

**ELECTIONS CODE SECTION 9212
REPORT ON VOTER APPROVAL
OF AMENDING DEVELOPMENT REGULATIONS
FOR BEACH PROPERTIES INITIATIVE**

Presented August 6, 2018
Del Mar City Council Meeting



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1. INTRODUCTION

California Elections Code Section 9212 provides that the City Council may order a report on the effect of a proposed initiative and may refer the initiative measure to any city agency or agencies for such report. The City may order a report during circulation of the petition or before taking action to submit the proposed ordinance to the voters or adopting the proposed ordinance. In ordering the report, the Council may request that the city agency or agencies address the following: fiscal impact, effect on the City's general and specific plans, including the housing element and the consistency between planning and zoning; effect on land use, including the impact on availability and location of housing; infrastructure impact; impact on use of vacant parcels; and any other matters the Council requests to be in the report. The report must be presented to the legislative body within 30 days after the elections officer certifies to the legislative body the sufficiency of the petition (Elections Code, Section 9212 (b).) After reviewing and considering this report, the City Council must either adopt the initiative without any amendments or schedule an election for consideration of the initiative by city voters (special election) within 10 days.

On July 2, 2018 the Del Mar City Council approved a Resolution No. 2018-48 calling for a report on the effects of the proposed initiative titled "Amending Development Regulations for Beachfront Properties". Specifically, the City Council directed staff to address the list of potential impacts set forth in California Elections Code Section 9212 and to address the following issues:

- 1) Whether the proposed initiative as circulated contained any material misrepresentations.
- 2) The historical practice of the City in considering the property west of the SPA Line for purposes of Floor Area Ratio (FAR) calculations.
- 3) Whether, if adopted, the proposed ordinance would, if implemented subject the City to potential claims of inverse condemnation or due process violations.
- 4) Would the proposed ordinance result in non-conforming lots or structures and what the potential ramifications of such non-conformance would be.

This report responds to that direction.

2. BACKGROUND

In 1988, the voters of the City of Del Mar approved Measure "D" – the "Beach Preservation Initiative" (BPI) –codified as Chapter 30.50 of the Del Mar Municipal Code (DMMC). The BPI created new standards for use and protection of the City's beaches through the establishment of the Shoreline Protection Area (SPA) for all land westerly of north to south delineation line, whose location is specifically described within the Chapter and commonly referred to as the "SPA Line." The SPA Line serves as the easterly limit of what is considered to be "public beach". It was not intended as a boundary line for

properties. Westward of the SPA Line, only limited development is permitted, and only when deemed necessary to protect persons and property.

There are 92 private properties in the City of Del Mar whose western legal lot boundary is either coterminous with SPA Line or is located westerly of the SPA Line, and they are all located north of Powerhouse Park. For 64 of these properties, all of which are located between 18th and 29th Streets, their western property boundaries are generally in alignment with the SPA Line. There are 28 properties along Del Mar's shoreline where the SPA Line encumbers private property westerly of the SPA Line and they are located between Powerhouse Park and 18th Street, and from 29th Street to the City's border with Solana Beach. A map depicting the above-described properties has been included as "Exhibit 1" of this report.

The westerly boundary of property ownership for the beach front properties extends westward to the ordinary high-water mark¹. (California Civil Code 830) In many cases this boundary is established by way of record of surveys filed with the County Assessor's office and form the basis for ownership and taxation. However, while the beach front property owners take title to the ordinary high water mark, this determination is ambulatory. As the land of water gradually builds up or erodes, the ordinary high water mark necessarily moves, and thus the legal boundary also moves. *City of Oakland v. Buteau* (1919) 180 Cal. 83, 179. It should be noted that records of survey are evidence of legal boundaries but they are not conclusive evidence. (*City of Los Angeles v. Duncan* (1933) 130 Cal. App. 11, 13-14. Conclusive legal boundaries can only be established through Boundary agreements between property owners and the State Lands Commission.

Prior to the adoption of the Beach Preservation Initiative, all portions of the beach front properties were considered as part of the Floor Area Ratio (FAR) analysis. Upon adoption of the Beach Preservation Initiative in April of 1988, the City took the position that the western boundary of some beach front properties were coterminous with the SPA Line and excluded the area west of the SPA Line. This position was based upon a study and map prepared by a State Lands Commission expert and his deposition testimony in the case of *Lang vs. the City of Del Mar*.

Until the early 2000's, the Del Mar Municipal Code ("DMMC") contained a definition for "Lot Area" which defined the lot area as the "total area exclusive of streets, alleys, road easements or private roads within the boundary lines of a lot or building site". "Streets" were defined in the Code as "a thoroughfare dedicated, condemned, and accepted for public use and/or which affords primary means of vehicular access to abutting property, including boulevard, avenue, place, drive court lane or other thoroughfare dedicated ... for public use". Staff, based on these Code provisions, concluded that the area west of the SPA Line qualified as a thoroughfare dedicated for public use and, therefore, was the equivalent of a street. This formed an additional basis upon which staff excluded property west of the SPA Line from the determination of "Lot Area". Upon review of City records three residences have been approved by the City (in 1998, 2003 and 2017 respectively) by excluding the property west of the SPA Line from

¹ As discussed above some of these properties are encumbered by the SPA line.

FAR calculations. Homes proposing to remodel and construct additions have also been consistently held to this standard subsequent to the adoption of the BPI.

Subsequently, in 2007, the lot area definition was removed from the DMMC and replaced with new definitions for “gross” and “net” lot area. The new definitions, in effect, narrowly defined “public rights of way” to refer to *vehicular* access as opposed to the broader reference to “a thoroughfare dedicated, condemned, and accepted for public use”. The newly defined code provisions led to some inconsistency in the determination of whether the lot area west of the SPA Line was to be included in FAR calculations. In at least one case, the Peto application, a compromise was reached with the property owner which allowed consideration of the SPA area as part of the FAR calculation.

In an effort to clarify the interpretation and application of the new code provisions, the Planning Commission at its hearing in November 2017, rendered an interpretation of definitions cited in Chapter 30.04 of the Del Mar Municipal Code for “gross lot area,” “net lot area” and “public right of way” as applied to the calculation of maximum permitted floor area ratio for properties within the Beach Overlay District. The Planning Commission interpretation led to the conclusion that the lot area west of the BPI/SPA line should not be deducted from the lot area for purposes of FAR calculation, allowing the private property westerly of the SPA Line to be counted towards FAR.

3. INITIATIVE SUMMARY

The ordinance proposed by the initiative petition would amend four provisions of the Del Mar Municipal Code that affect and relate to the development of beachfront properties. The proposed ordinance modifies the definition of four terms in the City of Del Mar’s Building Construction and Zoning codes related to the calculation of floor area ratios (FAR). The ordinance would exclude any area designated as a “Shoreline Protection Area” – defined in section 30.50.040 of the Municipal Code – from the calculation of floor area ratio used to determine allowable construction and development. A copy of the initiative has been included as Exhibit 2.

The proposed revisions to the Municipal Code include changes to the Zoning definitions of “Lot Area, Gross” in subsection (J) of section 30.04.120; “Lot Area, Net” in subsection (K) of section 30.04.120; and “Bulk Floor Area Ratio” in section 30.72.030. The ordinance also proposes revisions to the Building Construction definition of “Floor Area Ratio” in section 23.20.030.

Two terms in the definitions section of chapter 30.04 of title 30 – Zoning, would be revised to exclude portions of a lot that qualify as Shoreline Protection Area. “Lot Area, Gross” would exclude any portion of a lot that is designated as Shoreline Protection Area. “Lot Area, Net,” would similarly add any portion of a lot designated as Shoreline Protection Area to the areas already excluded from the net lot area calculation, such as public right-of-way.

“Bulk Floor Area Ratio,” contained in chapter 30.72 – Bulk Floor Area Limitations of title 30 – Zoning, would be modified to explain that the “total area of the lot” used to

determine the bulk floor area ratio (and to in turn determine the amount of bulk floor area that can be constructed upon a lot) is equivalent to the definition of Lot Area, Gross.

Finally, in title 23 – Building Construction, “Floor Area Ratio” would also be amended to explain that the “total lot area” used to determine the floor area ratio with respect to installation of solar energy systems is equivalent to the definition of Lot Area, Gross.

LEGAL ISSUES

4. Would the proposed ordinance, if enacted, constitute a regulatory taking?

The proposed ordinance would only impact those beach front parcels where the westerly boundary line extends beyond the SPA Line. The ordinance would preclude consideration of that portion of the parcel westward of the SPA Line (SPA area) for purposes of calculating the allowable FAR for the parcel. Staff has determined that there are potentially 28 lots affected².

Fifteen of the affected lots are located within the R1-10B zone (Low Density – Beach). Based on the average size of the lots (26,902 square-feet) with the inclusion of the SPA area in the FAR calculation the potential building floor area would be 8,070. Under the proposed ordinance the developable FAR would be reduced by approximately 23% resulting in the potential average building floor area of 6,214 square-feet.

Five of the affected lots are located within the RM-West zone (Medium Density Mixed-West). Based on the average size of the lots (10,201 square-feet) with the inclusion of the SPA area in the FAR calculation the potential building floor area would be 4,590 square-feet. Under the proposed ordinance the developable FAR would be reduced by approximately 27% resulting in the potential average building floor area of 3,362 square-feet.

Four of the affected lots are located within the R1-40 zone (Very Low Density Residential). Based on the average size of the lots (106,634 square-feet) with the inclusion of the SPA area in the FAR calculation the potential building floor area would be 13,329 square-feet. Under the proposed ordinance the developable FAR would be reduced by approximately 13% resulting in the potential average building floor area of 9,731 square-feet.

One of the affected lot is located within the R1-14 zone (Modified Low Density Residential) and is approximately 113,256 square-feet in area with the inclusion of the SPA area in the FAR calculation the potential building floor area would be 28,314 sq. ft. The ordinance would result in a 29% reduction in FAR resulting in an approximate potential building floor area of 20,103 square-feet.

² Staff has determined that boundary line for the lots within the R1-5B zone and the 1800 block of Ocean Front in the RM-West zone are coterminous with SPA Line.

Two of the affected lots are located in the Beach Commercial zone. Based on the average size of the lots (30,300 sq. ft.) with the inclusion of the SPA area in the FAR calculation the potential building floor area would be 3,030 sq. ft. Under the proposed ordinance the developable FAR would be reduced by approximately 38% resulting in the potential average building floor area of 3,555 square-feet.

Lastly, one of the affected lots is located in the Visitor Commercial zone and is approximately 14,261 square feet in area. With the inclusion of the SPA area in the FAR calculation the potential building floor area would be 5,704 sq. ft. The ordinance would result in a 38% reduction in FAR resulting in an approximate potential building floor area of 3,555 square-feet. (See Exhibit 3)

It is important to note that this analysis is based on the average lot size. Individual parcels may be affected differently based on their actual parcel size. In some individual cases the FAR may be reduced by as much as fifty percent. Additionally, in addition to the allowable FAR, a project's bulk and scale is regulated by the City's Design Review Ordinance. In many cases, this may prevent utilization of all of the maximum FAR.

The state and federal constitution guarantee real property owners "just compensation" when their land is taken for a public use. California Constitution, Article I section 19; U.S. Const., 5th Amendment; *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537. This constitutional guarantee is "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole". *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123. Where government regulations deprive a property owner of "all economically beneficial use" of his/her property this amounts to a regulatory taking (ie. inverse condemnation) *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 10015- 16 (1992).

In cases where government regulation does not cause a physical taking or deprive the property owner of all economically beneficial use of their property, the court may still find that a "taking" has occurred under what is commonly referenced as the Penn Central test. Under this test, the court considers three factors: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment backed expectations; and 3) the nature of the government action. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). In applying the Penn Central test, the California Supreme Court has added ten additional factors that might be relevant in determining whether a regulatory taking has occurred. These factors include:

1. Whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's primary expectations.
2. Whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute property for Fifth Amendment purposes.
3. The nature of the State's interest in the regulation and, particularly, whether the regulation is reasonably necessary to the effectuation of a substantial purpose.

4. Whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader.
5. Whether the government is acquiring resources to permit or facilitate uniquely public functions such as government's entrepreneurial operations.
6. Whether the regulation permits the property owner to profit and to obtain a reasonable return on investment.
7. Whether the regulation provides the property owner benefits or rights to mitigate whatever financial burdens the law has imposed.
8. Whether the regulation prevents the best use of the land.
9. Whether the regulation extinguishes a fundamental attribute of ownership.
10. Whether the government is demanding the property as a condition for the granting of a permit.

Kavanau v. Santa Monica Rent Control Board, 16 Cal. 4th 761, 775-776. (1997)

The principles and factors set forth in the above are applied on an ad hoc basis (case by case) so due to the potential complexity of the factors which would be involved in each potential case, it is difficult to reach any definitive conclusion regarding the whether the impacts of the proposed ordinance on a particular property within the Beachfront Overlay Zone would result in a regulatory taking. However, some general comments can be made with respect to some of the factors to be considered.

Land use restrictions, reasonably related to the promotion of health, safety, morals, or general welfare have repeatedly been upheld even though the challenged regulations destroyed or adversely affected recognized real property interests or flatly prohibited the most beneficial use of the property. *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 125. While property may be regulated in the promotion of health, safety, morals or general welfare if the regulation goes too far it may amount to a taking. The takings analysis requires balancing the property owners' rights and the government's authority to advance the common good. The determination of whether a regulation goes too far is not subject to a bright line test.

The proposed ordinance does not result in a physical taking nor does it deprive the affected property owners of all economically viable use of their property. The properties can continue to be used for residential purposes. The ordinance does, however, reduce the maximum FAR and thus the development potential of the property. The primary issue is whether this reduction in development potential is so significant that it would amount to an actual "taking".

The mere fact that a government regulation results in a loss of property value does not in and of itself result in a "taking". *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 518. The inability to reap as great a profit as one might absent the zoning restriction does

not equate with a “taking”. *William C. Haas & Co. v. City and County of San Francisco*, 650 F.2d 1117, 1120-1121 (9th Cir. 1979)³

In assessing the economic impacts the question is whether the regulation deprives the property owner of substantially all economically viable use of their property. In making that determination the courts generally look to the value that is left in the owner’s property rather than the value which was taken. *Keystone Bituminous Coal Association v. De Benedictis* 480 U.S. 470, 495-97 (1987) In other words, the focus is on the entire parcel of the property and is not limited to the affected portion of the parcel. To the extent the regulation provides the property owner with an economically viable use of his/her property there is no regulatory taking.

However, there have been cases which have established a “takings” claim based on the fact that the property owner was not deprived of all economically viable use of the property and only a portion of the property was affected. In *Twain Harte Associates, Ltd. v. County of Tuolumne* (1990) 217 Cal. App. 3d 71, the court stated that the law does not demand that property subject to an inverse condemnation claim be treated as a whole in determining whether an ordinance goes too far in its economic consequences and factors which should be considered include 1) whether the portion of the property affected is an economically viable part of the larger parcel 2) whether any development is allowed on the affected portion and 3) whether there were compensating densities or other allowances on the larger portion in order to ameliorate the owners’ loss of development options with respect to the affected portion. Also in *Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal. App. 4th 1175, the city in granting a development permit required that the developer leave approximately a third of its property undeveloped. A takings claim was successful in large part on the fact that the restriction was based on the city’s desire to preserve the restricted portion of the lot for reconstruction of a freeway interchange.

In summary, the determination as to whether the proposed ordinance would constitute a regulatory “taking” must be determined on a property by property basis considering the specific economic impacts and unique circumstances of each parcel. It is reasonable to conclude that the stated purpose of the initiative is reasonably related to a legitimate governmental purpose to promote the orderly development of Del Mar’s beach areas consistent with the City’s community plan and Local Coastal Plan. Additionally, it appears that the ordinance would not deprive the property owners of substantially all of their economically viable uses. However, whether the proposed ordinance goes “too far” in impacting the economic interests of the property owners would be determined on a case by case basis. In light of the opposition from property owners to the City’s recent proposal to adopt a similar ordinance and the complexity of the legal analysis, it is reasonable to conclude that the City will be exposed to lawsuits from some of the affected property owners claiming that the initiative results in a “taking”.

³ In this case the value of the property was reduced from \$2,000,000 to \$100,000.

5. Would the proposed ordinance, if enacted, violate the property owners' substantive due process rights?

Land use ordinances are subject to the substantive requirements of the federal and state due process clauses. The due process clause of the Fifth Amendment to the Constitution provides that “No person shall be deprived of life, liberty, or property without due process of law”. The Fourteenth Amendment applies this to state and local governments. The focus of a substantive due process claim is whether the land use regulation was arbitrary and capricious and, therefore, not a proper exercise of the police power. *Lingle v. Chevron U.S.A. Inc* (2005) 544 US 528, 548. The California Supreme Court has held that an ordinance that is restrictive of property use will be upheld against a due process attack unless its provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare. *Nash v. City of Santa Monica* (1984) 37 Cal. 3d 97, 103. The focus of the inquiry of a substantive due process claim is the reasonableness of the government regulation and the rational relationship of the regulation to a legitimate government purpose. *Shaw v. County of Santa Cruz* (2008) 170 CA4th 229.

The proposed initiative sets forth its purpose. In sum, the purpose is stated as providing for the orderly, fair, and consistent development of beach front lots; protection of the City of Del Mar’s beach areas and coastline consistent with the City of Del Mar Community Plan, the City of Del Mar Local Coastal Program, the requirements of the Coastal Act, and the historical application of the City’s Municipal code requirements. (Section 2 B, *Initiative Measure To Be Submitted Directly To The Voters*) On its face the initiative’s purpose would arguably be consistent with the City’s police power to regulate land uses within its jurisdiction. Regulating the potential buildable floor area is a commonly accepted development regulation. Its application in the underlying districts of the Beach Overlay Zone to regulate potential bulk and scale of projects to insure neighborhood compatibility would be consistent with the City’s authority to regulate land uses.

Further, the City of Del Mar utilizes several types of zoning standards to regulate bulk and scale, including the implementation of a two-story maximum, a maximum building height, lot coverage maximums, minimum yards areas (setbacks) and floor area ratios. Floor area ratios provide an expected proportionality between building size and the discernable size of a lot, In the case of properties encumbered by public beach, the discernable lot size of the actual lot is limited by the development prohibitions in the BPI/SPA and the visual presence of public beach over portions of private property. Therefore, the possibility exists that, along the shoreline homes utilizing the square-footage of non-buildable portions of a lot could be exceeding the building-to-lot proportionality that a zoning district’s FAR is expected to regulate.

6. Would the proposed ordinance violate the equal protection rights of property owners?

The essential elements for an equal protection claim under California law are⁴:

- Plaintiff was treated differently from other similarly situated persons;
- The difference in treatment was intentional; and
- There was no rational basis for the difference in treatment.

An essential element for an equal protection claim is that similarly situated properties must be treated differently. *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 CA4th 687. The ordinance would exclude any area designated as a “Shoreline Protection Area” – defined in section 30.50.040 of the Municipal Code – from the calculation of floor area ratio used to determine allowable construction and development. The proposed ordinance would only impact those beach front parcels which extend beyond the BPI/SPA line. Staff has determined that there are potentially 28 lots affected⁵. Fifteen of the lots are located within the R1-10B zone, five of the lots are located within the RM-West zone, four of the lots are located within the R1-40 zone and one lot is located with the R1-14 zone. Additionally, one lot located in the Visitor Commercial zone and two lots are located in the Beach Commercial zone.

Comparisons have been made between the lots within R1-10B zone and those lots just south of 29th street which are located in the R1-5B zone. These comparisons do not address similarly situated properties. The lots are located within different zones with fundamentally different purposes⁶, the average size of the lots differ substantially, and have different relationships with the SPA line. Therefore, it is unlikely that an equal protection claim would be viable, based upon this comparison.

Under the City’s development regulations, some parcels which contain non buildable areas (i.e., open space, easements) are allowed to include the non-buildable areas within their FAR calculations. In this case the similarly situated analysis is between properties with non-buildable areas and the properties within the Beach Overlay Zone. This would result in disparate treatment of the properties within the Beach Overlay Zone. A rational basis for this disparate treatment would need to be established in order to avoid an equal protection claim would be treated in a disparate manner.

7. Would the proposed ordinance create a non-conforming condition?

As discussed in this report the initiative would prevent the inclusion of the SPA area from FAR calculations for those parcels whose boundary line is westward of the SPA line. In effect, existing homes or other structures (i.e., restaurants) within the Beach Overlay zones which exceed the maximum allowed FAR under the initiative would become non-conforming structures.

⁴ Genesis Env’t Services v. San Joaquin Valley Unified Air Pollution Control District 92003) 113 CA4th 597, 605

⁵ Staff has determined that boundary line for the lots within the RM-West zone are coterminous with BPI/SPA line.

⁶ R1-10B is low density-beach and R1-5B is medium density single family.

Chapter 30.76 of the Del Mar Municipal Code addresses non-conformities. Section 30.76.030 defines a structural non-conformity as a physical aspect of a building, structure or improvement that does not conform to the development standards announced in the Code including without limitations... coverage of lot by structure. If a structural nonconformity exists it is unlawful for any person to enlarge, extend, expand or in any other manner change a non-conforming structural nonconformity so as to increase its inconsistency with the zoning restrictions of the Chapter. (Section 30.76.050).

In the event an existing non-conforming structure is damaged or the property owner seeks to remodel the structure the Code also contains restrictions on remodeling or reconstruction of a building with a structural non-conformity. In essence, to the extent a building with a structural non-conformity has been damaged to more than 50% of its valuation its reconstruction must be in compliance with the development regulations. Similarly, any remodel of a structural non-conformity must comply with the development regulations if the value of the remodel costs more than 50% of the building's value.

PLANNING ISSUES

8. Is the proposed ordinance consistent with the Community Plan?

The Del Mar Community Plan is comprised of the following five elements: 1) Environmental management; 2) Transportation; 3) Recreation; 4) Community Development; and 5) the Housing Element. The most relevant portion of the Community Plan with respect to the proposed ordinance is the Community Development Element. The purpose and intent of the Community Development Element is to address the form and character, as well as, land uses and densities for the future development of Del Mar, including addressing neighborhood concerns about compatibility of new development, land uses, and ongoing development of cohesive neighborhoods. The proposed ordinance's primary effect is on the North Beach District of the City.

One of the Community Plan's goal relating specifically to residential areas is Goal #3. The Community Plan's Goal #3 seeks to preserve and enhance Del Mar's special residential character and small town atmosphere with its harmonious blending of buildings and landscape in proximity to a beautiful shoreline.

Objective A: Maintain a low density residential character and allow only one and two story low mass intensity development in residential areas.

With respect to the North Beach District the Community Plan's specific recommendations include:

- The land west of Camino de Mar between 29th street and the mouth of the San Dieguito River is proposed as Low Density Residential in order to preserve the existing character and discourage major intensifications in residential development.

- South of 29th Street, medium density single family and duplex usage is recommended in the area of gridiron streets and pre-existing small lots thereby preserving the present character and discouraging redevelopment to higher density more expensive housing and encouraging the maintenance of existing residential development.

The Community Plan's describes the Low Density Residential (1-4 units/"net acre") category as follows:

This land use category is intended to allow a continuation of the predominately single family residential character that has been historically developed within the Del Mar hills area and at the north end of the beach front.

Medium Density (4-8 units per net acre) is described as follows:

This land use is intended to allow continuation of single family residential development and thus preserve an uncrowded character to areas subdivided into relatively small lots. Existing duplexes shall be allowed to continue as non-conforming uses in this area.

Of particular relevance is the "Special Note" on page 64 of the Plan relating to the residential policies:

"It is understood that the objectives of these policies to regulate floor area is not to unduly restrict development or redevelopment of properties but to assure that the scale of such development is compatible with the existing coastal village character of Del Mar."

The Community Plan policies referenced above reflect the goal of preserving the low density residential character of the North Beach District and to discourage major intensifications in residential development. The proposed ordinance would be consistent with this overall goal. However, it could be argued that the ordinance is unduly restrictive of development by excluding the SPA area from the FAR calculations for the properties impacted by the SPA line.

9. Will the proposed ordinance require a Local Coastal Program Amendment?

No. Del Mar's Local Coastal Program consists of the Land Use Plan and the Implementing Ordinances. The Implementing Ordinances in the LCP include the following: Chapter 30.29 Floodway Zone; Chapter 30.50 Beach Overlay Zone; Chapter 30.51 Setback Seawall Permits; Chapter 30.52 Bluff, Slope and Canyon Overlay Zone; Chapter 30.53 Lagoon Overlay Zone; Chapter 30.55 Coastal Bluff Overlay Zone; Chapter 30.56 Flood plain Overlay Zone; Chapter 30.61 Public Access; Chapter 30.75 Coastal Development Permits; Chapter 30.80 Parking; Zoning Designations/Allowed Uses; and various maps. Any proposed changes to the Implementing Ordinances including development regulations, land use changes and other verbiage would require a LCP amendment. LCP amendments require review and certification by the California Coastal Commission before it can become effective.

The proposed ordinance modifies zoning definitions (Section 30.04.120(J); Section 30.04.120(k) and Section 30.72.030 and makes revisions to the definition of Floor Area Ratio in Section 23.20.030. These sections are not included in the LCP Implementing Ordinances and, therefore, a LCP amendment is not necessary.

10. The proposed ordinance will have unintended citywide impact.

If approved, the proposed initiative and ordinance will have the unintended citywide impact of allowing lots currently encumbered with public rights-of-way, road easements and private streets to include those portions of private property for the purposes of calculating allowable FAR for the property. This is due to the initiative's insertion of a reference to the term "Gross Floor Area" in proposed revisions to the definitions of "Bulk Floor Area Ratio" (DMMC Section 30.72.030) and "Floor Area Ratio" (DMMC 23.020.030). Currently, the inclusion of areas dedicated to provide vehicular access to five or more dwelling units in floor area ratio calculations, whether as a public street, private road or residential access easement, is prohibited by Ordinance No. 795, which the City Council adopted in 2007. Approval of the initiative and ordinance would affect multiple properties in the City that are not located within the Beach Overlay Zone or directly affected by Shoreline Protection Area. A comparison chart displaying the pertinent Code language utilized over time for the calculation of allowable floor area has been included as Exhibit 4 of this report.

11. FISCAL IMPACT (future)

Based on City review of the county assessor map, those properties along the beach front whose west ward property boundary extends beyond the SPA line are assessed property taxes for that portion of the parcels included in the SPA area. If the initiative passes and the SPA area portion of the lot is no longer eligible for inclusion in the FAR calculations, the property owners may be eligible to reduce their property tax payments to account for the loss of the development potential. Due to the unique tax circumstance of each of the lots it cannot be determined at this time what the fiscal impact of such a reduction would be to the City revenues.

12. FISCAL IMPACT (ballot processing)

Preparation of a ballot measure for November 2018 would require approximately 80-100 hours of city staff time, as well as, the services of the City's legal counsel. Associated work items would include efforts such as preparation of ballot measure language, coordination with the Registrar of Voters on all associated logistical requirements, responding to media and public inquiries about the measure. The direct cost (not including labor) associated with the Initiative could range from approximately \$8,000-\$60,000 depending in the election process. This process is supported by the General Fund. Any funds from the General Fund to cover the cost of regulating and processing the Initiative would reduce the funds available for other City operations and programs. It should be noted that the City will incur additional costs in connection with the public vote in connection with the public vote on the 941 CDM Specific Plan.

13. Are there material misrepresentations in the Initiative?

The City Council requested that this Report include an evaluation of the Initiative which was circulated for signatures to determine whether it included any material misrepresentations. The Initiative is included as “Exhibit 2” to this report.

The portion of the Initiative most relevant to this analysis is Section 2 Findings and Purpose. In conducting this analysis it should be recognized that this is a very subjective analysis. Therefore, included below are City comments in response to specific statements in the Initiative which either the City does not agree with or believes needs clarification.

In Section 2.A.2: the initiative implies that by the adoption of the Beach Protection Initiative that public use of the SPA was established and such use included vehicular travel along the beach. The BPI limited development within the SPA but did not dedicate the SPA area for public use nor did it specifically authorize vehicular use of the SPA area. However, as described previously in this Report, between 1988 and 2007, based on the DMMC language which existed at that time staff did interpret the DMMC, as treating the SPA as a public thorough fare akin to a street for purposes of FAR calculations⁷.

Section 2.A.3: Based on the 2007 code amendments the language supporting the conclusion that the SPA was a public thoroughfare was deleted and the amended language does not support the previous interpretation that the SPA area be excluded from FAR calculations. Subsequent to the 2007 code amendments the City had an informal position regarding the treatment of the SPA area for FAR calculations and did allow some portion of the SPA area to be used for FAR purposes, in limited cases.

Section 2.A.4: The Planning Commission interpretation did allow the SPA to be included in FAR calculations for one application. However, in addition to the allowed FAR projects are subject to comply with the Design Review Ordinance which provides additional limits on a project’s building bulk and mass. Since the Planning Commission interpretation, there have only been two applications processed for development on a property that would be affected by the proposed initiative and ordinance. One of the applications is for a new home on a vacant lot, the other is for a request for additional floor area to be added to a home that was approved prior to the interpretation. The approval was based on the City’s policy of excluding SAP encumbered land from FAR calculations.

SUMMARY

The initiative does present potential legal issues with respect to its impact on private property interest. From a planning prospective the Initiative does have some unintended city wide impacts. Additionally, the Initiative will have both immediate fiscal impact associated with processing the Initiative and potential future fiscal impacts if adopted.

⁷ Prior to the establishment of the BPI the beach front properties FAR was calculated on the entire parcel as the SPA/BPI line did not exist.