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April 11, 2003

Mayor Emily Reilly and Council Members
Santa Cruz City Council
809 Center Street, Room 10
Santa Cruz, CA 95060

Re: Lighthouse Field State Beach General Plan -
Negative Declaration and Initial Study

Dear Mayor Reilly and Council Members:

We have reviewed the Initial Study and proposed Negative Declaration for the proposed amendments to the Lighthouse Field State Beach General Plan and Plan Summary/Local Coastal Program ("LCP"). The Initial Study concludes that the proposed project will not result in any significant adverse environmental impacts. Based upon the information and analysis provided in the environmental review and supporting documents, we agree that a negative declaration is the appropriate environmental document for this project under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.).

A source of controversy has been the Plan's policy regarding off-leash dog use. The proposed General Plan states that "California Department of Parks and Recreation policies on dogs in State Parks will be utilized to determine dog use policies for the Coastal Management Area, including Its Beach." (General Plan, p. 47.) An identical guideline governs dog use for the Field Management Area. (General Plan, p. 50.) In correspondence to the City, the State Department of Parks and Recreation directed that specific dog use policies should not be addressed in the General Plan, inasmuch as this issue was operational in character and should be dealt with at the local level, rather than be treated as a policy-based land use issue. (See Planning Commission Agenda Report, p. 2.) The City, through its Parks and Recreation Director, has officially allowed off-leash dog use at Its Beach and the field area during designated times (before 10:00 a.m. and after 4:00 p.m.) since 1993. Thus, the General Plan revision would allow continued off-leash dog use in restricted areas during designated hours. To ensure that the proposed policy does not conflict with any

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official City planning documents governing the area in question, the project includes a proposal to delete language in the existing "Plan Summary"¹ that requires pets to be "restricted to leashes." (Plan Summary, Policy 1.5.3.) As revised, the policy would also prohibit pets within sensitive habitat areas (willow riparian forest and monarch butterfly overwintering grove) except on designated trails.

The fact that off-leash dog use has occurred since 1993 is of crucial importance to the CEQA analysis for this project. Under CEQA, the determination of whether a project will result in significant impacts requires a "baseline" set of environmental conditions against which to compare a project's anticipated impacts. (See CEQA Guidelines, § 15125, subd. (a).) The environmental baseline includes "the physical environmental conditions in the vicinity of the project, as they exist . . . at the time environmental review is commenced[.]" (*Ibid.*; see also *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1451-1453; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277-1280 (court applies section 15125 to baseline for negative declaration).) Thus, the City was within its discretion in treating the environmental baseline for this project as including off-leash dog use in the designated areas. This project will not introduce dogs into the park for the first time; nor will it establish off-leash dog use as a new policy. The element of off-leash dog use is simply an existing physical condition at the project site. The environmental review for this project therefore need not assess the impacts of continued off-leash dog use.

The Third District Court of Appeal recently held that a lead agency has discretion on whether to include past activities within the environmental baseline for the purposes of environmental review. (See *Fat v. County of Sacramento, supra*, 97 Cal.App.4th at p. 1281.) In the *Fat* case, a Pilots' Association applied to the County in 1997 for a conditional use permit ("CUP") to operate a small airport in agricultural zones. The airport, which was established in 1934, had not been permitted since its previous CUP expired in 1973. The airport continued to expand after 1973 even though the CUP had expired. The County's Initial Study for the 1997 CUP featured an environmental setting with the airport as it existed in 1997, despite the fact that the airport continued to expand after 1973 without environmental review. (See *id.*, at pp. 1273-1274.)

The court found that, "[a]lthough the Airport developed over a period of nearly 30 years without County authorization, there was evidence of environmental damage during that period, and the Airport had been the subject of at least two zoning enforcement actions, the Pilots finally applied for the CUP in 1997 to resolve its lengthy dispute with the County." (*Id.* at p. 1281.) Based on these facts, the County could "reasonably view the Pilots' application as *an opportunity to bring the Airport development under some level of County*

¹/ Our understanding is that the current seeming prohibition on off-leash dog activity occurs only in this Plan Summary, but not in the text of the Plan itself.

supervision for the first time." (*Ibid.* (emphasis added).) Thus, *Fat* stands for the proposition that an agency has discretion to include illegal nonconforming uses in the baseline, even if those uses have never been subject to environmental review. By analogy, the City of Santa Cruz has discretion to include off-leash dog use in the baseline for the Lighthouse Filed General Plan amendment, even though such use began after the completion of the 1984 General Plan. Notably, even if off-leash dog use had occurred *illegally* up to the present, the City, under *Fat*, would still be permitted to treat ongoing off-leash dog use as part of its baseline conditions. Thus, the City need not anguish over whether the relevant language in the Plan Summary made the 1993 authorization of off-leash dog use somehow legally problematic.

At least one project opponent has asserted that the project will result in a significant impact because the ongoing off-leash dog use is inconsistent with the current Plan Summary policy prohibiting off-leash dog use. (See letter dated April 3, 2003, from Susan Brandt-Hawley.) As the *Fat* decision indicates, however, a lead agency is not required to analyze the impacts of past non-conforming uses if those uses are part of the existing environmental setting. (See *Fat*, *supra*, 97 Cal.App.4th at p. 1281; see also *Riverwatch*, *supra*, 76 Cal.App.4th at p. 1455.) Moreover, "CEQA evinces no interest in the effects of proposed general plan amendments on an existing general plan, but instead has clearly expressed concern with the effects of projects on the actual environment upon which the proposal will operate." (*Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354 ("EPIC").) The fact that a project requires a general plan amendment does not constitute a *per se* significant environmental impact. The environmental analysis must focus on the actual physical change in land use, if any, caused by the proposed project. (See *ibid.* ["[CEQA] concerns itself with the impacts of the project on the environment, defined as the existing physical conditions in the affected area"].)

Even if off-leash dog use had not been included in the environmental baseline for this project, however, we have seen no substantial evidence showing that such use would result in significant and unavoidable environmental impacts requiring an Environmental Impact Report ("EIR"). Under CEQA, a lead agency must prepare an EIR for a project if there is any "substantial evidence" in the entire administrative record demonstrating a potentially significant impact. (See Pub. Resources Code, § 21082.2, subd. (d).) "Substantial evidence" includes facts, reasonable assumptions predicated upon fact, and expert opinion supported by facts. Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, or evidence which is clearly erroneous or inaccurate. (See CEQA Guidelines, § 15384.)

Project opponents have argued that off-leash dogs present health and safety hazards and disturb natural communities and wildlife at the project site. All of their evidence, however, is speculative and anecdotal. Commenters assert that canine feces and urine may carry disease that can be transferred to humans and other animals through sand and water. We


have seen no evidence whatsoever, however, that off-leash dog use at the park has been a cause of any health problems during the past ten years. No scientific studies have demonstrated an incidence of illness or significant habitat disturbance caused by the off-leash dog use policy. In fact, the project includes measures to prevent dogs from invading sensitive biological areas. (Plan Summary Policy 1.5.3.) The only evidence approximating expert opinion are generalized reports and studies on canine health that are not specifically applicable to the current conditions at the project site. Project opponents have not demonstrated that City regulations requiring dog owners to pick up after their pets will be insufficient to minimize any health risks at the site. Moreover, commenters have ignored the fact that dogs will do their business whether on leash or off leash.

In any event, the CEQA Guidelines, which all state and local agencies are required to follow (Cal. Code Regs., tit. 14, § 15000), do not suggest that dog excrement is a "hazard" that rises to the level of a significant impact. (See CEQA Guidelines, Appendix G, part VII.) Rather, CEQA is concerned with the large scale handling, transport, and disposal of commercial or industrial hazardous materials, or domestic solid waste. (*Ibid.*) We are aware of no legal precedent that indicates dog waste is a significant hazard to the environment.

Project opponents offer speculation and anecdotal evidence of dog bites or attacks. Again, commenters have not shown that any incidents have occurred during the past ten years at the project site. Park visitors will be on notice that off-leash use occurs in designated areas in the morning and evening. Anyone who does not want to come into contact with dogs may visit another section of the park or adjust his or her schedule accordingly.

For the reasons stated above, and particularly because off-leash dog use will not involve any change in the existing physical environment, the proposed project does not pose any significant impacts to the environment. The City is legally justified in adopting the Negative Declaration and Initial Study.

Sincerely,



Jim Moose