

# SHOULD DEL MAR'S SEA LEVEL RISE ADAPTATION PLAN BE PUT IN THE COMMUNITY PLAN, IN OUR LCP, OR BOTH?

Recommendations From  
Dwight Worden, Mayor  
September 24, 2018

## SUMMARY CONCLUSIONS

**1. Del Mar should submit its approved Sea Level Rise Adaptation Plan (AP) to the Coastal Commission for certification as part of our Local Coastal Program (LCP).** That is the best way to ensure managed retreat is not forced on us, that Del Mar retains maximum local control, and that we maximize our ability to secure the grant funds, permits, and regional cooperation needed to carry out our favored strategies of sand replenishment, sand retention, river dredging, a living levee to control flooding in low lying areas, and the right to build seawalls (collectively referred to in this paper as “favored strategies”). Only by adding the Adaptation Plan to our LCP do we make it the standard of review that the Coastal Commission must apply in Del Mar matters.

**2. The Coastal Commission cannot force Del Mar to adopt managed retreat.** If, as part of the certification process the Coastal Commission attempts to add managed retreat to the AP, Del Mar has the right to reject those modifications.

**3. Putting our Adaptation Plan into the Community Plan offers some benefits, but doing so does not make it part of the standard of review binding on the Coastal Commission.** The Coastal Commission can ignore our Community Plan. The LCP is the standard of review the Commission must use, not the Community Plan. Our current LCP, now decades old, does not address sea level rise, does not reject managed retreat, and does not contain our favored strategies. If our AP is not added to our LCP to cover these key topics, it is left to the Commission’s discretion to interpret and fill in the gaps.

**For these reasons, I support putting the Adaptation Plan into both the LCP and the Community Plan. It is inadequate, however, to put the AP solely into the Community Plan.**

## DISCLAIMER AND CITY ATTORNEY’S LEGAL ANALYSIS

This paper reflects my personal views and is not legal advice. For a legal analysis see the City Attorney opinion dated August 6, 2018. It addressed the question:

*“Should the City of Del Mar sea-level rise Adaptation Plan (the “Adaptation Plan”) be submitted to the California Coastal Commission (the Commission) as a Local Coastal Program Amendment (“LCP”), or may it be processed instead as an amendment to the City’s Community Plan which serves as a general plan, and what are the pros and cons of each option?”*

The City Attorney’s analysis notes, *“There are legal and practical benefits to incorporating the Adaptation Plan into the LCP.”* It concludes, *“The Adaptation Plan can be part of the Community Plan—in addition to not in lieu of—incorporation into the LCP.”*

## **ANALYSIS**

### **Background**

State law requires Del Mar to have a Local Coastal Program (LCP)<sup>1</sup> and a General (Community) Plan.<sup>2</sup> The Del Mar LCP is required to address coastal related hazards, and the Del Mar Community Plan must include a Safety Element addressing climate change hazards citywide.

Recent state law and policy call for the LCP to be updated to address sea level rise hazards, and new state law (SB 379) requires the Community Plan to address climate change-related hazards including fire and other non-sea level rise concerns.<sup>3</sup> To meet these requirements Del Mar has prepared an LCP Amendment addressing sea level rise, and is a participant in the updated Countywide Hazard Mitigation Plan to ensure SB 379 compliance with respect to fire and other non-sea level rise hazards.

### **Del Mar’s Current LCP Does Not Address Sea Level Rise**

Del Mar’s LCP has two parts, a Land Use Plan (LUP) and Implementing Ordinances (IO’s). Del Mar’s LUP was certified by the Coastal Commission on March 18, 1993 and the IO’s were certified on September 11, 2001. Chapter 3 of the certified LUP addresses the hazards known at the time: “...coastal bluff failure, shoreline storm damage, flooding, and runoff and slope erosion.”<sup>4</sup> Notably absent from both the LUP and the IO’s, is any discussion of sea level rise. The LCP does not identify sea level rise as a hazard, does not address what might be at risk from sea level rise, or what the adaptation options might be.<sup>5</sup> The absence of any discussion of sea level rise and how it might impact Del Mar is the prime reason for the current update to the LCP on that topic.

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<sup>1</sup> See, Cal. Pub. Res. Code Section 30500(a) which reads in part “(a) Each local government lying, in whole or in part, within the coastal zone shall prepare a local coastal program for that portion of the coastal zone within its jurisdiction...”

<sup>2</sup> See, Cal. Gov’t code Section 65302

<sup>3</sup> California Senate Bill 379 was adopted in 2015. It requires each city to update its General Plan Safety Element “...to address climate adaptation and resiliency strategies applicable to that city or county.”

<sup>4</sup> As to coastal bluff failure, the LUP identifies excessive runoff on top of the bluffs and railroad use as the source of problems (LUP p. 27). As to shoreline storm damage the LUP identifies loss of beach sand due to littoral drift, and reduced sand resupply, sea wave attack, underground water seepage, surface runoff, and overtaxed drainage systems as the causes. (LUP p. 27-28). As to flooding, the LUP identifies storm wave impacts and flooding, and flooding from upland areas, and the rare tsunami. (LUP p. 28). As to runoff and slope erosion the LUP addresses rainfall patterns as the cause. (LUP p.28).

<sup>5</sup> LUP p.18 et seq. The LUP includes a number of policies for addressing the coastal hazards it does identify, including implementation of the Beach Preservation Initiative (BPI), but the existing LUP does not contain policies addressing sea level rise.

## **The Beach Preservation Initiative**

The Beach Preservation Initiative (BPI) was adopted by the voters of Del Mar in 1988. I am intimately familiar with the BPI, because I am its author. I drafted it as a successful citizens' initiative. It is part of the city's certified LCP.<sup>6</sup> The BPI addresses many topics, including removal of private encroachments from the public beach, seawalls, emergencies, and other matters. It does not, however, directly address sea level rise, associated risks and vulnerabilities, managed retreat, or adaptation options. It does allow construction of properly designed protective devices, including seawalls, for the protection of public and private property when required findings are made.<sup>7</sup>

## **Sea Level Rise Planning**

Sea level rise was not a common topic of discussion twenty five years ago when the Coastal Commission certified Del Mar's LUP. Both the Del Mar LCP and the BPI are out of date given what we now know about climate change and sea level rise. Del Mar is not alone, as LCPs up and down the state are generally out of date on sea level rise. Accordingly, the Coastal Commission and other state agencies have made grants to local governments to update their LCPs to reflect modern sea level rise analysis. The Coastal Commission also published "Guidance" documents advising local governments how the Commission recommends the updating process be undertaken. These guidance documents are advisory.

## **Del Mar's Grant**

Del Mar received two grants totaling \$311,220 to update its LCP to reflect sea level rise analysis. In 2015 Del Mar committed to a work program to do this planning. That work plan included hiring a qualified consultant, creation of a technical advisory committee (STAC) and committed to a science-based program, to maximum public input, and to submittal of a proposed amendment to the City's LCP to the Coastal Commission.

## **Del Mar's LCP Amendment Documents<sup>8</sup>**

Del Mar's proposed LCP Amendment is comprised of the following, all of which have been approved by the City:

- **Vulnerability and Risk Analysis** This, in many ways, is the key document. It uses the best available science and planning tools to identify what in Del Mar is at risk from sea

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<sup>6</sup> The BPI is found at Chapter 30.50 of the Del Mar Municipal Code and at page 32 et seq. of Del Mar's LUP, and on unnumbered pages in the IO's.

<sup>7</sup> See, BPI sections 6 and 8.

<sup>8</sup> There are a number of other documents and reports relied on by Del Mar that are not included in the Del Mar LCP documents but that informed the Del Mar process. Principal among these is an economic analysis entitled: "*Comparing Sea Level Rise Adaptation Strategies in San Diego: An Application of the NOAA Economic Framework*" dated June, 2017; a Legal risk Analysis entitled: "*Legal Risk Analysis for Sea Level Rise Adaptation Strategies in San Diego*" dated June, 2017 prepared by the Environmental Law Institute; and the Guidance Documents prepared by the Coastal Commission entitled: "*CALIFORNIA COASTAL COMMISSION SEA LEVEL RISE POLICY GUIDANCE Interpretive Guidelines for Addressing Sea Level Rise in Local Coastal Programs and Coastal Development Permits*" dated August 2015 and subsequently updated.

level rise, flooding, erosion, and storm surge. Vulnerabilities include public and private property, infrastructure (such as the railroad, sewer facilities, and bridges) as well as environmental assets (such as the beach and our lagoons). This risk assessment is thorough, accurate, and went through the process with little controversy.

- **Sediment Study** This report uses best available science and planning tools to analyze how sediment flows in the San Dieguito River, in the littoral cell running from San Clemente to La Jolla, and how this complex sediment system impacts Del Mar's beach and lagoons. The report gives key information for moving forward with Del Mar's favored strategies. The report is well respected and passed through the system relatively free of controversy.
- **Lagoon study** This report uses best available science and planning tools to analyze the impacts to our lagoons and environmental resources as sea level rises. It is also accepted as thorough, well respected, and accurate, and passed through the system relatively free of controversy.
- **Adaptation Plan** This report reflects policy recommendations for addressing sea level rise, formulated based on the consultant's input, public input, Coastal Commission staff input, STAC recommendations, Planning Commission recommendations, and city staff recommendations. The final Adaptation Plan was adopted by the Del Mar City Council on May 21, 2018 after revisions to reflect community input and stakeholder consensus.<sup>9</sup> Most of the Adaptation Plan's 99 pages are largely non-controversial. But, one issue remains: whether to put the Adaptation Plan into the City's LCP, into the Community Plan, or both.
- **Implementing Ordinances** The Implementing Ordinances reflect code updates to carry out the Plan. Note that the Planning Commission unanimously endorsed these code updates on September 11, 2018 and unanimously recommended that they move forward as part of an LCP Amendment.<sup>10</sup> Final Council action on these code updates is expected in October.

**RECOMMENDATION: Submit the Adaptation Plan to the Coastal Commission for certification as an amendment to our LCP. Also incorporate the AP into the Community Plan by reference, along with the Countywide Hazard Mitigation Plan as part of an SB 379 Update.**

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<sup>9</sup> The final wordsmithing of the Plan was completed by a working group representing all stakeholders and the final Plan was broadly supported.

<sup>10</sup> The Planning Commission noted two caveats to its recommendation (1) That instead of a deed restriction, a different form of recorded notice be utilized (2) that the City council be asked if the designated "transition area" is needed now or can be deferred to later.

Submitting the Adaptation Plan to the Coastal Commission for certification as part of an LCP Amendment gives Del Mar maximum local control and narrows the Commission's otherwise broad discretion. It is the best way to lock down rejection of managed retreat and to lock in our favored strategies. The benefits obtained through an LCP amendment include:

- The favored strategies, based around sand replenishment, are preferred by nearly everyone in Del Mar, including me. Keeping a wide beach through replenishment holds back rising seas. It is the best way to protect both a wide beach for public use and to protect shoreline private homes, public infrastructure, and low lying inland areas. However, sand replenishment is expensive, requires regional cooperation, grant funding, approvals from the Coastal Commission, and from a myriad of other federal, state, and local agencies. We seriously jeopardize Del Mar's chance for success at our favored strategies if we do not put our Adaptation Plan into the LCP. We cannot fund or implement our favored strategies on our own.
- The Coastal Commission's authority is limited to certifying our LCP Amendment as consistent with the broad policies of the Coastal Act, or to making specific findings why it is not consistent with the Act. The Commission is limited to "suggesting" modifications and cannot dictate changes. The City remains free to accept or reject any such suggested modifications, including as to managed retreat.
- The Coastal Commission is not bound by the Del Mar Community Plan and is free to ignore it. The Commission is bound only by the LCP.
- Future grant funding to implement the Adaptation Plan's favored strategies is more likely if these programs are in the LCP. The granting agencies typically require adopted local adaptation policies and regulations to be located in the LCP for all coastal cities. The Coastal Commission and other permitting<sup>11</sup> and resource agencies<sup>12</sup> look to certified LCPs for guidance in deciding whether to support a project.
- A SCOUP permit allowing Del Mar to accept sand for its beaches must be issued by the Coastal Commission, and is likely more difficult to receive if our Adaptation Plan is not in the LCP.
- Del Mar needs to process an LCP Amendment in any event to enact flood hazard regulations.
- Del Mar, in my opinion, satisfies its grant requirements by submitting its LCP Amendment to the Commission for certification whether or not it is ultimately certified, and whether or not Del Mar rejects any suggested modifications. On the other hand, Del Mar may have issues with grant compliance if it does not even submit an LCP Amendment.<sup>13</sup>

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<sup>11</sup> Coastal Commission, Army Corps of Engineers, Regional Water Quality Control Board, City of Del Mar and perhaps other permits are required.

<sup>12</sup> The US Fish and Wildlife Service, the California Fish and Wildlife Service, and perhaps other resource agencies must be consulted and their approvals obtained.

<sup>13</sup> See, e.g. Project Work Plan for Del Mar sea level rise planning grant setting out Del Mar's grant compliance commitments at page 4, item 6: "LCPA submittal to CCC: Following [city] adoption, the City will submit the LCPA

The dual approach of an LCP Amendment and incorporating both Plans into our Community Plan brings us into compliance with SB 379, with the Coastal Act, and maximizes local control. Adding both of these plans to the Community Plan has the added benefit of giving our community stronger protection against possible ill-advised future amendment attempts. Changing the Community Plan requires either an elevated 4/5ths Council vote or a public vote.

### **The Argument Against an LCP Amendment**

Some argue that if Del Mar submits an LCP Amendment it will only open the door to allow the Coastal Commission to insist that some form of managed retreat be added to Del Mar's Plan. They argue that the Commission, its staff, or both have already made it clear that managed retreat will be required.<sup>14</sup>

The record does not support this view. It shows only that the Commission, its staff, and its Guidance documents call for *consideration* of retreat as one of a range of adaptation strategies (protection, accommodation, retreat, and hybrid) with the choice of which strategies to pursue left to Del Mar. The Coastal Commission Guidance document recommends only that all options including managed retreat be *studied*.<sup>15</sup> Letters received by the City from Commission staff are consistent--they encourage Del Mar to *study* retreat as an option, but do not direct implementation of retreat.<sup>16</sup> It appears that some have confused a directive to *study* managed retreat with a directive to *implement* it. The difference is important.

Del Mar has completed study of the range of adaptation strategies recommended by the Coastal Commission Guidance and staff letters. Del Mar's study included detailed review of managed retreat as an option, with the city and public spending more time on that option than on any other topic. Del Mar's Adaptation Plan articulates valid reasons for rejecting managed retreat as infeasible for Del Mar's beach front. This is all in compliance with the official positions of the Coastal Commission.

If Del Mar submits the Adaptation plan as part of an LCP Amendment is certification a certainty? No one can say for sure. But:

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package to CCC for review and certification. **The grant commitment shall be complete upon submittal of a complete LCPA application to CCC for certification...**" and page 9, Task 6, which calls only for "**submittal of LCPA package to CCC prior to the grant deadline.**" (highlighting added)

<sup>14</sup> See, e.g. memorandum from attorney Jon Corn representing beach front owners to the Del Mar City Attorney dated July 17, 2018, unnumbered page 4: "The Coastal Commission has already said it will refuse to certify any amendment that does not include managed retreat." There is no citation to support this claim.

<sup>15</sup> See, e.g. California Sea Level Rise Policy Guidance, page 122 addressing Adaptation Strategies: "For purposes of implementing the Coastal Act, no single category of adaptation strategy or even specific strategy should be considered the 'best' option as a rule. Different types of strategies will be appropriate in different locations and for different hazard management and resource protection goals."

<sup>16</sup> The most recent Commission staff statement on the topic includes: "*On your question about other jurisdictions that are considering managed retreat as an adaptation strategy, we expect the strategy to be addressed and considered in all the plans...*" (Highlight added).

- Ninety percent+ of our Sea Level Rise documents are non-controversial and have already received Coastal staff favorable initial review.
- Neither the Coastal Act nor the Coastal Commission has adopted a policy requiring managed retreat in LCPs. The only requirement is that it be studied, which Del Mar has done.
- Cities up and down the state are wrestling with managed retreat just as Del Mar has, and neither the Commission nor another city has a better solution than the one proposed by Del Mar.
- The Coastal Commission wants cities to succeed in sea level rise planning, recognizes the challenges of addressing managed retreat, and is looking for science-based plans tailored to local conditions. This is what Del Mar's LCP Amendment contains.
- The Coastal Act and the Commission's Guidance Documents are clear that it is a local policy decision how to balance competing interests, and it is for Del Mar to choose which adaptation strategies to adopt for our city within the broad boundaries of the Coastal Act.
- In my view, Del Mar's proposed LCP Amendment, including the Adaptation Plan, is consistent with the Coastal Act, grounded in solid science, reflects legitimate legal and economic realities, sets forth reasonable policies, and the entire LCP Amendment package is entitled to certification.

All these factors indicate that a case can be made for certification. Can certification be guaranteed? No. But what can be guaranteed is that if the Commission, for whatever reason, declines to certify Del Mar's LCP Amendment and recommends the addition of managed retreat policies, Del Mar has the final right to reject such modifications. Those who think putting the Adaptation Plan only in the Community Plan will keep the Coastal Commission out of our business are mistaken. Because our entire city is within the coastal zone, we often have applications and matters that are required to go before the Coastal Commission. There is no "silver bullet" to avoid Coastal Commission oversight. What is attainable is to narrow Coastal Commission discretion and assert maximum local control through our LCP Amendment.

### **The bottom line**

If Del Mar submits the Adaptation Plan to the Commission as part of an LCP Amendment, Del Mar has satisfied its grant commitments and remains free to reject any suggested modifications. If the LCP Amendment is certified by the Coastal Commission, Del Mar benefits greatly by binding the Commission to the LCP, including our Adaptation Plan and its conclusion that managed retreat is not a feasible strategy for Del Mar. It also binds the Commission to use our AP as the standard of review for Del Mar projects. Examples of the how outcomes might differ if our AP is in our LCP, or only in our Community Plan, are attached as Exhibit A.

## EXHIBIT A

### EXAMPLES SHOWING WHY DEL MAR IS BETTER OFF WITH THE ADAPTATION PLAN IN OUR LCP

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September 24, 2018

**EXAMPLE 1: Rebuilding an existing seawall.** Assume a beach front owner applies to rebuild an existing BPI compliant seawall.

**Scenario 1: The Adaptation Plan is in the LCP.** Under this scenario, when that seawall permit application comes before the Coastal Commission, as either an "original jurisdiction" project or on appeal, the Commission will be constrained to follow Del Mar's LCP, including the BPI and the Adaptation Plan's rejection of managed retreat.

**Scenario 2: The Adaptation Plan Is Only In The Community Plan.** Under this scenario, the Commission may require relocation of the seawall inland as part of a managed retreat strategy. The Commission might conclude that although the BPI authorizes a seawall, it does not specify limits on a landward location.<sup>1</sup> Further, because the Del Mar LCP, absent the Adaptation Plan, does not take a position on managed retreat, the Commission might implement its version of retreat. Del Mar could try to dispute such a position, but without the Adaptation Plan and its rejection of managed retreat in the LCP to rely on, the outcome would be in doubt.

**EXAMPLE 2—A Modest Home Addition.** Assume a beach front homeowner wants to add 200 square feet to an existing home to extend a room toward the ocean. If the Adaptation Plan is not in the Del Mar LCP, and if the Commission wants to pursue a managed retreat agenda, it could deny the permit on the grounds that building to the west is not consistent with state policies for retreating. If the Adaptation Plan were in the LCP, the Commission could not take this position, as the Adaptation Plan expressly rejects managed retreat for these homes.

**EXAMPLE 3: Protecting Powerhouse Park and Other Public Property.** The city may need to protect Powerhouse Park and other public assets in the beach colony such as city sewer facilities, bridges, and streets. Absent the Adaptation Plan and its rejection of managed retreat being in the LCP the Commission might direct that the city allow natural retreat of these public assets in furtherance of a state policy on managed retreat.

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<sup>1</sup> Although the BPI specifies that a seawall may, under certain circumstances, extend up to 5 feet west of the SPA line, it is silent as to eastward locational limits.