

DATE ISSUED: June 5, 2008 **REPORT NO. PC-08-080**

ATTENTION: Planning Commission, Agenda of June 12, 2008

SUBJECT: La Jolla Children's Pool Rope Barrier, PROJECT NO. 119757,
PROCESS 3 Appeal

OWNER City of San Diego

APPLICANT: Park and Recreation Department

SUMMARY

Issue(s): Should the Planning Commission approve an appeal of the Hearing Officer's approval to erect a rope barrier, including support posts and foundations, at the La Jolla Children's Pool, located west of Coast Boulevard, near Jenner Street, in the La Jolla Community planning Area?

Staff Recommendation:

Deny the appeal and approve Coastal Development Permit No. 545642 and Site Development Permit No. 545642; and

Community Planning Group Recommendation: Due to the emergency nature of this project, no recommendation was obtained from the La Jolla Planning Association. A prior 7-2 vote on January 3, 2008 recommended denial of the Coastal Development Permit indicating that findings 1, 2, and 3 could not be made.

Environmental Review: This activity is EXEMPT FROM CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) pursuant to: Section 15304 of the State CEQA Guidelines (minor alterations to land), and Section 15333 of the State CEQA Guidelines ("Small habitat restoration projects").

Fiscal Impact Statement: None with this project.

Code Enforcement Impact: None with this project.

Housing Impact Statement: None with this project.

BACKGROUND

PLEASE NOTE:

This is an appeal of an April 23, 2008 Hearing Officer approval of a permit allowing the rope barrier to be placed until May 30th, 2008. That date has passed and the rope has been removed. After informing the appellant that the earliest the appeal could be heard was June 12, 2008, he indicated that he would still like the appeal hearing to go forward. The City attorney's Office has advised Development Services to accept the appeal and schedule the hearing.

Over the last two years, a rope barrier has been placed at the La Jolla Children's Pool in an effort to create a buffer between humans and seals, and simultaneously allow swimmers access to the ocean. The rope has been strung from the seawall on the western side of the sand beach to a point near the bottom of the coastal bluff (Attachment 2). The rope has been placed during the seal pupping season, generally regarded as approximately December through May. In addition, superior and state appeal courts have ruled in a legal matter that the Children's Pool should be returned to its 1941 configuration. This would entail dredging the accumulated sand from the beach, thereby reducing the size of the beach area. It is expected that the seals, annually hauling out at the Children's Pool to rear pups and rest, would no longer do so.

However, on March 10, 2008, the Ninth Circuit Court of Appeals (federal) stayed the earlier ruling preventing the placement of the rope barrier and allowed the rope to be placed until May 30, 2008 (Attachment 2). The prior installations had been permitted until May 15, 2007. On March 19, 2008, the City Attorney's Office opined that an emergency existed at the La Jolla Children's Pool and that the emergency necessitated the installation of a rope barrier (Attachment 12). Based on that opinion, the Development Services Department approved an emergency Coastal Development Permit to allow the emergency placement of a rope barrier at the La Jolla Children's Pool (Attachment 2). The rope barrier was erected by the Park and Recreation Department. The project is located in the La Jolla Community Planning area, within the Coastal Zone. The site is in the LJPD-5 zone, and is adjacent to Open Space and Park land use designations in the La Jolla Community Plan (LJCP).

Land Development Code (LDC) Section 126.0718 (Emergency Procedures for Coastal Development Permits) requires that any emergency development subsequently process a standard Coastal Development permit. Also, LDC Section 143.0110 requires that the rope barrier project obtain a Site Development Permit for Environmentally Sensitive Lands due to its location within a Coastal Beaches resource. On April 23, 2008, the Hearing Officer approved Coastal Development Permit No. 545642 and Site Development Permit No. 545642. The April 23, 2008 Hearing Officer approval has been appealed by Mr. John Leek (Attachment 1).

DISCUSSION

Appeal Issues

1. Permit Not Updated

Issue

The permit to be issued was a reprint of a permit issued in 2006 and was not updated to reflect the new conditions under which it arose, nor was it published with the hearing notice.

Response

The conditions under which the need for the current proposed permit arose do not affect the resulting draft permit. The permit reflects the need for a follow-up Coastal Development Permit following the emergency permit that was issued, and reflects the physical placement and duration of the rope barrier. Additionally, draft permits are not published with the hearing notice.

2. Planning Group Vote

Issue

The hearing officer had issued a notice of public hearing in 2007 for the permit application. He had specified in a December 22 Notice of Application that this public input would come from the La Jolla Community Planning Association. That body did hold a public hearing and voted 7-2 to deny the application for permit.

Response

The January 9, 2008 hearing was noticed, but the hearing was not held. The City Attorney's Office advised Development Services not to go forward with the hearing in that, just prior, the State Supreme Court had refused to hear an appeal of the State Appeals Court ruling on the rope issue. The Appeals Court upheld the Superior Court's ruling to return the pool to its 1941 condition. Doing so would in effect eliminate the rope issue as the sand used by the seals to haul out and rear pups would be removed. Therefore, the January 9, 2008 hearing on the rope issue did not take place. On August 2, 2007, the La Jolla Community Planning Association tabled the rope barrier issue on their agenda expecting these court rulings. The LJCPA met and voted on the project on January 3, 2008, expecting a January 9, 2008 hearing, but the project report and associated materials had already been distributed to the Hearing Officer, so that vote was not included. Development Services staff was not made aware of this LJCPA meeting or vote. The January 3, 2008 vote was 7-2 to recommend denial of the Coastal Development Permit for the Rope Barrier at the Children's Pool, indicating findings 1, 2 & 3 could not be made. No new recommendation vote was taken by the group on the application for the follow-up permit being

appealed today.

3. Permit Need

Issue

The permit is for a rope already installed, so there was no rope installation to be permitted. It is a waste of City resources to do this and incur liability too.

Response

The rope was installed under an emergency Coastal Development Permit (CDP) and a follow-up standard CDP is required.

4. Denying Access

Issue

The permit was for a rope that allowed public access and was not to be considered a hindrance to public to access the beach. Yet the City has used Private Security guards and even lifeguards to demand the public stay behind this rope. Therefore, the City has repeatedly violated the terms of the permit before it was approved and so should not now be granted a permit it has misused in the past. It will only put the City on record as deserving a contempt of court sanction when the O'Sullivan grace period runs out in mid-May.

Response

The rope is not intended to be a hindrance to beach access. City staff may have asked beachgoers to stay behind the rope in the area immediately adjacent to seals on the beach sand in an effort to prevent any perceived seal harassment. This guidance would not prevent access to the ocean around the easterly end of the rope, where it is open to the water.

5. Rope is Federal Issue

Issue

The supposed purpose of the rope is to carry out the Marine Life Protection Act, but that is a Federal matter, not a municipal one. One person in NOAA requested the City do this, did not order it.

Response

The purpose of the rope is to simultaneously create a buffer between humans and seals, and allow swimmers access to the ocean. The idea is that swimmers would still have access to the beach around the easterly end of the rope, but entering in this manner would help prevent any

harassment of the hauled out seals on the sand.

6. Rope Installed Without Permit

Issue

This rope is already installed with no permit because of a temporary 9th Circuit stay of a superior court order, but the City was not ordered to install the rope, the City was only allowed to install the rope. The decision rested solely on the City and it chose to ignore the State Court and put itself in a position of contempt of court. It is an unneeded permit with a 2 week lifetime has only the purpose of setting up for one next year, demonstrating further to the State Court the City has no intention of paying attention to it.

Response

The recent rope installation has been allowed under Emergency Coastal Development Permit/Site Development Permit No. 539520. This emergency permit was issued based on a City Attorney's opinion that an emergency existed at the Children's Pool.

7. Permit End Date

Issue

This permit will only be good until May 15. But the 9th Court permission extends to May 30th. This permit puts the City on record as purposefully defying the State Court order, and then the permit will terminate in mid May and the City will have to make a decision whether to defy the state court for two more weeks with no permit for itself. This is a bad position for the City to put itself in. It can just leave the rope up with no permit until May 30th with no complications.

Response

This permit would have allowed the placement of the rope until May 30, 2008. As that time period has elapsed, and the rope has been removed, the issue is moot. The proposed permit, if approved, would have allowed the rope to be placed until May 30, 2008. This would have been due to the Ninth Circuit Court's stay indicating the rope could be placed until that date. It should be noted that the City is proceeding with the project to dredge the Children's Pool. Initial work on the project's associated Environmental Impact Report has begun. It is not know at this time if the project will be completed by the start of the next seal pupping season in December of 2008. If not, the issue of the need for a rope installation may arise again.

8. Hearing Speaker Order

Issue

During the hearing on 4/16, the speakers Against were interrupted by the arrival of 2 more speakers in favor who were allowed to go in front of us. This is contrary to the regulations requiring all speakers have filled out slips before the start of the meeting. Such blatant favoritism was poor form, should not have been allowed and invalidated the proceedings.

Response

The intent of the Hearing Officer in allowing the speakers to turn in speakers slips and testify was to complete the testimony from those in favor of the rope permit and then complete the testimony from those opposed. There was no attempt at favoritism.

Conclusion

The physical conditions at the La Jolla Children's Pool remain as in past years. There was no need to create a varied permit as the draft permit conditions remained applicable as in previous permits. The La Jolla Community Planning Association recommendation vote of January 3, 2008 is reflected in this report. That information was not know prior to the planned January 9, 2008 hearing, which never took place. The current application for a follow-up standard permit is the result of an emergency permit issued following the City Attorney's opinion that there was an emergency at the Children's Pool. The January 3, 2008 recommendation vote by the La Jolla Community Planning Association was on the issue of the rope placement, but the follow-up standard permit was not before them at that time. The permit before the Planning Commission today is not for a rope already installed as contended in the appeal. The rope was installed under an emergency permit. The rope is not intended to be a hindrance, but to serve as a guideline in an effort to avoid seal harassment while allowing ocean access.

Given these facts, staff is recommending that the Planning Commission deny the appeal and approve the project.

ALTERNATIVES

1. **Deny** the appeal of Coastal Development Permit No. 545642, and Site Development Permit No. 545642, **with modifications.**
2. **Approve** the appeal and deny Coastal Development Permit No. 545642, and Site Development Permit No. 545642.

Respectfully submitted,

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Program Manager
Development Services Department

Morris E. Dye
Project Manager
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Attachments:

1. Appeal by Mr. Leek
2. April 23, 2008, Report to the Hearing Officer, with attachments.

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