

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH COUNTY TRANSIT DISTRICT –)	
VERIFIED PETITION FOR DECLARATORY)	Docket No. FD 36433
ORDER)	
)	

**REPLY IN OPPOSITION OF THE
CITY OF DEL MAR**

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The City of Del Mar (“Del Mar”) hereby replies in opposition to the Verified Petition for Declaratory Order that North County Transit District (“NCTD”) filed with the Surface Transportation Board (“Board” or “STB”) on August 28, 2020 (the “Petition” or “Pet.”).

**I.
INTRODUCTION AND SUMMARY**

NCTD’s request for the Surface Transportation Board (“STB” or “Board”) to issue a declaratory order should be summarily denied as inappropriate, unwise, and unnecessary. Despite its best efforts throughout its 168-page Petition to try to manufacture one, NCTD fails to present any actual, present controversy or uncertainty that could be resolved by the issuance of a declaratory order in this proceeding.

NCTD claims that the City of Del Mar (“Del Mar” or “City”) is somehow “defeating rail operations,” but that is simply untrue. The sole basis for the Petition is that Del Mar filed comments with the California Coastal Commission (“Coastal Commission”) with respect to the Coastal Commission’s *federal law* consistency review of *previously conducted* emergency repair work conducted by the San Diego Association

of Government (“SANDAG”) along the coastal bluffs area in Del Mar (“Bluffs” or “Del Mar Bluffs”). While NCTD fails to mention it, the work was *already* approved in an after-the-fact consistency certification by the Coastal Commission almost two months ago, and over two weeks prior to the filing of NCTD’s Petition. The modest potential mitigation raised in Del Mar’s comments was *not* adopted, and the Coastal Commission did not condition its approval in any way on the proposed mitigation. In no way has Del Mar, or the Coastal Commission interfered with, or sought to interfere with, let alone “defeat” NCTD’s railroad operations. The Petition is Moot.

Supported only by speculation, NCTD is now attempting to embroil the Board in hypothetical controversies that do not presently exist, and likely will not ever exist, because all of the relevant stakeholders have traditionally cooperated without conflict, and most likely will continue to do so in the future, in addressing Bluff stabilization and related projects, as they did with the most recent emergency repairs.

NCTD fails to inform the Board that the San Diego Association of Governments (“SANDAG”), and not NCTD, pursuant to state law, is in charge of planning, development, funding, and construction of the NCTD right of way. SANDAG has directed and funded, with the assistance of local, state, and federal funding, all of the Bluff stabilization projects since 2003, and SANDAG, not NCTD, is the entity that has been subject to Bluff stabilization project review by the Coastal Commission. Notably, SANDAG has not joined NCTD’s petition, likely because it has always worked in cooperation with the Del Mar and the Coastal Commission on NCTD related projects.

NCTD's speculation of possible future attempts by Del Mar to force it to build a tunnel to replace its current right of way is a red herring and absurd. It is NCTD's planning partner, SANDAG, and not Del Mar that has directed and engaged in substantial long-term planning and studying of line relocation alternatives to the current routing, including tunnels. This study is being performed in recognition of the severe erosion that is continuing in the Bluff area, as well as the geological and engineering constraints that limit train traffic and speeds over the existing corridor. Del Mar has never sought to require NCTD to build a tunnel, and it has never asserted that it has the authority to do so.

A declaratory order proceeding will not terminate a controversy or remove uncertainty here. NCTD does not satisfy the indispensable threshold requirement of demonstrating the existence of a real, live, concrete controversy. Instead, NCTD relies solely upon a hypothetical, future controversy, or alleged fictional past controversies it claims are somehow enough to invoke ICCTA preemption now.

Additionally, even NCTD admits that project reviews by the Coastal Commission through which Del Mar has sometimes participated as a party in individual proceedings, are made pursuant to *federal law*, under the Coastal Zone Management Act ("CZMA"). This fact provides another compelling reason for the Board to exercise caution and restraint and decline to institute a declaratory order proceeding at this time. Especially given the coexistence of two federal regulatory regimes, Del Mar respectfully submits that the Board should be wary of allowing NCTD to seek to use the auspices of

the Board to initiate a proceeding and grant relief that is likely to impinge upon concurrent federal law.

Even if the Board considers the merits of the Petition, which it should not do because the matter is not ripe for consideration, it should find no preemption. CZMA review is not the type of “regulation” required to establish preemption and neither Del Mar nor the Coastal Commission is seeking to regulate NCTD’s railroad transportation activities. Moreover, NCTD has not shown and cannot show actual unreasonable interference with its railroad operations. In fact, although NCTD does not mention it, much of the possible future activities of concern involve projects by SANDAG that are not even on common carrier property, and as discussed, the parties have previously found it relatively easy to cooperate even on those projects. Such cooperation in no way creates an ongoing, unreasonable interference with NCTD’s ability to maintain its infrastructure, operate, or engage in capital improvement projects.

Finally, NCTD’s Petition implicates the application of state law to subdivisions of that state that does not constitute regulation. Instead it is a form of self-governance, and this self-governance is not preempted by ICCTA.

In short, NCTD has not met its burden to demonstrate circumstances warranting issuance of a declaratory order, nor has it established a basis for a finding of preemption. Accordingly, the Petition should be denied.

II. FACTUAL BACKGROUND

The City of Del Mar was incorporated in 1959, and is the smallest incorporated city in San Diego County, with a population of 4,500, covering 2.2 square miles. It is chartered under state law and authorized to engage in self-governance, subject to the general laws of the State of California.

NCTD owns 62 miles of mainline track from the Orange County/San Diego County line to the San Diego Santa Fe Depot in downtown San Diego. Approximately 1.7 miles of NCTD's tracks are located on an area commonly known as the Del Mar Bluffs in Del Mar, California, with NCTD's right of way situated atop, and in excavated slots adjacent to, the Bluffs. NCTD's right-of way is approximately 100 feet wide (50 feet on each side of the centerline of the single-track railway). The NCTD right of way abuts City property on both the east and west side as well as State property to the west, including the Torrey Pines State Beach.

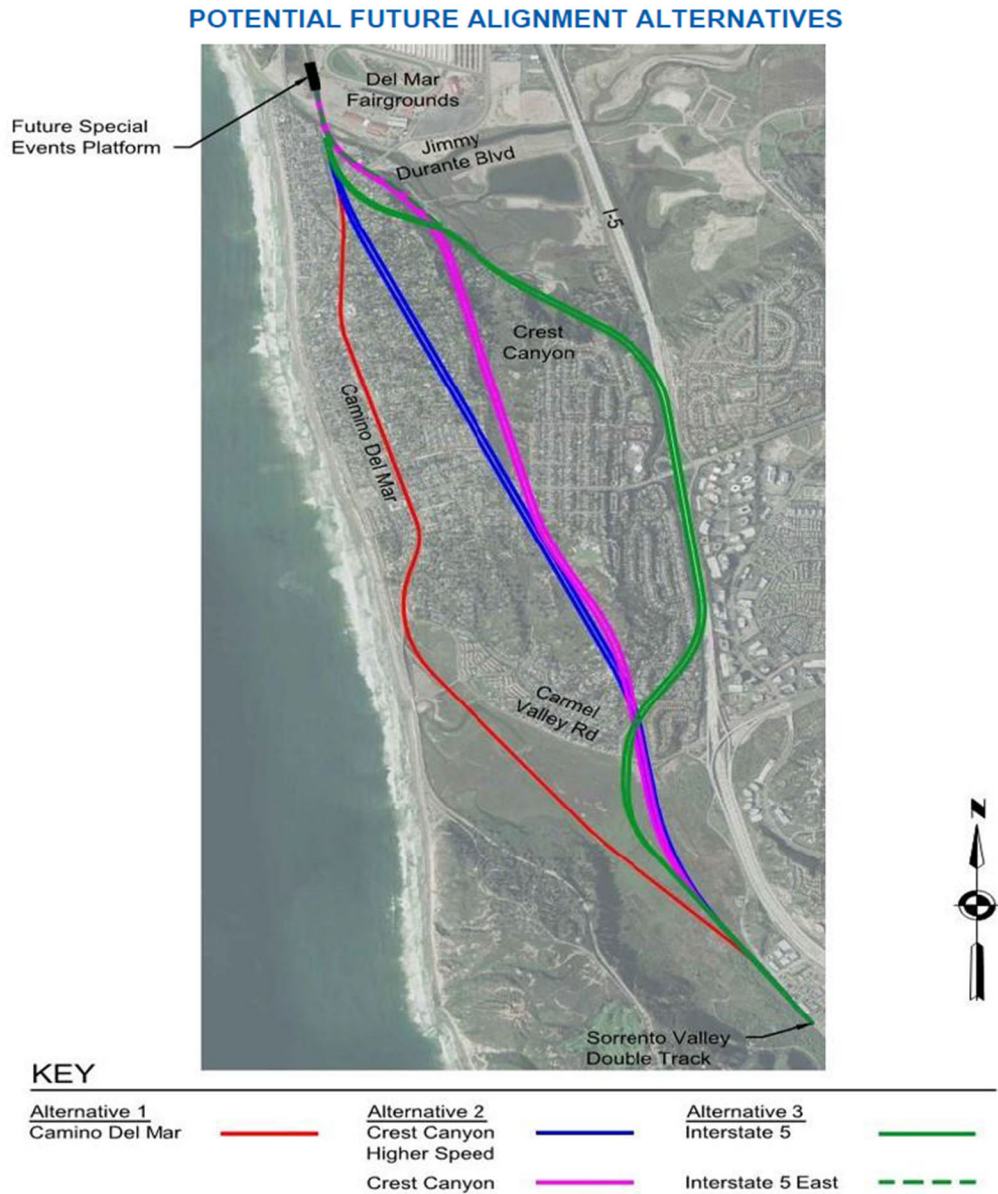
NCTD is responsible for the operations of the rail line and line maintenance. However, on January 1, 2003, Senate Bill 1703 transferred responsibility for future transit planning, programming, development, and construction to the San Diego Association of Governments (SANDAG).

SANDAG, as San Diego's regional planning agency, conducts preliminary studies and develops costs estimates for future projects. SANDAG, in cooperation with NCTD, through an ongoing two-year multi-million dollar comprehensive study, is evaluating options for removing the existing train tracks from the Del Mar Bluffs and

studying corridor and line alternatives. These alternatives are necessary due to the continuing risks from Bluff erosion, to ensure service reliability, and to accommodate modern railroad and customer service requirements. This includes the need for double tracking and faster train speeds that are not possible through the existing rail corridor, and that SANDAG has repeatedly recognized requires “removing the train from the Del Mar Bluffs and constructing a tunnel through the City of Del Mar.” SANDAG, *Conceptual Engineering and Environmental Constraints for Double Track Alignment Alternatives Between Del Mar Fairgrounds and Sorrento Valley* (Dec. 29, 2017), at 1, https://www.sandag.org/uploads/projectid/projectid_260_27269.pdf.

SANDAG has more recently emphasized that such routing alternatives are necessary “to ensure the long-term viability of the corridor” and because “[r]ecent erosion of the Del Mar Bluffs has underscored the immediate need to identify a long-term solution for the corridor.” See SANDAG’ *San Diego Regional Rail Alternative Alignment Study*, included at Attachment 1.

SANDAG is evaluating several potential alternative rail corridors to replace the current alignments:



Id. As noted, SANDAG's rail corridor realignment study is being performed in recognition that the longstanding, on-going erosion and degradation of the Bluff that supports the NCTD alignment since the line was first built over 130 years ago requires alternatives to meet the service needs of the public. However, until that time, SANDAG has undertaken bluff stabilization projects to address erosion events and ensure the safety of current operations.

Since 2003, four stabilization projects have been completed, funded through federal, state, and local sources. A schematic depicting past, current, and future Del Mar Bluffs' stabilization initiatives prepared by SANDAG is set forth at Attachment 2 (see *Del Mar Bluffs Past, Current, & Future Stabilization Efforts*, https://keepsandiegomoving.com/Libraries/Lossan-PDFs/SANDAG_LOSSAN_ART_MAP_Del_Mar_Bluffs_Stabilization_Project_Map_121219.sflb.ashx).

Most recently, on March 12, 2020, SANDAG submitted an after-the-fact consistency certification to the Coastal Commission for emergency bluff stabilization measures completed on December 15, 2019. See CCC Consistency Review Project 4 at Attachment 3. This work addressed a sudden erosion event on the Bluffs that caused a failure of the underlying roadbed. The work was initiated and undertaken by SANDAG without consultation with the Coastal Commission on November 30. SANDAG later informed Coastal Commission staff of the initial work it had performed and of its additional continuing work, and it committed to submitting itself to an after-the-fact consistency certification for the emergency measures.

No such similar consultation was undertaken by SANDAG with respect to Del Mar, and at no time did Del Mar seek to require any project pre-permitting or after-the-fact permitting of this emergency repair work under the Del Mar Municipal Code. During the Coastal Commission's after-the-fact review, the City of Del Mar sent a letter dated April 21, 2020 to the Coastal Commission as part of the Commission's Coastal

Zone Management Act (“CZMA”) review requesting soil and native planting materials be used to cover an installed retaining wall as an aesthetic mitigation measure. *See* April 21, 2020 letter included at Attachment 4 (“Del Mar CZMA Letter”). However, the Coastal Commission *approved* the work on August 12, 2020 without including or adopting any of the suggested mitigation measures from Del Mar.

The Phase 4 work includes seawall and drainage improvements along the toe of the Bluffs along the beach. Much of this work is being performed on State and City property in environmentally sensitive tidal and coastal areas well outside of NCTD’s right of way. *See* representative photographs at Attachment 5. As shown in these photographs, toe walls and other structures at the bottom of the bluffs (on the beach) are being installed well beyond NCTD’s right of way property limits on City and/or State property, using state and federal funding.

As referenced, this is the fourth phase of stabilization projects dating back more than 20 years. To Del Mar’s knowledge, at no time during any parts of Phase 1 to Phase 4 has Del Mar sought to subject SANDAG, or previously NCTD, to City permitting or other review for bluff stabilization initiatives under the Del Mar Municipal Code. To Del Mar’s knowledge, at no time has SANDAG, or previously NCTD, sought formal permission, or right of entry agreement for construction activities, or to locate structures on Del Mar property, in support of its Bluff stabilization initiatives.

While there are no current projects involving fencing by NCTD or SANDAG, there has been talk of a possible future project to include fencing on or around

portions of the right-of-way in Encinitas, Oceanside, and Del Mar. To date, there is no actual project, plans, or funding for this conceptual fencing. Del Mar understands that a feasibility study was being performed in order to evaluate fencing, as well as other potential safety options. Del Mar has consistently been supportive of safety on the Bluffs and even contributed financially to the safety feasibility study. However, Del Mar has yet to see the results of any such study from NCTD or SANDAG.

II. GOVERNING STANDARDS

A. Declaratory Order

As the party petitioning the Board for a declaratory order, NCTD bears the burden of proof. 5 U.S.C. § 556(d); *Eastern Ala. Ry. LLC – Pet. for Decl. Order*, FD 35583 at 4 (STB served Mar. 9, 2012). The Board has broad discretionary authority to issue a declaratory order to “terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e). In exercising its discretion, the Board considers, among other things, “the issue’s significance to the industry, the ripeness of the controversy, and whether past decisions establish adequate guidelines.” *Georgia-Pacific Corp. – Pet. for Decl. Order*, MC-C-30202, at 1 (ICC served Sept. 22, 1992); *see also Delegation of Auth. – Decl. Order Proceedings*, 5 I.C.C.2d 675, 676 (ICC served June 30, 1989). The Board may deny a petition that is premature, *i.e.*, where it is not shown that such a proceeding is necessary to terminate an active controversy. *USX Corp., U.S. Steel Grp. – Pet. for Decl. Order*, No. MC-C-30205, at 2 (ICC served Nov. 9, 1992).

B. Preemption

Under 49 U.S.C. § 10501(b), the remedies provided by ICCTA “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” “Transportation” includes a “property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail,” as well as “services related to that movement.” 49 U.S.C. § 10102(9).

Section 10501(b) limits ICCTA preemption to “*remedies* provided under Federal or State law” “with respect to regulation of rail transportation.” 49 U.S.C. § 10501(b) (emphasis added). It does not preclude the application of “all other law,” as Congress did, for example, with respect to railroad mergers and acquisitions. 49 U.S.C. § 11321(a); *see Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Instead, as the Eleventh Circuit has explained, “Congress narrowly tailored the ICCTA pre-emption provision to displace only ‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *Fla. E. Coast Ry.*, 266 F.3d at 1331 (internal citation omitted). Other circuits agree. *E.g., PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 214, 218-222 (4th Cir. 2009); *Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008).

Thus, the preemptive reach of § 10501 is limited. “Where the state or local law can be applied without interfering with [ICCTA], the courts have done so.” *Cities of Auburn & Kent, WA – Pet. for Decl. Order – Burlington N. R.R. – Stampede Pass Line*, STB Docket No. FD 33200, 2 S.T.B. 330, 338 (1997) (“*Stampede Pass*”); *aff’d sub nom. City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). “The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct* economic regulation by the *States*, as opposed to the incidental effects” *Fla. E. Coast Ry. Co.*, 266 F.3d at 1337 (emphasis in original). ICCTA preemption is therefore confined to instances where the activities in question actually regulate rail transportation, and thus the statute expressly preempts the inconsistent state laws.

There are two types of ICCTA preemption – express and as-applied. *Mid-America Locomotive & Car Repair – Pet. for Decl. Order*, FD 34599, at 2-3 (STB served June 6, 2005) (“*Mid-America*”). NCTD appears to concede that express preemption applies to only part of its petition concerning maintenance and upgrading of its rail line. Pet. at 33-37.

In construing § 10501(b), the STB and the courts have identified only two broad categories of state regulation that are wholly (or expressly) preempted for rail transportation by rail carriers: (1) the imposition of any form of permitting or

preclearance requirement that, by its nature, could be used to deny a railroad the ability to conduct rail operations or to proceed with activities the Board has authorized,¹ and (2) matters that are regulated by the STB, such as a state or local regulation determining what rates may be charged or how a railroad's traffic should be routed.²

To establish as-applied preemption, UP must demonstrate: (1) a regulation; (2) that unreasonably burdens or interferes with; (3) rail transportation. *Mid-America*, at 2-3 (citing *Thomas Tubbs – Pet. for Decl. Order*, FD 35792, at 4 (STB served Oct. 31, 2014)). By its nature, an “as-applied” test necessarily entails a fact-bound, case-specific determination. *See Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 413-16 (5th Cir. 2010) (en banc). Not all state and local regulations that affect railroads are preempted. *Joint Petition for Declaratory Order - Bos. & Maine Corp. & Town of Ayer, Ma*, 5 S.T.B. 500 (2001) (“*Ayer*”). State or local laws of general applicability are generally not preempted by the ICCTA so long as they do not unreasonably interfere with interstate commerce. *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

¹ Thus, building permits, zoning ordinances, and land use permitting requirements “regarding railroad operations” are preempted. *City of Auburn*, 154 F.3d at 1033; *see also Green Mountain R.R. v. Vermont*, 404 F.3d 638 (2d Cir. 2005). Otherwise, state and local authorities could deny a railroad the right to conduct operations, which would irreconcilably conflict with the STB’s authorization of those operations. *Id.*

² *See CSX Transp., Inc. – Pet. for Decl. Order*, STB Docket No. FD 34662, 2005 WL 584026, at *7 (STB served Mar. 14, 2005), *reh’g denied* (STB served May 3, 2005).

Also, “areas of law traditionally reserved to the states . . . are not to be disturbed absent ‘clear and manifest purpose of Congress.’” *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”). Additionally, localities retain certain police powers to protect public health and safety. *See Ayer*. Individual situations must be reviewed to determine the impact of that specific action on interstate commerce and whether the regulation is being applied in a discriminatory manner, or being used as a pretext for preventing a particular activity. *Id.*

III. APPLICATION OF GOVERNING STANDARDS

A. The Matter Is Not Ripe For Board Involvement

NCTD’s Petition fails out of the gate because there is no actual controversy. As the Petition itself demonstrates, the matter is not ripe for issuance of a declaratory order.

Here, the Petition fails to challenge any specific local regulation or action by Del Mar. Whether NCTD would be subject to any future state or local regulations for any future hypothetical work, and whether those regulations would be preempted involves a fact specific inquiry. Without having specific information regarding the disputed local law or ordinance, City action, or specific projects, it is impossible for the Board to make such a determination.

To date, Del Mar has not required NCTD to obtain any permits or perform any other type of preclearance activities in performing its work. In fact, Del Mar has been extraordinarily collaborative with NCTD and has not required NCTD to obtain right of entry or encroachment permits while working on Del Mar's property on the west side of the Bluffs. Additionally, there has been no indication that Del Mar will request any such permits for the hypothetical maintenance activities NCTD may perform in the future. NCTD's Petition fails to establish any facts to the contrary.

Through its Petition, NCTD first asserts that a Board Declaratory Order is required because, through Del Mar's CZMA Letter of April 21, 2020, it asked the Coastal Commission for "far-reaching unduly burdensome mitigation measures" (Pet at 15), which NCTD believes triggers ICCTA preemption. However, the Coastal Commission approved SANDAG's work on August 12, 2020 without conditioning approval on the implementation of *any conditions*, including the relatively minor aesthetic mitigation suggested by Del Mar.

NCTD fails to inform the Board that the central "controversy" raised in its Petition was resolved to NCTD's full satisfaction over two weeks prior to the bringing of its Petition, yet NCTD still decided to proceed with its Petition, unimpeded, completely ignoring this resolution. The Coastal Commission's decision moots the central point of the Petition.

Second, outside of Del Mar's Coastal Zone Management Act ("CZMA") Letter, NCTD specifically expresses concerns about the unreasonable interference with

SANDAG's ongoing Del Mar Bluff stabilization work ("Bluff stabilization"). It explains:

As part of [its] multi-phase approach, SANDAG and NCTD first completed an emergency repair in 2001, followed by drainage improvements and installation of a landslide warning system in 2003, and the installation of soldier piles in 2007 and 2010. NCTD and SANDAG are scheduled to begin another phase of construction on the bluffs in 2020. As a result, NCTD is extremely concerned that Del Mar and the Commission will interfere with these crucial, upcoming bluff stabilization rail projects under local, state or federal law that is applicable in coastal zones"

Pet. at 9. NCTD's "extreme concerns" about unreasonable interference are not borne out by reality, and while NCTD asserts that "Del Mar has constantly complained about the Line" and opposed line maintenance efforts, such assertions are completely unfounded. As NCTD notes, there has been numerous and widespread Bluff stabilization work performed by SANDAG (and previously NCTD) over the past 19 years, yet it does not, and cannot cite a single instance where Del Mar has sought to interfere with that work, much of which has occurred on Del Mar's and the State's property. NCTD also omits that all the stakeholders, including Del Mar, the Coastal Commission, SANDAG, and NCTD have actively worked in good faith in cooperation towards Bluff stabilization. The parties' decades long history actually demonstrates that there is no unreasonable interference and there is no current controversy requiring Board resolution.

Even assuming Del Mar attempted to implement some local regulation on the railroad in the future, such activity is not automatically preempted. It would have to affect rail operations. NCTD makes a conclusory statement that it would but provides no

argument or factual basis for this statement. The Petition only alludes to future Bluff stabilization projects and potential future fencing. It provides no specific details on the work.

In an attempt to overcome these vague and speculative arguments, NCTD claims that allowing any local regulation would result in an impermissible and unworkable patchwork of regulation. Pet. at 37-38. But since NCTD cannot show any real state or local regulation to which it has been subjected that might unreasonably interfere with its rail operations under ICCTA, there cannot be an issue of conflicting regulations requiring Board resolution through issuance of a declaratory order. Also, by this logic, no local regulation of any kind would ever be enforceable against the railroad. This is simply not the case:

[S]tates and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

Green Mountain R.R. Corp., 404 F.3d at 643. For example, local laws that prohibit the dumping of harmful substances are not preempted by the ICCTA because such a generally applicable regulation would not constitute an unreasonable burden on interstate commerce. *Stampede Pass*, 2 S.T.B. at 338.

The Petition should be denied for a lack of controversy requiring a Board decision, and the Board need go no further, especially given NCTD's failure to properly inform it of the resolution of the central issue raised in its Petition. If a ripe, real controversy arises in the future, which is not the case here, there is nothing precluding NCTD to come back to the Board.

B. NCTD Has Not Met Its Burden To Show ICCTA Preemption

1. The Coastal Commission's Federal CZMA Review Is Not Preempted Under ICCTA

The Petition raises potential conflict between two federal regulatory schemes. However, both the Board and the courts have held that Section 10501(b) must be harmonized with other federal statutes. *CSX Transp., Inc. – Pet. for Decl. Order*, FD 34662, at 9 (STB served Mar. 14, 2005); *New England Transrail, LLC – Constr., Acquisition & Operation Exemption*, FD 34897, at 9, 20 (STB served July 10, 2007); *Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517, 523 (6th Cir. 2001). Two federal statutes should be “harmonized” unless there is a “positive repugnancy” or “irreconcilable conflict” between them. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540 (1976); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020). Accordingly, the CZMA must be given effect so long as the CZMA and the ICCTA are not irreconcilable. *See S. Pac. Transp. Co. v. California Coastal Comm'n*, 520 F. Supp. 800, 805 (N.D. Cal. 1981).

Here, NCTD has not demonstrated that the CZMA and ICCTA cannot be harmonized. Congress did not intend that the Board's authority over common carriers

under ICCTA, such as NCTD, would supersede the National Oceanic and Atmospheric Administration's authority and obligations to manage natural resources in coastal zones for the nation. *See, e.g., Tyrrell*, 248 F.3d at 523 (“[Federal] agencies’ complementary exercise of their statutory authority accurately reflects Congress’s intent for the [statutes] to be construed *in pari materia*.”).

Lacking facts of actual interference, NCTD lodges vague assertions and hypothetical allegations of possible future harm. NCTD has not even specifically stated how the CZMA or any of its provisions specifically affect, let alone interfere with interstate commerce or the operation of their railroad. Instead, NCTD asks the Board to determine generally that any review of “rail maintenance and upgrade projects” (Pet. at 47) cannot be harmonized with the ICCTA. In doing so, NCTD broadly states it is constantly performing maintenance and upgrades, and any Federal Consistency Review under the CZMA would restrict rail operations. This bald assertion is extraordinarily broad and vague.

A challenge, such as NCTD’s, must state *specific facts* about how a particular use interferes with railroad operations, and cannot rely solely upon allegations of speculative harm, as NCTD does. *See, e.g., Franks*, 593 F.3d at 415; *Reading Blue Mountain & N. R.R. Co. v. UGI Utils., Inc.*, 2012 WL 251960, at *2 (M.D. Pa. Jan. 25, 2012); *Louisville Water Co. v. CSX Transp., Inc.*, 2012 WL 4098981, at *3 (W.D. Ky. Sept. 17, 2012) (no unreasonable interference where “purported ‘undue safety risk’ is wholly non-specific and hypothetical”); *Bayou DeChene Reservoir Comm’n v. Union*

Pac. R.R. Corp., 2009 WL 1604658, at *4 (W.D. La. June 8, 2009) (no preemption where railroad provided only “vague and unsubstantiated statement” that access road would interfere with railroad operations); *Buddy & Holley Hatcher – Pet. for Decl. Order*, FD 35581, at 7 (STB served Sept. 21, 2012) (“*Buddy & Holley Hatcher*”) (no preemption when railroad made “no arguments and provide[d] no facts supporting a finding that the state court action should be preempted”).

NCTD makes the conclusory statement that harmonization would result in the ICCTA being disregarded and its operations brought to a “standstill.” Pet. at 42. However, it provides no factual evidence to support this claim. The Petition merely alludes to the generalities of possible delays if NCTD was required to participate in Federal Consistency Review. As noted above, no such delays have ever previously occurred.

NCTD points to emergency repairs of their property, implying that no repair work would be performed prior to Federal Consistency Review. This is simply not the case. Under certain circumstances, Federal Consistency Review can be done after-the-fact. As noted above, with the most recent Federal Consistency Review of NCTD’s projects (Bluff Stabilization Project 4), the review was done after-the-fact. This project was already complete as of December, 2019 when Del Mar sent its April, 2020 letter requesting mitigation measures (ultimately asking for some dirt and native plantings to cover a concrete retaining wall). As noted, the Coastal Commission Federal Consistency

Review was completed on August 12, 2020 and the after-the-fact repair work was approved with no mitigation measures (including those requested by Del Mar).

The Petition also cites to the issue of potential future fencing of the Bluffs, stating that Federal Consistency Review cannot be harmonized with the ICCTA because it would directly interfere with its rail operations by making the rail line less safe.

However, it is unclear where and how NCTD may fence its property, whether it may seek to place fencing outside of its right of way on City or State property, or on or about grade crossings, or in a manner that might place public safety in jeopardy or endanger natural resources within the coastal zone. Additionally, it is unclear how such review would prevent NCTD from safely operating its rail line as NCTD and its predecessors have done since the late 1800s. Federal Consistency Review is not the equivalent of forbidding NCTD from erecting fencing, nor does it prevent other safety measures. Del Mar has consistently been supportive of safety on the Bluffs and even contributed financially to a safety feasibility study regarding the Bluffs.

NCTD argues that that Federal Consistency Review may not apply to any future fencing project, since there is no federal action to date and funding is expected to come from California, rather than from federal sources. Therefore, NCTD claims, any review of the project should only involve state and local law under the Coastal Act's permitting regime. However, NCTD acknowledges that the expected fencing project "may later include federal dollars." These contradictory statements showcase two significant problems.

First, these facts demonstrate that the project itself is speculative. There is no actual fencing project at this time since the project idea has not yet been designed or funded. Further, the Petition does not provide any factual information or documentation regarding the alleged project for the Board to make an informed decision regarding preemption and the applicability of different laws.

Second, the alleged project admittedly “may later include federal dollars.” If federal dollars are later used to fund the project, it would then become subject to the CZMA. 16 U.S.C § 1456. It remains speculative whether Federal Consistency Review would be required. Therefore, such a determination is entirely premature.

Also, with respect to NCTD wild claims regarding Del Mar seeking to require NCTD to relocate its tracks, again, there simply has been no attempt by Del Mar or the Coastal Commission to seek to force NCTD to relocate its tracks, nor does either entity claim to have any such rights. Instead, it is SANDAG that has authority over all regional transit programs, including rail, and it is SANDAG, in coordination with NCTD, that has been studying future alternative routing and railroad tunnels. This study is being performed in part due to the continuing erosion of the Bluffs, and the severe limitations that the geology of the Bluffs presents to rail operations and future passenger and freight growth.

Finally, NCTD argues that any Federal Consistency Review of its future undefined projects would place it in a patchwork of environmental regulations that would affect their ability to operate between various jurisdictions. However, again, NCTD has

not pointed to any specific regulations that Del Mar or Coastal Commission are attempting to enforce that might create such patchwork.

Essentially, NCTD is asking for an open-ended order from the Board that no matter the factual circumstances involved, the CZMA can never be harmonized with the ICCTA and that railroads are not subject to Federal Consistency Review. That is simply not the law. Establishing unreasonable interference is a high bar. NCTD cannot meet it. The added fact that there are two federal statutes at issue here greatly favors administrative restraint and caution, and it is a compelling reason for the Board to decline to institute a declaratory order proceeding.

2. California's Coastal Management Program Is Not Preempted Under ICCTA

As NCTD Petition candidly acknowledges, “[i]f a state’s enforceable policies, **as described or applied**, are not preempted, the state may apply them through CZMA federal consistency to a preempted field. It should be noted that whether state action is preempted is a fact-specific inquiry.” Pet. at 39. Despite this acknowledgment of a fact specific inquiry, NCTD asserts that any application of any California Coastal Management Program (“CCMP”) policies would be automatically preempted. However, the Petition provides no facts as to any specific rail maintenance activities, any specific and existing (rather than hypothetical) upgrade activities, or any specific state enforcement policy that would be preempted. Additionally, NCTD fails to provide information as to which state policy would require NCTD to move its rail line or any actual actions taken by Del Mar or Coastal Commission requiring line relocation.

Relocation of the rail line off the Bluffs falls entirely within the purview of SANDAG as the responsible regional transit agency.

Any theoretical enforcement policy NCTD is alluding to is likely not expressly preempted. “NOAA will not approve for incorporation into a state's management program a state policy that is expressly preempted by Federal law.” Coastal Zone Management Act Program Change Procedures, 84 FR 38118-01. If any underlying enforcement policies were expressly preempted, they would not have been incorporated into the state’s management program. The question would instead be whether a policy is impliedly preempted in its application. *See id.*

Del Mar does not dispute that an enforcement policy could theoretically be preempted by federal law. However, not all state enforcement policies are automatically preempted. As even NCTD admits, the specific policy would need to be reviewed on a case-by-case basis in order to make such a determination. The Petition raises issues with respect to the CCMP that are either not ripe, or do not contain enough information to allow the STB to make a determination.

3. Matters Outside Of the Board’s Jurisdiction Involving State Property Disputes Are Not Preempted under ICCTA

Although not mentioned by NCTD in its Petition, several aspects of the Bluff stabilization work performed to date have been completed on state and City property. For example, recently built toe walls at the bottom of the Bluffs (on the beach) were installed outside NCTD’s 100 foot right of way and on City/State property. *See* representative photographs at Attachment 5. NCTD’s Petition appears to cover such

activities. However, any assertion that NCTD possesses open-ended property rights under ICCTA to engage in construction of structures and engage in rail related activities on City/State property is simply wrong.

While under 49 U.S.C. 10501(a)(1), the Board's jurisdiction extends to "transportation by rail carrier," neither ICCTA generally nor the preemption provisions of ICCTA enable the Board or a railroad to federally condemn or occupy property or to enable a carrier to engage in trespass on property that it does not own outside of its right of way that is not part of the interstate rail network. For example, in a case involving state law claims of inverse condemnation, trespass, nuisance, and negligence arising out of water runoff damage to homeowners' property allegedly caused by a railroad's salvage of nearby track, the Board found those state law claims *not* preempted, because the state court action would not unreasonably burden interstate commerce or interfere with rail transportation. *See Buddy & Holley Hatcher*, at 7.

While neither Del Mar nor the State to date have required SANDAG to obtain a right of entry agreement or other permit to access and engage in bluff stabilization work in City or State property outside of the railroad right of way, a carrier generally needs to obtain the requisite property rights before engaging in any rail-related activity on City/State property. *See Oakland Glob. Rail Enterprise – Petition for Declaratory Order Oakland Glob. Rail Enter., LLC – Acquisition Exemption – Rail Line in Alameda County, Cal. et al.*, FD 36168, at 6 (STB served June 20, 2019) .

As these disputes involve City property, and work performed on City property (rather than in the railroad right-of-way), they are outside the jurisdiction of the STB. Disputes over property lines and ownership of property should be resolved in state court. *See MVC Transp., LLC—Acquisition Exemption—P&LE Props., Inc.*, FD 34462 et al., at 6 (STB served Oct. 20, 2004); *Allegheny Valley Railroad Company—Petition for Declaratory Order*, FD 35239, at 9 (STB served June 15, 2010); *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 214, 218-222 (4th Cir. 2009); *cf. Jie Ao & Xin Zhou*, FD 35539, at 6 (STB served June 6, 2012) (finding state-law adverse possession claim *within* right of way preempted because it sought “to claim title to a strip of rail-banked ROW that is within the national rail network system and has not been abandoned”).

4. The ICCTA Preempts Regulation of Rail Transportation, Not Self-Governance

While the ICCTA does preempt state regulation requiring environmental preclearance of projects involving railroad transportation, the application of state law to subdivisions of that state does not constitute regulation. *Friends of the Eel River v. N. Coast R.R. Auth.*, 399 P.3d 37, 43 (Cal. 2017). Instead, it is a form of self-governance. *Id.* While the Board ultimately may not need to address this issue on the merits because of the lack of ICCTA preemption shown by NCTD in its Petition, this self-governance is not preempted by the ICCTA. *Id.* at 44.

The North San Diego County Transit Development Board (now NCTD) was established in 1976 by California Senate Bill No. 802 to plan, construct, and operate

public transit in North San Diego County.³ Seventy-seven million dollars are allocated on a per capita basis to the North San Diego County Transit Development Board for expenditure on rail projects within San Diego County. Cal. Pub. Util. Code § 99642 (West).

As an entity of the State, receiving state funding, NCTD's adherence to state environment laws and the California's Coastal Management Program is not regulation by the state but a form of self-governance by the owner. Congress does not deprive a state of its sovereign authority over its internal governance, at least not without a particularly clear statement of intent. *Id.* at 66. There is no indication in the language of the ICCTA that Congress intended to preempt such self-governance. *Id.* at 52. "It appears ... extremely unlikely that Congress, in enacting the ICCTA, intended to preempt a state's adoption and use of the tools of self-governance..., or to leave the state, as owner, without any means of establishing the basic principles under which it will undertake significant capital expenditures." *Id.* at 65.

The analysis is different when a state entity such as NCTD is the owner of the railroad. Courts assume Congress did not intend to upset the constitutional balance of state and federal powers. For example, ICCTA does not preempt historic state police powers over health, safety and land use matters. Imposing increased costs on railroad

³ In 1995, the legislature changed the North San Diego County Transit Development Board's name to North County Transit District with the passing of California Assembly Bill No. 1238.

improvements is not a basis to preempt state law with a remote or incidental effect on rail transportation. *Id.* at 63 citing *Franks*, 593 F.3d at 410.

The STB has afforded similar recognition that while a locality cannot require permits prior to rail line construction, “railroads have some responsibility to . . . address local concerns in a way that makes sense and protects public health and safety with pragmatic solutions.” *Id.* at 64 quoting *Ayer*, supra, 2001 WL 458685, *7 (internal quotations omitted). “Examples of solutions that appear . . . reasonable include conditions requiring railroads to (1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit, (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures. . . ; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time . . .” *Id.* at 64 quoting *Ayer*, supra, 2001 WL 458685, *7.

A state agency does not engage in “regulation” within the meaning of the ICCTA when applied to state law governing the state’s “own” rail project subject to certain state guidelines. *Eel River* at 65. How the state itself and the state’s own subsidiaries must abide by their own legal responsibilities is not a matter of regulation subject to the ICCTA, but a matter of self-governance. *Id.*

What NCTD is proposing is a form of regulatory anarchy the Courts have forewarned about. NCTD cannot be afforded a carte blanche right to avoid the requirement to harmonize the CZMA and the State's ability to govern over its own state agencies and work on state property.

“[T]he zone of autonomy belonging to the state when it is the owner, such that within the deregulated zone, the state as owner may make its decisions based on its own guidelines rather than some anarchic absence of rules of decision.” *Id.* at 66. This means state and local laws serve as an internal means of self-governance, not regulation, “governing the processes by which state agencies may develop or approve projects.” *Id.* “This principle cautions against an interpretation of a preemption clause that encroaches on states’ internal authority over the structure of their governments.” *Id.* at 66-67 citing *Iskanian v. CLS Transp. Los Angeles, LLC* 327 P.3d 129 (Cal. 2014); *Printz v. United States*, 521 U.S. 898, 928 (1997).

What this boils down to is that ICCTA can by no means effectuate a blanket preemption of state law, particularly when the projects in question are exempt from STB review and potentially outside of the STB's jurisdiction. There can be no preemption of other federal laws, specifically the CZMA and the state laws preserved thereby. NCTD must follow its own internal rules, including those laws promulgated for the Coastal Commission, which apply to the public agency charged with maintaining and further improving property such as the Del Mar Bluffs, located entirely within the Coastal Zone.

**V.
CONCLUSION**

For the reasons stated above, NCTD's Petition should be denied. It is unripe, and even if the Board considers the merits of the Petition, it should find no preemption.

CITY OF DEL MAR

/s/ Peter A. Pfohl
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: October 5, 2020

Its Attorneys

ATTACHMENT 1

SAN DIEGO REGIONAL RAIL ALTERNATIVE ALIGNMENT STUDY



ALTERNATIVE ALIGNMENT STUDY STATUS

Schedule:

Study is expected to take 18 – 24 months

Budget

Estimated \$5 million

IMPORTANCE OF THE LOSSAN RAIL LINE

The Los Angeles-San Diego-San Luis Obispo (LOSSAN) corridor is the economic lifeline for the San Diego region and serves as a crucial link for national and international commerce. The corridor moves nearly 8 million passengers per year and is the second busiest intercity corridor in the nation. In terms of freight, BNSF Railway runs more than 30,000 freight cars per year along the corridor, carrying about \$1 billion worth of goods. The corridor plays a vital role in our nation's defense by providing rail access to the Pacific Fleet, a network of key military bases throughout San Diego County and the Port of San Diego. The corridor also provides access to the region's 43 miles of beaches and recreational areas. SANDAG is currently commissioning an in-depth analysis of the economic impacts of LOSSAN rail corridor to the San Diego region.

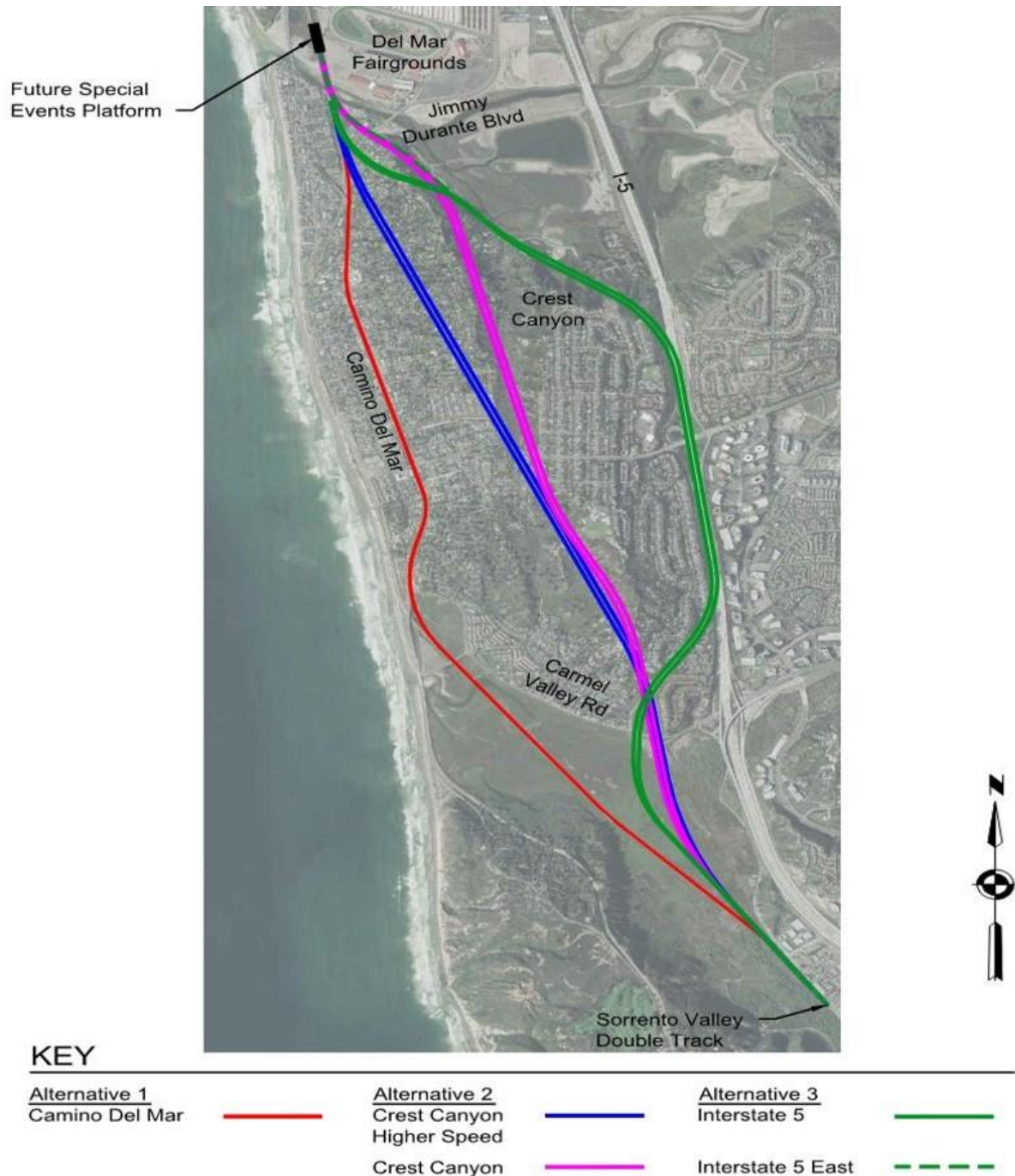
NEED FOR ALTERNATIVE ALIGNMENT STUDY

Recent erosion of the Del Mar Bluffs has underscored the immediate need to identify a long-term solution for the corridor. Near-term improvements will be constructed in early 2020 (known as Del Mar Bluffs 4), and the San Diego Association of Governments (SANDAG) and the North County Transit District (NCTD) are seeking \$100 million to complete the bluff stabilization work (known as Del Mar Bluffs Phases 5 and 6).

Simultaneously, to ensure the long-term viability of the corridor, SANDAG is seeking \$5 million to evaluate alternative strategies to move the tracks completely off the bluffs. The scope of this work would include:

- Alternative alignment analysis (including preliminary engineering)
- Safety and speed assessment of existing corridor conditions
- Benefits and costs of alternative alignments and improvements (such as speed, safety, and ridership compared to capital costs, impacts of sea level rise, right of way, and constructability)
- Service plans for all operators
- Implementation plan for service and capital improvements
- Future alignment extensions

POTENTIAL FUTURE ALIGNMENT ALTERNATIVES



FOR MORE INFORMATION OR TO SIGN UP FOR PROJECT UPDATES:

Visit: KeepSanDiegoMoving.com/PSI | Call: (858) 549-RAIL | TTY: (619) 699-1904 | Email: LOSSANRail@KeepSanDiegoMoving.com



sandagregion | gonctd



SANDAG | GoNCTD



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ATTACHMENT 2

Del Mar Bluffs Past, Current, and Future Stabilization Efforts



A. Drainage Improvements



B. Support Column Installation



C. Retaining Wall Improvements

LEGEND

-  Completed Stabilization Efforts
(Includes approximately 200 support columns and drainage improvements.)
-  Phase 4 Del Mar Bluffs Stabilization
(Includes the installation of support columns, replacement of a drainage channel, concrete channel improvements, storm chute outfalls, and headwall stabilization)
-  Phase 4
 - A. Drainage Improvements
 - B. Support Column Installation
 - C. Retaining Wall Improvements
-  Future Planned Del Mar Bluffs Stabilization
(Includes the installation of support columns, seismic improvements, general drainage improvements, concrete lagging, and base reinforcement)
-  Existing Support Columns
(Exact number of existing columns not shown)



ATTACHMENT 3

CALIFORNIA COASTAL COMMISSION

455 Market Street, Suite 228
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400



W 13b

Filed:	3/12/20
3 rd Month:	6/12/20
6 th Month:	9/12/20
Staff:	LS-SF
Staff Report:	7/24/20
Hearing Date:	8/12/20

STAFF REPORT: REGULAR CALENDAR

Consistency Certification No.:	CC-0001-20
Applicant:	San Diego Association of Governments
Location:	Mile Posts 244.30 and 244.25 (near 13 th Street and 15 th Street, respectively) on the North County Transit District railroad right-of-way on the Del Mar Bluffs, City of Del Mar, San Diego County (Exhibit 1).
Project Description:	After-the-fact review of emergency bluff stabilization measures constructed between November 30, 2019, and December 15, 2019, to preserve railroad trackbed support and railroad operations due to a large storm event that overwhelmed drainage systems and caused significant bluff erosion in two locations west of the trackbed.
Staff Recommendation:	Concurrence

SUMMARY OF STAFF RECOMMENDATION

The San Diego Association of Governments (SANDAG) submitted an after-the-fact consistency certification for two emergency bluff stabilization measures constructed on the Del Mar Bluffs between November 30 and December 15, 2019. On November 28 and 29 a rainstorm event overwhelmed the drainage systems in the North County Transit District's (NCTD) railroad right-of-way (ROW). Drainage inlets were blocked with sediment and vegetation, and storm water runoff overflowed the railroad trackbed at Mile Posts 244.30 and 244.25 (near 13 Street and 15th Street, respectively), causing significant erosion immediately west of the trackbed at the two locations. SANDAG determined that

immediate installation of bluff stabilization measures was needed in order to protect the trackbed and resume safe rail operations. SANDAG informed Commission staff on December 3, 2019, of the emergency measures completed at MP 244.30 and to be undertaken at MP 244.25, and also committed to submitting an after-the-fact consistency certification for the emergency measures.

The consistency certification submitted on March 12 included a description of the emergency repairs. The work at MP 244.30 consisted of removal of loose material from the failed slope area and excavation to a depth where hard material was encountered. Two steel plates were installed behind existing steel H-piles and the eroded area was backfilled with concrete slurry. The repair work at MP 244.25 consisted of excavation down to the stable Del Mar Formation, approximately eight feet below the top of the existing soldier piles. Steel dowels were drilled into the eight soldier piles, steel reinforcement was installed between the piles, and shotcrete was installed to create a lagging wall between the exposed piles. The shotcrete was colored Mesa Bluff and was sculpted by hand to blend in with the surrounding bluff.

The emergency repair project was necessary to protect the railroad trackbed and public safety and is similar to previous upper bluff stabilization projects the Commission has reviewed and approved on the Del Mar Bluffs. However, the two walls will alter natural landforms and erosion patterns on the bluffs and are therefore inconsistent with Section 30253 of the Coastal Act. However, Section 30235 permits approval of the project despite this inconsistency because it is required to protect an existing structure in danger from erosion, is designed to mitigate adverse impacts to shoreline sand supply and other coastal resources, and is the least environmentally damaging feasible alternative. The staff recommends the Commission find the project is inconsistent with Section 30253 of the Coastal Act, but that the override provision of Section 30235 allows for concurrence with the project despite that inconsistency.

The emergency repair project was designed and constructed to minimize the alternation of the bluffs and be visually compatible with the surrounding area. The two walls are similar to existing visible bluff stabilization projects concurred with previously by the Commission and include design and treatment methods to minimize adverse effects on scenic views. The staff recommends that the Commission find the emergency project consistent with the view protection policy of the Coastal Act (Section 30251).

SANDAG's consistency certification also includes information on its future Del Mar Bluffs Stabilization Projects 5 and 6, ongoing planning efforts for relocating the railroad off the bluffs, development of sea level rise vulnerability analysis and hazard adaptation reports, and progress reports and timelines to keep the Commission informed about the status of these projects and planning studies. SANDAG will continue to submit consistency certifications for Del Mar Bluffs stabilization projects and continue its coordination with the Commission staff during project design and implementation to ensure the protection of critical public infrastructure and coastal resources consistent with the Coastal Act.

The staff recommends that the Commission **concur** with consistency certification CC-0001-20. The motion and resolution are on Page 4 of this report. The standard of review for this consistency certification is the Chapter 3 policies of the Coastal Act.

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EXHIBITS

- [Exhibit 1](#) – Project Location Map
- [Exhibit 2](#) – Photo of Component 1 Project Site Pre-Construction
- [Exhibit 3](#) – Photo of Component 1 Project Site Post-Construction
- [Exhibit 4](#) – Photo of Component 2 Project Site Pre-Construction
- [Exhibit 5](#) – Photo of Component 2 Project Site Post Construction
- [Exhibit 6](#) – Plan View of Potential Modification to Component 2 Site
- [Exhibit 7](#) – CC-0001-18 Findings Excerpt on Jurisdiction

I. APPLICANT'S CONSISTENCY CERTIFICATION

The San Diego Association of Governments (SANDAG) has certified that the proposed activity (CC-0001-20) complies with the California Coastal Management Program and will be conducted in a manner consistent with that program.

II. MOTION AND RESOLUTION

MOTION:

I move that the Commission **concur** with consistency certification CC-0001-20.

Staff recommends a **YES** vote on the motion. Passage of this motion will result in an agreement with the certification and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

RESOLUTION:

The Commission hereby **concurs** with consistency certification CC-0001-20 by SANDAG on the grounds that the project is consistent with the enforceable policies of the California Coastal Management Program.

III. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION

On March 12, 2020, the San Diego Association of Governments (SANDAG) submitted an after-the-fact consistency certification to the Commission for emergency bluff stabilization measures constructed on the Del Mar Bluffs between November 30 and December 15, 2019 ([Exhibit 1](#)). On November 28 and 29, 2019, a rainstorm event overwhelmed the drainage systems in the North County Transit District's (NCTD) railroad right-of-way (ROW). Drainage inlets were blocked with sediment and vegetation, storm water runoff overflowed the railroad trackbed at Mile Posts 244.30 and 244.25 (near 13 Street and 15th Street, respectively), and runoff spilled over the edge of the 50- to 70-foot-high bluff causing significant erosion immediately west of the trackbed at the two locations ([Exhibits 2 and 4](#)). The erosion of the bluff edge back towards the trackbed temporarily halted train operations over the Thanksgiving weekend. SANDAG determined that immediate installation of bluff stabilization measures were needed in order to protect the trackbed at the edge of the coastal bluff and to resume safe rail operations.

On Saturday November 30, SANDAG began and completed emergency repairs at the MP 244.30 site ([Exhibit 3](#)). Passenger and freight train service resumed at reduced speeds and on-site monitoring was significantly increased to ensure public safety. Repairs at the MP 244.25 site were undertaken on December 14 and 15 and required suspending all railroad operations between the Solana Beach and Sorrento Valley stations ([Exhibit 5](#)). Train service across the Del Mar Bluffs resumed on December 16.

SANDAG informed Commission staff on December 3, 2019, of the emergency measures completed at MP 244.30 and to be undertaken at MP 244.25, and also committed to submitting an after-the-fact consistency certification for the emergency measures. Commission staff then discussed with SANDAG staff the provisions in the federal consistency regulations that provided for implementation of emergency measures prior to full compliance with the federal consistency requirements of a State coastal management program. On December 9 SANDAG submitted brief descriptions of the repair work completed at the 15-foot-wide eroded area at MP 244.30 and the proposed work at the 40-foot-wide eroded area at MP 244.25. Commission staff worked with SANDAG staff during the months of January and February on the required elements for the after-the-fact consistency certification, including more detailed descriptions of the emergency work completed, schedules for future Del Mar Bluffs stabilization projects, updated plans for relocating the railroad off the bluffs to an inland alignment, and schedules for completion of an updated sea level rise vulnerability analysis and bluff retreat analysis for the Del Mar Bluffs railroad corridor.

The consistency certification submitted on March 12, 2020, included the following description of the emergency repairs completed in late 2019:

Component 1 - MP 244.30 (13th Street Area)

Pre-Project Condition

As a result of significant erosion that resulted from the November 28-29 storm event, a 15-foot-wide area eroded at MP 244.30, within 10 feet of the edge of the railroad tracks (attachment 1; photos 1-3) [\[Exhibit 2\]](#). The eroded area was located within an area that was previously reinforced with soldier piles and a steel H-pile wall as part of the Del Mar Bluffs 2 Stabilization Project in 2007 and a separate NCTD maintenance project in 1996.

Improvements

SANDAG and NCTD mobilized Mid Coast Transit Constructors (MCTC) to perform the emergency repair work of Component 1 on November 30, 2019. The repair work consisted of the installation of a slurry backfill. Loose material from the failed slope area was removed, and the area was then excavated to a depth where hard material was encountered (approximately 10 feet below the top of the existing steel H-piles). The contractor then installed two steel plates (each measuring eight feet by 10 feet) behind the existing piles and subsequently backfilled the eroded area to fill the void left by the erosion (attachment 1; photos 4-6) [\[Exhibit 3\]](#). This repair is expected to remain in place until the steel soldier pile wall is replaced or modified as part of the future Del Mar Bluffs Stabilization Project 5, which is expected to enter the construction phase in 2021, or when funding is secured.

Alternatives

Due to the need for immediate action due to safety concerns, and limited availability of materials, other alternatives were not analyzed. Furthermore, no alternatives were analyzed for this component because the improvement consisted of the repair of a portion of an existing damaged area. The filling of the eroded area was the least impactful and most cost-effective solution to repair the localized erosion.

Component 2 – MP 244.25 (15th Street Area)

Pre-Project Condition

The localized erosion at MP 244.25, which is located approximately 250 feet north of MP 244.30, caused by the November 28-29 storm event resulted in an approximate 77-foot-wide eroded area immediately west of the railroad tracks (attachment 1; photo 7) [\[Exhibit 4\]](#). Soldier piles that were installed as part of the 2007 Del Mar Bluffs 2 Stabilization Project, which became exposed as a result of the erosion, acted as designed and resulted in soil arching between the piles, which supported the lateral loads received from passing trains. Trains were able to operate before this emergency repair was completed, but at significantly reduced speeds and with onsite track monitoring 24/7 to ensure that the erosion did not encroach into the critical railroad zone of influence. Due to the extent of the localized erosion in this area, the proximity of the erosion to the railroad zone of influence, and the depth at which the soldier piles were exposed, a permanent engineered solution was required in order to ensure public safety.

Improvements

The engineering firm of record on previous Del Mar Bluffs Stabilization Projects, HTNB, designed a permanent lagging solution in conjunction with Leighton Consulting, Inc. for geotechnical recommendations, Jacobs Engineering Group, Inc. (representing NCTD) for safety of train operations, and MCTC for constructability (attachment 2). SANDAG and NCTD mobilized MCTC on December 14, 2019, and all the work was completed on December 15, 2019. The emergency repair area was excavated until the stable Del Mar Formation was reached, which was present approximately 8 feet below the top of the soldier piles. Steel dowels were drilled into the soldier piles and steel reinforcement was subsequently installed between the piles in preparation of shotcrete installation, which was required to create a lagging wall between the exposed piles. The shotcrete was colored Mesa Bluff and was sculpted by hand to provide a rock appearance to blend in with the surrounding bluff (attachment 1; photos 8-13) [\[Exhibit 5\]](#). This emergency repair is expected to remain in place until the tracks are permanently relocated off the bluffs.

Alternatives

The first alternative considered was to implement a temporary fix. This would have consisted of installing temporary end shoring between the piles as an initial measure to prevent further erosion while a long-term solution was designed. This alternative was not utilized because installation of the end shores would have disrupted the soil arching between the piles, which would have exacerbated the localized erosion.

Another alternative that was analyzed was to use steel plates and concrete slurry backfill, which would have been similar to the repair technique that was utilized in the first component at MP 244.30. This alternative would have involved the installation of steel plates behind the soldier piles to retain the material supporting the trackbed. However, the soldier piles in this area have tie back anchors that begin in the pile cap and extend at an angle down into the bluff. The proximity of the tie backs to the top of the pile would have made it difficult to install the steel plates without compromising the integrity of the tie back. This alternative was not utilized due to the risk of damaging the tie back anchors.

The last alternative that was analyzed was the installation of a cast in place concrete lagging wall. This alternative was consistent with the original lagging design included as part of Del Mar Bluffs 2 Stabilization Project. The overall approach was similar to that of the constructed shotcrete wall; however, it would have first required the installation of wood formwork between the piles before concrete could have been poured. This alternative posed constructability issues as the formwork would be difficult for the workers to construct within the narrow work window. Additionally, installing the formwork for the rear of the wall would have required excavating further toward the track than the shotcrete alternative. Preserving the soil arching between the piles was required to maintain the stability of the track, and the additional excavation required for the cast in place option would have potentially encroached into the critical railroad zone of influence. Due to the constructability issues, and the potential to disrupt the stability of the track, this alternative was eliminated.

These November and December 2019 emergency repair measures are evaluated for consistency with the applicable Chapter 3 Coastal Act policies in Sections D and E of this report. In addition, SANDAG has asked the Commission to review the consistency of possible future work at the shotcrete wall that it may undertake (and which it formally incorporated into its consistency certification on July 17, 2020) in order to address what the City of Del Mar believes is the visual prominence of this emergency repair project. This work is relatively minor and is described in the visual resources section of this report.

The additional information included in SANDAG's consistency certification regarding schedules for future Del Mar Bluffs stabilization projects, updated plans for relocating the railroad off the bluffs to an inland alignment, and schedules for completion of an updated sea level rise vulnerability analysis and bluff retreat analysis for the Del Mar Bluffs railroad corridor is examined in Section F of this report. These materials are provided by SANDAG

for informational purposes only and SANDAG is not requesting at this time that the Commission analyze those schedules and plans for consistency with the Coastal Act.

B. COMMISSION JURISDICTION AND STANDARD OF REVIEW

The Commission, SANDAG, and NCTD have had a long disagreement over whether SANDAG and NCTD rail projects are subject to state coastal development permit requirements. Typically, a project triggers federal consistency review because SANDAG is required to obtain a federal Clean Water Act Section 404 permit for the project and/or because it involves federal funding. The various positions regarding state permit requirements are outlined in [Exhibit 7](#), taken from Commission findings concurring with a recent SANDAG consistency certification (CC-0001-18). As reflected in that discussion, the Commission has generally agreed during past reviews, and is repeating this interpretation here, that as long as all the entities can agree to the activity's consistency with the Coastal Act, it is not necessary to resolve any question as to the necessity of a coastal development permit. For the subject emergency bluff stabilization measures, SANDAG submitted an after-the-fact consistency certification to the Commission.

The federal consistency regulations (15 CFR Section 930.32(b)) provide a process whereby federal agencies, when faced with an emergency or other similar unforeseen circumstance, can undertake an activity consistent to the maximum extent practicable with the enforceable policies of a state coastal management program, to the extent that the emergency/circumstance allows. Federal agencies shall consult with State agencies and attempt to seek State agency concurrence prior to addressing the emergency. Once the emergency/circumstance has passed, Federal agencies shall comply with all applicable provisions of the federal consistency regulations regarding procedures for submittal of a consistency or negative determination.

However, the federal consistency regulations for activities requiring a federal license or permit (under which the subject consistency certification was submitted), do not provide a similar provision for an after-the-fact consistency certification submittal. Nevertheless, the Commission has previously conducted after-the-fact reviews of emergency actions undertaken by non-federal entities that adhere to the provisions of 15 CFR Section 930.32. As noted above, SANDAG informed the Commission staff last December of the emergency measures it was constructing on the Del Mar Bluffs, committed to submit an after-the-fact consistency certification for that activity, and committed to work with the Commission staff on the required elements of that submittal.

The standard of review for this and all consistency certifications is the Chapter 3 policies of the Coastal Act. A Certified Local Coastal Program (LCP), such as the City of Del Mar's, may be used by the Commission as guidance or provide background information for interpreting how to apply the Chapter 3 policies of the Coastal Act, but an LCP is not the legal standard of review for a consistency certification under the provisions of the California Coastal Management Program.

C. OTHER GOVERNMENTAL APPROVALS AND CONSULTATIONS

SANDAG did not undertake any formal consultation with other government agencies prior to the construction of the emergency bluff stabilization measures. Subsequently, SANDAG did discuss the emergency work with the Corps of Engineers and the San Diego Regional Water Quality Control Board and informed both agencies that none of the work took place in jurisdictional waters. (SANDAG later sent both agencies a copy of the subject consistency certification.) On December 5, 2019, the executive directors of SANDAG and NCTD sent a memo to the Board of Directors of both agencies and key stakeholders, including the City of Del Mar, regarding the status of the emergency bluff stabilization measures. On July 20, 2020, SANDAG staff made a presentation to the Del Mar City Council regarding the status of: (1) emergency repair work completed last December; (2) SANDAG's development of a response to the City's request for a modification to the shotcrete wall installed at MP 244.25; (3) ongoing construction of the Del Mar Bluffs Stabilization Project 4; and (4) planning for future bluff stabilization projects and relocation of the railroad off the bluffs.

D. GEOLOGIC HAZARDS

Coastal Act Section 30235 states:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible.

Coastal Act Section 30253 states in part:

New development shall do all of the following:

- (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
- (b) 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 emergency repair work constructed by SANDAG in late 2019 is similar to other upper bluff stabilization measures the Commission has reviewed and approved over the last 20 years along the 1.6-mile-long segment of railroad that crosses the Del Mar Bluffs. To date, SANDAG and NCTD have completed extensive field investigations and geotechnical studies, characterized the nature and cause of bluff erosion, identified and prioritized the

areas in need of stabilization, and completed numerous bluff stabilization projects, including the following:

- In CDP 6-96-156, the Commission authorized installation of 24 soldier piles at 13th Street, including visual treatment for the top of the exposed piles so that the project would blend in with the surrounding terrain.
- In 1998 drainage improvements were constructed on the top of the bluffs.
- In CDP 6-01-081, the Commission authorized the installation of 12 soldier piles between 7th and 8th Streets, including conditions requiring erosion controls, best management practices, annual reporting, and Commission staff review of staging and construction plans, monitoring and maintenance plans, and the use of materials and colors.
- The Commission concurred with CC-048-04 for SANDAG's Del Mar Bluffs Stabilization Project 2 for the installation of 1,326 linear-feet of soldier pile walls on the upper bluffs.
- The Commission concurred with CC-020-10 for SANDAG's Del Mar Bluffs Stabilization Project 3 for the installation of 1,060 linear-feet of soldier pile walls at seven additional priority areas along the bluffs.
- The Commission concurred with CC-0004-18 for SANDAG's Del Mar Bluffs Stabilization Project 4 for the installation of a variety of bluff stabilization and repair projects to protect the railroad trackbed, including bluff-top drainage improvements and slope failure repairs near: (1) 7th Street using an earth-colored cement slurry buttress fill within the eroded area of the upper bluff; (2) Anderson Canyon using new soldier piles, steel H-piles, concrete lagging, and backfilling; (3) 7th and 8th Streets using soldier pile walls on the upper bluff; and (4) 9th and 10th Streets using steel H-piles and lagging walls.

In concurring with CC-0004-18, the Commission found that:

The most recent geotechnical memorandum for the proposed project (Leighton Consulting, Inc., August 13, 2018) stated that the coastal bluffs supporting the rail alignment in the project area have a history of landslides and failures, and that the bluffs are subject to ongoing erosion and failures that could threaten the viability of rail service. This memorandum also stated that the average bluff retreat rate in the project area is 0.5 feet per year, and that bluff retreat is typically episodic with no retreat for some time and then several feet or more in one event. Segments of the pedestrian pathway on top of the bluff have eroded away and in some locations the coastal bluff has eroded to as close as 20 feet from the railroad track.

As noted in Section A of this report, the storm event, drainage failures, and subsequent bluff erosion that occurred in late November 2019 brought the edge of the eroding bluff to within 10 feet of the edge of the railroad track at MP 244.30 near 13th Street ([Exhibit 2](#)).

Section F of this report provides more information on the status of updated sea level rise analyses and the development of a long-term, phased adaptation plan to address the chronic erosion and safety issues in this area, including relocation planning.

In the above-referenced projects, the Commission found that bluff stabilization was necessary to protect the railroad trackbed and public safety and consistent with the geologic hazard minimization policies of Sections 30235 and 30253. The emergency repairs made to the upper bluff at MP 244.30 and MP 244.25, and which are the subject of this after-the-fact consistency certification, were also necessary to protect the railroad trackbed and are similar to previous bluff stabilization projects constructed on the Del Mar Bluffs.

In CC-0004-18 SANDAG agreed to incorporate numerous measures regarding maintenance and monitoring of bluff stabilization structures that it had previously included in CC-020-10. These measures include: (1) visual treatment plans for exposed soldier piles and grade beams; (2) annual monitoring and reporting (including to the Commission) on the status of stabilization structures, and following major storm events or earthquakes; (3) coordination with the City of Del Mar; (4) agreeing that future stabilization measures needing additional federal consistency review; and (5) Commission review of the status of stabilization measures and structures at the end of their design life and/or in the context of railroad relocation planning. This agreement ensured that SANDAG and the Commission will be made aware of any damage to or weathering of bluff stabilization structures. It also provided for consultation between the two agencies to determine whether structural repairs or other actions are necessary to protect the railroad trackbed and what type of federal consistency review may be needed for future repair actions. SANDAG has incorporated the two 2019 emergency repair projects into the maintenance and monitoring agreement outlined in CC-0004-18.

With these maintenance and monitoring provisions incorporated, the Commission finds that the emergency repair projects designed and constructed in November and December 2019 provide necessary protection to the railroad trackbed at two eroding locations on the Del Mar Bluffs. These projects will minimize risks to life and property, assure stability and structural integrity of the trackbed, and will neither create nor contribute significantly to erosion, geologic instability, or destruction of the two project sites or surrounding areas.

The projects will, however, alter natural landforms along bluffs and cliffs by altering natural erosion patterns at the site, and are therefore inconsistent with that portion of Section 30253. However, Section 30235 permits approval of cliff retaining walls and erosion control measures such as these, despite such inconsistencies, if the retaining structure is required to protect an existing structure in danger from erosion, the structure is designed to eliminate or mitigate its adverse impacts to shoreline sand supply and other coastal resources, and the proposed protective measure is the least environmentally damaging feasible alternative. Here, the railroad line was constructed prior to the passage of Proposition 20 and the Coastal Act and is therefore an existing legal structure that qualifies for shoreline protection. The rainstorms in November 2019 caused the railroad trackbed to be in danger due to erosion. These measures were also necessary in order to protect the trackbed and were the least environmentally damaging alternative to stabilize the trackbed. (See Section A for a discussion of alternatives to the proposed project, and Section F for a

discussion of a longer-term alternative that will help preclude the need for continued armoring of this section of the coast.) Finally, the development did not include work on the beach, will only cause minimal impacts to local sand supply, and – as described elsewhere in these Findings – does not have other coastal resource impacts that require mitigation. Further, CC-0004-18 required SANDAG to prepare (in coordination with the North County Transit District and the City of Del Mar) a comprehensive long-term public access improvement plan for the Del Mar area, which will be submitted to the Commission by February 2022. This previously required public access improvement plan will ensure the public access and sand supply impacts of the various bluff stabilization projects, including the subject emergency projects (which are located within the geographic area covered by CC-0004-18), will adequately be mitigated.

Should SANDAG not implement the above-referenced maintenance and monitoring measures, the Commission can use the federal consistency reopener provisions of the Coastal Zone Management Act (15 CFR Sections 930.65 and 930.85) and determine whether the two emergency projects remain consistent with the policies of the California Coastal Management Program (i.e., Chapter 3 of the Coastal Act). Therefore, the Commission finds that the emergency Del Mar Bluffs stabilization projects constructed in November and December 2019 are inconsistent with Section 30253 of the Coastal Act, but that the override provision of Section 30235 permits the project despite that inconsistency.

E. SCENIC VIEWS

Coastal Act Section 30251 states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

SANDAG evaluated the potential effects on scenic views of the two emergency repair projects. The smaller project at MP 244.30 near 13th Street is at a location within the railroad right-of-way such that it is not very visible from the beach or public access pathways in the area. One of the installed steel plates is located behind existing wooden lagging and the second steel plate is located partially behind existing rock on the bluff face ([Exhibit 3](#)). The end result is even when the project site is viewed from the beach, there is no noticeable change in the appearance of the top of the bluff given the existing wooden lagging wall at this location.

As described in Section A (Project Description) of this report, the 77-foot-wide repair project at MP 244.25 near 15th Street required an engineering solution that accommodated the existing soldier piles and tie back anchors at the project site. The constructed shotcrete wall and the tops of the exposed soldier piles were colored and hand textured to match the

appearance of the existing bluff, and are similar in appearance to other bluff stabilization structures concurred with by the Commission in this region ([Exhibit 5](#)). SANDAG concluded that the bluff-top structure may be noticed by beachgoers but not in a significant way and would likely not draw viewers' attention.

However, the City of Del Mar, in a letter to the Commission on April 21, 2020, stated that the emergency repair work should include mitigation measures to address the impacts to aesthetics that the walls create. The City states that:

. . . the emergency repair resulted in exposed vertical walls visible from the beach below and the excavated soil was not replaced. While the repair did include shotcrete wall treatments intended to blend the wall face into the adjacent bluff, the City requests mitigation be required to cover the walls entirely with natural material including soil and native plantings.

The City further stated that while the location of the walls was justified to address the emergency situation that developed in late November 2019, the existing appearance of the walls are inconsistent with policies in the City's LCP (in particular DMMC Section 30.50.060) which call for "feasible mitigation measures to minimize adverse environmental effects," in this case aesthetics.

To address this concern, on July 17 SANDAG submitted to the Commission a document which described a potential modification that could be made to the shotcrete wall installed last December at MP 244.25 to further reduce the visual appearance of the wall. SANDAG examined potential options for covering the wall face with native soil and adding landscaping to control further erosion of the steep slope beneath the wall. A topographic survey of the wall area was completed on July 7 and determined that: (1) the wall has an exposed height varying from 3.5 to 6.5 feet; (2) the existing slope below the wall that drops to the beach sits at an angle of approximately 1:1; and (3) there is a flat area at the base of the wall approximately 3 feet wide along the southerly part of the wall and this flat area widens to a maximum of 10 feet at the northern end of the wall ([Exhibit 6](#)).

In the July 17 document SANDAG outlined a potential project at this location:

The project team has concluded that a potentially feasible option would be to place fill in the flat area in front of the lagging wall to raise the grade up to 3 feet and construct a new slope at an angle varying from 1:1 to 1.5:1 (Attachments 1 and 2). A limited compaction effort would be proposed using equipment placed on the uphill side of the wall. Although a mechanically compacted or geogrid reinforced slope would be less prone to erosion, it is not feasible due to the small area, limited access, and the potential of further eroding the slope. Additionally, a limited compaction effort is desirable to encourage plant growth. The fill placement would cover approximately 30% (130 SF) of the exposed wall; covering the entire width of the wall is not feasible due to the limited width of the flat area in front of the southerly portion of the wall. Covering the entire height of the wall is also not feasible as the slope of the fill would be too steep and unstable.

An unirrigated hydroseed mix with a bonded fiber matrix could be applied to the entire slope from the bottom of the wall to the toe of the slope at the beach. The seed mix would utilize native salt tolerant species and be comprised of species that do not require regular maintenance. Container plants such as Salt Grass plugs could be used in the flatter accessible areas to encourage taller massing in front of the wall as well as to provide a stringer root structure to hold loose surface materials in place (Attachments 1 and 2). Although cost estimates have not yet been evaluated, if costs are reasonable, it is recommended that the bonded fiber matrix and hydroseed mix be applied to the entire slope, even if fill is not placed in front of the wall. Vegetation growth from the bonded fiber matrix and hydroseed matrix would help stabilize the steel 1:1 slope below the wall.

Although this option is potentially feasible, there is a risk of future erosion to fill placed against the wall and to the slope below. Bluff erosion is episodic and therefore unpredictable; storm damage and wave action eroding the toe of the slope are also factors in future erosion of the area.

SANDAG also considered other alternatives to addressing both the appearance of the wall and the eroding slope below the wall. A turf reinforced mat system with hydroseeding is not viable due to the lack of support for anchoring the system on the eroding bluff face and the visual appearance of the mat. Benching of the slope and adding fill to promote vegetation growth is not viable as it would require excavating into an existing unstable slope. A third alternative considered covering the existing wall and soldier piles with engineered fill at a slope of 1.5:1 with geogrid reinforcing placed at 2-foot intervals vertically. However, this would also require construction of a new retaining wall at the toe of the bluff. SANDAG determined that the cost, permitting requirements, and potential effects associated with a shoreline protection structure make it infeasible for modifying the view of the shotcrete wall.

In a response to questions from Commission staff regarding the potential project described above, SANDAG stated that no final decision has been made about incorporating the project into the ongoing Del Mar Bluffs Stabilization Project 4 or the future Del Mar Bluffs Stabilization Project 5. That decision will be made at a future date after engineering design and cost estimates are completed for the design alternative described above. SANDAG further stated that it would like to involve and coordinate with NCTD and the City of Del Mar prior to making a final decision about the modification to the shotcrete wall. Despite these current timing constraints, SANDAG requested that the Commission review the proposal as a part of its analysis of CC-0001-20.

The Commission agrees with SANDAG that the two emergency repair projects are similar to existing visible project elements associated with bluff stabilization projects concurred with previously by the Commission in consistency certifications CC-048-04, CC-020-10, and CC-0004-18. The two upper bluff walls included design and treatment methods to minimize to the extent practicable any adverse effects on scenic views, particularly given the emergency nature of the work, the requirement to protect the railroad trackbed from failure, the limitations on stabilization alternatives at this location, and the inherent instability of the bluffs.

Should future remedial measures be necessary to protect the constructed emergency projects, SANDAG will consult with the Commission to determine what if any additional federal consistency review is necessary to ensure that those remedial measures do not create adverse effects on scenic resources in the project area. In addition, SANDAG has agreed to incorporate into the subject consistency certification the maintenance and monitoring measures and commitments regarding bluff stabilization structures included in the Del Mar Bluffs Stabilization Project 4 (CC-0004-18). Those measures include visual treatment plans for exposed soldier piles and grade beams, annual monitoring and reporting (including to the Commission) on the status of stabilization structures, and following major storm events or earthquakes, coordination with the City of Del Mar, future stabilization measures needing additional federal consistency review, and Commission review of the status of stabilization measures and structures at the end of their design life and/or in the context of railroad relocation planning.

While the Chapter 3 policies of the Coastal Act, including the view protection policy of Section 30251, are the standard of review for federal consistency certifications, the Commission acknowledges the City of Del Mar LCP and the guidance it can provide to the Commission in its analysis of project consistency with the view protection policy of the Coastal Act. The Commission finds that the coloring and texturing incorporated into the emergency repair projects served as feasible mitigation measures to minimize the effects of the walls on scenic resources. The Commission also finds that SANDAG's potential modification to the shotcrete wall (as described above), while not necessary to bring the shotcrete wall into consistency with the view protection policy of the Coastal Act, would nevertheless serve as an additional visual mitigation measure and its construction would be consistent with that policy. Therefore, the Commission encourages SANDAG to implement the potential modification to the shotcrete wall.

In conclusion, the Commission finds that the two emergency repair projects at MP 244.30 and MP 244.25 were designed and constructed to minimize the alternation of the bluffs, be visually compatible with the surrounding area, and protected scenic views along the shoreline. The Commission also finds that the potential modification to the shotcrete wall at MP 244.25 (which, as discussed previously, SANDAG has incorporated into this consistency certification) is designed to further minimize the appearance of the wall from the adjacent beach area. Therefore, the Commission finds that the emergency Del Mar Bluffs stabilization projects constructed in November and December 2019, and the potential modification to the wall, are consistent with the view protection policy of the Coastal Act (Section 30251).

F. UPDATE ON FUTURE BLUFF STABILIZATION PROJECTS AND PLANNING FOR RAILROAD RELOCATION

The emergency repairs analyzed in this consistency certification represent one in a series of measures to stabilize the blufftop railroad corridor in the face of increasing hazards associated with erosion and climate change, including sea level rise and more frequent and extreme storm events. SANDAG has addressed these hazards in part through large-scale bluff stabilization projects that have resulted in a significant hardening of the Del Mar Bluffs. Additional projects – Del Mar Bluffs Stabilization Projects 5 and 6 – are planned to address expected hazards to the railroad corridor over the next 20 to 30 years. These

projects have been and will continue to be necessary to protect the railroad, which is considered critical infrastructure under the Coastal Act. However, these bluff stabilization projects are also implemented at a cost to other coastal resources, including visual resources and the natural process of bluff erosion and sediment movement within the coastal ecosystem.

The risks to the railway corridor as well as the necessary monetary and resource costs to maintain the existing infrastructure will only increase with time. To address this ongoing situation, Commission staff is working with SANDAG staff to develop a long-term planning solution that protects critical railway use and other coastal resources associated with the bluff. In January 2020, as part of discussions related to the emergency repairs included in this consistency certification, Commission staff and SANDAG staff discussed the need to accelerate the development of several medium- and long-term planning elements associated with the railroad corridor. Specifically, these elements include:

1. An updated and more detailed sea level rise vulnerability analysis for the Del Mar Bluffs railroad corridor, using the Commission's most recent sea level rise forecasts and the "H++" sea level rise planning scenario identified by the California Ocean Protection Council. This analysis will need to examine the potentially severe effects from that scenario on railroad infrastructure in and adjacent to the Del Mar Bluffs corridor. This vulnerability analysis must also include an updated bluff retreat analysis, based in part on the effects to bluff stability from sea level rise and associated wave attack at the toe of the bluffs.
2. A plan and timeline for development of a phased, long-term adaptation plan for relocating the railroad off the bluffs. An update on the status of railroad relocation alternatives, sea level rise and hazards adaptation planning efforts, relocation scheduling, and the latest estimates on costs associated with railroad relocation. A schedule, with objectives and timelines, for reporting to the Commission on progress made by SANDAG on developing the long-term adaptation plan, including analysis of the City of Del Mar's sea level rise adaptation plan.
3. Details and estimated schedules for Del Mar Bluffs Stabilization Projects 5 and 6, including potential mitigation measures for unavoidable adverse effects to coastal resources arising from stabilization measures.
4. An update on the current threats to railroad operations on the bluffs, including bluff-top drainage problems (both within and east of the railroad right-of-way), bluff instability, wave attack at the toe of the bluffs, and sea level rise.
5. Preliminary plans for removing railroad infrastructure off the bluffs and at the toe of the bluffs once the railroad is relocated.
6. Status of development of the long-term public access plan SANDAG committed to undertake along with NCTD and the City of Del Mar for submittal to the Commission by February 2022.

Commission staff requested that SANDAG provide information on each of the elements above, including a process and timeline as appropriate, as part of the review of this federal consistency certification. In response, SANDAG submitted information on Del Mar Bluffs Stabilization Projects 5 and 6 and railroad relocation planning. The submittals are summarized below.

Del Mar Bluffs Stabilization Project 5

The project will focus primarily on upper bluff and bluff top stabilization measures including soldier pile installation for seismic stabilization of the bluffs, grading for erosion stabilization and control, repairing and upgrading the existing storm water drainage systems, installing new drains and subdrains to reduce infiltration into the bluffs, installing new piped drainage outlets to the beach, and installing lagging walls between soldier piles. SANDAG has agreed to develop any necessary environmental mitigation measures for DMB 5 in coordination with Commission staff. A new geotechnical study is incorporated into the project to review current geology and analyze conditions based on updated standards. The project will also include preparation of an updated bluff retreat analysis and an updated bluff stabilization plan. SANDAG anticipates beginning construction of the approximately \$65 million project in the year 2021 if funding is secured. A consistency certification is expected to be submitted to the commission in August 2020 with a hearing before the Commission in November or December.

Del Mar Bluffs Stabilization Project 6

SANDAG acknowledges that coastal erosion of the bluffs is anticipated to accelerate with climate change and sea level rise, both of which threaten the trackbed and rail operations. This project will develop a detailed sea level rise analysis and adaptation plan. The project will provide an assessment of the impacts of sea level rise on bluff stability and rail operations, and will analyze the trackbed and bluffs to identify locations and methods for bluff toe protection and bluff face stabilization in order to slow down future bluff retreat and to protect the bluffs from future sea level rise. An updated Del Mar Bluffs geotechnical report will outline potential bluff stabilization measures which could include replacement and enhancement of existing bluff toe walls, new bluff toe protection structures, bluff face landscaping, additional soldier piles, drainage improvements, and erosion control measures. SANDAG has agreed to develop any necessary environmental mitigation measures for DMB 6 in coordination with Commission staff. SANDAG anticipates that construction of this \$34 million project could start in the year 2024 if funding is secured. The submittal date of a consistency certification is unknown at this time.

Railroad Relocation off the Del Mar Bluffs

SANDAG states in its March 2020 Project Study Report that an update to the 2015 San Diego Regional Transportation Plan is in progress and is planned to be completed in October 2021. This will include an updated timeline of a

phased, long-term adaptation plan for relocating the railroad off the bluffs. SANDAG is also undertaking a LOSSAN corridor planning study to narrow down the long-term alternatives and alignments for the railroad, with completion expected in December 2021. SANDAG also notes that once funding is secured to relocate the railroad off the bluffs, a detailed plan to remove railroad infrastructure off the bluffs and from the toe of the bluffs will be developed. However, it also states that the permanent relocation solution (such as a tunnel option along an inland alignment underneath the City of Del Mar) could take decades to plan, fund, and construct.

Based on this future project information submitted by SANDAG in its consistency certification, a discussion of the above-referenced six planning elements follows.

For **Element 1**, Commission staff began discussions with SANDAG staff on what the sea level rise vulnerability analysis report should include, the process for collaboration, and the timeline for submitting the report. Commission staff has requested that SANDAG include in its upcoming consistency certification for DMB 5 a progress report on the development of the sea level rise vulnerability analysis report. Furthermore, and given the uncertain funding and date for submittal of the consistency certification for DMB 6 (which, as SANDAG notes above, is to include the completed sea level rise analysis report), the Commission staff requested that SANDAG provide the Commission's Executive Director with additional progress reports on the development of the sea level rise vulnerability analysis. SANDAG has agreed to submit another progress report to the Executive Director by June 30, 2021. SANDAG anticipates submitting the final sea level rise vulnerability analysis report to the Executive Director by December 31, 2021. However, if funding constraints delay completion of the report, SANDAG has agreed to submit a progress report by December 31, 2021, and additional semi-annual reports if necessary until the final report is completed.

Regarding **Elements 2 and 5**, Commission staff requested that SANDAG provide the Commission's Executive Director semi-annual progress reports on planning, scheduling, and costs for railroad relocation off the bluffs, preliminary planning for removal of railroad infrastructure off the bluffs and at the toe of the bluffs, and on sea level rise and hazards adaptation planning efforts. SANDAG has agreed to submit semi-annual progress reports on these subjects to the Executive Director; the first report will be submitted by December 31, 2020.

Element 3 will be addressed during preparation of the consistency certifications for the DMB 5 and DMB 6 projects. Potential mitigation measures to address unavoidable project effects on coastal resources are currently being studied cooperatively by SANDAG and Commission staffs. **Elements 4 and 6** are addressed through monthly coordination meetings between SANDAG and Commission staffs that commenced in March 2020.

The Commission notes that when it reviews and acts on the consistency certification for DMB 5, which is expected to occur later this year, it expects that SANDAG will include in the DMB 5 submittal the above-referenced commitments regarding progress reports and timelines for sea level rise vulnerability analysis, railroad relocation, and sea level rise and hazards adaptation planning.

On April 21, 2020, the City of Del Mar sent letter to the Commission's Executive Director requesting, in part, that the Commission commit to conducting a full federal consistency review of any future Del Mar Bluffs stabilization projects proposed by SANDAG, with ample public notice provided to all interested parties and affected cities. The City requests that such reviews should: (1) include a comprehensive analysis of the long term effects on sand supply and coastal processes resulting from the proposed use of bluff stabilization structures; and (2) analyze feasible alternative designs for the permanent inland relocation of the rail corridor, including anticipated funding sources, reasonable timeframe for construction, and use of the NCTD bluff right-of-way post-relocation for purposes of public access, recreation, and open space.

SANDAG has and will continue to submit federal consistency certifications for all of its Del Mar Bluffs stabilization projects, and the Commission will continue to undertake the required analysis of future consistency certifications according to the applicable provisions of the Coastal Zone Management Act (CZMA) and the associated federal consistency regulations. In its reviews of previous consistency certifications for Del Mar Bluffs stabilization projects the Commission undertook detailed analyses of project effects on sand supply, coastal processes (including sea level rise), public access and recreation, scenic views, environmentally sensitive habitat, water quality, and cultural resources, and reviewed project alternatives and mitigation measures for unavoidable coastal resource impacts. The Commission will continue its rigorous and comprehensive analyses for all future Del Mar Bluffs consistency certifications. However, as was the case for this consistency certification, the Commission will follow the process described in the federal Coastal Zone Management Act (referenced in Section B of this report) to review any emergency or other unforeseen circumstances through after-the-fact consistency certifications.

The City's letter also requested that: (1) prior to submitting a consistency certification to the Commission for a bluff stabilization project, SANDAG should hold ample community meetings to solicit public feedback on the project and then prepare a report outlining the project, public comments received, and how the project was or was not modified; and (2) SANDAG should thoroughly analyze bluff stabilization projects under NEPA and CEQA and make draft documents available for public comment and review. The Commission supports these recommendations.

In conclusion, the Commission staff looks forward to working with SANDAG on future Del Mar Bluffs stabilization projects and longer-term planning for sea level rise and railroad relocation. The Commission appreciates the commitments made by SANDAG to work with our staff to provide the Commission with adequate information on upcoming projects and sea level rise planning efforts to ensure these efforts protect critical infrastructure and coastal resources and are fully consistent with the Coastal Act.

SUBSTANTIVE FILE DOCUMENTS

1. CC-0001-20 (SANDAG, Del Mar Bluffs Emergency Repair Project; post-project submittal).
2. CC-0004-18 (SANDAG, Del Mar Bluffs Stabilization Project 4).

CC-0001-20 (SANDAG)

3. CC-020-10 (SANDAG, Del Mar Bluffs Stabilization Project 3).
4. CC-048-04 (SANDAG, Del Mar Bluffs Stabilization Project 2).
5. CDP 6-01-081 (NCTD, Soldier Pile Installation, Del Mar Bluffs).
6. CDP 6-96-156 (NCTD, Soldier Pile Installation, Del Mar Bluffs).
7. San Diego Forward: The Regional Plan (SANDAG, 2015).
8. City of Del Mar LCP as amended.
9. Letter from City of Del Mar to California Coastal Commission, April 21, 2020.

ATTACHMENT 4



CITY OF DEL MAR

April 21, 2020

Jack Ainsworth
Executive Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105

RE: Federal Consistency Review of SANDAG Emergency Repair to Del Mar Bluffs

Dear Mr. Ainsworth:

On behalf of the City of Del Mar City Council, please consider this request with respect to the California Coastal Commission's (CCC) Federal Consistency Review of the San Diego Association of Government's (SANDAG) emergency repair work along a section of coastal bluff in Del Mar southwest of Seagrove Park. While the City has expressed support for SANDAG's previous bluff stabilization projects, including most recently Phase IV, the emergency repair work should include mitigation for impacts to aesthetics and a commitment by the CCC for any future bluff stabilization project as outlined below.

The area of bluff failure and emergency repair work is entirely located within the City's Beach Overlay Zone (B-OZ), the Coastal Bluff Overlay Zone (CB-OZ), and the Open Space Overlay Zone (OS-OZ) all of which are Implementing Ordinances in the City of Del Mar's certified Local Coastal Program (LCP). The LCP is incorporated into the Del Mar Municipal Code (DMMC), in part, as Chapters 30.50 (B-OZ), 30.55 (CB-OZ), and 30.60 (OS-OZ). Accordingly, the Standard of Review for this emergency repair is the certified Del Mar LCP, which includes a Shoreline Protection Line (SPP) within the B-OZ that follows the approximate center line of the railway tracks as specified in Exhibit B of the B-OZ.

The emergency repair work included the construction of bluff stabilization devices (retaining walls) adjacent to the track bed for two sections of the failing bluff and the excavation of loose soil to provide a stable working area. However, the emergency repair resulted in exposed vertical walls visible from the beach below and the excavated soil was not replaced. While the repair did include shotcrete wall treatments intended to blend the wall face into the adjacent bluff, the City requests mitigation be required to cover the walls entirely with natural material including soil and native plantings. Under the certified Del Mar LCP (DMMC Section 30.50.060), the construction of a protective structure may be authorized if it meets a list of findings – in particular Finding G, which reads:

G. Will, if there is a vertical wall element in the proposed protective structure, have the seaward face of the vertical wall located within the Shoreline Protective Area only if there is no other feasible location for effectively protecting a principle structure; there is no feasible, less environmentally damaging alternative; **and feasible mitigation measures have been provided to minimize adverse environmental effects; but in no event have**

the seaward face of the vertical wall more than five feet westward of the Shoreline Protection Area line; (emphasis added)

As constructed, it is the City's position that the exposed vertical walls (albeit treated with shotcrete) are not consistent with the **bolded** section above and should include feasible mitigation to minimize adverse environmental effects to Aesthetics. This mitigation should be added as part of the CCC's Federal Consistency Review. This mitigation is further supported by the fact that the location of the walls are more than five feet westward of the SPP line (which follows the approximate center line of the railway tracks) and, although the wall location is justified to address the emergency, the walls should not be visible with the incorporation of feasible mitigation. Further, the completed grading does not appear to be consistent with the coastal bluff setback provisions in DMMC Section 30.55.080 and the City is unaware if a geotechnical report has been provided to the CCC to sufficiently address the requirements of DMMC Section 30.55.090.

While the City understands that permanent failure of the Del Mar Bluffs would severely impact the local and regional economy and be detrimental to passenger and freight movement along the Los Angeles – San Diego – San Luis Obispo (LOSSAN) Rail Corridor, the perpetual reliance upon long-term stabilization efforts along the Del Mar Bluffs must be reconsidered sooner than later. While the City understands that SANDAG is currently evaluating alternatives for an inland relocation of the rail corridor, the City requests a commitment by the Coastal Commission as part of this emergency repair Federal Consistency Review that any future bluff stabilization project proposed by SANDAG will:

- 1) Prepare a report and hold ample community meetings to solicit public feedback as a prerequisite to submitting a project for Federal Consistency Review:
 - a) The report shall outline what was presented, what feedback was heard, and how the project was modified as a result (or not modified with an explanation why);
- 2) Go through a full Federal Consistency Review process with ample public notice provided, including all interested parties and affected cities;
- 3) Be required to thoroughly analyze the project under the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) and make the draft documents available for public review and comment;
- 4) Include a comprehensive analysis of the long-term effects on sand supply and coastal processes resulting from the proposed use of bluff stabilization structures; and
- 5) Analyze feasible alternative designs for the permanent, inland relocation of the rail corridor including:
 - a) Anticipated funding sources;
 - b) Reasonable timeframe for construction; and
 - c) Use of NCTD bluff right-of-way post-relocation for purposes of public access, recreation, and open space.

Executive Director Ainsworth

April 21, 2020

Page 3

Thank you for your consideration of the City's request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ellie Haviland".

Ellie Haviland
Mayor

Attachments:

Exhibit A: Photos of Completed Vertical Wall

Exhibit B: SANDAG Bluff Repair Presentation (February 3, 2020)

Exhibit C: Del Mar LCP Beach Overlay Zone (DMMC Chapter 30.50)

Exhibit D: Del Mar LCP Coastal Bluff Overlay Zone (DMMC Chapter 30.55)

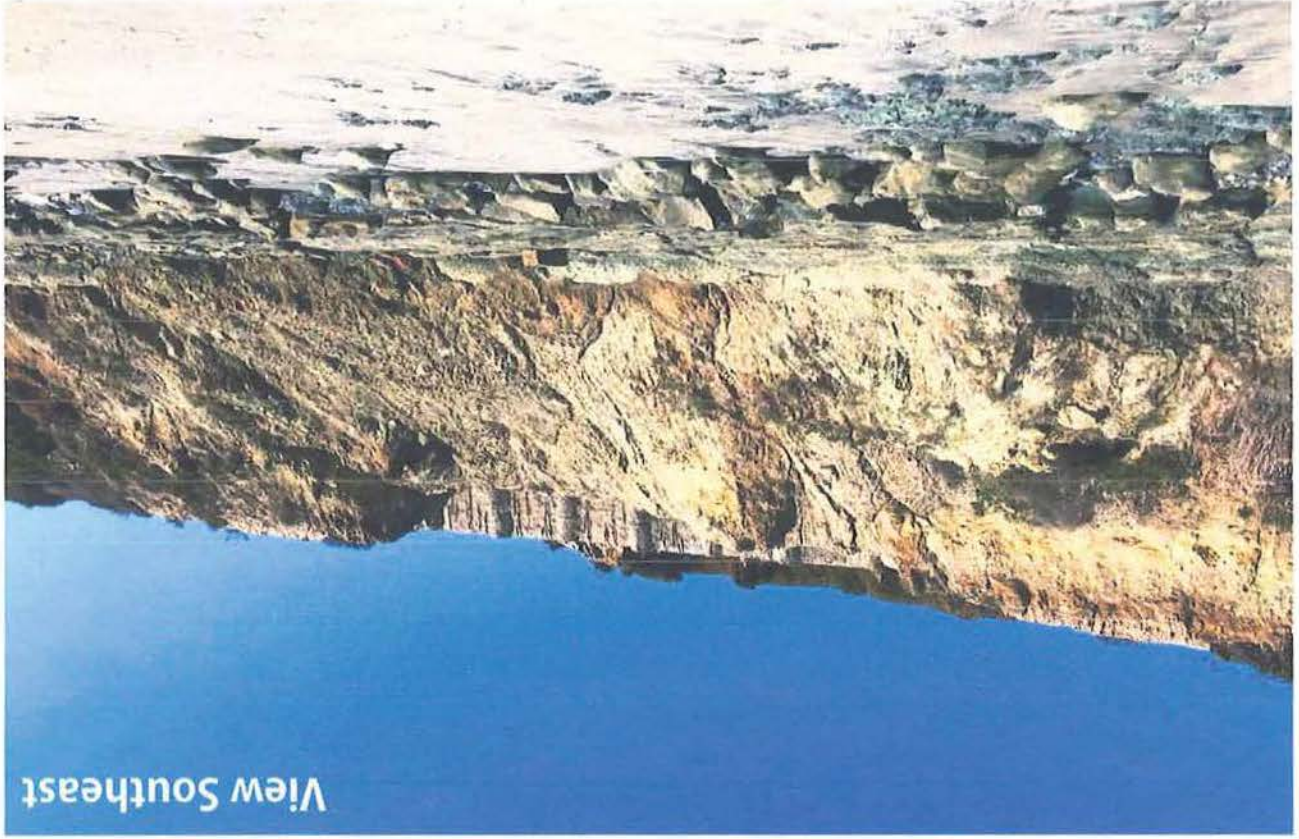
Cc:

Larry Simon, CCC

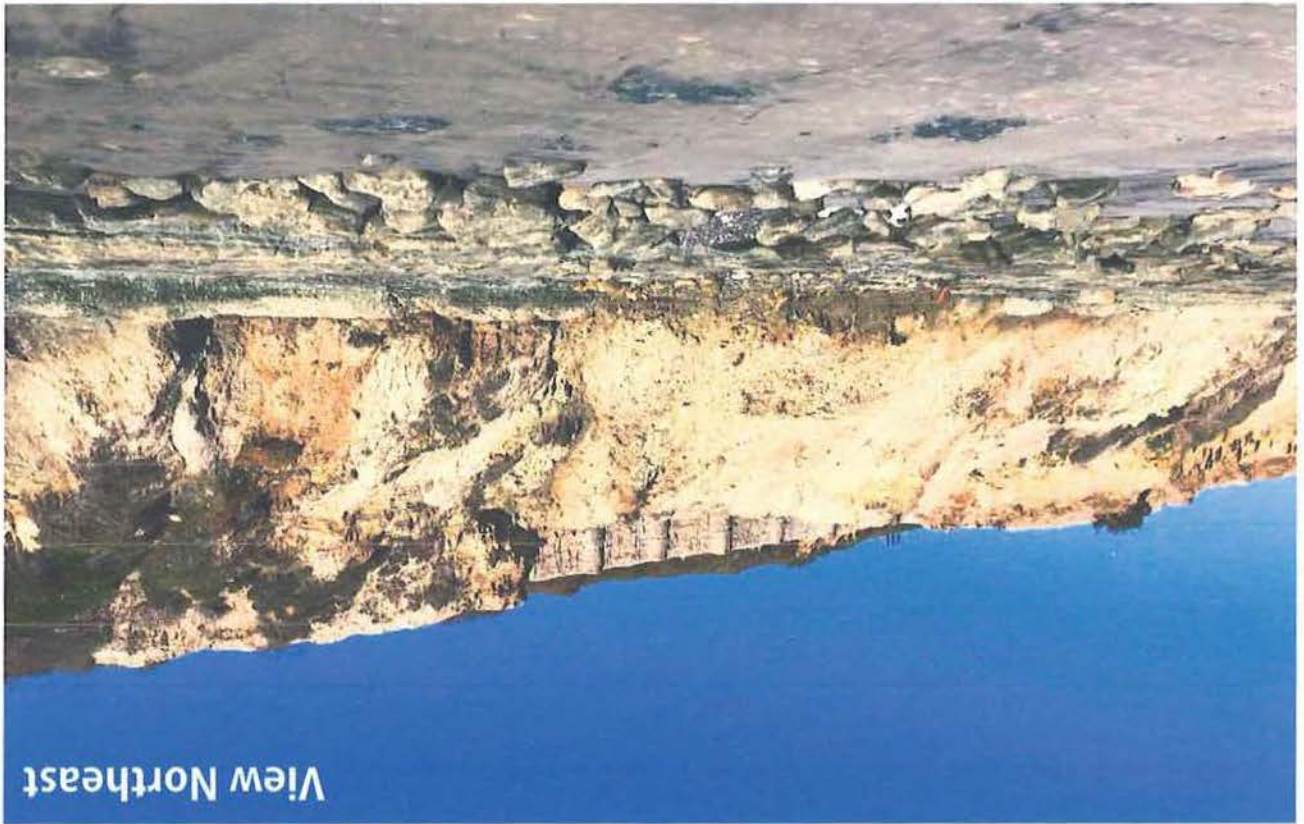
Gabe Buhr, CCC San Diego District

Bruce Smith, SANDAG

Allie DeVaux, SANDAG



View Southeast



View Northeast



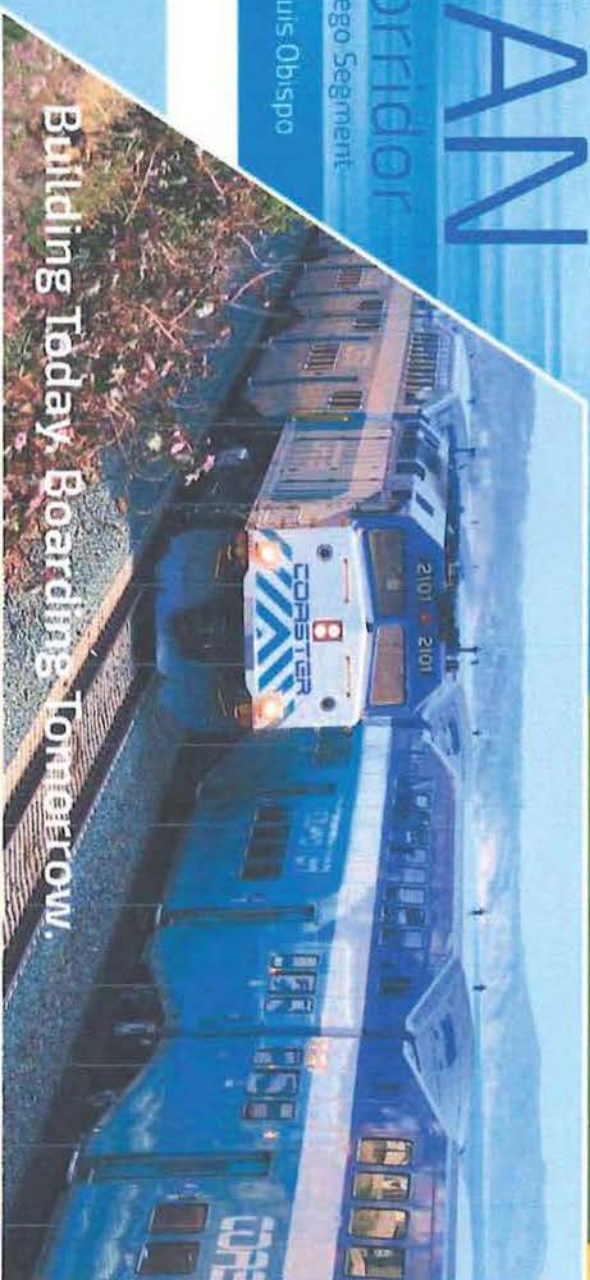
EXHIBIT B

LOSSAN

Coastal Rail Corridor

San Diego Segment

Los Angeles • San Diego • San Luis Obispo



Del Mar Bluffs Emergency Project

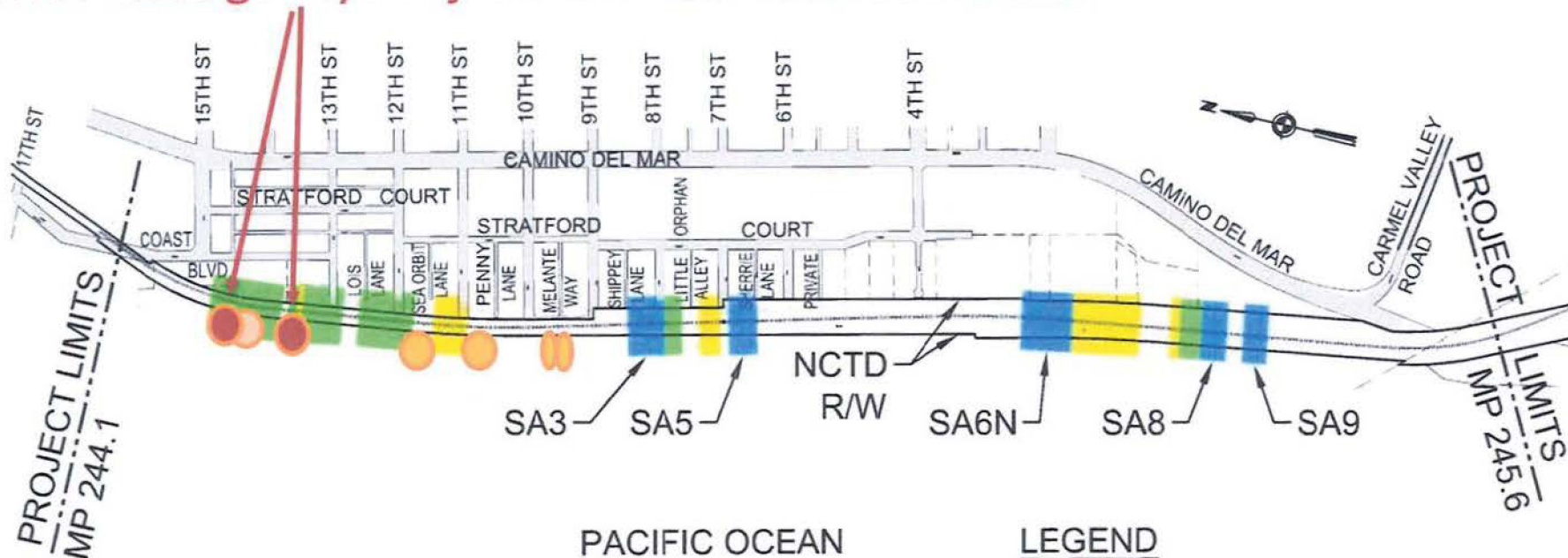
November 2019

KeepSanDiegoMoving.com

Del Mar Bluffs Emergency Project November 2019 Erosion



DMB Emergency Project: 14th-15th Street in 2019



Del Mar Bluffs 2 and 3 – installed 230 piles and made drainage improvements

LEGEND

- DMB 2
- DMB 3
- DMB FUTURE
- RETREAT EVENTS 2018
- BLUFF EROSION NOV 2019
- SA STABILIZATION AREA

DMB Emergency Project

Storm Damage west of 14th Street



November 28-29, 2019

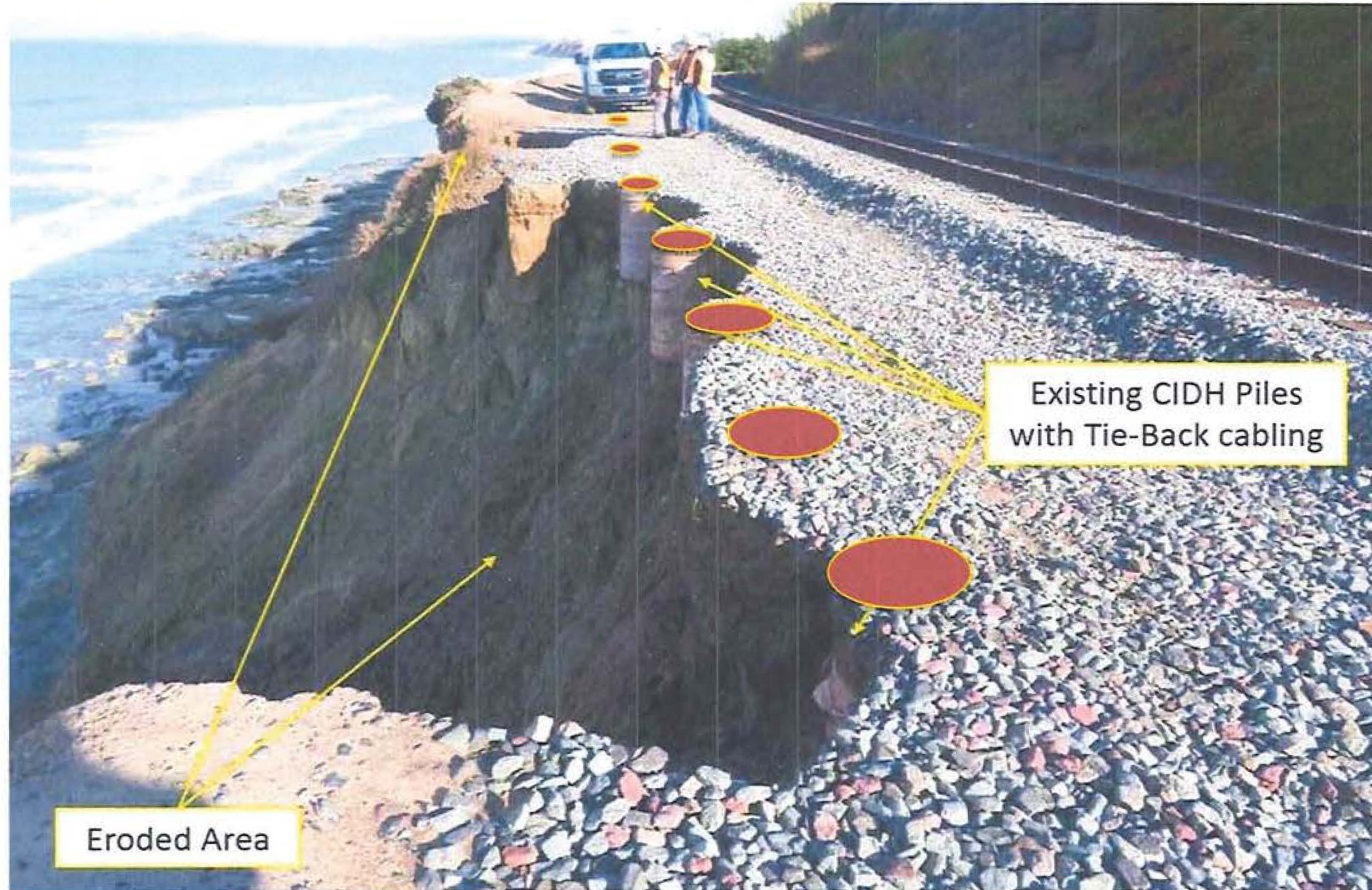
DMB Emergency Project Repairs

14th Street, Dec. 1, 2019



DMB Emergency Project Storm Damage

15th Street, December 1, 2019



Water running over bluff exposed the piles that are 3ft. in diameter and 40 to 60 ft. deep with 45 ft. long tie-back anchors. Piles designed to support track in case of bluff face slide or erosion

DMB Emergency Project Repairs

15th Street December 14 – 15, 2019



DMB Emergency Project

Completed Repair 15th Street



EXHIBIT C

Chapter 30.50

BEACH OVERLAY ZONE

Adopted as an Initiative on April 12, 1988

30.50.010 Purpose. The Beach Overlay Zone created by this initiative is established to regulate the uses of the Del Mar beach area, a distinct and valuable natural resource, for the benefit of present and future generations. The regulations contained herein shall be administered so as to protect public access to and along the shoreline, while promoting public safety, health and welfare, and providing for the protection of private property. [Ord. 722]

30.50.020 Zone Boundaries. The boundaries of the Beach Overlay Zone are as described in Exhibit A, incorporated herein by reference.

30.50.030 Permitted Uses. Permitted uses within the Beach Overlay Zone shall be those allowed in the underlying zone, subject to the regulations contained in the Beach Overlay Zone which shall prevail in the event of conflict with any other provisions of the City Code.

30.50.040 Definitions.

A. "Shoreline Protection Area" shall mean that area which is within the Beach Overlay Zone and is located from south to north along the shoreline of the City being more particularly described as follows: All lands located westerly of the line as described in Exhibit B, incorporated herein by reference.

B. "Development" shall mean the placement or construction of any solid material or structure on land, to include without limitation, any human directed alteration of the land and the planting, cultivation or maintenance of any vegetation.

C. "Protective Structure" shall mean any privately or publicly owned development designed to protect property inland from such structure from ocean flooding or wave damage.

30.50.050 Development Within The Shoreline Protection Area. No development shall occur within the shoreline area

except such privately owned protective structures, publicly owned protective structures, and publicly owned development authorized, constructed, and maintained in accordance with the regulations set forth in the City Code.

30.50.060 Authorized Protection Structures. The construction of a protective structure located within the Shoreline Protection Area may be authorized by the issuance of a Shoreline Protection Permit, if the City Council finds following notice and public hearing that the proposed protective structure:

A. Is required to serve coastal dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts to local shoreline sand supply;

B. Will minimize risks to life and property in areas of flood hazards;

C. Will assure stability and structural integrity and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area, nor in any way substantially alter natural landforms along bluffs and cliffs;

D. Is in conformity with the certified Coastal Program after certification of the Local Coastal Program;

E. Is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act;

F. Has material and design which are consistent with good engineering practices;

G. Will, if there is a vertical wall element in the proposed protective structure, have the seaward face of the vertical wall located within the Shoreline Protective Area only if there is no other feasible location for effectively protecting a principle structure; there is no feasible, less environmentally damaging alternative; and feasible mitigation measures have been provided to minimize adverse environmental effects; but in no event have the seaward face of the vertical wall more than five feet westward of the Shoreline Protection Area line;

H. Will, if other than a vertical wall, meet all the conditions of Subsection G above;

I. Will, if there is a riprap element in the proposed structure:

1. Have the riprap extending no more than 20 feet westward from the Shoreline Protection Area line.

2. Have a westward slope beginning no higher than a 5.7 foot elevation (NGVD) at the Shoreline Protection Area Line, decreasing in height at a minimum rate of one vertical foot for every one and one-half feet of lateral distance, the riprap extends westerly of the SPA line.

30.50.070 Permit Application Procedure.

A. An application for a Shoreline Protection Permit shall be made to the City Manager on forms provided by the City. The applicant shall pay a fee determined by the City Manager to be sufficient to pay for the costs of notice and the processing of the application for City Council consideration to include prehearing CEQA processing and any consulting costs incurred by the City.

B. The application shall include the full description of the development and the applicant's proposal, together with supporting evidence on each issue raised by the application. Where deemed necessary by the City Manager, the application will include information as prepared by either a registered engineer or a land surveyor and an environmental consultant.

C. Following the required CEQA processing, the City Manager shall cause the application to be set for a noticed administrative hearing before the City Council. The City Manager shall cause to be published, at least ten days before the date set for the administrative hearing, a notice of application. The notice of application shall also be concurrently posted on the site of the subject development and mailed to each person who has filed a written request for such notice, giving their name and mailing address. The notice of application shall contain:

1. A description of the subject development;
2. The purpose of the application;

3. The date and time of the meeting at which the administrative hearing will be conducted;

4. A statement that the hearing will be open to the public and to public discussion.

30.50.080 Issuance Shoreline Protection Permit.

A. It shall be unlawful to construct or maintain a privately owned protective structure or maintain privately owned development within the Shoreline Protection Area without first having obtained a Shoreline Protection Permit from the City Council.

B. The City Council may issue a Shoreline Protection Permit authorizing the following:

1. The construction and maintenance of a privately owned protective structure in accordance with the regulations of this ordinance.

2. The maintenance of a privately owned protective structure or privately owned development constructed prior to and in nonconformance with the Beach Overlay Zone regulations for the duration of the amortization term established for such privately owned protective structure or privately owned development.

3. The private financing, construction and/or maintenance of a publicly owned protective structure authorized by the Beach Overlay Zone regulations.

C. A Shoreline Protection Permit shall:

1. Contain waivers, indemnification and hold harmless provisions as required by the City Council at the time of approval.

2. Contain such conditions as the City Council determines to be necessary to accomplish the purposes of the Beach Overlay Zone.

3. Shall require a reasonable user fee to be determined by the City Council.

4. Be recorded in a manner to bind successors in interest.

30.50.090 Emergency Reinforcement.

A. Where property inland from a protective structure is being immediately threatened by ocean flooding or wave damage, a shoreline protection permittee may temporarily increase the height and bulk of the protective structure. The permittee shall, within fifteen days from the end of the emergency condition, remove the temporary protection from the Shoreline Protection Area. Said emergency reinforcement shall be subject to other requirements contained in the California Coastal Act.

B. In the event such added temporary protection remains beyond April 15 in any year, the City shall remove such added structure within ten days and shall charge the owner the cost of removal, placing a lien on the property for such cost.

30.50.100 Shoreline Protection Area: Removal of Noncomplying Development.

A. Privately owned development within the Shoreline Protection Area constructed before the effective date of and in nonconformity to the Beach Overlay Zone regulations shall be abated immediately by the person or persons who constructed, now use and/or maintain such development; unless a Shoreline Protection Permit has been obtained establishing an amortization period of such development.

B. The following privately owned development within the Shoreline Protection Area shall constitute a public nuisance. In addition to other remedies provided by law, all direct and indirect costs, including legal expenses, incurred by the City of Del Mar in abating such nuisance shall become a lien on the property and a personal obligation of the person or persons who constructed, now use and/or now maintain such development, and shall be a special assessment against said property to be collected as ordinary municipal taxes.

1. Privately owned development which was constructed before the effective date of and in noncompliance with the regulations of the Beach Overlay Zone and thereafter is maintained either without or contrary to the terms of a Shoreline Protection Permit.

2. Privately owned development which is constructed and maintained after the effective date of and in noncompliance with the regulations of the Beach Overlay Zone.

30.50.110 Shoreline Protection Area: Determination of Noncomplying Developments, Amortization Term.

A. The City Manager shall investigate and identify within a period of no later than six months following the date of the enactment of this ordinance the existence of any development within the Shoreline Protection Area that is not in compliance with the requirements of the Beach Overlay Zone.

B. The City Manager shall prepare a preliminary recommendation identifying the noncomplying development, and designating an abatement procedure to include an amortization period calculated as follows:

For every \$5,000.00 of initial construction costs on each individual lot, the noncomplying development may remain for one year following its initial construction, not to exceed ten years. The City Manager shall determine the initial cost of construction based upon the best information available.

C. The City Manager shall cause a Notice of Preliminary Recommendation to be sent by certified mail, return receipt request, and by first class postage prepaid mail to the address of record listed in the County Recorder's office, and to such other address of which the City Manager has actual knowledge of the person or persons who constructed, now use, and/or now maintain the privately owned development. In addition, the Notice of Preliminary Recommendation shall be concurrently posted in a conspicuous location at the development site and shall be mailed to persons who have registered their names and addresses with the City indicating an interest in obtaining such notice. Further, the notice shall be published in accordance with the provisions of this ordinance at least 15 days prior to the administrative hearing thereon.

30.50.120 Notice of Preliminary Recommendation. The Notice of Preliminary Recommendation shall contain the following:

A. The preliminary recommendation.

B. The date and time of the City Council meeting at which an administrative hearing will be conducted.

C. A statement that the City Council, following the completion of the administrative hearing, will make a final determination of the foregoing matter and may record a Notice of Abatement against the property of persons found to be responsible for removing the development.

D. A statement that the hearing will be open to the public and to public discussion.

30.50.130 Determination of Noncompliance and Abatement.

A. Following the administrative hearing, the City Council shall reach a final determination as to whether the development is noncomplying, whether it constitutes a nuisance, and the final determination of an abatement procedure consistent with the terms of this ordinance. The City Council shall base its determination on any information presented during the administrative hearing that may be constitutionally considered.

B. After such final determination, the City shall give the notice, provided for in Section 12, C, notifying the noncomplying owner, notifying such persons that they have thirty days from the date of the notice to remove the noncomplying development; that upon a showing of good cause, this period may be extended for a longer period but not to exceed ninety days.

C. If the owner of the noncomplying development does not remove it within the required period, the City Council shall direct the City Attorney to take immediate action to abate the nuisance created by the development, including the taking of any necessary legal action to abate the same. The City will recover the expense of such actions as provided in Section 10, B.

30.50.140 New Construction or Reconstruction. No reconstruction or remodeling of a structure when 50% or more of the lot's permitted floor area is involved and no new construction shall be located within 15 feet east of the Shoreline Protection Area line. Patio and landscaping improvements not to exceed six feet in height, and which

provide adequate drainage of excess water resulting from storm and/or wave conditions shall be exempt from this section. Said drainage capabilities shall be reviewed and subject to approval of the City Engineer at the time of application.

30.50.150 Shoreline Protection Area: Publicly Owned Development. Within the Shoreline Protection Area, the City Council may authorize the construction and maintenance of lifeguard facilities.

30.50.160 Development of Shoreline Protective Structures Landward of the Shoreline Protection Area Line. Protective structures as defined in this Chapter may be developed on private property landward of the Shoreline Protection Area line, irrespective of any otherwise applicable setback requirements imposed by the Municipal Code. No variance shall be required for the same. [Ord. 543]

30.50.170 Application Procedure and Processing. The application procedure for such an application shall be the same as specified in this Chapter for shoreline protective structures on or seaward of the Shoreline Protection Area line, except that the application shall note that the project is to be constructed landward of said line, and such applications shall be processed in the same manner, provided that such applications shall go to the Planning Commission rather than the City Council for final approval. The decision of the Planning Commission shall be subject to appeal to the City Council in conformance with 1.12 of the Del Mar Municipal Code. [Ord. 543]

30.50.180 Criteria for Approval. Property owners shall have a right to construct protective structures on their private property landward of the Shoreline Protection Area line provided that the Planning Commission makes the findings specified herein in Section 30.50.060, provided that no portion of the structure or riprap, if any, may extend beyond the Shoreline Protection Area line. Such permits shall be subject to such conditions as the Planning Commission may reasonably impose, including conditions C(1), (2), and (4) of Section 30.50.080 of this Chapter. [Ord. 543]

30.50.190 Emergency Reinforcement. Emergency protective structures may be installed landward of the Shoreline Protection Area line in conformance with the same procedures

and criteria specified in Section 30.50.090 of this Chapter.
[Ord. 543]

30.50.200 Shoreline Protection Area: Removal of Noncomplying Development. Protective structures approved landward of the Shoreline Protection Area line shall not be deemed to be nonconforming for any purpose under any other provision of the City's General Plan, Zoning Ordinance, or Design Review Ordinance. The provisions of this Chapter 30.50 with respect to such projects shall prevail and supercede any other provisions of the Municipal Code which would otherwise apply to such applications. [Ord. 543]

[This Chapter of the Municipal Code forms a portion of the City of Del Mar Local Coastal Program Implementing Ordinances. The regulations found within this Chapter are not subject to "relief" through the Del Mar Variance process. Exceptions to, or relief from, the requirements found within this Chapter are limited to those specified within the language of this Chapter or found within other Chapters of the Implementing Ordinances. Where there is a conflict between the language of this Chapter and other portions of the Del Mar Municipal Code, the language of this Chapter shall take precedence.]

EXHIBIT A

All land lying westerly of a line extending southerly from the northern City boundary along the westerly right-of-way line of Camino del Mar, then turning westerly along the northerly right-of-way line of 29th Street, then turning southerly along the westerly right-of-way of Ocean Front, then turning easterly along the southerly right-of-way line of 17th Street, then turning southerly along the westerly right-of-way line of Coast Boulevard, and then following southerly along the easterly right-of-way line of the AT&SF Railway to the southern City boundary.

EXHIBIT B

FOLLOWING IS THE DESCRIPTION OF A LINE KNOWN AS THE "SHORELINE PROTECTION LINE" AS IS DEFINED IN THE CITY OF DEL MAR ZONING ORDINANCE, BEACH OVERLAY ZONE, D.M.M.C. CHAPTER 30; SAID LINE EXTENDING FROM THE NORTHERLY CORPORATE BOUNDARY TO THE SOUTHERLY CORPORATE BOUNDARY OF THE CITY OF DEL MAR IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF LOT 1 OF MAP 6838, SAID POINT BEING LOCATED ON THE SOUTHERLY EXTENSION OF THE CENTERLINE OF SIERRA AVENUE AND ON THE NORTHERLY CORPORATE BOUNDARY LINE OF THE CITY OF DEL MAR:

1. THENCE WESTERLY ALONG SAID NORTHERLY BOUNDARY LINE NORTH 89 DEGREES 35'36" WEST, 458.98 FEET (RECORD - NORTH 89 DEGREES 49'32" EAST) TO THE "TRUE POINT OF BEGINNING;"
2. THENCE LEAVING SAID NORTHERLY CORPORATE BOUNDARY LINE DUE SOUTH A DISTANCE OF 362.08 FEET;
3. THENCE SOUTH 12 DEGREES 58'16.0" EAST, 182.66 FEET;
4. THENCE SOUTH 54 DEGREES 11'22.8" EAST, 60.01 FEET;
5. THENCE SOUTH 23 DEGREES 58'07.5" EAST, 90.00 FEET TO A POINT COINCIDENT WITH THE NORTHEASTERLY CORNER OF THE CITY OF DEL MAR SEA BLUFF PRESERVE;
6. THENCE SOUTHERLY ALONG THE EASTERLY BOUNDARY LINE OF SAID SEA BLUFF PRESERVE, SOUTH 23 DEGREES 58'07.5" EAST, 428.26 FEET;
7. THENCE LEAVING SAID EASTERLY BOUNDARY LINE OF SAID SEA BLUFF PRESERVE, SOUTH 13 DEGREES 50'16.1" EAST, 987.41 FEET TO A POINT ON THE EAST FACE OF A SEAWALL AS IT EXISTED ON JANUARY 11, 1986, SAID SEAWALL LOCATED SOUTHERLY OF THE SAN DIEGUITO RIVER;
8. THENCE SOUTHERLY SOUTH 8 DEGREES 26'48.8" EAST, 273.20 FEET TO A POINT ON THE EASTERLY FACE OF SAID SEAWALL AS IT EXISTED ON JANUARY 11, 1986;

9. THENCE SOUTH 9 DEGREES 04'07.8" EAST, 269.57 FEET TO A POINT ON THE EASTERLY FACE OF SAID SEAWALL AS IT EXISTED ON JANUARY 11, 1986;

10. THENCE SOUTH 8 DEGREES 59'16.2" EAST, 449.91 FEET TO A POINT ON THE EASTERLY FACE OF SAID SEAWALL AS IT EXISTED ON JANUARY 11, 1986; SAID POINT BEING LOCATED ON THE SOUTHERLY RIGHT-OF-WAY LINE OF 29TH STREET AS SHOWN ON RECORD OF SURVEY 679,9056 & 9551;

11. THENCE WESTERLY ALONG SAID SOUTHERLY RIGHT-OF-WAY LINE OF 29TH STREET, SOUTH 81 DEGREES 01'01" WEST, 0.89 FEET (RECORD - SOUTH 80 DEGREES 48' WEST);

12. THENCE LEAVING SAID SOUTHERLY RIGHT-OF-WAY LINE OF 29TH STREET, FOLLOWING A LINE PARALLEL TO AND 120.00 FEET WESTERLY OF THE CENTERLINE OF THE ALLEY KNOWN AS OCEANFRONT AS SHOWN ON RECORD OF SURVEY 9551, SOUTH 8 DEGREES 59'56.2" EAST, 440.00 FEET (RECORD SOUTH 9 DEGREES 10' EAST) TO A POINT LOCATED ON THE NORTH RIGHT-OF-WAY LINE OF 27TH STREET AS SHOWN ON RECORD OF SURVEY 9551;

13. THENCE EASTERLY ALONG SAID NORTHERLY RIGHT-OF-WAY LINE OF 27TH STREET NORTH 81 DEGREES 20'36.7" EAST, 10.21 FEET (RECORD - SOUTH 80 DEGREES 50' WEST);

14. THENCE LEAVING SAID NORTHERLY RIGHT-OF-WAY LINE OF 27TH STREET AND CONTINUING ALONG A LINE COINCIDENT WITH THE EASTERLY RIGHT-OF-WAY LINE OF A 20.00 FOOT WIDE ALLEY AS SHOWN ON MAP 1737, SOUTH 9 DEGREES 00'34.3" EAST, 480.02 FEET (RECORD - SOUTH 9 DEGREES 10' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 25TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 26, MAP 1737;

15. THENCE CONTINUING ALONG THE EASTERLY RIGHT-OF-WAY LINE OF A 15 FOOT WIDE PUBLIC SIDEWALK AS SHOWN ON MAP 1450, SOUTH 9 DEGREES 00'34.3" EAST, 140 FEET (RECORD - SOUTH 80 DEGREES 50' EAST) TO AN ANGLE POINT, SAID ANGLE POINT BEING THE SOUTHWEST CORNER OF LOT 7, BLOCK 127, MAP 1450;

16. THENCE CONTINUING ALONG THE EASTERLY RIGHT-OF-WAY LINE OF SAID PUBLIC SIDEWALK AS SHOWN ON MAP 1450, SOUTH 7 DEGREES 15'27.3" EAST, 102.13 FEET (RECORD - SOUTH 7 DEGREES 07' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 24TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 13, BLOCK 127, MAP 1450;

17. THENCE CONTINUING ALONG THE EASTERLY RIGHT-OF-WAY LINE OF SAID 15 FOOT PUBLIC SIDEWALK AS SHOWN ON MAP 1450, SOUTH 6 DEGREES 15'34.1" EAST, 690.00 FEET (RECORD - SOUTH 6 DEGREES 24' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 21ST STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 13, BLOCK 124, MAP 1450;

18. THENCE EASTERLY ALONG THE NORTHERLY RIGHT-OF-WAY LINE OF 21ST STREET, NORTH 83 DEGREES, 39'25.5" EAST, 20.10 FEET (RECORD - SOUTH 83 DEGREES 36' WEST);

19. THENCE LEAVING SAID NORTHERLY RIGHT-OF-WAY LINE OF 21ST STREET AND CONTINUING SOUTHERLY ALONG THE EASTERLY LINE OF LOT 22 AS SHOWN ON MAP 1277, SOUTH 6 DEGREES 15'32.2" EAST, 114.20 FEET (RECORD - SOUTH 56 DEGREES 24 FEET EAST) TO AN ANGLE POINT LOCATED ON THE WESTERLY LINE OF LOT 19, BLOCK 115, MAP 1277, A DISTANCE THEREON SOUTH 6 DEGREES 15'32.2" EAST, 19.00 FEET (RECORD - SOUTH 6 DEGREES 24" EAST) FROM THE NORTHWEST CORNER OF SAID LOT 19;

20. THENCE CONTINUING ALONG THE EASTERLY LINE OF LOT 22 AS SHOWN ON MAP 1277, SOUTH 3 DEGREES 20' 32.2" EAST, 293.20 FEET (RECORD - SOUTH 3 DEGREES 29' EAST) TO A POINT ON A NORTHERLY RIGHT-OF-WAY LINE OF 20TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 11, BLOCK 115, MAP 1277;

21. THENCE ALONG THE EASTERLY LINE OF SAID LOT 22, SOUTH 3 DEGREES 20' 32.2 EAST, 820.25 FEET (RECORD - SOUTH 3 DEGREES 29' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 18TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 11, BLOCK 113, MAP 1277;

22. THENCE ALONG THE SOUTHERLY EXTENSION OF THE EASTERLY LINE OF SAID LOT 22, SOUTH 3 DEGREES 20' 32.2" EAST, 60.00 FEET (RECORD - SOUTH 3 DEGREES 29' EAST) TO A POINT ON THE SOUTHERLY RIGHT-OF-WAY LINE OF 18TH STREET, SAID POINT COINCIDENT WITH THE NORTHWEST CORNER OF LOT 20, BLOCK 112, MAP 1277;

23. THENCE WESTERLY ALONG THE SOUTHERLY RIGHT-OF-WAY LINE OF 18TH STREET, SOUTH 86 DEGREES 39' 27.8" WEST, 7.00 FEET;

24. THENCE LEAVING SAID SOUTHERLY RIGHT-OF-WAY OF 18TH STREET SOUTH 3 DEGREES 20' 32.2" EAST, 350.00 FEET, TO THE NORTHERLY RIGHT-OF-WAY LINE OF 17TH STREET;

25. THENCE WESTERLY ALONG THE NORTHERLY RIGHT-OF-WAY LINE OF 17TH STREET SOUTH 86 DEGREES 39' 27.8" WEST, 11.72 FEET;

26. THENCE SOUTH 3 DEGREES 20' 32.2" EAST, 267.46 FEET;

27. THENCE SOUTH 7 DEGREES, 59' 14.8" WEST, 100.73 FEET;

28. THENCE SOUTH 6 DEGREES 02' 48.2" EAST, 1,133.67 FEET TO A POINT LOCATED ON THE APPROXIMATE CENTERLINE OF THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY TRACKS, SAID POINT BEING LOCATED ON AN APPROXIMATE 1,900 FOOT RADIUS CURVE, CONCAVE EASTERLY SAID POINT ALSO BEING ON THE WESTERLY PROLONGATION OF THE NORTHERLY LINE OF LOT 1 OF PARCEL MAP 10422, A DISTANCE THEREON, NORTH 72 DEGREES 34' 48.5" EAST, 256.59 FEET (RECORD - NORTH 72 DEGREES 33' 09" EAST) FROM THE NORTHEASTERLY CORNER OF SAID LOT 1;

THE FOLLOWING COURSES NUMBERED 29 THROUGH 35 ALL CONTINUE ALONG THE APPROXIMATE CENTERLINE OF THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY TRACKS AS IT EXISTED ON JANUARY 11, 1986;

29. THENCE CONTINUING ON THE APPROXIMATE CENTERLINE OF THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY TRACKS, THROUGH SAID 1,900 FOOT RADIUS CURVE, A CENTRAL ANGLE OF 6 DEGREES 44' 55.2", A DISTANCE OF 223.79 FEET;

30. THENCE SOUTH 11 DEGREES 34' 14.3 EAST, 947.56 FEET TO A POINT LOCATED AT THE BEGINNING OF A 5,500 FOOT RADIUS CURVE, CONCAVE EASTERLY;

31. THENCE THROUGH SAID CURVE A CENTRAL ANGLE OF 7 DEGREES 02' 53", A DISTANCE OF 676.56 FEET;

32. THENCE SOUTH 18 DEGREES 37' 10" EAST, 2,384.90 FEET TO A POINT LOCATED AT THE BEGINNING OF A 9,000 FOOT RADIUS CURVE, CONCAVE WESTERLY;

33. THENCE THROUGH SAID CURVE A CENTRAL ANGLE OF 6 DEGREES 20' 32", A DISTANCE OF 996.23 FEET;

34. THENCE SOUTH 12 DEGREES 16' 36.9" EAST, 1,767.95 FEET TO A POINT LOCATED AT THE BEGINNING OF A 2,400 FOOT RADIUS CURVE, CONCAVE EASTERLY;

35. THENCE THROUGH SAID 2,400 FOOT CURVE A CENTRAL ANGLE OF 8 DEGREES 46' 45.5", A DISTANCE OF 367.75 FEET MORE OR

LESS TO A POINT LOCATED ON A LINE BEARING NORTH 46 DEGREES 32' 16" WEST, SAID LINE BEING THE NORTHEASTERLY LINE OF THE PUEBLO LANDS OF SAN DIEGO, AS SHOWN ON MAP THEREOF MADE BY JAMES PASCOE IN THE YEAR 1870, A CERTIFIED COPY OF SAID MAP BEING FILED IN SAN DIEGO COUNTY RECORDER'S OFFICE AS MISCELLANEOUS MAP NO. 36, SAID POINT OF INTERSECTION ALSO BEING STATION 813 AS SHOWN ON SHEET 18 OF THE CITY OF SAN DIEGO ENGINEERING DRAWING 47281 ON FILE IN THE CITY ENGINEER'S OFFICES OF SAID CITY; AND SAID LINE ALSO BEING THE SOUTHWESTERLY CORPORATE BOUNDARY LINE OF THE CITY OF DEL MAR.

THE BASIS OF BEARINGS FOR THE ABOVE DESCRIBED LINE WAS DEFINED BY ESTABLISHING A LINE BETWEEN UNITED STATES ARMY CORPS SURVEY BENCHMARK NUMBERS DM590 AND DM560, LOCATED IN THE CITY OF DEL MAR, SAID LINE BEARING NORTH 6 DEGREES 15' 54" WEST.

THE FOLLOWING RECORD MAPS INCLUDED IN THE DESCRIPTION OF THE ABOVE SURVEY LINE ARE RECORDED IN THE COUNTY RECORDER'S OFFICE OF SAN DIEGO COUNTY:

MAP 6838 DEL MAR BEACH CLUB
MAP 1737 NORTH STRAND MAP
MAP 1450 DEL MAR SUBDIVISION NO. 3
MAP 1277 DEL MAR RESUBDIVISION NO. 2
MAP 10422 DEL MAR SUBDIVISION 80-02
RECORD OF SURVEY 679
RECORD OF SURVEY 9056
RECORD OF SURVEY 9551

EXHIBIT D

Chapter 30.55

COASTAL BLUFF OVERLAY ZONE

30.55.010 Purpose. The purpose of the Coastal Bluff Overlay Zone is to protect Del Mar's fragile coastal bluffs as a visual resource and avoid the risks to life and property associated with bluff failure and shoreline erosion. [Ord. 722]

30.55.020 Boundaries. Property within the Coastal Bluff Overlay Zone shall be designated by Ordinance to be depicted upon the City Zone Map.

30.55.030 Definitions.

A. For purposes of this Chapter, the following definitions shall apply:

1. "Coastal Bluff" shall mean a steep escarpment with a slope gradient equal to or greater than an average of one foot vertical to one foot horizontal and a vertical rise of 15 feet or more, and which is located in an area that is periodically subject to ocean wave action.

2. "Coastal Bluff Top" shall mean the top edge of a coastal bluff as delineated using the following criteria:

a. In cases where the coastal bluff involves a series of stepped vertical and horizontal planes, the bluff top shall be considered to start at the seaward edge of the topmost riser of the vertical plane of the coastal bluff.

b. In cases where the coastal bluff edge is composed of a continuous, rather than stepped, downward slope, the bluff top shall be considered to start at that point nearest the bluff, seaward of which the downward gradient of the land surface increases more or less continuously at an angle which is more vertical than horizontal until it reaches the general gradient of the bluff.

3. "Top Edge of Coastal Bluff" shall mean the same as "Coastal Bluff Top."

4. "Principal Structure" shall mean a building or structure in which the primary use of the lot on which the building is located is being conducted.

5. "Accessory Structure" shall mean structures accessory or incidental to the principal structures on lot including, but not limited to, pools, spas, storage sheds, gazebos, and above-grade decks or patios.

30.55.040 Allowable Uses. Unless specified herein, allowable uses in the Coastal Bluff Overlay Zone shall be those uses and accessory uses allowed by the underlying zone, subject to the regulations and restrictions of the underlying zone and of this Chapter.

30.55.050 Accessory Uses. [See underlying zone.]

30.55.060 Parking Requirements. [See Chapter 30.80.]

30.55.070 Development Review. Unless otherwise exempted by this Title, no building, improvement, structure, or portion thereof shall be erected, constructed, converted, established, altered or enlarged; nor shall any lot or premises be excavated or graded for any purpose including, but not limited to, in-ground structures such as swimming pools or spas; nor shall clearance of vegetation occur until both a Conditional Use Permit and a Coastal Development Permit are obtained from the Planning Commission. In reviewing such applications for Conditional Use Permits and Coastal Development Permits, the Planning Commission shall apply the standards of review contained in this Chapter, as well as the applicable provisions of Beach Overlay Zone and the underlying zone for the property.

30.55.080 Setbacks from Coastal Bluffs.

A. Unless otherwise specified herein, all new or redeveloped principal or accessory structures, including new supporting foundations or supports for existing structures, shall be set back a minimum of 40 feet from the top edge of the coastal bluff as defined in this Chapter.

B. All new fences, windscreens, and benches shall be set back a minimum of ten feet from the top edge of the coastal bluff as defined in this Chapter. All such improvements, when providing less than the 40 foot coastal bluff top setback otherwise required in this Chapter, shall be constructed primarily above grade using light-weight materials and without the use of grading and/or continuous foundation components.

C. No grading shall be allowed within 40 feet of the top edge of a coastal bluff.

D. No grading or construction activities shall be allowed on the face of a coastal bluff unless approved as part of a Shoreline Protection Permit or Setback Seawall Permit issued in accordance with the provisions of this Title and when the Planning Commission or City Council, as the authorized review body for the project, makes a finding that the proposed grading has been minimized to the extent feasible to implement the authorized shoreline protection.

30.55.090 Application Submittals.

A. Applications for development of property which includes or lies in proximity to coastal bluffs as defined in this Chapter, shall include topographic maps, as necessary, to delineate the location of all coastal bluffs located on site or off site in proximity to the development proposal. Said maps shall indicate the alignment of the top edges of such coastal bluffs as defined in this Chapter. Maps required by this Section shall be of a scale not less than 1" equals 100' and shall delineate the topography of the site in two-foot contour intervals.

B. All applications for projects involving new construction on properties containing coastal bluffs shall be accompanied by a geotechnical report addressing: 1) existing conditions; 2) the suitability of the site for the proposed construction; and 3) the potential of the proposed development to affect bluff stability over a 70-year life span of the project; 4) the potential future need for shoreline protection during an expected 70-year life span of the project; 5) an analysis of bluff retreat and coastal stability for the project site, according to accepted professional standards; 6) an analysis of the potential effects on bluff stability of rising sea levels, using latest scientific information; 7) an analysis of the potential effects of past and projected El Nino events on bluff stability; and 8) an analysis of whether the affected section of coastline is under a process of retreat. The report shall also include recommended mitigation measures as they relate to avoidance of risks and preservation of fragile bluff systems. In the event that a submitted report recommends a coastal bluff top setback of a greater distance than otherwise minimally required in this Chapter, the greater distance shall be provided. In addition, for new development, the applicant shall acknowledge a waiver of all rights to future protective devices for the new development through recordation of a deed restriction as a condition of permit approval. [Ord. 733]

C. At the discretion of the Planning Director, the applicant may be required to provide funding for an independent, third party analysis of the information provided by the applicant pursuant to the application submittal requirements of this Section. The purpose of said third-party analysis is to ensure the project's consistency with the standards of review contained in this Chapter.

30.55.100 Grading Methodology and Practice.

A. In addition to the other provisions of the Del Mar Municipal Code, projects located within the Coastal Bluff Overlay Zone shall be subject to the following provisions:

1. All projects involving grading shall be subject to the submittal of an erosion and sedimentation control plan. Said plan shall ensure that all drainage from the impervious surfaces of the site will be collected and appropriately discharged in a manner which will prevent drainage and/or erosion related damage to the coastal bluff or any other properties or improvements in the vicinity. In addition, the plan shall include the provision of drainage facilities to convey all drainage away from any coastal bluff face and, where available, into existing developed storm drain systems capable of handling all anticipated drainage flows associated with the proposed project. Where an existing storm drain system is not available, the plan shall provide that drainage will be conveyed to a clearly defined, legal natural drainage course which can be shown to have adequate capacity to handle all required drainage flows without adverse impact to coastal bluffs. All designs and plans for drainage improvements shall be prepared by a licensed civil engineer and shall be subject to the review and approval of the City Engineer.

2. All projects requiring a Conditional Use Permit and a Coastal Development Permit pursuant to the provisions of this Chapter shall be subject to the submittal of a detailed landscape plan. Said plan shall ensure that native and other drought-tolerant plant species will be utilized in a manner that will minimize irrigation requirements and reduce the potential of slide hazards due to over watering of the bluffs. Said plan will ensure that no new irrigation systems will be installed within 40 feet of the edge of the coastal bluff top and that any existing irrigation systems located within said 40 foot bluff top setback will be removed as part of project implementation.

3. All projects involving grading shall be subject to the submittal of an erosion and sedimentation control plan. Said plan shall

ensure that the project will not result in an increase in peak runoff from the site over the greatest discharge expected during a 10-year, 6-hour frequency storm. Runoff control shall be accomplished by a variety of measures including, but not limited to, temporary and/or permanent on-site catchment basins, detention basins, siltation traps, energy dissipaters and the installation of landscape material. The required erosion and sedimentation control plan and any proposals to increase flows shall be subject to review and approval of the City Engineer.

4. All temporary erosion control measures proposed or required pursuant to the provisions of this Section including berms, interceptor ditches, sandbagging, hay bales, filtered inlets, debris basins, silt traps, or other similar measures shall be installed prior to the commencement of grading in the areas for which the erosion control measures are intended.

5. For projects involving a total of more than 25 cubic yards of cut and/or fill grading, no grading shall occur during the rainy season, identified for purposes of this Chapter as the period from November 15th to March 31st.

6. In addition to other erosion control measures required pursuant to this Chapter, all graded slopes shall be stabilized prior to the November 15th onset of the rainy season through the provision of vegetative erosion control. Vegetative erosion control may be achieved through measures such as: landscape planting, seeding, mulching, fertilization, and irrigation. The installation of vegetative erosion control shall occur with sufficient time to achieve landscape coverage prior to the November 15th start of the rainy season.

7. All permits shall be subject to the submittal of a polluted runoff control plan. The required plan shall incorporate the use of structural and non-structural Best Management Practices (BMPs), to the extent necessary, to minimize the discharge of pollutants carried by runoff from

urban development into surface water drainage, and to maintain post-development peak runoff rate and average volume at levels similar to pre-development levels. The plan shall include, but not be limited to the following Best Management Practices (BMPs), as applicable: silt traps, catch basins, oil/grit separators, street sweeping and cleaning program, low-maintenance landscape and pesticide management plan, solid waste management and public education program. Post-construction structural BMPs (or suites of BMPs) should be designed to treat, infiltrate or filter storm water runoff from each storm, up to and including the 85th percentile, 24-hour storm event for volume-based BMPs, and /or the 85th percentile, 1-hour storm event, with an appropriate safety factor, for flow-based BMPs. The plan shall include a monitoring component to ensure long-term maintenance of BMPs as relevant, and to allow for continued evaluation of the effectiveness of the polluted runoff control plan in meeting the goals of LUP regarding the protection and enhancement of sensitive resources. [Ord. 733]

30.55.110 Maintenance of Drainage and Erosion Control Measures.

A. Where the installation of erosion and/or drainage control measures is required pursuant to the provisions of this Chapter, the responsibility for maintenance of such measures shall rest with the applicant unless such responsibility is assumed by another agency or party found acceptable by the Planning Director.

B. The responsibility for maintenance of drainage and erosion control measures and a detailed maintenance program shall be included in an agreement(s) recorded against the deed for the property. The arrangements shall provide for the ongoing repair and maintenance of approved control measures to ensure continued effective erosion/drainage control.

30.55.120 Retained Open Space/Conditions of Development.

A. Areas to be retained in their natural state pursuant to the provisions of this Chapter shall be subject to conditions to ensure the protection of the designated area(s) from future encroachment, disturbance, or degradation. Said conditions shall include the recordation of an open space deed restriction, conservation easement, or open space easement to ensure protection of the designated area and to serve notice to the property owner, subsequent owners, or interested parties of the restrictions in effect on such property.

30.55.130 Additional Development Standards for Subdivisions.

A. No subdivision shall be approved unless the Planning Commission makes a finding that the proposed design of the subdivision and its improvements will be consistent with the criteria of this Chapter. Specifically, no subdivision shall be approved for creation of a lot(s) which would be incapable of either: 1) supporting the construction of a use allowed within the underlying zone and of supporting such use without the installation or construction of a shoreline protective device; 2) supporting such construction with provision of the applicable Coastal Bluff Top setbacks and other resource protection measures required pursuant to this Chapter; or 3) supporting such use without the installation or construction of a bluff or shoreline protective device. As a condition of recording the subdivision, a deed restriction shall be placed on all proposed bluff top parcels, which waives all rights to future protective devices for new development. In reviewing the subdivision proposal, the Planning Commission shall take into consideration, the probable impacts that the project, including subsequent development on the lot(s), will have on preservation of coastal bluffs and the avoidance of hazards.

[This Chapter of the Municipal Code forms a portion of the City of Del Mar Local Coastal Program Implementing Ordinances. The regulations found within this Chapter are not subject to "relief" through the Del Mar Variance process. Exceptions to, or relief from, the requirements found within this Chapter are limited to those specified

within the language of this Chapter or found within other Chapters of the Implementing Ordinances. Where there is a conflict between the language of this Chapter and other portions of the Del Mar Municipal Code, the language of this Chapter shall take precedence.]

ATTACHMENT 5

Bluff Parcel Ownership Exhibits – City, State, NCTD



Source: CityGIS (Nobel Systems Geoviewer, 2017 Del Mar Aerials)



Example:

This depicts a long toe wall at the base of the bluff running from from 11th Street north to 12th Street. This wall is currently being replaced as part of Project 4. The wall is on the City's bluff parcel and/or State property (beginning at the ambulatory mean high tide line)



Northerly view; photo taken September 28, 2020



Examples:

This is the northern part of the toe wall being replaced as part of Project 4.

The drainage device is being proposed for replacement as part of Project 5 – current proposal is to remove and underground with a head wall outfall. These are at the base of 12th Street

Both are on the City's bluff parcel and/or State property (beginning at the ambulatory mean high tide line)



Northerly view; photo taken September 28, 2020



Example:

This toe wall is located just north of 13th Street and being replaced as part of Project 4.

It is on the City's bluff parcel and/or State property (beginning at the ambulatory mean high tide line)



Northerly view; photo taken September 28, 2020



Examples:

This drainage device just north of 13th Street is being removed/replaced as part of current Project 4.

It is on the City's bluff parcel and/or State property
(beginning at the ambulatory mean high tide line)



Northerly view; photo taken September 28, 2020



Example:

This toe wall (this vertical line at base of bluff) is at the base of 7th Street and is being replaced as part of Project 4. We anticipate more wall replacements and new walls as part of future Projects 5 or 6.

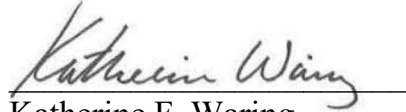
These areas are on the City's bluff parcel and/or State property (beginning at the ambulatory mean high tide line)



Northerly view; photo taken September 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that this 5th day of October, 2020, I caused a copy of the foregoing document to be served by U.S. First Class Mail or by more expeditious means on all parties of record.

A handwritten signature in cursive script, reading "Katherine Waring", is written over a horizontal line.

Katherine F. Waring

An Attorney for City of Del Mar