

Surfer's Point Timeshare Project

How did we get here?

On Sept. 5, 2002 the draft EIR was reviewed by the Planning Commission. Numerous objections were raised over a 2 hour meeting. In 2005 the EIR again came before the Commission and was approved in record time. The Coastal Development Permit was appealed to the Coastal Commission, who again requested changes and eventually issued the permit in 2007. By 2009 the project had gone dormant, and the CPD expired, as per Coastal Commission rules.

In 2017, after 8 years of silence, the developers came back to the City to restart this project, and on June 6, 2019, the Planning Commission finally heard this case. The Commissioners shared with the developer our many concerns with the design of this project, and the many violations of our Design Guidelines. The case was continued off calendar so the project could be reworked.

The project as designed would be a *disaster* for the Northwest corner of our City. The entire project is oriented towards Carlsbad and Ponto Beach. The “back” of the project, which consists mostly of large, flat wall planes, faces SE, directly in line with the view over the ocean to the West. It's as if this project has turned its back on our town. It is not a pretty site. All of our sunset views in this sensitive view corridor will be blocked forever. Driving west on La Costa, you might catch a glimpse of the ocean just as you get to the 101.

We expected better. Instead, a year later the applicant returned to the Commission, and we found that none of our recommendations were implemented. The argument was made that since the Design Review had been approved back in 2005, it was still valid, even after all these years. Based on our reading of our own Municipal Code, the Planning Commission ruled that this was not the case, and that the Design Review Permit was expired and must be deemed null and void.

We only directly addressed the Design Review Permit. We could have also turned our attention to the Major Use Permit and the Coastal Development Permit, which also have clear direction on the expiration.

Why it matters

Times change, and the needs of our City change along with it. Permits cannot and should not last forever - they should be allowed to expire as our Municipal Code demands.

Were we to allow permits to just sort of “hang in the wings” forever, we could potentially lose all control. Investors would now be motivated to let a permitted project lie dormant for years until the “right buyer” comes along for their pre-approved plan. We issue permits so that developments can *happen*, not to help prop up someone's investment portfolio. Our needs today are not what they will be in 10 years from now, and they will continually evolve.

Our City was founded over the issue of local control of our own direction, and the principal tool of that control is our Municipal Code. Local control is currently under siege from Sacramento, as more and more bills are passed that strip local control from our City and cede this authority to State Laws. We need to ensure that we do not lose even more control over our future through a misinterpretation of our own rules.

Let's look at our Municipal Code

At the core, this case revolves around Permits, both Major & Minor Use Permits, Coastal Development Permits, and Design Review Permits. The question boils down to, “do they expire, or are they valid forever?” I've already addressed the question of “should they expire?” Now let's see what our Code says about how and when they expire.

Concerning **Design Review Permits**, our Municipal Code is quite clear.

Title 23.08.160 ([link](#))

- a. The design review permit approval **shall be valid for two years** after the effective date of the permit. A building permit and any other permit required for the construction of the project **shall** be obtained within the two-year period. If construction has not started within the time period specified in the City's adopted building code, and is not diligently pursued thereafter, **the design review permit shall be deemed null and void.**
- b. The Director **may**, upon written request by the proponent, grant reasonable extensions of up to a total of two years for the use permit; provided no change in City policies has occurred which would be in conflict with the project. [...] A public hearing is not required. (Ord. 92-15)

Concerning **Major Use Permits**, our Municipal Code is also quite clear.

Title 30.74.120 ([link](#))

- A. The use permit approval **shall be valid for two years** after the effective date of the permit. A building permit and any other permit required for the construction of the project **shall** be obtained within the two-year period. If construction has not started within the time period specified in the City's adopted building code, and is not diligently pursued thereafter, **the use permit shall be deemed null and void.**

B. The Director **may**, upon written request by the proponent, grant reasonable extensions of up to a total of two years for the use permit; provided no change in City policies has occurred which would be in conflict with the project. A request for such an extension **shall** be filed with the Director and at least 15 days prior to the expiration of the use permit, together with the required application fee. Upon proper filing of an application for extension, public notice **shall** be made according to the provisions of Chapter 30.01 as modified by this chapter. A public hearing is not required. (Ord. 92-15)

Title 30.20.020, specifically deals with **Commercial Projects**.

30.20.020(A7)b. Expiration of Approval. A major use permit approving a planned commercial development plan and/or text **shall lapse two years after the effective date of approval**, or at an alternate time specified as a condition of approval unless:

- i. A grading permit has been issued and grading has been diligently pursued; or
- ii. A building permit has been issued. If the construction authorized by the building permit has not started within the time period specified in the City's adopted building code, or, if the construction authorized by the building permit has started within the time period specified in the City's adopted building code, but is not diligently pursued thereafter, the major use permit **shall** be deemed null and void; or
- iii. An occupancy permit has been issued; or
- iv. The approval is extended pursuant to Section 30.20.020A7c.

Section 30.20.020A7c Details the steps required to extend the Permit, again for a period of no longer than two (2) years.

Concerning **Coastal Development Permits**, our Code also calls for CDP's to expire in 2 years, and allows for an extension of no more than 2 years. The language is not as strict as the rest of our code, and contains several ambiguities. This should be addressed and brought into line with the rest of our code in the next Omnibus Code Cleanup.

30.80.162 Expiration of Coastal Development Permit.

If substantial construction has not been completed in reliance upon a granted coastal development permit within a minimum of two years of the grant or a longer period as otherwise approved, then upon notice to the property owner and an opportunity to present information to the Director, the Director **may** declare the coastal development permit to have expired with the privileges granted thereby canceled. (Ord. 95-04)

30.80.164 Extension of Coastal Development Permit.

Upon application to the Director and good cause having been shown, the Director may, on one or more occasions, extend the expiration period on the coastal development

permit if the Director finds that there are no changed circumstances which would affect the development's consistency with the certified Local Coastal Program. A request for such an extension shall be filed with the Director at least 15 days prior to the expiration of the coastal development permit, together with the required application fee and evidence of the applicant's continued legal interest in the property. **However, the total of all extensions shall not exceed a period of two years.** Upon proper filing of an application for extension, public notice shall be made in accordance with Chapter [30.01](#) as modified by this chapter. A public hearing may be required. (Ord. 95-04)

Our Municipal Code is hard to misinterpret on this point - Use Permits and Design Review Permits **shall** expire in 2 years, and they **may** be extended for an additional 2 years. It is our duty to set a clear precedent on this matter.

The Argument Against

The argument raised by the Applicant is this standard condition of approval that is included in every project approved by the City of Encinitas. SC2 reads as follows:

SC2 At any time after **two years** from the date of this approval, on [date], or the expiration date of any extension granted in accordance with the Municipal Code, the City *may require a noticed public hearing* to be scheduled before the authorized agency to determine if there has been demonstrated a good faith intent to proceed in reliance on this approval. If the authorized agency finds that a good faith intent to proceed has not been demonstrated, the application shall be deemed expired as of the above date (or the expiration date of any extension). The determination of the authorized agency may be appealed to the City Council within 15 days of the date of the determination.

Staff has argued that the phrase "the City may require a noticed public hearing" should be interpreted to mean that *unless* a hearing is held to invalidate an application, then all permits associated with the application will never expire.

Staff then argued that this Condition overrides our Municipal Code, and further argues that "case law" supports the interpretation that since no hearing was held to force this application to expire, it was still in effect. Upon questioning our Acting City Attorney, he could provide no examples of such a case, and Staff confirmed that this situation has never occurred before since our founding as a City.

The Planning Commission challenged Staff's interpretation, and determined that our own Municipal Code takes precedence over Special Condition SC2. The "Application" might not expire, but the underlying permits are unaffected by this provision - they are ruled by our Municipal Code. The inclusion of the phrase within SC2 "or the expiration date of any extension", implies that yes, extensions are required and necessary - they are not automatic.

Comparisons will be made with the Encinitas Beach Hotel (EBH) project on the West side of 101. In contrast, the EBH appeared to have been dormant for 30 years, but had made crucial public improvements within the first few years after receiving their permit. They pulled permits and installed physical staircase access and a ViewPoint in order to vest their permit rights. This difference is a key reason that EBH had a claim where Surfer's Point should be considered expired.

Our Code states that permits shall expire within a reasonable amount of time. Extensions can be granted, and projects with extraordinary benefit can still be granted exceptions. The Surfer's Point project does not meet any of these requirements and should be denied outright.

What now?

For all the reasons stated above, I believe the City Council should support the decision of the Planning Commission and deny this appeal.

As a resident, I ask that the Council address the larger question of the status of the other use permits, and provide a clear direction to Staff and the Planning Commission. I believe it is imperative that we assert control over our local permitting process, and not allow such a precedent to stand. Permits must be allowed to expire.

I stand ready to help in any way possible, and will gladly make myself available for questioning, or to conduct additional research. Thank you for your attention to this matter, and for your service during these difficult times. I look forward to the day when we can all be reunited in Council Chambers!

Best regards, Kevin Doyle



President, Leucadia 101 Mainstreet Association
Planning Commissioner, Old Encinitas