

THE CITY ATTORNEY  
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

Michael J. Aguirre  
CITY ATTORNEY

MEMORANDUM OF LAW

**DATE:** December 15, 2006

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Emergency Authorization to Replace the Rope Barrier at the Children's Pool and Implement City Council's December 5, 2006 Resolution

INTRODUCTION

The City Council at the December 5, 2006 meeting adopted a resolution extending the replacement period of the rope barrier at the Children's Pool from December 15<sup>th</sup> through May 15<sup>th</sup> of every year (starting December 15, 2006), and directed the Park and Recreation Department staff to make every effort to get the permits required for the rope placement, if any. The City Attorney's Office was directed to make the determination as to whether any permits are necessary, and if so which ones.

There has been a considerable amount of public testimony regarding the rope barrier at the Children's Pool and other related issues both at Natural Resources and Culture Committee meetings and City Council meetings. Through that testimony, it is clear that in order to protect the public health and safety and to prevent damage to life, health, and essential public services that an emergency exception to the permit requirements is appropriate. Specifically, public testimony has revealed that:

- Between mid-December and mid-May, more mother seals and their pups will need to haul out (rest) on the Children's Pool beach and for longer periods of time in order to prepare for birth, go through the birthing process, and nurse the seal pups.
- There are continually and on a regular basis (if not daily) conflicts and encounters between people who want to protect the seals from harassment and people who want to use the beach. These conflicts have the potential to turn violent, and often involve confrontations and yelling. It has been reported from the Park and Recreation Department staff that one member of the public went so far as to urinate on another in one of these confrontations.

- The presence of more seals on the beach and the increased sensitivity of the mother and baby seals as the pupping season approaches will likely cause these conflicts between members of the public to occur more often and to become more intense.
- Additionally, the mother seals may become more aggressive during pupping season due to their instinct to protect themselves and their baby seals from humans who are getting too close. The lives of the seal pups are also at stake because the stress of harassment caused by the mothers being flushed from the beach may cause the pups to be stillborn, among other things.
- As conflicts arise between people on either side of the issue and between people and seals, lifeguards are regularly brought into these situations by the public. Lifeguards are authorized to enforce state and local codes; however, they are continually asked to diffuse conflicts over the seals at the Children's Pool, which takes them away from providing essential public services as lifeguards by protecting swimmers from danger and drowning.
- The presence of the rope barrier would reduce the number of conflicts between humans and humans and between humans and seals because it would be a clear indicator to the public the appropriate distance from the seals to avoid harassing them.
- The California Coastal Commission [CCC] has indicated that this is a situation in which an emergency exists such that an Emergency Coastal Development Permit would be appropriate in order to get the rope barrier placed at the Children's Pool by the mid-December date. *See Attachment A.*
- The National Oceanic and Atmospheric Administration [NOAA] has newly indicated that it is urgent to replace the rope barrier at the Children's Pool from mid-December through mid-May of this year. *See Attachment B.*

### **QUESTIONS PRESENTED**

1. Does an emergency exist per the San Diego Municipal Code warranting the placement of the Children's Pool rope barrier by December 15, 2006?
2. Should Emergency Authorization be granted to replace the Children's Pool rope barrier without a Site Development Permit [SDP] by December 15, 2006 to protect public health and safety?
3. Should an Emergency Coastal Development Permit [ECDP] be issued by the City for the replacement of the Children's Pool rope barrier by December 15, 2006 to mitigate the loss of or damage to life, health, and essential public services?

4. Should the Park and Recreation Department apply for an SDP and a regular City Coastal Development Permit [CDP] for the emergency rope replacement and for all future rope barrier replacement periods at the Children's Pool?

### **SHORT ANSWERS**

1. Yes. As demonstrated herein, based upon an analysis of the information known at this time, an emergency exists per the San Diego Municipal Code warranting the placement of the Children's Pool rope barrier by December 15, 2006.
2. Yes. The rope barrier is needed to protect public health and safety by preventing human-to-human conflicts and violence, by preventing seal harassment and associated harm to seals and humans, and by allowing lifeguards to focus on protecting swimmers from danger and drowning.
3. Yes. The rope barrier will mitigate for damage to life, health, and essential public services by preventing human-to-human conflicts and violence, by preventing seal harassment and associated harm to seals and humans, and by allowing lifeguards to focus on protecting swimmers from danger and drowning. In addition, the CCC has stated an ECDP is appropriate, and it would be consistent for the City to issue a local ECDP.
4. Yes. When emergency work is authorized without an SDP and/or with an ECDP, applications for standard City SDP and CDPs must also be submitted for the emergency work. Additionally, a regular CDP and an SDP are required for all future rope replacement periods.

### **ANALYSIS**

#### **A. An Emergency Exists In Order to Protect Public Health and Safety**

The Environmentally Sensitive Land Regulations [ESLRs] apply when *development* is proposed on *environmentally sensitive lands*, which include *coastal beaches*. SDMC § 143.0110. As *development* under the SDMC is defined in pertinent part as "the act of...erecting [or] placing...any...structure," the replacement of the rope barrier at the Children's Pool is considered development within the meaning of the code. However, the ESLRs specify that certain uses and activities are allowed on coastal beach areas, including lifeguard towers, public comfort stations, public piers, safety and public information signs, shoreline protective works, public stairs and ramps, and public recreational equipment. SDMC §§ 143.0130(b); 143.0144. Furthermore, development that is necessary to protect the public health and safety may be authorized without prior approval of an SDP or a public hearing. Specifically, the SDMC provides in section 143.0126:

**§ 143.0126 Emergency Authorization to Impact Environmentally Sensitive Lands**

Whenever *development* activity within *environmentally sensitive lands* is deemed necessary by order of the City Manager to protect the public health or safety, the City Manager may authorize, without a public hearing, the minimum amount of impact necessary to protect the public health or safety, subject to the following:

- a) If the emergency work involves only temporary impacts to *environmentally sensitive lands*, a Neighborhood Development Permit or Site Development Permit is not required provided the *environmentally sensitive lands* are restored, in a timely manner to their natural state, to the satisfaction of the City Manager. Restoration shall be in accordance with a restoration plan that conforms with the Biology Guidelines and is approved by the City Manager. The restoration plan shall be submitted to the City Manager within 60 days of completion of the emergency work and work on the approved restoration plan shall be initiated within 90 days of project completion or prior to the beginning of the next rainy season, whichever is greater.
- b) If the emergency work results in permanent impacts to *environmentally sensitive lands*, a subsequent Neighborhood Development Permit or Site Development Permit is required in accordance with all regulations of this division. The application for the Neighborhood Development Permit or Site Development Permit shall be submitted within 60 days of completion of the emergency work.
- c) Within the Coastal Overlay Zone, a Coastal Development Permit is required for any emergency *coastal development* in accordance with Section 126.0718.

The SDMC allows for an emergency authorization for development without an SDP where the development is necessary to protect public health and safety. SDMC § 143.0126. The rope barrier is needed to protect public health and safety by preventing human-to-human conflicts and violence, preventing encounters between mother seals and humans, and allowing lifeguards to focus on their duties protecting swimmers from danger and drowning. In addition, an ECDP is needed.

**B. An Emergency Coastal Development Permit Is Warranted to Mitigate For Damage to Life, Health, and Essential Public Services**

A Coastal Development Permit is generally required for *coastal development* within the Coastal Overlay Zone, which includes the Children's Pool beach. SDMC § 132.0402, Diagram 132-04A. *Coastal development* in the SDMC has the same meaning

as under the state California Coastal Act, and is defined in pertinent part as “the placement or erection of any solid material or structure [or a] change in the intensity of use of water, or of access thereto. SDMC § 113.0103. An Emergency Coastal Development Permit may be issued on an expedited basis when there is a coastal emergency.

A coastal emergency is a sudden, unexpected occurrence within the Coastal Overlay Zone that demands immediate action to prevent or mitigate loss of or damage to life, health, property, or essential public services.

SDMC § 126.0718(a).

The purpose of the CDP procedures is to make the City’s management and treatment of coastal resources comply and be consistent with those of the California Coastal Act as enforced and implemented by the CCC. Cal Pub Resources Code §§ 30108.6, 30240. Specifically, the SDMC section 126.0701 provides:

The purpose of these procedures is to establish a City review process for *coastal development* that is consistent with the *Local Coastal Program*, the California Coastal Act of 1976 (Public Resources Code section 30000, et seq.) and the California Code of Regulations, Title 14, Division 5.5., Chapter 8, Subchapter 2, Article 17.

Thus, the SDMC Coastal Development Procedures are a local implementation of the state standards under the Coastal Act. Cal Pub Resources Code § 30108.6.

The rope barrier at the Children’s Pool is coastal development because it places a structure on the beach that changes public access to water. The City has jurisdiction over CDPs for development proposed above (or landward of) the mean high water line at the Children’s Pool beach, and the Coastal Commission has jurisdiction over CDPs for proposed development seaward of the mean high water line. SDMC § 126.0702; *See also* Cal. Pub. Resources Code § 30600. City CDP grants are appealable to the Coastal Commission. SDMC § 126.0710.<sup>1</sup> However, there are no administrative appeal procedures established for City issued ECDPs. The CCC has indicated that generally ECDPs are not appealable to the CCC, but a regular City permit must be applied for at the same time or soon after the emergency work which is appealable to the CCC.

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<sup>1</sup> If the rope barrier were erected below the mean high water line, then the Coastal Commission could grant the ECDP. However, as demonstrated by maps of the location of the mean high water line, it appears that the placing of the rope barrier at that level on the beach would provide little protection for the seals. A large area above the mean high water line is currently used for hauling out.

The Park and Recreation Department indicated it was unaware until late November of this year that a CDP was required for the replacement of the rope barrier at the Children's Pool.<sup>2</sup> Last April, the rope was erected without a permit. Thus, on December 5, 2006 the City Council became newly apprized that no steps had been taken to erect the rope barrier pursuant to the April 2006 resolution. At the same time, the City Council took new action by approving the replacement of the rope barrier at the Children's Pool beginning on December 15, 2006 rather than January 1, 2007. On December 11, 2006, NOAA issued a new letter indicating that the rope barrier needs to be erected by mid-December of this year to protect the seals and the public. As explained in the Introduction to this memorandum, seal harassment leads to conflicts between people and loss of essential lifeguard services to conflict resolution.

Immediate action is required because a normal CDP could only be processed by mid-January with a more realistic date of mid-March or later. By that time, the pupping season would be half, if not completely over, and the City Council's action to have the rope barrier placed from December 15, 2006 to May 15, 2007 would be rendered moot. The CCC has stated that an ECDP is appropriate for the current Children's Pool situation where NOAA provided new direction as to the urgency of the rope barrier.

### **C. Procedures and Findings for Emergency Development Approval**

Notice of the emergency work must be given to the CCC and the public. SDMC § 126.0718(h). The following findings are required under SDMC section 126.0718(f) for an ECDP:

- 1) A coastal emergency exists that requires action more quickly than would be permitted by the normal procedures for acquiring a Coastal Development Permit and the *development* can and will be completed within 30 days unless otherwise specified in the permit;
- 2) Public comment on the proposed coastal emergency action has been solicited and reviewed to the extent feasible; and
- 3) The proposed emergency work is consistent with the *Local Coastal Program*.

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<sup>2</sup> The CCC's Laurinda Owens provided written confirmation that the an ECDP is appropriate; however, in a phone conversation, Lee McEachern from the CCC stated that the City should have and did know as early as April of this year that a CDP was required. Lee stated that with further direction from NOAA, the recent unexpected event requirement could be met. NOAA Special Agent in Charge, Don Masters, agreed that the replacement of the rope barrier to protect the seals from this mid-December through mid-May is urgent. His letter is attached hereto as Attachment B.

In addition, the related finding that it is necessary to protect the public health and safety to take emergency action to replace the rope barrier without an SDP is required. SDMC § 143.0126. As explained below, these findings are supported by the facts.

First, there is ample evidence that emergency conditions exist as explained in the Introduction to this memorandum such that the findings can be made for emergency authorizations under SDMC sections 126.0718 and 143.0126. The City Council, the CCC, and NOAA have all newly indicated it is important to get the rope barrier up by December 15, 2006 in order to protect the seals and the public. The regular permitting process will not allow the replacement of the rope barrier by that time. The rope barrier is needed immediately to protect public health and safety and to mitigate for damage to life, health, and essential public services by preventing human-to-human conflicts and violence, by preventing seal harassment and associated harm to seals and humans, and by allowing lifeguards to focus on protecting swimmers from danger and drowning. The rope barrier was previously erected within days of authorization and can be replaced well within the 30 day limit on completion time. It must be erected by December 15, 2006, or as soon as possible, and remain up through May 15, 2007.

Second, the placement of this rope barrier during pupping season and additionally from December 15<sup>th</sup> through December 31<sup>st</sup> and from May 1<sup>st</sup> through May 15<sup>th</sup> annually has been open for public comment extensively. In the last City Council meeting on December 5, 2006, the Park and Recreation Department presented oral testimony regarding the need to evaluate expedited permitting procedures in order to effectuate the City Council's action. Public comment was received on the issue of the permit. The City Council at the December 5, 2006 meeting directed the Park and Recreation Department staff to make every effort to get the permits required for the rope placement. Now, City Council is in legislative recess, and the December 15<sup>th</sup> date is rapidly approaching. The California Coastal Commission has indicated that it would be appropriate to take emergency action to replace the rope barrier as was newly directed by NOAA. Thus, it would be appropriate for the City to also deem it necessary to authorize an ECDP.

Third, the replacement of the rope barrier is consistent with the *Local Coastal Program*. The *Local Coastal Program* is an implementation of the California Coastal Act on the local level. The Coastal Act provides that the Coastal Zone is a delicately balanced eco-system and that development needs to be carefully planned to protect the resources. Cal Pub Resources Code § 30001. In addition, the goals of the Coastal Act are to:

- (a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.
- (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.
- (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources

- conservation principles and constitutionally protected rights of private property owners.
- (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.
  - (e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

Cal Pub Resources Code § 30001.5. The state legislature declared that where there are conflicts between these goals created by proposed development, such conflicts should be resolved in a way that is “the most protective of significant coastal resources” and “specific wildlife habitat.” Cal Pub Resources Code § 30007.5. Thus, it is consistent with the Local Coastal Program to replace the rope barrier because it better protects the seals and their habitat. The public may still access the beach up to the rope barrier, and the rope will only be erected on a seasonal basis so that it allows the maximum appropriate public access consistent with sound conservation principles.

**D. Regular Permit Applications are Required after Emergency Work and for Future Rope Barrier Replacements at the Children’s Pool**

The authorization under an ECDP may only be for “the minimum necessary to stabilize the emergency. In addition, emergency development requires the subsequent processing of a standard Coastal Development Permit application for any work authorized on an emergency basis by these procedures.” SDMC § 126.0718(b). This means that the ECDP should only be granted for this December 15, 2006 through May 15, 2007 rope placement. Also, even though the rope may be erected immediately by the December 15, 2006 date, subsequent processing of a regular CDP is required for the emergency placement and in advance of all future placements of the rope barrier. *See also* SDMC § 126.0718(g) (requiring that the subsequent processing of a regular CDP must be included as a condition on the ECDP).<sup>3</sup>

Additionally, an emergency exception to the SDP requires that where there are permanent impacts to environmentally sensitive lands [ESL], an application for a regular SDP must be submitted within 60 days of the completion of the emergency work.<sup>4</sup> SDMC § 143.0126(b). Therefore, where this emergency rope replacement is authorized without an SDP and/or with an ECDP, applications for standard City SDP and CDPs must also be submitted for the emergency replacement. Additionally, a regular CDP and an SDP are required for all future rope replacement periods.

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<sup>3</sup> All of the procedures contained in the SDMC for the processing of the ECDP must be complied with, even if not specifically addressed herein.

<sup>4</sup> While the installation of the rope barrier is only replaced from December 15<sup>th</sup> through May 15<sup>th</sup>, it will be installed annually on a continuing basis, so it should be assumed for the purposes of the SDP requirement that it will be a permanent impact.

### CONCLUSION

Based upon an analysis of the information available at this time, it is clear that an emergency exists within the meaning of the San Diego Municipal Code warranting the placement of the Children's Pool rope barrier by December 15, 2006. Given the existing emergency, no further City Council action is needed at this time to proceed, and, therefore, the Mayor is authorized to place the rope barrier at the Children's Pool by December 15, 2006. A standard Coastal Development Permit application must be submitted for the emergency work and be a required condition on the ECDP. Both a CDP and an SDP will be required for all future rope replacement periods, and the regular application processes must be complied with to effectuate the City Council's December 5, 2006 action.

MICHAEL J. AGUIRRE, City Attorney

By

Nina M. Fain  
Deputy City Attorney

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Attachments

cc: April Penera, Park Planning and Development Deputy Director  
Samir Mahmalji, Project Officer II

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