *Existing, lawfully established structures that are located between the sea and the first public road paralleling the sea (or lagoon) built prior to the adopted date of the LUP that do not conform to the provisions of the LCP shall be considered legal nonconforming structures. Such structures may be maintained and repaired, as long as the improvements do not increase the size or degree of non-conformity.* (emphasis added)

As we have shown above, any characterization of the original staircase as lawfully established ignores the permit history of the staircase and this condo association. As no pre-Coastal Act permit for the stairs has been identified, and the developer of the condos repeatedly flouted permits and zoning ordinances when building Seascape Shores, it is safe to assume that the pre-Coastal stairs were never lawfully established.

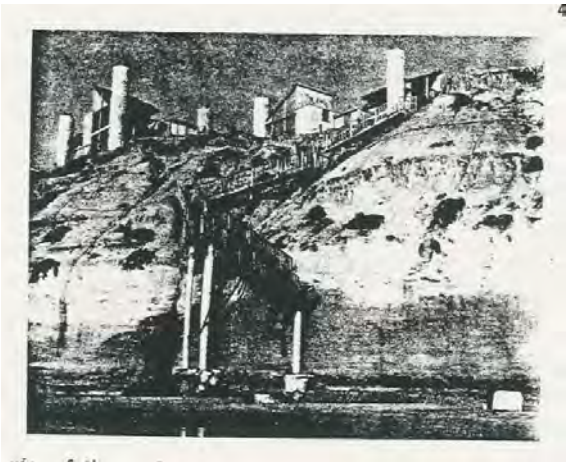
The staircase is new development that is reliant on a seawall

The fact is, the original staircase that was constructed prior to the Coastal Act effective date no longer exists. Therefore, the condo association does not have any

[3]Staff report Appendix A: Excerpts of The Broken Promises (page 53)

right to the continued use of a private beach access because the stairway is located on public property.

From historical photos, it appears the original staircase was illegally built in 1972, and it was partially destroyed that year. Sometime between 1972 and 1979, the destroyed portion of the stairs was replaced. Photographs of the staircase from 1972 (prior to the Coastal Act) show it is clearly a different staircase than existed in 1979 (after the Coastal Act).



November 1972 staircase (partially destroyed)[4]

1979 staircase[5]

[4] Staff report Appendix A: Excerpts of The Broken Promises (page 48)

[5] http://www.californiacoastline.org/cgi-bin/image.cgi?image=7955025&mode=big&lastmode=timecompare&flags=0&year=1979

The two photographs below show the subject property in 1972, and it is clear there was no stairway in 1972 when the property was still under construction.[6]

6

https://www.californiacoastline.org/cgi-bin/image.cgi?image=7241048&mode=sequential&flags=0&year=1972

The staff report explains how the 1979 staircase was in fact reconstructed again in 1980 (page 15):

> *"In 1980, 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 for the erosion control measures at the base of the 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….CDP No. F9143 also allowed for the existing stairway to be reconstructed with new landing and stair sections."*

1979[7] - no seawall

1989[8] - new staircase relies on seawall

The permit and photographic history demonstrates that the staircase of the 1980s is different from the staircase of the 1970s, and thus the staircase should not be considered 'existing.' The private staircase violates Coastal Act Section 30253, as it

[7] http://www.californiacoastline.org/cgi-bin/image.cgi?image=7955025&mode=big&lastmode=timecompare&flags=0&year=1979

[8] http://www.californiacoastline.org/cgi-bin/image.cgi?image=8920171&mode=big&lastmode=timecompare&flags=0&year=1989

constitutes new development that both alters the natural landform and also requires a protective device:

> *Section 30253: New development shall: (1) minimize risks to life and property in areas of high geologic, flood, and fire hazard; (2) assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site, or surrounding area, or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs*

The staff report takes pains to point out that the current proposed construction activities should not be considered 'redevelopment' since the 50% redevelopment threshold is not being crossed at this point. However, this argument misses the point entirely. The 50% redevelopment threshold is to be applied only to 'existing permitted', i.e. legal pre-Coastal Act, staircases. **Because this staircase is not existing and violated the original construction permits, the 50% replacement threshold does not apply.** However, LUP Policy 2.60, which states that '*private beach stairways shall be phased out*' does apply, given the stairway is new development:

> *No new private beach stairways shall be constructed, and private beach stairways shall be phased out at the end of the economic life of the stairways. Existing permitted or private beach stairways constructed prior to the Coastal Act may be maintained in good condition with a CDP where required, but shall not be expanded in size or function. Routine repair and maintenance shall not include the replacement of the stairway or any significant portion of greater than 50% of the stairway cumulatively over time from the date of LUP certification.*

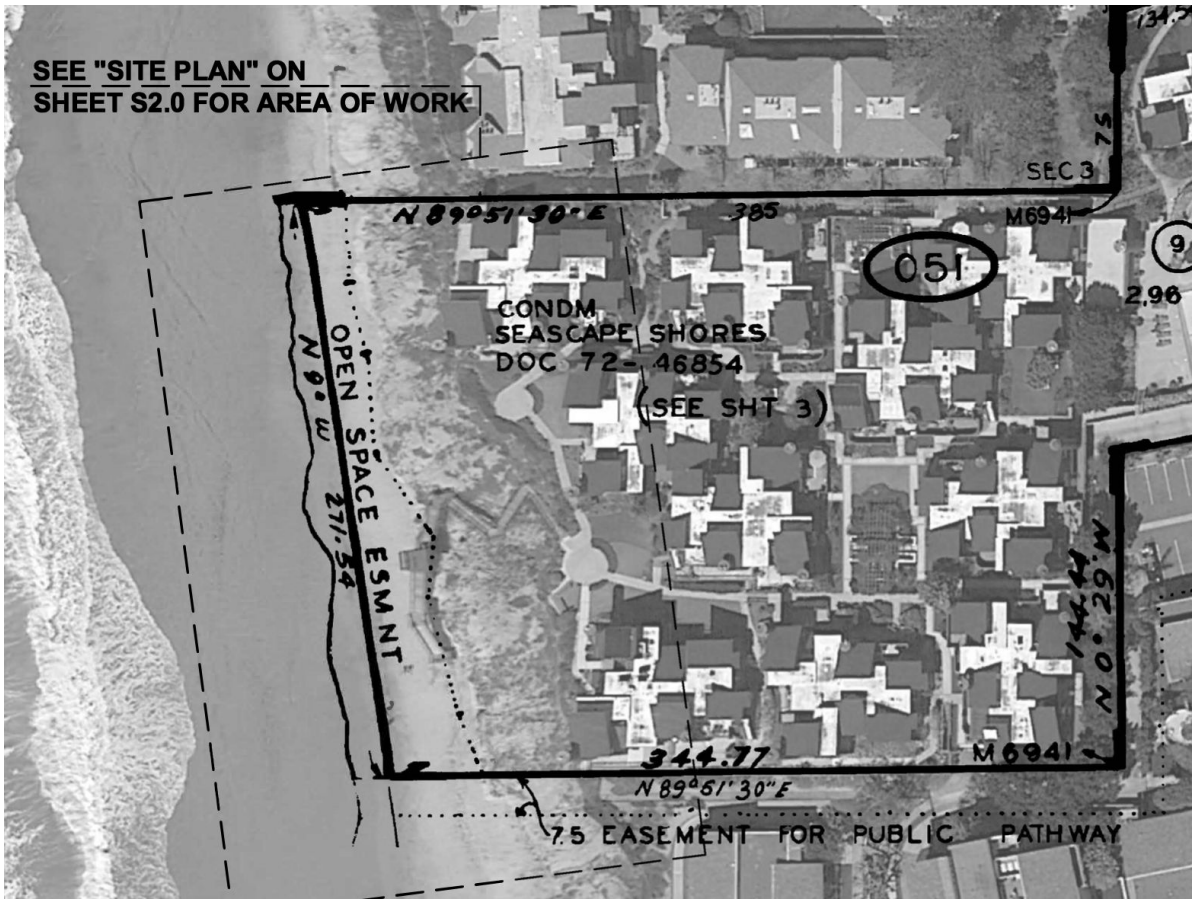
The photographic evidence and permit history above clearly show this current, new staircase is not existing, and the original staircase was not permitted.

The new private staircase is located on public land

The 1970 permits for the Seascape Shores condos required a public easement:

"Deny, the proposed ramp for access to the beach, but grant, as plot plan, except as noted below, a special permit in accordance w Ordinance 3534 (New Series) to allow grading for and construction of a condominium development, on condition the prior to the issuance of any permit, pursuant to this special permit, the applicant shall submit a revised plot plan to be approved by the Director of Planning showing detailed plans to indicate that no building will be located closer than 90 feet to the most westerly property line, and shall grant to the County, without cost, an easement over the westerly portion of the property lying below the ten-foot elevation line."[2]

Therefore, both the original, illegal staircase and the current, new staircase have been occupying public lands for almost 50 years.



Mitigation in the form of public access is appropriate

The Coastal Act mandates increasing public access where feasible. Section 30212 states:

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects …

Chapter 4 of the Solana Beach LUP also makes clear that only principal existing structures may rely on a seawall:

The City's preference for protecting existing principal structures in danger from erosion is relocating/rebuilding the principal structure on the site to a location that is stable per LUP Policy 4.25. If all feasible alternatives to mid and upper bluff protection have been excluded, then the following types of upper bluff retention systems may be utilized when collapse of the mid and upper bluff threatens an existing principal structure…(Land Use Provisions, page 13)

Policy 4.22: No bluff retention device shall be allowed for the sole purpose of protecting an accessory structure.

Policy 4.32: When bluff retention devices are unavoidable, encourage applicants to pursue preferred bluff retention designs as depicted in Appendix 2 of the LUP when required to protect an existing principal structure in danger from erosion.

Policy 4.38: Maximize the natural, aesthetic appeal and scenic beauty of the beaches and bluffs by avoiding and minimizing the size of bluff retention devices, preserving the maximum amount of unaltered or natural bluff face, and minimizing encroachment of the bluff retention device on the beach, to the extent feasible, while ensuring that any such bluff retention device accomplishes its intended purpose of protecting existing principal structures in danger from erosion.

Policy 4.53: No permit shall be issued for retention of a bluff retention device unless the City finds that the bluff retention device is still required to protect an existing principal structure in danger from erosion, that it will minimize further alteration of the natural landform of the bluff, and that adequate mitigation for coastal resource impacts, including but not limited to impacts to the public beach, has been provided.

The LUP does make room for shoreline protection of public access points:

Policy 4.20: Existing, legal non-conforming publicly-owned facilities that are coastal-dependent uses such as public access improvements and lifeguard facilities located within 40 feet of the edge of the bluff edge, may be maintained, repaired and/or replaced as determined necessary by the City. Any such repair or replacement of existing public facilities shall be

designed and sited to avoid the need for shoreline protection to the extent feasible.

Likewise, LUP Policy 2.60.5 specifically directs that private stairways be converted to provide public access where feasible::

> *"…private beach accessways shall be converted to public accessways where feasible and where public access can reasonably be provided."*

The private staircase currently relies on a seawall, which runs contrary to all provisions of the city's LUP that only allow for protection of principal structures or public access points.

We note that the 1970 permit for the Seascape Shores condominiums relied on a finding by the County Planning Commission, per its 'Reasons for Decision of the Commission,' which understood that no development would take place beyond the bluff line:

> *"The proposed use of the land will be consistent with the orderly, efficient and balanced development of the coastal shoreline area, and reasonable protection of the bluffs and beach area is not involved in this request as all construction will take place behind the bluff line"*[9] *(emphasis added)*

The stairs are clearly located seaward of the bluff line on public land as well as traversing a public easement, and construction activities have occurred past the bluff line at least three times since the 1970 permit was originally approved. **Mitigation in the form of conversion to a public access is the minimal possible action to take given this ongoing imposition on public lands.**

Surfrider has detailed one possible avenue for pursuing mitigation in the form of public access in our October 2019 letter regarding a CDP application for this stairway[10]. In this letter, Surfrider recommended converting the stairs to a combined public access and private stairway. There are several options for a shared-use model:

- Join the existing stairs from the public access along the south side of the condominium
- Create a new shared public and private access along the southern property line
- Create a public access easement through the property to the stairs from the existing public trail on the southern boundary

[9] Staff report Appendix A: Excerpts of The Broken Promises (page 50)
[10] W18b-2-2021 exhibits, pages 38-46

The California Coastal Act is still the standard of review

While we recognize that the City's LUP should be used as guidance, the Coastal Act is still the standard of review. The staff report states:

> *"…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)." (page 25 emphasis added)*

In the Douda case, the appeals court upheld the Coastal Commission's decision to deny the Doudas a CDP to build a home as it was located in an environmentally sensitive habitat area, even though the Los Angeles County LUP had not designated the land as such. This appeals court decision supports the Coastal Commission's right to deviate from a certified LUP if such a decision can be justified.

The staff report confirms the Coastal Act is still the standard of review:

> *The City of Solana Beach has a certified Land Use Plan (LUP). However, no implementing ordinances have yet been reviewed or approved by the Commission. Thus, the Chapter 3 policies of the Coastal Act remain the standard of review and the City's certified Land Use Plan is used as guidance. (page 27)*

In the case of the Seascape Shores private staircase, the standard set by the Coastal Act makes clear that no new development may alter natural landforms or rely on a seawall.

Conclusions

To summarize, this private encroachment on public lands should not be perpetuated, as it already has survived years beyond its 'natural' lifetime. The current staircase does not predate the Coastal Act, and so it should not benefit from any protection in that respect. The staircase also relies on a seawall. Accessory structures are not allowed seawalls per the city's LUP. Likewise, new development is not permitted to rely on a seawall per the Coastal Act or the City's LUP. Reconstruction of a new stairway reliant on a relatively new seawall should not override the clear intentions of both the Coastal Act and the LUP to phase out development that occupies Solana Beach's public bluffs and beaches.

There are several feasible options to provide public access at this location. Providing public access is consistent with the access policies of the Coastal Act and the city's certified LUP. The subject site provides a rare and feasible

opportunity to provide new public access while maintaining privacy and access for the existing development.

The Seascapes Shores Condo Association has had no problem illegally encroaching on public easements for the last 45-50 years, but the public has the right to require vertical access to the public easement. The condo association has a choice: share their beach access with the public to address 50 years of illegal privatized beach access, or relinquish the private beach access. In this case, condo users could still use the two public beach access points two blocks north at Fletcher Cover or two blocks south at Del Mar Shores as everyone else is accustomed to using.

Sincerely,

Kristin Brinner & Jim Jaffee
Residents of Solana Beach
Co-leads, Beach Preservation Committee
San Diego Chapter, Surfrider Foundation

Laura Walsh
Policy Coordinator
San Diego Chapter, Surfrider Foundation

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Coastal Property Rights, Land Use & Litigation

February 8, 2021

VIA EMAIL

California Coastal Commission
c/o Daniel Nathan, Coastal Program Analyst
455 Market Street, Suite 300
San Francisco, California 94105
Daniel.Nathan@coastal.ca.gov

Re: W18b CDP 6-20-0200 (Seascape Shores) – Applicant's Response to Surfrider

Chair Padilla, Vice Chair Brownsey, and Honorable Commissioners:

The applicant, Seascape Shores Maintenance Corporation ("Seascape Shores"), respectfully submits this response to Surfrider Foundation's opposition letter dated February 4, 2021. Seascape Shores supports staff's recommendation of approval (though we have objections to certain of the conditions as stated in our letter dated February 3, 2021). Surfrider's arguments in opposition to staff's recommendation are based on misstatements of fact or law and should be rejected.

The County of San Diego Approved Construction of the Staircase in 1971

Surfrider makes the preposterous argument that Seascape Shores' stairway—which was constructed nearly fifty years ago—was never approved by the County of San Diego. Surfrider's argument relies on a partial quote of a county planning commission decision dated December 18, 1970, in which the planning commission initially approved the Seascape Shores condominium development but denied approval of a "proposed ramp for access to the beach." This quote is taken from *The Broken Promise*, an unpublished book, as the original planning commission record has not been located. This book is not an official record of the planning commission proceedings, but assuming the excerpted quote is accurate, the planning commission only denied approval of a *ramp*, not a *stairway*. Those are two different things, and it makes perfect sense that a stairway would be preferred over a ramp. A ramp, though it presumably would have been cheaper than a stairway for the developer to build, would have required grading into the bluff, a disfavored practice even in 1970. On the other hand, a stairway, which was a common feature for coastal development projects during that era, would have caused relatively little impact to the bluff.

Surfrider's argument is further disingenuous because it highlights the planning commission's decision of December 19, 1970, but omits the planning commission's subsequent, superseding decision on February 19, 1971:

B. Decision of the Commission on February 19, 1971

"GRANT, as per plot plan, a special permit in accordance with Ordinance 3534 (New Series) to allow grading for and construction of a 51-unit condominium development on condition that the applicant shall grant to the County without cost an easement over the westerly portion of the property lying below the ten-foot elevation line."[8]

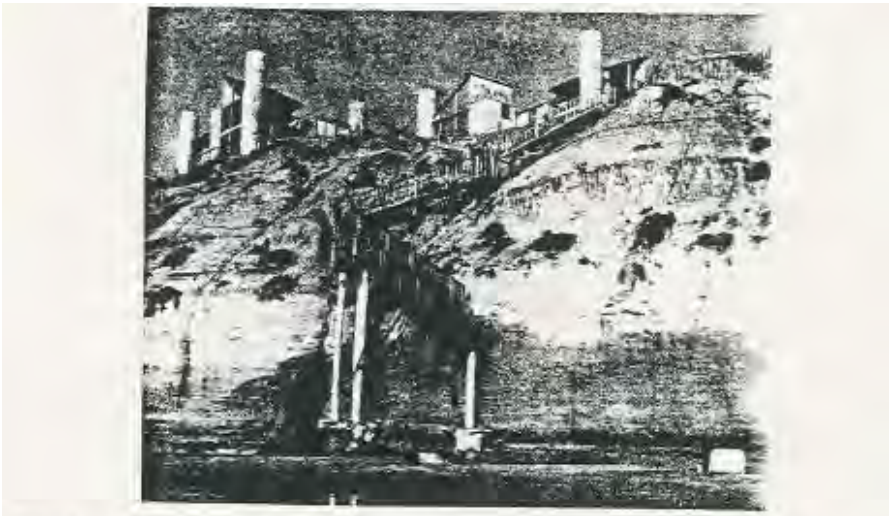
C. Notification of the Applicant

On March 1, 1971, the applicant was notified of the decision of the Planning Commission, which became final on March 12, 1971.[9]

As can be seen, the *only* condition stated in the planning commission's *final* decision was the grant of an easement (discussed further below). The planning commission did not deny any form of beach access as in its the earlier decision.

[continued on following page]

Importantly, *The Broken Promise* contains photographic evidence that the Seascape Shores stairway had been constructed by November 1972:



This is a view of the completed Seascape Shores project, looking east, photographed from the beach. Note that the bottom portion of the beach stairs is missing (torn loose by heavy wave action, November 1972). [Photo taken in November 1972.]

The western portion of Seascape Shores, looking north. Note the proximity to the bluff edge of the buildings in the background and the portion of the buildings in the right foreground. [Photo taken in November 1972].

The book was published on January 9, 1973. If the stairway had been constructed in violation of the county's zoning code or the terms of the permit the county had granted, the book certainly would have alleged that. But though the book states myriad concerns, for example an allegation that the county had approved construction too close to the bluff edge, the book contains no allegation that the construction of the stairway had been illegal in any way.

Moreover, because the Seascape Shores development was highly visible in the community, we can be absolutely certain that if the construction of the stairway had been outside the scope of the county permit, *someone* would have complained about it to the county and the county would have ordered it removed. The county also would not have permitted the subsequent maintenance projects on the stairway.

Thus, although we do not have copies of the original permits, the only conclusion one can draw from what is known about the history of the staircase is that it was permitted by the county. Even Surfrider concedes in its letter: "After-the-fact permits for the illegal seawall and bluff structures *were granted by the Planning Commission* over the objections of the Solana Beach Town Council." (Surfrider Letter, Feb. 4, 2021, p. 3 [emphasis added].)

Finally, even if we assume for the sake of argument that the staircase was constructed without county approval (which is not the case), it was constructed before the effective date of the Coastal Act—and even before Proposition 20, the Coastal Act's predecessor—and thus could not have violated the Coastal Act.

The Stairway Was Later Approved by the Coastal Commission

Even if the original construction of the stairway were somehow illegal, the Coastal Commission later approved it.

In 1980, the San Diego Coast Regional Commission approved the removal and reconstruction of a portion the stairway—the same portion that the applicant now proposes to repair—to allow for the filling of a sea cave and construction of a seawall to protect the residential structures above. (CDP No. F9143.) The County of San Diego concurrently issued its own permit for the project. (CUP No. P79-066.) It is quite clear from a review of the photographs that no changes were made to the stairway itself other than the reconstruction of Landing No. 5 and the temporary support and reattachment of the stairway stringers above and below Landing No. 5.

In 2006, the Coastal Commission issued an exemption for repairs to a storm-damaged portion of the stairway. (Exemption No. 6-06-051-X.)

In 2010, the Coastal Commission again issued an exemption for repairs to the stairway. (Exemption No. 6-10-049-X.)

The stairway thus has been permitted, and its legality confirmed, by the Coastal Commission as well as the county.

The Stairway Does Not "Rely" on a Seawall

As noted, a portion of the then existing stairway was removed and reconstructed in 1980 to make room for the construction of a seawall. One section of the stairway was reconstructed with a new

caisson integrated into the structure of the wall.[1] (CDP No. F9143.) The seawall was constructed to protect the residential structures above, not the stairway. The stairway was partially removed and rebuilt only because it happened to be in the way of the construction of the seawall. The caisson could just as easily have been extended down to the bedrock behind or in front of the seawall, but instead it was built together with the seawall as an integrated structure, presumably to minimize the footprint on the sand and to avoid drilling into the bluff.

Regardless of the reason for the design, *the work was duly permitted by the Coastal Commission*. (CDP No. F9143.) Even if the Commission's approval was wrong or "illegal" (and it was not), Surfrider does not have the right *forty years later* to challenge that decision. (See Nat. Res. Code, § 30627, subd. (b) [request for reconsideration must be made by "[a]n applicant … within 30 days of the decision on the application for a coastal development permit"]; Cal. Code Regs., tit. 14, § 13109.2, subd. (a) ["the applicant of record" must make a request for reconsideration "within thirty (30) days following a final vote upon an application for a coastal development permit"]; Nat. Res. Code, § 30801 [petition for judicial review must be filed "within 60 days after the decision or action has become final"].)

In any event, *the repair work proposed here will not touch the seawall or the caisson footing.* All the repair work for this project is proposed to be performed *seaward* of the existing seawall and caisson footing. Thus, the Coastal Commission is not being asked to approve any new structure that is "reliant" on a seawall.

The Proposed Repair Work Is Not "New Development"

Surfrider argues that the proposed repair work is "new development" and therefore, under section 30253 of the Coastal Act, must not "in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." As explained above, however, this project does not *require* the *construction* of protective devices.

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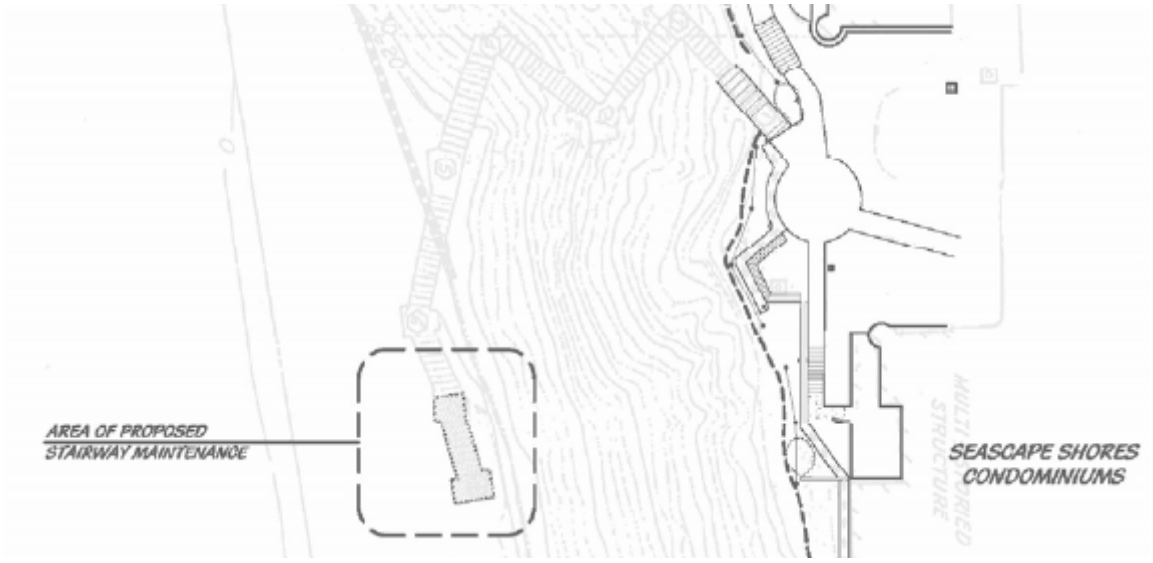
[1] The caisson was built in 1980, not in 2005 as stated in the staff report.

Even if the proposed project did somehow require the construction of protective devices, section 30253 does not apply because the project is not "new development." The project affects less than 24.2% of the stairway, well below the 50% threshold set by the Solana Beach LUP for "new development." (Solana Beach LUP Policy 2.60.) The plan drawings illustrate how minor the project is in relation to the size of the entire staircase:



The 24.2% figure used in the staff report is actually overstated. Policy 2.60 of the Solana Beach LUP states:

> No new private beach stairways shall be constructed, and private beach stairways shall be phased out at the end of the economic life of the stairways. *Existing permitted or private beach stairways constructed prior to the Coastal Act may be maintained* in good condition with a CDP where required, but shall not be expanded in size or function. Routine repair and maintenance shall not include the *replacement* of the stairway or *any significant portion of greater than 50%* of the stairway cumulatively over time from the date of LUP certification. [Emphasis added.][2]

Under the plain language of the LUP policy, only *replacement* counts toward the 50% threshold. Here, the applicant proposes to replace just 9.9% of the stairway. (See Staff Rpt., pp. 16, 24.) The additional maintenance work does not count toward the 50% threshold. But either way, the project is well below the 50% threshold.

[2] Note that this policy applies to stairways that were permitted *or* constructed prior to the Coastal Act. Seascape Shores' stairway was *both* permitted *and* constructed prior to the Coastal Act.

Surfrider's discussion of whether the stairway is an "existing" structure is irrelevant. (See Surfrider Ltr., Feb. 4, 2021, pp. 6–7.) Section 30235 of the Coastal Act states in part that "seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required … to protect existing structures …." Surfrider argues that "existing" structures within the meaning of this statute are only those that existed before the Coastal Act. Their interpretation of the statute is wrong, but setting that debate aside, it does not matter because Seascape Shores is not proposing to construct a seawall or cliff retaining wall. Surfrider cannot point to any provision of the Coastal Act or the Solana Beach LUP that says maintenance and partial replacement are only allowed for structures that were "existing" prior to the Coastal Act—at least where, as here, the partial replacement is below the 50% threshold. And in any event, as explained above, the stairway is "existing" under any definition because it did exist before the Coastal Act.

The Stairway Is Entirely on Private Land

Contrary to Surfrider's claim, the stairway is entirely on private land, as shown here:

Surfrider suggests that, despite being on private land, the stairway violates the open space easement granted to the county in connection with its 1971 approval of the original construction. It would be illogical, however, if the county had approved the stairs and simultaneously required an open space easement having the effect of prohibiting the stairs. That certainly could not have been the intent.

Regardless, a permit for the proposed repair project is subject to review and approval by the State Lands Commission to ensure the project does not illegally encroach onto public lands.

Public Access Mitigation Is Not Required

Policy 2.60.5 of the Solana Beach LUP requires "private beach accessways [to] be converted to public accessways" only "[u]pon application for a coastal development permit for the replacement of a private beach stairway or replacement of greater than 50% thereof." As explained repeatedly here and in the staff report, Seascape Shores is not proposing to replace greater than 50% of its stairway. The requirement to convert a private stairway to a public stairway therefore does not apply.

Moreover, "[t]he condition to convert the private stairway to a public stairway shall only be applied where all or a portion of the stairway utilizes public land, private land subject to a public access deed restriction or private land subject to a public access easement." (Solana Beach LUP, Policy 2.60.5.) As shown clearly above, no portion of the stairway utilizes public land. And, while there is an *open space* easement, there is no *public access* easement or deed restriction.

Surfrider no doubt would love for Seascape Shores to provide public access through its private property and build a new public stairway at its own expense. But the staff report correctly observes that this beach already has adequate public access, with a public access point approximately 1,000 feet to the south and another public access point approximately 1,500 feet to the north.

Standard of Review

Curiously, at page 11 of its letter, Surfrider minimizes the importance of the Solana Beach LUP and appears to suggest that the Commission should "deviate" from the LUP. The case of *Douda v. California Coastal Commission* (2008) 159 Cal.App.4th 1181, cited both in Surfrider's letter and in the staff report, does not support such a view. The court in *Douda* stated: "To promote efficiency and good will between agencies, and prevent injurious reliance by property owners, we believe that the issuing agency should consider the contents of a certified land use plan in making a decision. If it ignores the certified land use plan, then the decision may be subject to reversal if a reviewing court finds that the decision was arbitrary and capricious. In other words, *the issuing agency must have a good reason for ignoring a certified land use plan, such as a significant change of conditions*." (*Id.* at 1194–1195 [emphasis added].) Surfrider has not

identified a “significant change of conditions” or any other “good reason for ignoring” the LUP, which was only recently approved by the Commission.

Though Surfrider’s discussion on this point is misguided, it is academic because, for the reasons explained in this letter and the staff report, the proposed project is entirely consistent with both the LUP and the Coastal Act.

Very truly yours,

AANNESTAD ANDELIN & CORN LLP

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cc: Walter Crampton
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