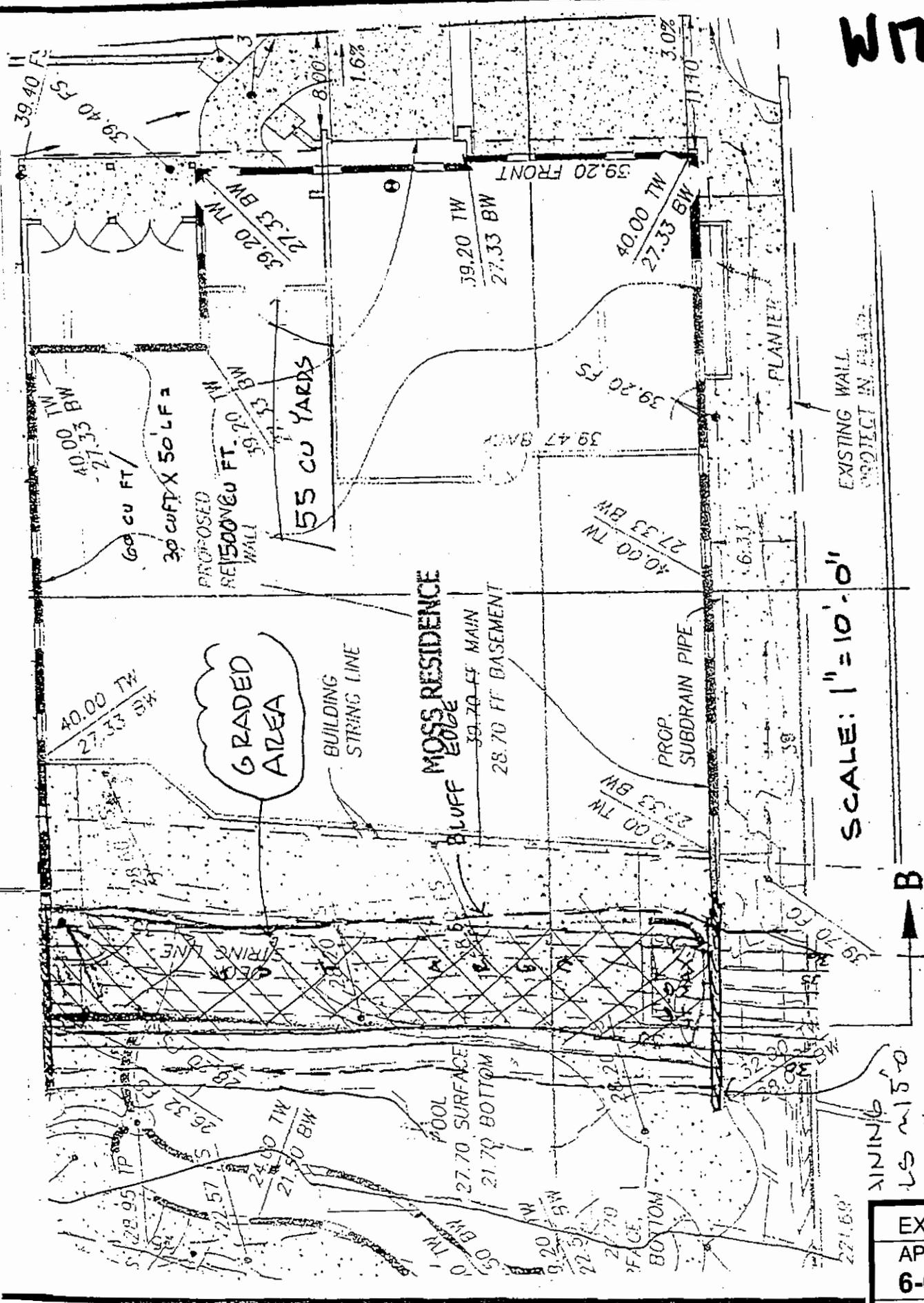


W17.52



SCALE: 1" = 10'-0"

B

# HIBIT B - GRADED AREA

EXHIBIT NO. 21  
 APPLICATION NO.  
**6-09-016-EDD**  
 Updated Proposed  
 Site Plan

003/003

16 PAI

# CROSS SECTION A-A'

Moss Residence  
5015 Tierra Del Oro  
Carlsbad, CA.

ROOF ELEV = 69.0'

PROPOSED RESIDENCE  
SEE ARCH. SECTIONS FOR DETAILS

MAIN FLOOR 39.70 FT  
BASEMENT 28.70 FT

Qb1

WALL BEYOND

EXIST GRADE

EARTH TO BE REMOVED

SECTION A-A'

SCALE 1" = 20' HORIZ  
SCALE 1" = 20' VERT.

Tab

Approximate Elevation Above Mean Sea Level

60

40

20

EXIST RIP RAP

APPROX. MEAN-HIGH TIDE LINE

0

20

40

60

80

100

W17.5a

# EXHIBIT B - GRADING PROPOSED

EXHIBIT NO. 22  
APPLICATION NO.  
6-09-016-EDD  
Updated Proposed  
Cross-Section

California Coastal Commission  
San Diego Coast District

**FORM FOR DISCLOSURE  
OF EX PARTE  
COMMUNICATIONS**

W17.5a

RECEIVED

APR 30 2009

CALIFORNIA  
COASTAL COMMISSION

received  
MAY 04 2009

Name or description of project, LCP, etc.:

Mass (W17.5a)

Date and time of receipt of communication:

4/30/09 10:00am

Location of communication:

La Jolla, Ca.

Type of communication (letter, facsimile, etc.)

meeting

Person(s) initiating communication:

MR. Mass and Ken Ehrlich

Person(s) receiving communication:

Patrick Krueger

Detailed substantive description of content of communication:  
(Attach a copy of the complete text of any written material received.)

Applicant and MR. Ehrlich, Esp. take issue with the issue of grading and they refer to daylighting to grade westward of the 36' contour line. MR. Mass asserts that his lenders are balking at the reduction in the 5 bedroom house to 3 bedrooms if not allowed to grade below the 36' contour and thus affect the value. I shared with them I do not buy into that kind of analysis. I said the design of their house should not require daylighting below 36' contour. Also, the permitted house next door was never appealed and they never make a finding that the contour was 36'

Date

4/30/09

Signature of Commissioner

Patrick Krueger

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner, Executive Director at the meeting prior to the time that the hearing matter commences.

If communication occurred within seven days of the hearing, complete form, provide the information orally on the record of the proceeding, provide the Executive Director with a copy of any written material part of the communication.

EXHIBIT NO. 23  
APPLICATION NO.  
6-09-016-EDD

Ex Parte 5

## CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA  
7575 METROPOLITAN DRIVE, SUITE 103  
SAN DIEGO, CA 92108-4421  
(619) 767-2370

Staff: Toni Ross-SD  
Staff Report: April 22, 2009  
Hearing Date: May 6-7, 2009



# W17.5a

## STAFF REPORT: DISPUTE RESOLUTION

### DISPUTE RESOLUTION

**NUMBER:** 6-09-016-EDD

**APPLICANTS:** Steve and Janet Moss

### PROJECT

**LOCATION:** 5015 Tierra Del Oro, Carlsbad, San Diego County

**DESCRIPTION:** Public hearing on dispute over proposed grading and retaining walls to take place seaward of the established bluff edge inconsistent with Special Condition No. 1 associated with the following project: demolition of a 2,100 sq. ft. home and construction of a 6,755 sq. ft. single-family residence including a 2,366 sq. ft. basement, an infinity edge swimming pool, spa and patio.

---

### SUMMARY OF STAFF RECOMMENDATION:

The applicants contend that grading and construction seaward of the established bluff edge, to facilitate construction of a "daylighted" basement, is consistent with the intent of Special Condition No. 1 that was approved by the Commission when it approved the de novo permit for this project at the August, 2008 Commission hearing. Commission staff does not agree with the applicants' contention. Special Condition No. 1a states that "any proposed accessory improvements (i.e., decks, patios, walls, etc.) located seaward of the identified bluff edge on the bluff face....shall only be at grade and capable of being removed without significant landform alteration." Special Condition No. 1b required the "deletion of the pool, spa, patios, and **retaining walls** on the face of the bluff that involve **grading of the bluff...**" (Emphasis added). Therefore, it is clear based on the language of Special Condition No. 1 that no development that involves grading was to be allowed seaward of the established bluff edge (+36' MSL). In meetings with the applicants following the Commission's action, the details of the "daylighted" basement were first brought to staff's attention. Based on staff's review of the submitted preliminary plans and cross-sections (including consultation with the Commission's staff Coastal Engineer), it was apparent that the plans could not be found consistent with the intent of Special Condition No. 1, as approved by the Commission because grading and retaining

walls were required seaward of the bluff edge. However, because the “daylighted” basement wasn't specifically identified in the staff report or discussed by the Commission, the applicants contend that the grading and retaining walls associated with the “daylighted” basement should be accepted as consistent with Special Condition No. 1.

On April 13, 2009, Commission staff received a letter from the applicant requesting to amend their previously submitted dispute resolution request (ref Exhibit #21) to “revisit” the Commission’s decision to require that the stairs that extend from the lower bluff, across the riprap revetment, be deleted from the plans as required pursuant to Special Condition #1b. However, the applicants’ revised request does not relate to a dispute resolution of interpretation of special conditions, but is in fact asking for the Commission to revise its previous decision. Such a request can only be addressed pursuant to a Reconsideration Request (ref Sections 13109.1 – 13109.5 of the California Code of Regulations). However, such a request needs to be made in writing within 30 days of the Commission’s final vote on the de novo appeal and no such request was received. Thus, this request is not properly before the Commission and is dismissed.

Commission staff recommends that the applicants revise their proposed project so that grading and development will no longer occur seaward of the bluff edge as required by Special Condition No. 1.

---

## I. STAFF RECOMMENDATION ON DISPUTE RESOLUTION

Staff recommends that the Commission adopt the following findings and resolution to determine that Special Condition No. 1 of CDP A-6-CII-08-028 prohibits grading and construction of retaining walls seaward of the bluff edge.

**MOTION:** *I move that the Commission reject the Executive Director’s interpretation of Special Condition No. 1 of CDP A-6-CII-08-028.*

**Staff Recommendation that Special Condition No. 1 of CDP A-6-CII-08-028 Prohibits Grading and Construction of Retaining Walls Seaward of the Bluff Edge**

Staff recommends a **NO** vote on the motion. Failure of this motion will result in (1) the Commission upholding the Executive Director's determination that Special Condition No. 1 of CDP A-6-CII-08-028 prohibits grading and construction of retaining walls seaward of the bluff edge, and (2) the Commission's adoption of the following resolution and findings. A majority of the Commissioners present is required to approve the motion.

**RESOLUTION:**

The Commission hereby finds that Special Condition No. 1 of CDP A-6-CII-08-028 prohibits grading and construction of retaining walls seaward of the bluff edge and

adopts the findings recommended by staff below, or as modified at the hearing, to support the conclusions set forth in the staff report.

---

## II. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

The subject site located at 5015 Tierra Del Oro, in the City of Carlsbad, County of San Diego. The reviewed project consisted of demolition of a 2,100 sq. ft. home and construction of a 6,755 sq. ft. single-family residence including a 2,366 sq. ft. basement, and an infinity edge swimming pool, spa and patio on the face of the coastal bluff. Also proposed were improvements made to an existing revetment (after-the-fact) and retention of the private access stairway situated on top of the existing revetment on a 13,650 sq. ft. blufftop lot.

The Commission finds that the applicants' proposal to grade seaward of the established bluff edge and to construct retaining walls associated with such grading to create a "daylighted" basement, is not in compliance with Special Condition No. 1. which states:

1. Revised Final Plans. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit to the Executive Director for review and written approval, final site, building, grading, foundation and elevation plans for the permitted development that have been approved by the City of Carlsbad. Said plans shall be in substantial conformance with the plans submitted by the applicant dated July 2007 by Zavatto Design Group, but shall be revised as follows:

- a. Any proposed accessory improvements (i.e., decks, patios, walls, etc.) located seaward of the identified bluff edge on the bluff face shall be detailed and drawn to scale on the final approved site plan. Such improvements shall only be "at grade" and capable of being removed without significant landform alteration.
- b. The deletion of the pool, spa, patios and retaining walls on the face of the bluff that **involve grading** of the bluff and the **stairs on the top of the riprap revetment** [emphasis added]

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

### **A. Project History & Previous Commission Actions.**

The original project included the demolition of a 2,100 sq. ft. home and construction of a 6,755 sq. ft. home including a basement, infinity edge pool, spa, and patio on a bluff top lot. The site slopes from the street (Tierra Del Oro), towards the ocean, transitioning to a steep coastal bluff.

At the time the City approved the permit, the subject site bluff was developed with a pre-Coastal wooden stairway to a riprap revetment. The rip rap revetment was, in some form, also constructed prior to the Coastal Act, however, since that time the revetment has been significantly modified and there is also a private stairway located on top of this revetment that is not pre-Coastal (meaning that it was constructed or reconstructed sometime after 1979)(ref. Exhibit #9).

The project approved by the City included several additional improvements beyond the Commission established bluff edge. The City failed to address the permit history for the improvements to the existing revetment and stairway; therefore, the Commission appealed the project on February 28th, 2008.

Commission staff began investigating the historically accepted location of the bluff edge for the Tierra Del Oro neighborhood in 2007 when it appealed the construction of a new home on a vacant lot directly to the north of the subject site. Based on geotechnical review of that project, Commission staff established a new, more accurate, location for the bluff edge. Since that time, two additional City approved projects located on the blufftop portion of the Tierra Del Oro neighborhood have been appealed by the Commission; CDP A-6-CII-08-018/Byrne and the subject project A-6-CII-08-028/Moss); both were heard at the August 8, 2008 Commission hearing.

The Commission found Substantial Issue at the June 12, 2008 hearing and unanimously approved the project with all 17 recommended Special Conditions on August 8, 2008. At the hearing the applicants' agent indicated that the applicants were willing to accept 16 of the 17 Special Conditions, Special Condition No. 1 being the only area of contention. Special Condition No. 1 was developed to limit development beyond what the Commission staff geologist confirmed as the bluff edge, +36' MSL, to at-grade structures that don't require grading and are capable of being removed and, specifically, removal from the project plans of all retaining walls on the face of the bluff. Special Condition No. 1 also required the plans be revised to delete the stairway located on top of the riprap revetment.

After the August 2008 Commission hearing, Commission staff met with the applicants a number of times to discuss the Revised Plans Special Condition. In response to the Commission's decision, on September 4th, 2008, the applicants' submitted preliminary plans showing the proposed improvements (pool, spa, patios) moved inland to the landward side of the bluff edge, except for two large retaining walls. After reviewing the preliminary plans and subsequently provided cross-sections (submitted on September 16, 2008) and consulting with the Commission's staff Coastal Engineer, staff determined that

both the retaining walls and the grading associated with the proposed plans were inconsistent with Special Condition #1. Staff responded to the applicants' preliminary plans on October 20th, stating:

...the plans **do not** meet the requirements of the special conditions which do not allow structures or grading seaward of the edge of the bluff. Your proposed plans include substantial grading of the bluff (and installation of retaining walls over 10' high on the face of the bluff)...both the grading and the retaining walls are inconsistent with the special conditions and the Commissions intent which was to leave the face of the bluff in its natural condition... (ref Exhibit #15).

On January 8, 2009 the applicants submitted a revised preliminary plan titled "Response from Steven and Janet Moss to California Coastal Commission FAX dated 10/20/08" (ref. Exhibit #19). These revised preliminary plans removed the pool, spa, etc. from the project but left the "daylighted" basement and retaining walls on the face of the bluff (ref. Exhibit #19, pgs. 10 & 11). To accommodate the "daylighted" basement, the revised preliminary plans indicated that an estimated 55 cubic yards of grading was necessary beyond the bluff edge, along with two 15 ft. long, approximately 6' 6" high retaining walls. In this case, the basement would daylight onto the bluff on the west side of the property. The design of the basement would require grading to remove a portion of the bluff to facilitate this "daylighted" design (ref. Exhibit #19, pgs. 10 & 11). On January 29<sup>th</sup>, Commission staff responded to the second submittal of preliminary plans by the applicants, again indicating that the revised plans did not meet the intent of Special Condition No. 1, including the specific prohibition of retaining walls seaward of the bluff edge and that they would have to submit revised plans that included the removal of the retaining walls, and eliminate the grading for the daylighted basement. Staff advised the applicants a potential means to have the Commission address staff's interpretation of the condition would be to process a Dispute Resolution (ref. Exhibit #16). On April 1, 2009 the applicants began the dispute resolution process.

The applicants are seeking interpretation of the requirements included in Special Condition No. 1. The applicants contend that the proposed revised plan, specifically the daylighted basement, was not expressly restricted in Special Condition #1, and as such, is asking that this portion of grading on the bluff face and the necessary retaining walls be permitted.

## **B. Analysis**

The applicants' dispute resolution request letter included a number of contentions as to why the project should include the supplemental grading associated with the retaining walls and the daylighted basement. These contentions include primarily the lack of specific discussion or restriction of the "daylighted" basement, the impacts of not including the basement in the project design, and the previous concessions of the applicants by accepting the 16 other special conditions. These contentions are discussed in detail below.

The applicants contend that neither within the staff report nor the special conditions, or at the hearing, did the Commission specifically discuss the concerns associated with the daylighted basement. Further the applicants state that at no time during the review process did anyone ever mention a concern with the “daylighted” basement. The portions of the project specifically called out as a concern included only the patios, pool, and spa all located on the bluff face. However, the major construction that required the grading was identified, in that the patios, pool, spa, and retaining walls are all located at the same elevation as the required cut for the daylighted basement, thus, the focus of the special condition language. While neither Commission staff nor the Commission itself specifically identified the concerns associated with a daylighted basement; concerns regarding both grading of the bluff and the retaining walls were directly addressed and prohibited. Both the retaining walls on the bluff face and grading of the bluff face would be necessary to accommodate the daylighted basement. As such, any plans including such development would not be consistent with the Commission's action. Furthermore, it should be noted that the Commissioners’ comments were particularly limited, and no specific concerns were highlighted by Commissioners during the hearing.

During Commission staff’s initial review of the applicants’ original plans, the proposed bluff face grading was interpreted as **most directly** associated with development of the pool, patios, spa, etc, and that without these developments, grading would not be necessary. Thus staff did not specify the concern associated with the design of the basement at that time. Instead, staff consistently, throughout the review process, identified these developments and the grading necessary to accommodate them as a concern, and Special Condition No.1 was included to require the project to be revised to eliminate development and grading seaward of the bluff edge. Construction of a subterranean basement would be acceptable and feasible without a daylight cut at its seaward edge.

The applicants also contend now that the recommended removal of the “daylighted” basement would require a significant, unanticipated, project redesign. Again, Commission staff disagrees. The substantial redesign argument was not unanticipated by the applicants at the time of the hearing. In fact, the applicants’ agent, Susan McCabe, raised this concern to the Commission in a letter dated August 1, 2008 (which was included in the August 5, 2008 addendum to the staff report – see Exhibit #4 attached). This concern was also documented in several of the individual Commissioner ex Parte forms (ref. Exhibit #12). Thus, the applicants believed at the time of the hearing that approval of Special Condition No. 1 would require a substantial redesign of their proposed project.

The applicants contend that Executive Director Peter Douglas indicated on record during the August, 2008 hearing that the applicants would be able to retain the design of their home and would only be required to remove the accessory improvements. The quote the applicants' site states:

They are going to have a house, they are going to have their family home, they are going to have a stairway down the bluff face. The only thing that they won't have is the pool and the deck and the spa.

Commission staff feels the applicants have misinterpreted this quote. The intent of this argument was to clarify that what staff was recommending, and was subsequently approved by the Commission, was not disallowing the construction of a home on the property. The quote never indicated that the applicants will have the exact same home; it indicated that they will get a family home. In fact, as discussed above, the applicants and their representative acknowledged that in order to comply with Special Condition No.1, the home would need to be redesigned. The Executive Director was aware of this fact when making his statement. Furthermore, it is clear that in the quoted language, the Executive Director was not describing all of the prohibitions included in Special Condition No. 1, as he failed to mention the requirements included in that condition that the applicants remove the stairs located on top of the revetment and the retaining walls seaward of the bluff edge. In essence, the Executive Director's quote was a summary of a portion of Special Condition No. 1. The Commission would have had to revise Special Condition No. 1 to accomplish what the applicants argue the Executive Director was proposing in his quote. The Commission did not approve any such amendment.

Commission staff further disagrees that the prohibition of grading or construction of retaining walls on the bluff face would necessitate a substantial redesign. On January 13, 2009, in response to a technical request, staff received comments from the Commission's staff Coastal Engineer, Lesley Ewing, indicating that home could be constructed without grading the bluff face in the alignment proposed by the applicants. Specifically, she stated that "the basement could have a solid wall up to the +36' elevation and maybe some narrow windows at the top that would allow in some light." Such a redesign would still allow the square footage, layout, etc. of the house to remain unmodified. More importantly, such a design could be considered consistent with the Commission's August, 2008 action.

Lastly, the applicants contend that the grading and retaining walls should be allowed on the bluff face, given that they have already conceded to all other special conditions. However, accepting all other special conditions in no way obligates Commission staff to interpret Special Condition No. 1 to allow impacts to a coastal bluff, especially when the proposed retaining walls are explicitly prohibited by the approved Special Condition. Special Condition No. 1 is the primary condition addressing protection of the coastal bluff. The protection of coastal bluffs is a primary objective of the Coastal Act, and it is also addressed in more than one policy of the City's certified LCP (ref. Exhibit #4). The Commission found that the proposed development could only be found consistent with the LCP, and therefore approved, by adopting Special Conditions, including Special Condition No. 1, which prohibits grading and retaining walls seaward of the bluff edge.

**C. Conclusion.**

In conclusion, the intent of Special Condition No. 1, as approved by the Commission at the August 2008 hearing, was to prohibit grading and any development that required grading seaward of the bluff edge on the bluff face. The applicants are requesting the approval of a development that includes both grading and development of the bluff face. Commission staff concludes that the applicants' request is inconsistent with Special Condition No. 1 and that the Commission never intended to allow grading of the bluff face and installation of retaining walls to accommodate a "daylighted" basement. As such, Commission staff recommends that the applicants revise their proposed project so that neither development nor grading occurs seaward of the bluff edge line, consistent with approved Special Condition No. 1.

[Click here to go to the exhibits.](#)