

F17a

RECEIVED

FORM FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

JUL 30 2009

CALIFORNIA COASTAL COMMISSION SAN DIEGO COUNTY OFFICE

Name or description of project, LCP, etc.:

DR. O'Kin Appeal #A-6-ENC-09-044

Date and time of receipt of communication:

7/24/09 12:00 PM

Location of communication:

La Jolla, Calif

Type of communication (letter, facsimile, etc.)

meeting

Person(s) initiating communication:

DR O'KIN, G. Smith, Bob Trotter

Person(s) receiving communication:

Patrick Krauer

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

The applicant discussed the long history of the Bluff Protection Actions and improvements and the approval of said improvements by CCC. Then the applicant discussed the issue of why the CCC should find no substantial issue. The history of the neighbor and all the litigation and he followed the rules only to have a 11th hour mitigation measures to address this new beach restoration mitigation. Then we discussed the staff's effects on the bluffs. Last part of the house

Date

7/29/09

Sign.

Signature on file

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 to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

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

CALIFORNIA COASTAL COMMISSION

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



F17a

Filed: July 7, 2009
49th Day: August 25, 2009
Staff: G. Cannon -SD
Staff Report: July 29, 2009
Hearing Date: August 14, 2009

STAFF REPORT AND RECOMMENDATION ON APPEAL
SUBSTANTIAL ISSUE

LOCAL GOVERNMENT: City of Encinitas

DECISION: Approved with Conditions

APPEAL NO.: A-6-ENC-09-40

APPLICANT: Leonard Okun

PROJECT DESCRIPTION: Demolish existing single-family residence that straddles two lots (Lots 18 and 19) and construct 2,986 sq. ft. two-story, 26-ft. high single-family home with 447 sq. ft. garage and 1,677 sq. ft. basement on an 9,922 sq. ft. coastal blufftop lot. The residence will be located 40 ft. landward of a reconstructed bluff edge and the second floor will be cantilevered 8 ft. seaward of the first floor.

PROJECT LOCATION: 828 Neptune Avenue, Encinitas, Lot 18, APN 256-011-03 & 13

APPELLANTS: Commissioners Sara Wan and Mary Shallenberger

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed.

SUBSTANTIVE FILE DOCUMENTS: City of Encinitas Certified LCP; Appeal applications by Commissioners Wan and Shallenberger dated 7/7/09; Case Number 08-189 PCIN; City Permit #08-73-CDP; Project plans "Neptune Residence" by Cohn+Associates Architecture Planning 12/2/08; "Review Memorandum" by GEOPACIFIC INC. dated April 21, 2008; "Additional Geotechnical Recommendations" by Soil Engineering Construction, Inc. dated May 21, 2008; Emergency Permits 6-96-96-G/Okun, 6-01-005/Okun, 6- 6-01-011-G/Okun, 6-01-40-G/Okun, 6-01-62-G/Okun, 6-02-074-G/Okun and 01-85-G/Okun; Coastal Development Permit 6-05-30/Okun.

I. Appellants Contend That: The City approval is inconsistent with the LCP because: 1) the home will be sited closer than 40 ft. inland of the natural coastal blufftop edge; 2) the second floor cantilevered section will be located greater than 8 ft. seaward of the minimum 40 ft. setback location; 3) the City defined the “bluff edge” differently than the LCP certified definition requires; 4) the City failed to require the home be designed so as to be removed if threatened in the future and; 5) the City failed to require the applicant to adequately demonstrate the home will be safe over its lifetime so as to not require shoreline protection

II. Local Government Action: On February 19, 2009, per the applicant’s request, the City Planning Commission approved a “Planning Commission Interpretation” of the “bluff edge” at the subject site as being located along the seaward side of the reconstructed bluff. The coastal development permit was approved by the City of Encinitas Planning Commission on June 4, 2009. Specific conditions were attached which, among other things, require the use of Best Management Practices to control and filter polluted runoff and implementation of grading and drainage controls to assure no runoff occurs over the bluff, a prohibition of permanent irrigation within 40 ft. of the coastal bluff edge setback, the use of only non-invasive, drought-tolerant plants, submission of an “as built geotechnical report” to verify recommendations of the Geotechnical Report are implemented, submission of demolition plans for the existing residence and submission of final construction plans and structural calculations for the new residence.

III. Appeal Procedures: After certification of a municipality’s Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permit applications. One example is that the approval of projects within cities and counties may be appealed if the projects are located within mapped appealable areas. The grounds for such an appeal are limited to the assertion that “development does not conform to the standards set forth in the certified local coastal program or the [Coastal Act] public access policies.” Cal. Pub. Res. Code § 30603(b)(1).

After the local government has taken final action on an appealable project, it must send a notice of that final action (NOFA) to the Commission. Cal. Pub. Res. Code § 30603(d); 14 C.C.R. § 13571. Upon proper receipt of a valid NOFA, the Commission establishes an appeal period, which runs for 10 working days. Cal. Pub. Res. Code § 30603(c); 14 C.C.R. § 13110 and 13111(b). If an appeal is filed during the appeal period, the Commission must “notify the local government and the applicant that the effective date of the local government action has been suspended,” 14 C.C.R. § 13572, and it must set the appeal for a hearing no later than 49 days after the date on which the appeal was filed. Cal. Pub. Res. Code § 30621(a).

Section 30625(b)(2) of the Coastal Act requires the Commission to hear an appeal of the sort involved here unless the Commission determines that no substantial issue is raised by the appeal. If the staff recommends “substantial issue” and no Commissioner objects, the Commission will proceed directly to the de novo portion of the hearing on the merits of the project then, or at a later date.

If the staff recommends “no substantial issue” or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project either immediately or at a subsequent meeting. If the Commission conducts the de novo hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program.

In addition, for projects located between the sea and the first public road paralleling the sea, Sec. 30604(c) of the Coastal Act requires that, for a permit to be granted, a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act.

The only persons qualified to testify before the Commission at the “substantial issue” stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

IV. Staff Recommendation On Substantial Issue.

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission determine that Appeal No. A-6-ENC-09-40 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-6-ENC-09-40 presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

V. Findings and Declarations.

The Commission finds and declares as follows:

1. **Project Description/Permit History.** The project as approved by the City involves the demolition of an existing single-family residence that straddles two lots (Lots 18 and 19) and construction of a 2,986 sq. ft. two-story single-family home with 447 sq. ft. garage and 1,677 sq. ft. basement on an 9,922 sq. ft. coastal blufftop lot. The new home will be sited on Lot 18 so as to not straddle the lot line and another home is proposed on Lot 19 pursuant to a separate coastal development permit (Ref. Appeal A-6-ENC-09-41/Okun). The subject residence will be located 40 ft. landward of a reconstructed bluff edge and the second floor will be cantilevered 8 ft. seaward of the first floor.

In 1996 the bluff fronting the subject residence sustained a series of sloughages/landslides that eventually led to the loss of portions of the residence. The landslides extended to two lots south of the subject site and three lots north. As a result of these landslides, the Executive Director approved emergency permits in 1996 authorizing a series of measures to temporarily protect the residence until more substantive measures could be designed and implemented. These included the use of soil nails, chemical grouting, the placement of riprap at the toe of the landslide and underpinning of the residence. Of these, only the underpinning of the residence subsequently occurred (ref. Emergency Permit 6-96-96-G/Okun). In January of 2001, the Executive Director authorized an emergency permit for the construction of a 100 ft.-long, 20 to 27 ft. high seawall to be backfilled with soil (Ref. Emergency Permit #6-01-005/Okun) to protect the existing home. Since the work was not completed before the emergency permit expired, the Executive Director authorized a new emergency permit for the seawall's completion in June of 2001 (ref. Emergency Permit #6-01-85-G/Okun). The applicant was informed (in the context of each emergency permit authorization) and signed an acknowledgement that the work authorized by the permit was "temporary and subject to removal if a regular Coastal Permit is not obtained to permanently authorize the emergency work" and that any such permit may be subject to substantial conditions. Because of winter storms that occurred during the construction, the Executive Director also authorized the temporary placement of riprap seaward of the seawall to protect a construction platform/ramp (Ref. Emergency Permit 6-01-011-G/Okun). During construction of the seawall, the Executive Director also authorized the construction of an approximately 100 ft.-long upper bluff retaining wall, approximately 14 to 20 ft.-high to be placed approximately 20 ft. seaward of the bluff edge and backfilled (Ref. Emergency

Permits #6-01-40-G/Okun, 6-01-62-G/Okun and 6-02-074-G/Okun. The upper wall was proposed to be colored and textured to match the natural bluff. At the time of construction of this upper bluff wall, portions of the residence were undermined such that they extended 10 ft. seaward of the bluff edge.

Both the seawall and upper bluff retention systems authorized by the emergency permits were subsequently constructed. In addition, although soil was approved to backfill the area between the seawall and the upper bluff retaining wall, the applicant substituted gravel for the soil in violation of the emergency permit. The gravel was highly visible and not in character with the natural appearance of the bluffs along this section of coastline. The upper bluff retaining wall and backfill behind the seawall lie within the City of Encinitas' coastal development permit jurisdiction. On March 3, 2005, the City approved the required follow-up coastal development permit for the residential underpinning, upper bluff wall and backfill material. To mitigate the visual impacts of the gravel material that was placed without authorization, the City required that a portion of the gravel be removed and be replaced by soil and landscaping. In the area where gravel could not be completely removed, the City required the gravel be covered by soil and landscaped. That action by the City was not appealed to the Coastal Commission. In September of 2005, the Commission approved the required follow-up regular coastal development permit for the construction of a 100 ft.-long, 20-27 ft. high seawall at the base of the bluff subject to several special conditions including a requirement that the seawall be monitored and maintained in its approved state (Ref. CDP #6-05-30/Okun). Special Condition #5 of that permit also required that monitoring reports be submitted for Executive Director review every year for three years and then every three years thereafter for the life of the seawall. Although the seawall was completed in 2005, the applicant has failed to submit any of the monitoring reports as required by Special Condition #5 of the seawall permit, in an apparent violation of Coastal Development Permit #6-05-30.

The proposed development is located on a coastal blufftop lot on the west side of Neptune Avenue (first public road) in Encinitas approximately seven lots south of Beacon's Beach access path. The standard of review is the certified City of Encinitas Local Coastal Program and the public access policies of the Coastal Act.

2. LCP Consistency. The appellants' first contention is that the City approval is inconsistent with the certified LCP requirement that new development on a coastal blufftop be sited no closer than 40 ft. inland of the natural bluff edge because the City incorrectly identified the location of the bluff edge. Sections 30.34.020(B) and 30.34.020(C)(1) of the City's certified Implementation Plan (IP) require that new principal structures be located no closer than 40 ft. inland of the natural bluff edge. The City allowed the project to be sited 40 ft. inland of the western edge of an upper bluff retaining wall which extends up to approximately 20 feet seaward of the natural bluff edge. As result, the home will be sited as close as 25 ft. from the natural bluff edge which is inconsistent with the requirements of Section 30.34.020(B) that states, in part:

In addition to development and design regulations which otherwise apply, the following development standards shall apply to properties within the Coastal Bluff

Overlay Zone. In case of conflict between the following standards and other standards, regulations and guidelines applicable to a given property, the more restrictive shall regulate.

1. With the following exceptions, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. Exceptions are as follows:

a. Principal and accessory structures closer than 40 feet but not closer than 25 feet from the top edge of the coastal bluff, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below. This exception to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is setback a minimum of 25 feet from the coastal blufftop edge and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future. Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

b. Minor accessory structures and improvements located at grade, including landscaping, shall be allowed to within 5 feet of the top edge of the coastal bluff. Precautions must be taken when placing structures close to the bluff edge to ensure that the integrity of the bluff is not threatened. For the purposes of the Coastal Bluff Overlay Zones, "minor accessory structures and improvements" are defined as those requiring no City approval or permit including a building or grading permit, and not attached to any principal or accessory structure which would require a permit. Grading for reasonable pedestrian access in and around a principal or accessory structure may be permitted by the City Engineer following review of a site specific soils report.

c. Essential public improvements providing coastal access, protecting natural resources, or providing for public safety, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below, including but not limited to, walkways leading to approved public beach access facilities, open fences for safety or resource protection, public seating benches, lighting standards, and signs.

d. Drainage improvements within 5 feet of the top edge of coastal bluff as required to satisfy Section 30.34.020(B)5 of this Code.

[. . .]

In addition, Section Section 30.34.020(C)(1) contains similar restrictions:

C. DEVELOPMENT PROCESSING AND APPROVAL. In addition to findings and processing requirements otherwise applicable, the following establishes specific processing and finding requirements for proposed development within the Coastal Bluff Overlay Zone. The Planning Commission shall be the authorized agency for reviewing and granting discretionary approvals for proposed development within the Coastal Bluff Overlay Zone. Recommendations to the Planning Commission shall come from staff and qualified City Consultants. (Ord. 96-07)

1. Development and improvement in compliance with the development standards in paragraph B "Development Standards", proposing no structure or facility on or within 40 feet of the top edge of the coastal bluff (except for minor accessory structures and improvements allowed pursuant to Section 30.34.02(B)1b, and proposing no preemptive measure as defined below), shall be subject to the following: submittal and acceptance of a site-specific soils report and geotechnical review described by paragraph D "Application Submittal Requirements" below. The authorized decision-making authority for the proposal shall make the findings required based on the soils report and geotechnical review for any project approval. A Second Story cantilevered portion of a structure which is demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area may be permitted 20% beyond the top edge of bluff setback if a finding can be made by the authorized agency that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure. (Ord. 92-31)

The project, as approved by the City, does not involve the above-cited exceptions to the 40 ft. minimum setback from the bluff edge for new development, therefore, the City is required to site the new residence no closer than 40 ft. inland of the natural bluff edge. In addition, "bluff edge" is defined in the City's certified IP as:

BLUFF EDGE shall mean the upper termination of a bluff. When the top edge of the bluff is rounded away from the face of the bluff as a result of erosional processes related to the presence of the steep bluff face, the edge shall be defined as that point nearest the bluff beyond which the downward gradient of the land surface increases more or less continuously until it reaches the general gradient of the bluff. In a case where there is a step-like feature at the top of the bluff face, the landward edge of the topmost riser shall be taken to be the bluff edge. In those cases where irregularities, erosion intrusions, structures or bluff stabilizing devices exist on a subject property

so that a reliable determination of the bluff edge cannot be made by visual or topographic evidence, the Director shall determine the location of the bluff edge after evaluation of a geologic and soil report.

This definition refers to the natural bluff edge and does not make an allowance for a reconstructed artificial bluff edge. In addition, as the definition describes, if there is an irregularity to the bluff edge such as when a bluff stabilizing device is located over the natural bluff edge (which is the case here), then the Planning Director is required to determine the bluff edge “after evaluation of a geologic and soil report.” The purpose of evaluating a geologic or soil report is to assist the Director in locating the natural bluff edge when it is covered over by a structure or device. In addition, in a memorandum to the City on April 21, 2008, the City’s geotechnical consultant advised the City that the applicant’s geotechnical reports have failed to adequately identify the correct top of bluff. He wrote:

The architect calculates the 40’ setback from the top of bluff as the top of the recently constructed upper bluff wall. This is not the top of bluff, as stated by the City of Encinitas Planning Department and its geotechnical consultant in several meetings with the owner and his consultants. The top of bluff as previously stated is the top of the slope prior to construction of the upper wall. The top of bluff changed significantly after a landslide in the mid 1990’s. The existing upper bluff wall has artificially created additional back yard area and is not be used as the top of bluff designation. (“Review Memorandum” by GEOPACIFIC INC. dated April 21, 2008)

Prior to the City approval of the subject development, the applicant requested the Planning Commission provide a formal interpretation as to what constitutes a “top edge of bluff” for the purpose of determining the location of the minimum 40 ft. setback from the coastal bluff for future development. In February 2009, the Planning Commission approved a “Planning Commission Interpretation” (Case #08-189 PCIN) which identified that the western edge of the upper bluff retention system should be used as the “bluff edge” in order to accommodate future development of the site. The Planning Commission took this action even though City and Coastal Commission staff identified that the LCP requires the setback be determined from the edge of the natural bluff edge:

“Staff consulted with the California Coastal Commission staff to discuss and review the subject request. Coastal Commission staff concurred with City staff’s determination that the coastal bluff setback shall be measured from the preexisting natural edge of coastal bluff as determined and certified by Soil Engineering Construction Inc. Engineering Firm in their Geotechnical Evaluation dated January 2, 2001, prepared for the construction of the upper wall. . .” (Planning Commission Agenda Report, February 19, 2009, Case Number 08-189 PCIN)

In this case, the City chose to ignore that requirement and allowed the applicant to use the seaward edge of the upper bluff retention device as the “bluff edge”. In addition, the plans approved by the City identified the location of the natural bluff edge, but the City failed to

require the applicant to site the residence 40 ft. inland of the natural bluff edge (Ref. “Neptune Residence” by Cohn+Associates Architecture Planning dated 12/2/08).

Based on the above discussion, the City appears to have incorrectly determined the top edge of the bluff and thereby has incorrectly located the new development closer than 40 ft. landward of the bluff edge, inconsistent with the certified LCP. Therefore, the appellants’ contention that the City approval is inconsistent with the certified LCP, as it relates to siting new development no closer than 40 ft. inland of the natural bluff edge, raises a substantial issue.

The second contention of the appellants is that the proposed second floor cantilever of 8 feet seaward of the 40 ft. geologic setback is also inconsistent with the LCP since the 40 ft. setback was incorrectly determined. Section 30.34.020(C)(1) of the certified IP allows for a second floor extension that extends no more than 20% seaward of the minimum 40 ft. geologic setback:

. . . A Second Story cantilevered portion of a structure which is demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area may be permitted 20% beyond the top edge of bluff setback if a finding can be made by the authorized agency that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure.

In this case, since the home was approved to be located within 25 ft. of the natural bluff edge, the proposed second floor extension would be located within 17 ft. of the bluff edge and would represent an approximate 42% seaward extension from the required minimum 40 ft. geologic setback which is inconsistent with Section 30.34.020(C)(1) of the certified LCP. If the City had sited the new residence at 40 ft. seaward of the natural bluff and if that location were determined to be safe over 75 years, then the proposed 8 ft. extension of the second floor seaward of the residence would be consistent with the LCP. However, as identified by the appellants, it appears the City has approved the siting of the residence as close as 25 ft. landward of the natural bluff, which would result in the second floor extension being located 17 ft. landward of the natural bluff and would be inconsistent with the LCP. Therefore, on this issue, the appellants have also raised a substantial issue.

The third contention by the appellants is that the City failed to require the proposed home to be designed so that it could be removed if threatened in the future. Public Safety (PS) Policy 1.6 of the certified LUP requires that any new structure on the bluff be designed and constructed in a manner so that it could be removed in its entirety if threatened in the future and requires the applicant to agree to participate in the development of the Comprehensive Plan addressing coastal recession and shoreline erosion:

POLICY 1.6: The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:

[. . .]

In all cases, all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the applicant shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

While the applicant provided a written agreement to participate in the development of a Comprehensive Plan, the City approval did not require that the home be designed and constructed so that it could be removed in the future if threatened as required by PS Policy 1.6. Instead, the City simply accepted a statement from the applicant that “noted that the project could be moved either as a unit or as structurally separable units.” In addition, the City approval identified that “[t]his in no way represents a commitment on the part of the owner or owner’s successor to remove the structure(s) at any time.” In order to comply with this requirement, the appellants assert that the City should have required submission of final plans documenting the way in which the home would be designed and constructed so as to be removed if threatened. On this point the appellants appear to have raised a substantial issue because unless the home is constructed in a way to assure it could be removed if threatened in the future, this provision of the LCP could not be enforced. Therefore, the City’ approval is inconsistent with PS Policy 1.6 of the certified LUP and the appellants have raised a substantial issue.

The final contention of the appellants is that the City failed to have the applicant adequately demonstrate that the home will be sited in a safe location and not require shoreline protection over its lifetime. Section 30.34.020(D) of the certified IP requires that the applicant submit a soils report or geotechnical review that demonstrates the proposed residence will safe over its lifetime so as to not require shoreline protection:

APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. The review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. Each review/report shall consider, describe and analyze the following:

1. Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;

2. Historic, current and foreseeable-cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;
3. Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features, such as bedding, joints and faults;
4. Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;
5. Impact of construction activity on the stability of the site and adjacent area;
6. Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);
7. Potential erodibility of site and mitigating measures to be used to ensure minimized erosion problems during and after construction (i.e., landscaping and drainage design);
8. Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data; (Ord. 95-04)
9. Potential effects of seismic forces resulting from a maximum credible earthquake;
10. Any other factors that might affect slope stability;
11. Mitigation measures and alternative solutions for any potential impacts.

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. The report shall use a current acceptable engineering stability analysis method and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project.

In addition to the above, each geotechnical report shall include identification of the daylight line behind the top of the bluff established by a bluff slope failure plane analysis. This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:

- Cover all types of slope failure.
- Demonstrate a safety factor against slope failure of 1.5.
- Address a time period of analysis of 75 years.

Any newly proposed structure, other than a minor accessory structure or improvement, or a preemptive measure, which is proposed closer than 40 feet to the edge of the bluff shall be demonstrated to be behind the identified daylight line. Analysis methods alternate to a slope failure plane analysis which predict an equivalent level of safety may be proposed, and must be accepted in the City's review of the geotechnical report.

[. . .]

In addition to siting the new development no closer than 40 ft. landward of the natural bluff edge pursuant to Section 30.34.020(B) of the City's certified IP, Section 30.34.020(D) of the IP as cited above, requires the applicant to evaluate a series of listed geologic concerns as well as to perform a slope stability analysis that evaluates existing conditions and conditions after 75 years so as to determine if a 40 ft. will be a safe setback or if a larger setback is necessary to assure stability over 75 years. In particular, Section 30.34.020(D) requires the geotechnical information demonstrate a safety factor against slope failure of 1.5 addressing a period of analysis of 75 years. In review of the geotechnical information submitted to the City by the applicant, it appears that the slope stability analysis was limited to existing conditions and did not include an evaluation of 75 years as required by the LCP. In addition, there is no discussion, description or evaluation of all the other listed concerns such as erosion rate, geologic conditions, groundwater condition, etc. and there is not even a description or evaluation of the existing shoreline protective devices located on site. Section 30.34.020(D) of the IP requires a thorough geotechnical evaluation of the site in order to determine where new development can be safely sited. It appears this did not occur for the subject development. Instead, it appears that the City and applicant assume that the existing shoreline protective devices will be safe over the lifetime of the new home, but that is not specifically addressed in the geotechnical reports.

However, even if there had been a thorough analysis of the structural integrity of the existing shoreline devices today, there is no way to know how these structures will perform in the future and, therefore, new development should be sited in a location that is not dependent on these shoreline protective devices. As previously described, the applicant received a series of coastal development permits and emergency permits for the construction of a seawall, reconstructed bluff and upper-bluff below grade retention structure which were designed to protect an existing single-family home that was threatened

by erosion. These shoreline devices were not designed and approved to accommodate future redevelopment of the blufftop parcels. While the existing seawall and other shoreline protective devices will provide a level of protection for some period of time, there is no way to assure that the structures will perform as designed over the lifetime of new development which is generally considered to be 75 years. In fact, the seawall approved by the Commission in 2005 was only proposed to have a “life expectancy” of 22 years if monitored and maintained as designed. However, as previously identified, the applicant is required to monitor and maintain the existing seawall and submit monitoring reports to the Executive Director every year for the first three years and every three years thereafter for the life of the seawall. In this case, however, the applicant has failed to submit any of those reports as required. In addition, there is no evidence in the City file that these reports were prepared or submitted to the City for their review of the subject development. Therefore, given that the existing shoreline protection was constructed to protect a home that is now proposed to be demolished, the uncertainty that the existing protection will remain and function for the life of the new structure and the fact that monitoring reports have not been prepared to even document that the protective devices are operating effectively today, new development should be sited where it will not be dependent on the existing shoreline protective devices for protection.

In this case, the City approved the siting of the new residence as close as 25 ft. landward of the natural bluff edge, which is inconsistent with Section 30.34.020(B) of the certified IP and it appears that the City failed to adequately evaluate whether the new home will be safe over the next 75 years as required by Section 30.34.020(D) of the certified IP. Therefore, it cannot be determined whether a home that is sited only 25 ft. landward of the natural bluff edge will be safe over 75 years. Therefore, on this issue as well, the appellants have raised a substantial issue.

3. Conclusion. Based on the information cited above, it appears the City approval of the demolition of the existing home and construction of a new home is inconsistent with Public Safety (PS) Policy 1.6 of the City’s certified LUP and Sections 30.34.020(B), 30.34.020(D) and 30.34.020(C)(1) of the City’s certified Implementation Plan (IP) relating to siting of new development on a coastal blufftop so as to assure it will be safe from failure and erosion over its lifetime without requiring shoreline protection. The City’s use of an incorrect bluff edge along with an inadequate geotechnical review could result in the new home being sited in a location on the site that would be subject to threat in the future. Therefore, the Commission finds that a substantial issue exists with respect to the consistency of the local government action with the City’s certified Local Coastal Program.

4. Substantial Issue Factors. As discussed above, there is inadequate factual and legal support for the City’s determination that the proposed development is consistent with the certified LCP. The other factors that the Commission normally considers when evaluating whether a local government’s action raises a substantial issue also support a finding of substantial issue. The objections to the project suggested by the appellants raise substantial issues of regional or statewide significance and the decision creates a poor precedent with respect to the proper interpretation of the City’s LCP, as the City’s

determination of the bluff edge and its failure to require an adequate geotechnical analysis are not only incorrect interpretations of the LCP, but they could also set an adverse precedent elsewhere along the coast. In addition, the coastal resources affected by the decision are significant.

(G:\San Diego\Reports\Appeals\2009\A-6-ENC-09-40 Okun SI.doc)

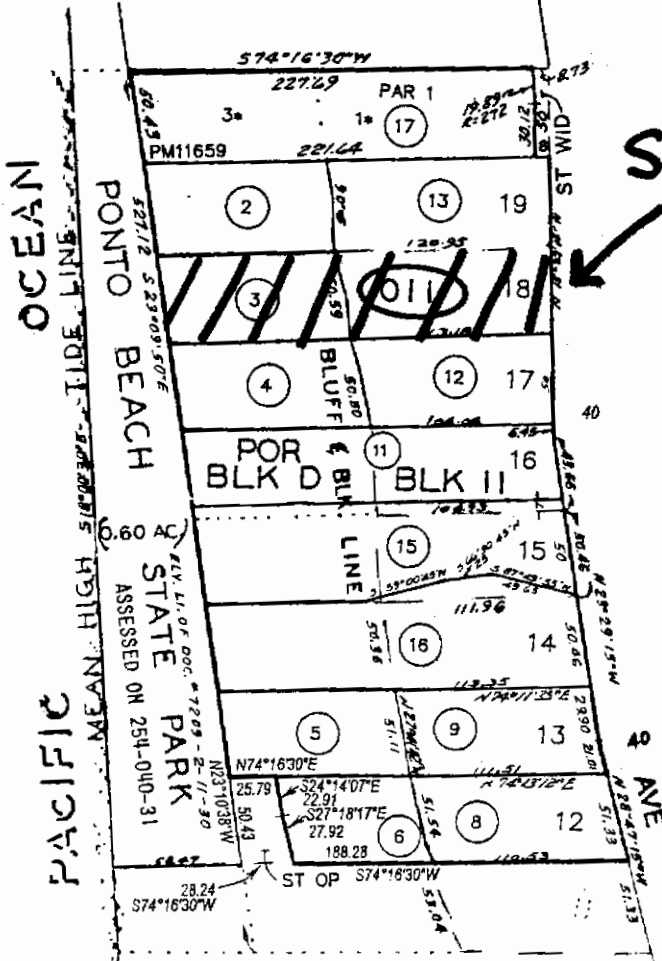
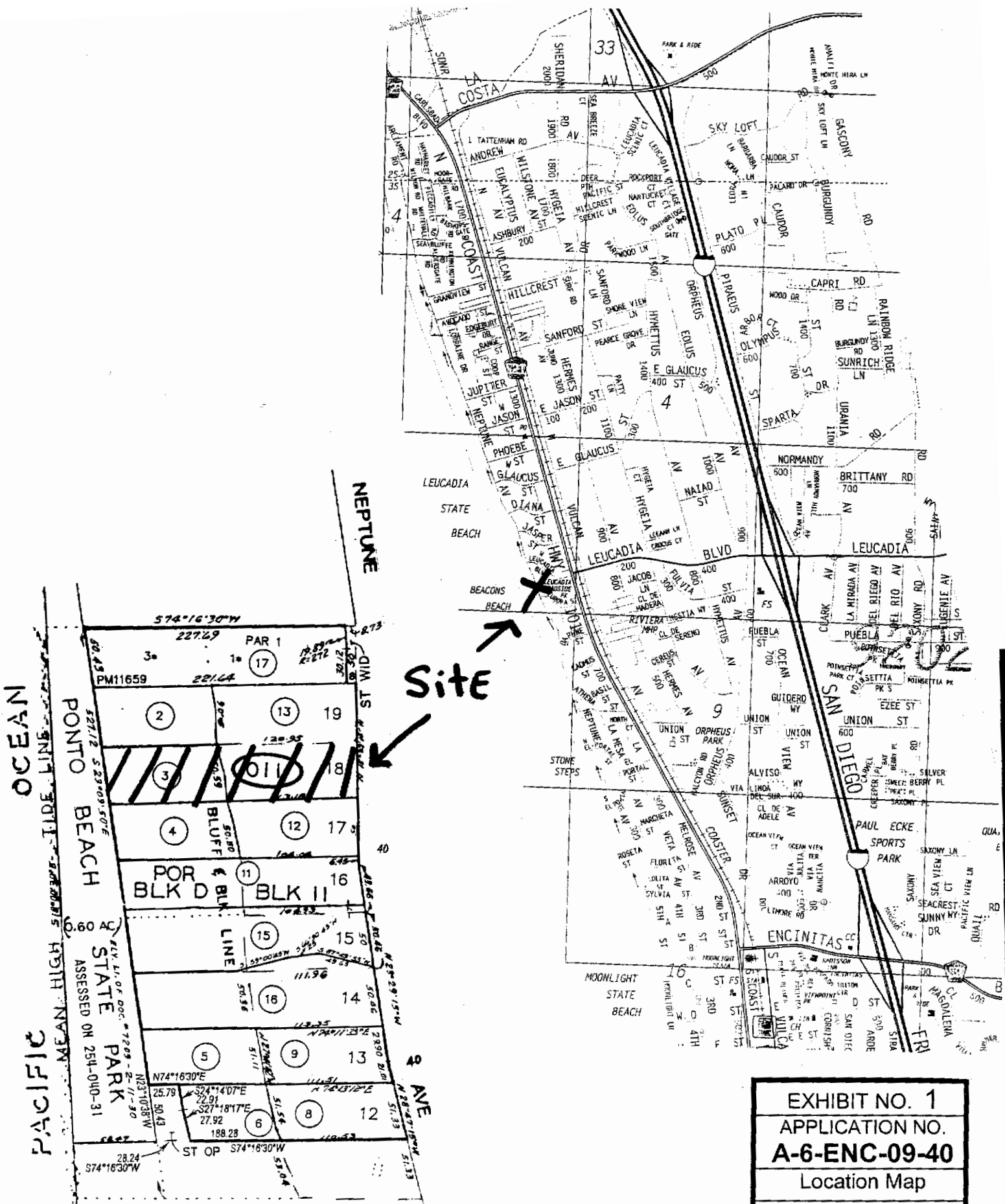


EXHIBIT NO. 1
 APPLICATION NO.
A-6-ENC-09-40
 Location Map

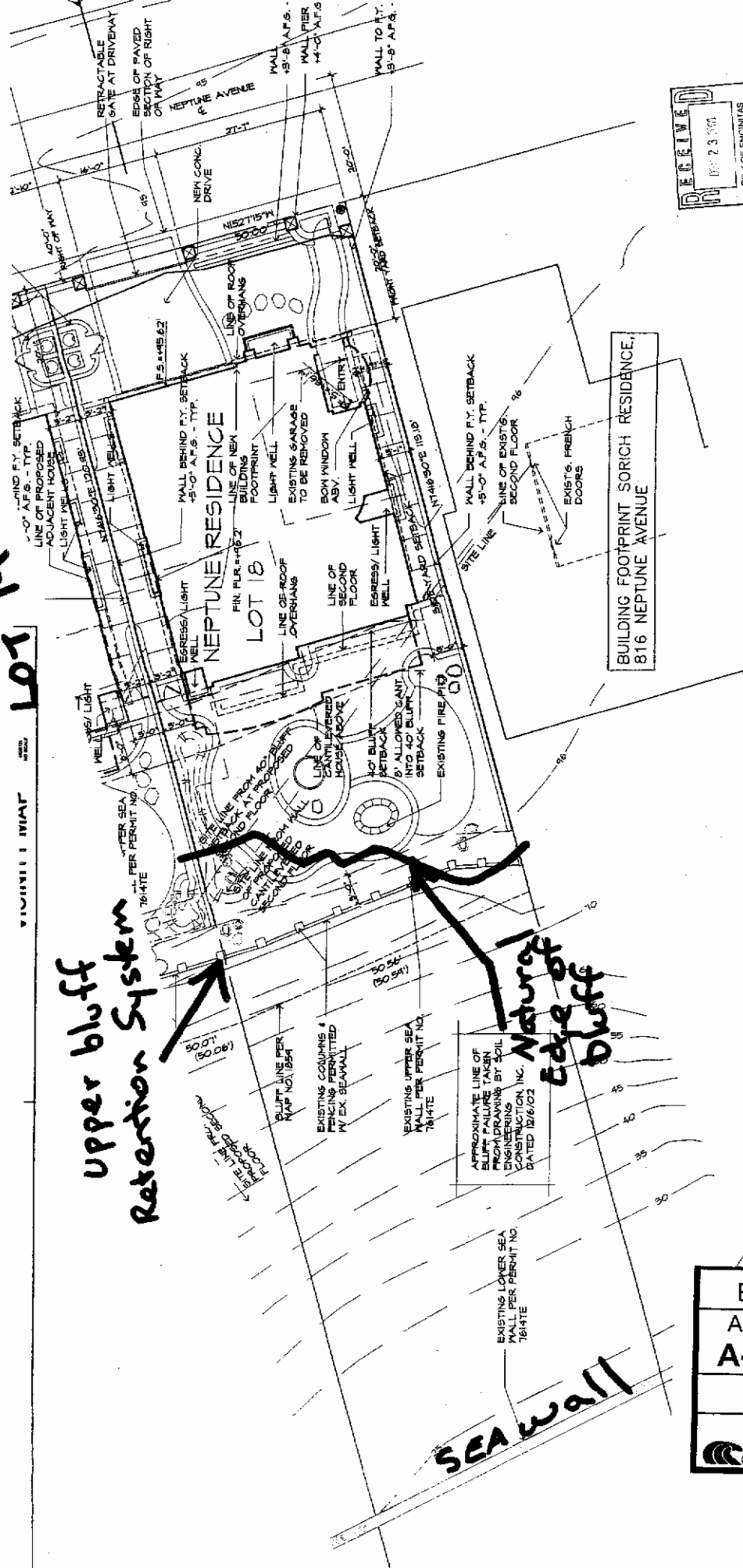
A 19

LOT 19

**Upper bluff
Retention System**

**Natural
Edge of
bluff**

SEA WALL



RECEIVED
FRI FEB 23 1991
CITY OF ENCINITAS

BUILDING FOOTPRINT SORICH RESIDENCE,
816 NEPTUNE AVENUE

APPROXIMATE LINE OF BLUFF AS TAKEN FROM DRAWING BY SOIL ENGINEERS & CONSTRUCTION, INC. DATED 12/6/02

EXHIBIT NO. 2
APPLICATION NO.
A-6-ENC-09-40
Site Plan
California Coastal Commission

RESOLUTION NO. PC 2009-19

A RESOLUTION OF THE CITY OF ENCINITAS PLANNING COMMISSION APPROVING A COASTAL DEVELOPMENT PERMIT FOR THE DEMOLITION OF PORTIONS OF AN EXISTING SINGLE-FAMILY DWELLING UNIT AND THE CONSTRUCTION OF A NEW TWO-STORY SINGLE-FAMILY DWELLING UNIT WITH A SECOND STORY MASTER BEDROOM AND DECK ELEMENTS WHICH CANTILEVER EIGHT (8) FEET INTO THE 40-FOOT COASTAL BLUFF SETBACK FOR THE PROPERTY LOCATED AT 828 NEPTUNE AVENUE.

(CASE NO. 08-073 CDP; APN: 256-011-03 & -13 (LOT 18))

WHEREAS, a request for consideration of a Coastal Development Permit was filed by Gary Cohn, project architect, on behalf of Leonard Okun, property owner, to demolish portions of an existing single-family dwelling unit and to allow the construction of a new two-story single-family residence with a second story master bedroom and deck elements of the structure to cantilever eight (8) feet into the required 40-foot coastal bluff setback, in accordance with Chapters 30.34 (Special Purpose Overlay Zones) and 30.80 (Coastal Development Permit) of the Encinitas Municipal Code, for the property located within the R-11 (Residential 11) zone, the Coastal Bluff Overlay Zone and the California Coastal Commission Appeal Jurisdiction of the Coastal Zone, legally described as:

LOT 18 IN BLOCK 11 OF SOUTH COAST PARK NO. 2, IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 1859, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, SEPTEMBER 21, 1925.

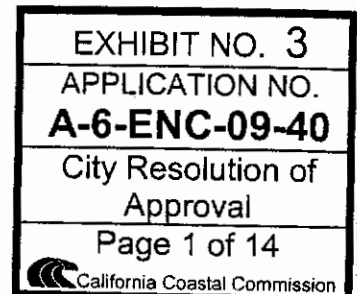
ALSO THAT PORTION OF BLOCK "D" OF SOUTH COAST PARK NO. 2, IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 1859, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY SEPTEMBER 21, 1925, AS FURTHER DESCRIBED IN RECORDED GRANT DEED DOCUMENT NO. 75-017112.

EXCEPTING THEREFROM ANY PORTION HERETOFORE OR NOW LYING BELOW THE MEAN HIGH TIDE LINE OF THE PACIFIC OCEAN.

WHEREAS, the Planning Commission conducted a noticed public hearing on the application on June 4, 2009, at which time all those desiring to be heard were heard; and

WHEREAS, the Planning Commission considered, without limitation:

1. The June 4, 2009 agenda report to the Planning Commission with attachments;
2. The General Plan, Local Coastal Program, Municipal Code and associated Land Use Maps;
3. Oral evidence submitted at the hearing;



4. Written evidence submitted at the hearing;
5. Project drawings consisting of 11 sheets, including Site Plan, Site Section, Basement Floor Plan, First Floor Plan, Second Floor Plan, Roof Plan, Building Sections, Elevations (East & South), Elevations (West & North), Conceptual Grading Plan, Planting Plan and Irrigation Plan; all stamped received by the City of Encinitas on December 23, 2008; and

WHEREAS, the Planning Commission made the following findings pursuant to Chapters 30.34 (Special Purpose Overlay Zones) and 30.80 (Coastal Development Permit) of the Encinitas Municipal Code:

(SEE ATTACHMENT "A")

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission of the City of Encinitas hereby approves application No. 08-073 CDP subject to the following conditions:

(SEE ATTACHMENT "B")

BE IT FURTHER RESOLVED that the Planning Commission, in its independent judgment, finds that this project is categorically exempt from environmental review pursuant to Sections 15301(l) and 15303(a), which categorically exempt the demolition of one single-family residence and the construction of a new single-family residence, respectively.

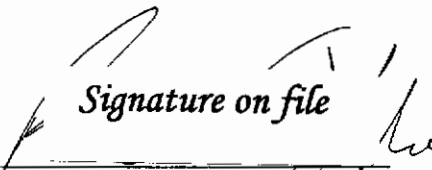
PASSED AND ADOPTED this 4th day of June, 2009, by the following vote, to wit:

AYES: Chapo, Felker, Shannon & Van Slyke

NAYS: None

ABSENT: Steyaert

ABSTAIN: None


Signature on file
Paul Van Slyke, Chair of the
Encinitas Planning Commission

ATTEST:

Patrick Murphy
Secretary

NOTE: This action is subject to Chapter 1.04 of the Municipal Code, which specifies time limits for legal challenges.

ATTACHMENT "A"
Resolution No. PC 2009-19
Case No. 08-073 CDP

**FINDINGS FOR COASTAL BLUFF SETBACK AND CANTILEVER PORTION OF A
STRUCTURE DETERMINATION:**

STANDARD: In accordance with Sections 30.34.020C(1) and 30.34.020D of the Municipal Code, the authorized agency must make the following findings of fact, based upon the information presented in the application and during the Public Hearing:

1. The development and improvement proposes no structure or facility on or within 40 feet of the top edge of the coastal bluff and a specific soils report and geotechnical review/report demonstrate and certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future.

Facts: The project proposes the demolition of portions of an existing dwelling unit and the construction of a 2,986-square foot two-story single-family dwelling unit with 447 square feet of garage and 1,677 square feet of basement/garage area. The new residence also includes a second-story master bedroom and deck element cantilevered eight (8) feet into the 40-foot coastal bluff setback to be measured from the edge of the existing upper coastal bluff wall. Pursuant to Section 30.34.020C1 of the Municipal Code, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. However, a second story cantilevered portion of a structure may be permitted 20% beyond the top edge of bluff setback if demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area. Section 30.34.020D requires that each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report and a geotechnical report. The Planning Commission rendered a determination on February 19, 2009 under Case No. 08-189 PCIN that new construction on the subject property can utilize the existing edge of upper coastal bluff wall as the "bluff edge" and that bluff setbacks shall be measured from the wall, not the pre-existing bluff edge.

Discussion: The criteria required to be considered in order to approve construction on the coastal bluff maintaining the standard 40-foot setback have been addressed by the Preliminary Geotechnical Investigation Reports and Addendums dated November 28, 2006, May 21, 2008 and February 5, 2009 prepared by John Niven of Soils Engineering Construction, Inc. The geotechnical report and addendum letters were reviewed by the City's third party geotechnical consultant, Geopacifica, which found that said geotechnical report provided information to adequately meet the standards of the City of Encinitas Municipal Code, Sections 30.34.020C and D. According to the results of the slope stability analyses and estimate of 75-year bluff top retreat, John Niven recommended that in accordance with the currently recommended guidelines of the Coastal Commission, a 40-foot bluff top setback be applied to the proposed project to be measured from the edge of the existing upper coastal bluff wall in compliance with the

required 40-foot bluff setback pursuant to Section 30.34.020B of the City of Encinitas Municipal Code and the determination of the City of Encinitas Planning Commission. Additionally, the report concluded that the proposed improvements will be constructed within areas of the site which are considered to be generally stable. The Third Party Review concluded that the geotechnical report adequately addressed the site conditions and provided information to adequately meet the standards of the City of Encinitas Municipal Code Section 30.34.020B, C and D. The issue of the cantilevered portions of the structure was addressed in the geotechnical reports by John Niven and said report was reviewed and accepted by the third party geotechnical consultant. As noted in the project geotechnical report, the cantilevered portions of the structure will not adversely create unnecessary surcharge load upon the bluff area.

Conclusion: Therefore, the Planning Commission finds that the proposed project will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future and that the cantilevered portions of the structure will not adversely create unnecessary surcharge load upon the bluff area.

2. No private or public views would be significantly impacted by the construction of the cantilevered portion of the structure.

Facts: Pursuant to Section 30.34.020C.1 of the Municipal Code, a second-story cantilevered portion of a structure is permitted 20% beyond the top edge of coastal bluff setback, if demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area and if a finding can be made that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure. The project application includes a second-story cantilevered deck and master bedroom to encroach eight (8) feet into the required 40-foot coastal bluff setback to be measured from the edge of the existing coastal bluff.

Discussion: The proposed residential structure, including the cantilevered elements, will sit further back from the bluff than the existing residential structure to be removed. The existing residence immediately to the south of the project site already projects out further to the west than the proposed project cantilevered elements and the proposed dwelling unit (Case No. 07-155 CDP) to the north will be in alignment with the proposed cantilevered elements; therefore, no negative impacts on their respective southward and northward views would occur. The proposed project's cantilevered elements are the same width as the main residence and would not be visible from properties to the east across Neptune Avenue. Thus no private or public views would be significantly impacted by the construction of the second story cantilevered master bedroom and deck element of the structure.

Conclusion: Therefore, the Planning Commission finds that the proposed cantilevered portions of the structure will not significantly impact any existing private or public views.

FINDINGS FOR A COASTAL DEVELOPMENT PERMIT

STANDARD: Section 30.80.090 of the Municipal Code provides that the authorized agency must make the following findings of fact, based upon the information presented in the application and during the Public Hearing, in order to approve a coastal development permit:

1. The project is consistent with the certified Local Coastal Program of the City of Encinitas; and
2. The proposed development conforms with Public Resources Code Section 21000 and following (CEQA) in that there are no feasible mitigation measures or feasible alternatives available which would substantially lessen any significant adverse impact that the activity may have on the environment; and
3. For projects involving development between the sea or other body of water and the nearest public road, approval shall include a specific finding that such development is in conformity with the public access and public recreation policies of Section 30200 et. seq. of the Coastal Act.

Facts: The project proposes the demolition of portions of the existing dwelling unit and the construction of a 2,986-square foot two-story single-family dwelling unit with 447 square feet of garage and 1,677 square feet of basement/garage area. The new residence also includes a second story master bedroom and deck elements cantilevered eight (8) feet into the 40-foot coastal bluff setback to be measured from the edge of the existing coastal bluff. The project site does not currently provide access to the shore, and the project does not propose any public access or public recreational facilities. Policy 1.6 of the Public Safety Element of the General Plan stipulates that all new construction shall be designed and constructed such that it could be removed in the event of endangerment and the applicant shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

Discussion: As to the findings above, the proposed project is consistent with the development standards and findings set forth in Sections 30.34.020C1 and 30.34.020D (Coastal Bluff Overlay Zone) of the Municipal Code. In conformance with Policy 1.6 of the Public Safety Element of the General Plan, the owner have submitted a statement noting that they agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City. Additionally, the statement noted that the project could be moved, either as a unit or as structurally separable units. This in no way represents a commitment on the part of the owner or owner's successors to remove the structure(s) at any time. With authorization to construct the second-story cantilever, the project is in conformance with the development standards of the Downtown Encinitas Specific Plan, Municipal Code, the General Plan and the Local Coastal Program. The project was determined to be exempt from environmental review pursuant to Sections 15301(l) and 15303(a), which categorically exempt the demolition of one (1) single-family residence and the construction of a new single-family residence, respectively. The project will not cause significant negative impacts to the surrounding area and the project will not adversely impact public coastal access.

Public access or public recreational facilities are not feasible given the project site's condition as a blufftop residential property. Therefore, no condition requiring public access is imposed with this approval. Public access to the shore is available in the near vicinity at Stone Steps and Grandview public beach accesses. Since there was no public access through the property prior to this application, the ability of the public to access the shore is not adversely impacted with this application.

Conclusion: The Planning Commission finds that 1) the project is consistent with the certified Local Coastal program of the City of Encinitas; 2) the project as proposed will not have a significant effect on the environment, and 3) providing public access or recreational facilities is not feasible or appropriate for a project of this type or scale.

ATTACHMENT "B"
Resolution No. PC 2009-19
Case No. 08-073 CDP

Applicant: Leonard Okun

Location: 828 Neptune Avenue (Lot 18) (APN: 256-011-03 & -13)

SC1 SPECIFIC CONDITIONS:

SC2 At any time after two (2) years from the date of this approval, on June 4, 2011 at 5:00 pm, 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.

SC5 This project is conditionally approved as set forth on the application dated received by the City on May 28, 2008 and project drawings stamped received by the City on December 23, 2008, consisting of 11 sheets, including Site Plan, Site Section, Basement Floor Plan, First Floor Plan, Second Floor Plan, Roof Plan, Building Sections, Elevations (East & South), Elevations (West & North), Conceptual Grading Plan, Planting Plan and Irrigation Plan, and shall not be altered without express authorization by the Planning and Building Department.

SCA The following conditions shall be completed and/or fulfilled to the satisfaction of the Engineering Services Department prior to issuance of grading and/or building permits:

1. The plan shall make clear that runoff from all roof and paved areas is directed to landscape areas designated for storm water pollution control BMP. Area drains are not allowed within hard surface areas unless the drains are designed to discharge to a treatment area prior to discharge from the private property. The BMP areas shall be shown with a shading symbol indicating the extent of the designated area and shall be labeled as "landscape area designated for BMP to be privately maintained and not to be modified without a permit from the City".
2. No enhanced paving will be allowed within the public right-of-way. The proposed enhanced paving shown on the site plan shall be relocated to the private property.
3. The property shall be graded to allow positive drainage to Neptune Avenue. No runoff shall be allowed to discharge over the bluff.
4. The proposed driveway shall occupy a maximum of 40% of the property frontage.
5. The unit shall connect to the sanitary sewer with a separate lateral.
6. The existing AC berm along the property frontage shall be removed and a paved swale shall be installed along the property frontage to Neptune between the existing edge of pavement and the property line.

SCB To the satisfaction of the San Dieguito Water District, the applicant shall comply with the following conditions:

1. The subject property (Lots 18 & 19) is currently being served by a 5/8-inch water meter. Upon development, each lot will be required to be individually metered. The owner is required to provide the District with written statement indicating which meter will remain with the corresponding lot. Upon development, developer may be required to fire sprinkler the home, if so, the developer shall be required to upgrade the existing service water meter to meet fire requirements.
2. The developer will be required to show all existing and proposed water facilities on improvement or grading plans for District Approval.
3. The developer is required to comply with the District's fees, charges, rules and regulations.
4. The district will require that water meters be located in front of the lot they are serving and outside of any existing or proposed travel way. Cost of relocation is the responsibility of the developer.

SCC No permanent irrigation shall be permitted within the 40-foot coastal bluff edge setback.

SCD All landscaping plant materials proposed shall be of non-invasive, drought tolerant plant species not detrimental to bluff stability to the satisfaction of the Planning and Building Department.

SCE The applicant shall submit building permit plans for the demolition of the existing residential building. The plans shall clearly indicate the removal methodology of existing structure including building foundation and footings. The demolition permit plans shall be reviewed and approved by the Planning and Building Department and the City of Encinitas Third Party Geotechnical Engineering Consultant prior to issuance of demolition permit.

SCF The proposed tower element on the south elevation shall comply with the City of Encinitas standards providing a maximum diameter of 12 feet. If the diameter of the proposed element exceeds 12 feet, the applicant shall revise the element to comply with height requirements pursuant to Section 30.16.010B6 of the Encinitas Municipal Code.

G1 STANDARD CONDITIONS:

CONTACT THE PLANNING AND BUILDING DEPARTMENT REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):

G2 This approval may be appealed to the City Council within 15 calendar days from the date of this approval in accordance with Chapter 1.12 of the Municipal Code.

G3 This project is located within the Coastal Appeal Zone and may be appealed to the California Coastal Commission pursuant to Coastal Act Section 30603 and Chapter 30.04 of the City of Encinitas Municipal Code. An appeal of the Planning Commission's decision must be filed with the Coastal Commission within 10 days following the Coastal

Commission's receipt of the Notice of Final Action. Applicants will be notified by the Coastal Commission as to the date the Commission's appeal period will conclude. Appeals must be in writing to the Coastal Commission, San Diego Coast District office.

- G4 Prior to **building permit issuance** the owner shall cause a covenant regarding real property to be recorded. Said covenant shall set forth the terms and conditions of this grant of approval and shall be of a form and content satisfactory to the Planning and Building Director. The Owner(s) agree, in acceptance of the conditions of this approval, to waive any claims of liability against the City and agrees to indemnify, hold harmless and defend the City and City's employees relative to the action to approve the project.
- G5 Approval of this request shall not waive compliance with any sections of the Municipal Code and all other applicable City regulations in effect at the time of Building Permit issuance unless specifically waived herein.
- G7 Prior to issuing a final inspection on framing, the applicant shall provide a survey from a licensed surveyor or a registered civil engineer verifying that the building height is in compliance with the approved plans. The height certification/survey shall be supplemented with a reduced (8 ½" x 11") copy of the site plan and elevations depicting the exact point(s) of certification. The engineer/surveyor shall contact the Planning and Building Department to identify and finalize the exact point(s) to be certified prior to conducting the survey.
- G13 The applicant shall pay development fees at the established rate. Such fees may include, but not be limited to: Permit and Plan Checking Fees, Water and Sewer Service Fees, School Fees, Traffic Mitigation Fees, Flood Control Mitigation Fees, Park Mitigation Fees, and Fire Mitigation/Cost Recovery Fees. Arrangements to pay these fees shall be made prior to **building permit issuance** to the satisfaction of the Planning and Building and Engineering Services Departments. The applicant is advised to contact the Planning and Building Department regarding Park Mitigation Fees, the Engineering Services Department regarding Flood Control and Traffic Fees, applicable School District(s) regarding School Fees, the Fire Department regarding Fire Mitigation/Cost Recovery Fees, and the applicable Utility Departments or Districts regarding Water and/or Sewer Fees.
- G19 Garages enclosing required parking spaces shall be kept available and usable for the parking of owner/tenant vehicles at all times, and may not be rented or conveyed separately from the appurtenant dwelling unit.
- BL1 Owner(s) shall enter into and record a covenant satisfactory to the City Attorney waiving any claims of liability against the City and agreeing to indemnify and hold harmless the City and City's employees relative to the approved project. This covenant is applicable to any bluff failure and erosion resulting from the development project.
- BL2 The applicant shall execute and record a covenant to the satisfaction of the Planning and Building Department setting forth the terms and conditions of this approval prior to the issuance of building permits. Said covenant shall also provide that the property owner shall be responsible for maintaining the approved structure(s) in good visual and structural condition in a manner satisfactory to the Directors of Engineering Services and Planning and Building.

BL3 An "as-built geotechnical report" shall be submitted to the Planning and Building and Engineering Services Departments, for review and acceptance, prior to approval of the foundation inspection. The report shall outline all field test locations and results, and observations performed by the consultant during construction of the proposed structure(s), and especially relative to the depths and actual location of the foundations. The report shall also verify that the recommendations contained in the Geotechnical Investigation Report, prepared and submitted in conjunction with the application, have been properly implemented and completed.

BL4 An "as-built geotechnical report", reviewed and signed by both the soils/geotechnical engineer and the project engineering geologist, shall be completed and submitted to the City within 15 working days after completion of the project. The project shall not be considered complete (and thereby approved for use or occupancy) until the as-built report is received and the content of the report is found acceptable by the Planning and Building and Engineering Services Departments.

B1 **BUILDING CONDITION(S):**

CONTACT THE ENCINITAS BUILDING DIVISION REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):

B2R The applicant shall submit a complete set of construction plans to the Building Division for plancheck processing. The submittal shall include a Soils/Geotechnical Report, structural calculations, and State Energy compliance documentation (Title 24). Construction plans shall include a site plan, a foundation plan, floor and roof framing plans, floor plan(s), section details, exterior elevations, and materials specifications. Submitted plans must show compliance with the latest adopted editions of the California Building Code (The Uniform Building Code with California Amendments, the California Mechanical, Electrical and Plumbing Codes). These comments are preliminary only. A comprehensive plancheck will be completed prior to permit issuance and additional technical code requirements may be identified and changes to the originally submitted plans may be required.

F1 **FIRE CONDITIONS:**

CONTACT THE ENCINITAS FIRE DEPARTMENT REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):

F6 **GATES:** All gates or other structures or devices, which could obstruct fire access roadways or otherwise hinder emergency operations, are prohibited unless they meet standards approved by the Fire Department. Gates across fire access roadways shall be automatic and equipped with approved emergency key operated switches overriding all command functions and opens the gate(s). Power supply shall be connected to a reliable municipal source. Gates accessing four (4) or more residences or residential lots, or gates accessing hazardous, institutional, and educational or assembly occupancy group structures, shall also be equipped with approved emergency traffic control activating strobe sensor(s), which will activate the gate on the approach of emergency apparatus with a battery back-up or manual mechanical disconnect in case of power failure. All automatic gates must meet Fire Department requirements for rapid, reliable access.

Where this Section requires an approved key-operated switch, it shall be dual keyed or dual switches with covers provided to facilitate access by law enforcement personnel.

F10 **OBSTRUCTION OF ROADWAYS DURING CONSTRUCTION:** All roadways shall be a minimum of 24 feet in width during construction and maintained free and clear, including the parking of vehicles, in accordance with the California Fire Code and the Encinitas Fire Department.

F13 **ADDRESS NUMBERS: STREET NUMBERS:** Approved numbers and/or addresses shall be placed on all new and existing buildings and at appropriate additional locations as to be plainly visible and legible from the street or roadway fronting the property from either direction of approach. Said numbers shall contrast with their background, and shall meet the following minimum standards as to size: 4" high with a 3/8" stroke for residential buildings, 8" high with a 1/2" stroke for commercial and multi-family residential buildings, 12" high with a 1" stroke for industrial buildings. Additional numbers shall be required where deemed necessary by the Fire Marshal, such as rear access doors, building corners, and entrances to commercial centers.

F15A **AUTOMATIC FIRE SPRINKLER SYSTEM-ONE AND TWO FAMILY DWELLINGS:** Structures shall be protected by an automatic fire sprinkler system designed and installed to the satisfaction of the Fire Department. Plans for the automatic fire sprinkler system shall be approved by the Fire Department prior to the issuance of building permit(s).

F17 **SMOKE DETECTORS/FIRE SPRINKLER SYSTEMS:** Smoke detectors/fire sprinklers shall be inspected by the Encinitas Fire Department.

F18 **CLASS "A" ROOF:** All structures shall be provided with a Class "A" Roof covering to the satisfaction of the Encinitas Fire Department.

E1 **ENGINEERING CONDITIONS:**

CONTACT THE ENGINEERING SERVICES DEPARTMENT REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):

E2 All City Codes, regulations, and policies in effect at the time of building/grading permit issuance shall apply.

E3 All drawings submitted for Engineering permits are required to reference the NAVD 88 datum; the NGVD 29 datum will not be accepted.

EG1 **Grading Conditions**

EG3 The owner shall obtain a grading permit prior to the commencement of any clearing or grading of the site.

EG4 The grading for this project is defined in Chapter 23.24 of the Encinitas Municipal Code. Grading shall be performed under the observation of a civil engineer whose responsibility it

shall be to coordinate site inspection and testing to ensure compliance of the work with the approved grading plan, submit required reports to the Engineering Services Director and verify compliance with Chapter 23.24 of the Encinitas Municipal Code.

- EG5 No grading shall occur outside the limits of the project unless a letter of permission is obtained from the owners of the affected properties.
- EG6 Separate grading plans shall be submitted and approved and separate grading permits issued for borrow or disposal sites if located within city limits.
- EG7 All newly created slopes within this project shall be no steeper than 2:1.
- EG8 A soils/geological/hydraulic report (as applicable) shall be prepared by a qualified engineer licensed by the State of California to perform such work. The report shall be submitted with the first grading plan submittal and shall be approved prior to issuance of any grading permit for the project.
- EG9 Prior to hauling dirt or construction materials to any proposed construction site within this project the owner shall submit to and receive approval from the Engineering Services Director for the proposed haul route. The owner shall comply with all conditions and requirements the Engineering Services Director may impose with regards to the hauling operation.
- EG10 In accordance with Section 23.24.370 (A) of the Municipal Code, no grading permit shall be issued for work occurring between October 1st of any year and April 15th of the following year, unless the plans for such work include details of protective measures, including desilting basins or other temporary drainage or control measures, or both, as may be deemed necessary by the field inspector to protect the adjoining public and private property from damage by erosion, flooding, or the deposition of mud or debris which may originate from the site or result from such grading operations.

ED1 Drainage Conditions

- ED2A An erosion control system shall be designed and installed onsite during all construction activity. The system shall prevent discharge of sediment and all other pollutants onto adjacent streets and into the storm drain system. The City of Encinitas Best Management Practice Manual shall be employed to determine appropriate storm water pollution control practices during construction.
- ED3 A drainage system capable of handling and disposing of all surface water originating within the project site, and all surface waters that may flow onto the project site from adjacent lands, shall be required. Said drainage system shall include any easements and structures required by the Engineering Services Director to properly handle the drainage.
- ED5 The owner shall pay the current local drainage area fee prior to issuance of the building permit for this project or shall construct drainage systems in conformance with the Master Drainage Plan and City of Encinitas Standards as required by the Engineering Services Director.

ES1 **Street Conditions**

ES5 Prior to any work being performed in the public right-of-way, a right-of-way construction permit shall be obtained from the Engineering Services Director and appropriate fees paid, in addition to any other permits required.

EU1 **Utilities**

EU2 The owner shall comply with all the rules, regulations, and design requirements of the respective utility agencies regarding services to the project.

EU3 The owner shall be responsible for coordination with S.D.G. & E., AT&T, and other applicable authorities.

EU4A The existing overhead utilities service to the property shall be undergrounded.

ESW1 **Storm Water Pollution Control Conditions**

ESW3 Best Management Practice shall be utilized for storm water pollution control to the satisfaction of the City Engineer. The surface run off shall be directed over grass and landscaped areas prior to collection and discharge onto the street and/or into the public storm drain system. If pipes are used for area drainage, inlets shall be located to allow maximum flow distance over grass and non-erodable landscape areas. A grass lined ditch, reinforced with erosion control blanket, or a rip-rap lined drainage ditch shall be used instead of a concrete ditch where feasible. Hardscaped areas and driveways shall be sloped toward grassy and landscaped areas. Driveways with a grass- or gravel-lined swale in the middle can be used if the site topography does not allow for the discharge of driveway runoff over landscaped areas. The **Grading Plan/Building Permit Site Plan** shall identify all landscape areas designed for storm water pollution control (SWPC). A note shall be placed on the plans indicating that the BMPs are to be privately maintained and the facilities not modified or removed without a permit from the City.

ESW9 For storm water pollution control purposes, all runoff from all roof drains shall discharge onto grass and landscape areas prior to collection and discharge onto the street and/or into the public storm drain system. Grass and landscape areas designated for storm water pollution control shall not be modified without a permit from the City. A note to this effect shall be placed on the **Grading/Building Permit Site plan**.

ECB1 **Coastal Bluff Conditions**

ECB2 In order to prevent any runoff from discharging over the coastal bluff, a drainage collection system shall be designed to intercept all the on-site runoff. The runoff shall be directed to a holding tank/wet well. The wet-well pump system shall be designed to handle a 50-year storm event and must be pumped onto a street or into a controlled storm drain system. No storm or irrigation water shall flow over the bluff edge.

ECB3 If an automatic irrigation system is proposed for this project, it shall be designed to avoid any excess watering. The system shall also be designed to automatically shut off in case

of a pipe break. Automatic shut-off system, moisture shut-off sensors, and other advanced controls will be required for the installation of an automatic irrigation system. The automatic irrigation system, shut-off systems, or any other system controls shall not be allowed within the 40-foot coastal bluff setback. Only hand-held irrigation is permitted within the 40-foot coastal bluff setback.

EB1: Underground Basement/ Garage Conditions

- EB2 This project proposes construction of an underground garage. The drainage for the garage access ramp shall be designed to intercept all runoff and ensure that no stormwater may enter the garage. The system to drain wastewater from the garage shall be connected to the sewer system.
- EB3 The developer shall design and have approved the shoring and construction dewatering systems necessary for the construction of the underground garage prior to issuance of any grading permit for the project.
- EB4 No permanent dewatering system shall be allowed for the underground garage. The underground garage shall be designed to withstand the hydrostatic pressure without any dewatering.
- EB5 If temporary shoring with tie-backs will be utilized for construction of the basement garage, the tie-backs could potentially encroach into the public right-of-way. If tie-backs within the public right-of-way are proposed, the applicant shall meet the following requirements:
- a. A permanent encroachment permit shall be obtained with a minimum of \$1 million liability insurance.
 - b. The tie-backs shall be placed a minimum of 5 feet below the lowest public utilities and a minimum of 10 feet below the finished surface elevation at the property line.
 - c. All the existing utilities within the public right-of-way shall be potholed by the developer and the actual location shall be shown on the proposed grading and improvement plans.
 - d. Shoring sheet piles, soldier beams, and lagging shall be within the private property and shall not encroach into the public right-of-way.
 - e. A structural calculation shall be submitted for temporary shoring for Engineering review and approval prior to issuance of a grading permit.
 - f. If phased construction is proposed for the grading and shoring operation, the phasing sequence shall be shown on the grading plan.
 - g. An adequate performance bond shall be provided for the grading and shoring. The engineer's cost estimate for the purpose of bonding shall also include an item for the complete backfill of the excavated basement area.
 - h. Grading and building permits shall be processed concurrently. No grading permit will be issued unless the building plancheck is complete and the project is ready for building permit issuance.

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4402
(619) 767-2370



APPEAL FROM COASTAL PERMIT
DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: Commissioner Sara Wan
Mailing Address: 22350 Carbon Mesa Road
Malibu, Ca 90265

Phone Number: 415-904-5200

SECTION II. Decision Being Appealed

1. Name of local/port government: City of Encinitas
2. Brief description of development being appealed: Demolish portions of an existing single-family home and construct 2,986 sq. ft. two-story single-family home with 447 sq. ft. garage and 1,677 sq. ft. basement on a coastal blufftop lot. The residence will be located 40 ft. landward of a reconstructed bluff edge and the second floor will be cantilevered 8 ft. seaward of the first floor.
3. Development's location (street address, assessor's parcel no., cross street, etc.):
828 Neptune Avenue, Encinitas, Lot 18, APN 256-011-03 & 13
4. Description of decision being appealed:
 - a. Approval; no special conditions:
 - b. Approval with special conditions:
 - c. Denial:

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-6-ENC-09-040

DATE FILED: 7/7/09

DISTRICT: San Diego

EXHIBIT NO. 4
APPLICATION NO. A-6-ENC-09-40
Appeal by Commissioner Wan
Page 1 of 9
California Coastal Commission

5. Decision being appealed was made by (check one):

a. Planning Director/Zoning
Administrator

c. Planning Commission

b. City Council/Board of
Supervisors

d. Other

Date of local government's decision: June 4, 2009

Local government's file number (if any): 08-73

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

Name and mailing address of permit applicant:

Leonard Okun
828 Neptune Avenue
Encinitas, Ca 92024

Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

SECTION IV. Reasons Supporting This Appeal

Note: Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section, which continues on the next page.

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Page 3

State briefly your reasons for this appeal. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)

See Attachment "A" dated July 7, 2009

Note: The above description need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Signature on file

Signed: _____

Appellant or Agent

Date: _____

7/7/09

Agent Authorization: I designate the above identified person(s) to act as my agent in all matters pertaining to this appeal.

Signed: _____

Date: _____

Attachment A
Leonard Okun Appeal
828 Neptune Ave., Encinitas
"Lot 18"
July 7, 2009

The project as approved by the City involves the demolition of an existing single-family residence that straddles two lots (Lots 18 and 19) and construction of a 2,986 sq. ft. two-story single-family home with 447 sq. ft. garage and 1,677 sq. ft. basement on a coastal blufftop lot. The residence will be located 40 ft. landward of a reconstructed bluff edge and the second floor will be cantilevered 8 ft. seaward of the first floor. The project as approved by the City is inconsistent with City's LCP as it relates the requirements for siting of new development on a coastal blufftop.

1. Section 30.34.020(B) of the City's certified Implementation Plan (IP) requires that principal structures be located no closer than 40 ft. inland of the natural bluff edge. The City allowed the project to be sited 40 ft. inland of the western edge of an upper bluff retaining wall which extends up to approximately 15 feet seaward of the natural bluff edge. As result the home will be sited as close as 25 ft. from the natural bluff edge which is inconsistent with the requirements of Section 30.34.020(B) that states, in part:

In addition to development and design regulations which otherwise apply, the following development standards shall apply to properties within the Coastal Bluff Overlay Zone. In case of conflict between the following standards and other standards, regulations and guidelines applicable to a given property, the more restrictive shall regulate.

1. With the following exceptions, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. Exceptions are as follows:

a. Principal and accessory structures closer than 40 feet but not closer than 25 feet from the top edge of the coastal bluff, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below. This exception to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is setback a minimum of 25 feet from the coastal blufftop edge and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future. Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

b. Minor accessory structures and improvements located at grade, including landscaping, shall be allowed to within 5 feet of the top edge of the coastal bluff. Precautions must be taken when placing structures close to the bluff edge to ensure that the integrity of the bluff is not threatened. For the purposes of the Coastal Bluff Overlay Zones, "minor accessory structures and improvements" are defined as those requiring no City approval or permit including a building or grading permit, and not attached to any principal or accessory structure which would require a permit. Grading for reasonable pedestrian access in and around a principal or accessory structure may be permitted by the City Engineer following review of a site specific soils report.

c. Essential public improvements providing coastal access, protecting natural resources, or providing for public safety, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below, including but not limited to, walkways leading to approved public beach access facilities, open fences for safety or resource protection, public seating benches, lighting standards, and signs.

d. Drainage improvements within 5 feet of the top edge of coastal bluff as required to satisfy Section 30.34.020(B)5 of this Code.

[...]

The project that was approved by the City does not involve the above-cited exceptions to the 40 ft. minimum setback from the bluff edge for new development, therefore, the City is required to site the new residence no closer than 40 ft. inland of the natural bluff edge. In addition, "bluff edge" is defined in the City's certified IP as:

BLUFF EDGE shall mean the upper termination of a bluff. When the top edge of the bluff is rounded away from the face of the bluff as a result of erosional processes related to the presence of the steep bluff face, the edge shall be defined as that point nearest the bluff beyond which the downward gradient of the land surface increases more or less continuously until it reaches the general gradient of the bluff. In a case where there is a step-like feature at the top of the bluff face, the landward edge of the topmost riser shall be taken to be the bluff edge. In those cases where irregularities, erosion intrusions, structures or bluff stabilizing devices exist on a subject property so that a reliable determination of the bluff edge cannot be made by visual or topographic evidence, the Director shall determine the location of the bluff edge after evaluation of a geologic and soil report.

This definition quite clearly refers to the natural bluff edge and does not make an allowance for a reconstructed artificial bluff edge. In addition, as the definition describes, if there is an irregularity to the bluff edge such as when an bluff stabilizing device is located over the natural bluff edge (which is the case here), then the Planning Director is required to determine the bluff edge "after evaluation of a geologic and soil report." The purpose of

evaluating a geologic or soil report is to assist the Director in locating the natural bluff edge when it is covered over by a structure or device. In this case, the City chose to ignore that requirement and allowed the applicant to use the seaward edge of the upper bluff retention device as the "bluff edge". In addition, the plans approved by the City identified the location of the natural bluff edge, but the City failed to require the applicant to site the residence 40 ft. inland of the natural bluff edge.

2. Since the City has failed to site the residence at a minimum of 40 ft. landward of the natural bluff edge as required by the LCP, the proposed second floor cantilevered of 8 feet seaward of the 40 ft. geologic setback is also inconsistent with the LCP. Section 30.34.020(C)(1) of the certified IP allows for a second floor extension that extends no more than 20% seaward of the minimum 40 ft. geologic setback:

... A Second Story cantilevered portion of a structure which is demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area may be permitted 20% beyond the top edge of bluff setback if a finding can be made by the authorized agency that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure.

In this case, since the home was approved to be located within 25 ft. of the natural bluff edge, the proposed second floor extension would be located within 17 ft. of the bluff edge and would represent an approximate 42% seaward extension from the required minimum 40 ft. geologic setback which is inconsistent with Section 30.34.020(C)(1) of the certified LCP.

4. Public Safety (PS) Policy 1.6 of the certified LUP requires that any new structure on the bluff be designed and constructed in a manner so that it could be removed in its entirety if threatened in the future and requires the applicant to agree to participate in the development of the Comprehensive Plan addressing coastal recession and shoreline erosion:

POLICY 1.6: The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:

[...]

In all cases, all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the applicant shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

While the applicant has provided a written agreement to participate in the development of a Comprehensive Plan, the City approval did not require that the home be designed and constructed so that it could be removed in the future if threatened as required by PS Policy 1.6. Instead the City simply accepted a statement from the applicant that "noted that the project could be moved either as a unit or as structurally separable units." In addition, the

City approval identified that “[t]his in no way represents a commitment on the part of the owner or owner’s successor to remove the structure(s) at any time.” In order to comply with this requirement of the RM Policy 1.6, the City should have required submission of final plans documenting the way in which the home would be designed and constructed so as to be removed if threatened. Therefore, the City’ approval is inconsistent with PS Policy 1.6 of the certified LUP.

5. Section 30.34.020(D) of the certified IP, requires that the applicant submit a soils report or geotechnical review that demonstrates the proposed residence will safe over its lifetime so as to not require shoreline protection:

APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. The review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. Each review/report shall consider, describe and analyze the following:

1. Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;
2. Historic, current and foreseeable-cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;
3. Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features, such as bedding, joints and faults;
4. Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;
5. Impact of construction activity on the stability of the site and adjacent area;
6. Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);

7. Potential erodibility of site and mitigating measures to be used to ensure minimized erosion problems during and after construction (i.e., landscaping and drainage design);
8. Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data; (Ord. 95-04)
9. Potential effects of seismic forces resulting from a maximum credible earthquake;
10. Any other factors that might affect slope stability;
11. Mitigation measures and alternative solutions for any potential impacts.

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. The report shall use a current acceptable engineering stability analysis method and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project.

In addition to the above, each geotechnical report shall include identification of the daylight line behind the top of the bluff established by a bluff slope failure plane analysis. This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:

- Cover all types of slope failure.
- Demonstrate a safety factor against slope failure of 1.5.
- Address a time period of analysis of 75 years.

Any newly proposed structure, other than a minor accessory structure or improvement, or a preemptive measure, which is proposed closer than 40 feet to the edge of the bluff shall be demonstrated to be behind the identified daylight line. Analysis methods alternate to a slope failure plane analysis which predict an equivalent level of safety may be proposed, and must be accepted in the City's review of the geotechnical report.

[. . .]

As identified above, in order to provide that information the applicant is required to evaluate a series of listed geologic concerns as well as to perform a slope stability analysis that evaluates existing conditions as well as conditions after 75 years. In particular, Section 30.34.020(D) requires that the geotechnical information demonstrate a safety factor against slope failure of 1.5 addressing a period of analysis of 75 years. In this case, slope stability analysis was limited to existing conditions and did not include an evaluation of

75 years as required by the LCP. Therefore, it cannot be determined whether a home that is sited only 25 ft. landward of the natural bluff edge will be safe over 75 years. Therefore, on this issue as well, the City action is inconsistent with the LCP.

In summary, the City's approval of the proposed residence is inconsistent with the policies of the certified LCP relating to siting of new development on a coastal blufftop so as to assure it will be safe from failure and erosion over its lifetime without requiring shoreline protection.

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4402
(619) 767-2370



APPEAL FROM COASTAL PERMIT
DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: Commissioner Mary Shallenberger

Mailing Address: 45 Fremont Street, Suite 2000
San Francisco, Ca 94105

Phone Number: 415-904-5200

SECTION II. Decision Being Appealed

1. Name of local/port government: City of Encintas
2. Brief description of development being appealed: Demolish portions of an existing single-family home and construct 2,986 sq. ft. two-story single-family home with 447 sq. ft. garage and 1,677 sq. ft. basement on a coastal blufftop lot. The residence will be located 40 ft. landward of a reconstructed bluff edge and the second floor will be cantilevered 8 ft. seaward of the first floor.
3. Development's location (street address, assessor's parcel no., cross street, etc.):
828 Neptune Avenue, Encinitas, Lot 18, APN 256-011-03 & 13
4. Description of decision being appealed:
 - a. Approval; no special conditions:
 - b. Approval with special conditions:
 - c. Denial:

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-6-ENC-09-040

DATE FILED: 7/7/09

DISTRICT: San Diego

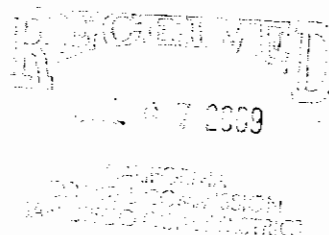


EXHIBIT NO. 5
APPLICATION NO. A-6-ENC-09-40
Appeal by Commissioner Shallenberger
Page 1 of 9
California Coastal Commission

5. Decision being appealed was made by (check one):

a. Planning Director/Zoning
Administrator

c. Planning Commission

b. City Council/Board of
Supervisors

d. Other

Date of local government's decision: June 4, 2009

Local government's file number (if any): 08-73

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

Name and mailing address of permit applicant:

Leonard Okun
828 Neptune Avenue
Encinitas, Ca 92024

Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

SECTION IV. Reasons Supporting This Appeal

Note: Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section, which continues on the next page.

State briefly your reasons for this appeal. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)

See Attachment "A" dated July 7, 2009

Note: The above description need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Signed: *M. [unclear]* *Signature on file* *beigh*
Appellant or Agent

Date: *7/7/09*

Agent Authorization: I designate the above identified person(s) to act as my agent in all matters pertaining to this appeal.

Signed: _____

Date: _____

Attachment A
Leonard Okun Appeal
828 Neptune Ave., Encinitas
"Lot 18"
July 7, 2009

The project as approved by the City involves the demolition of an existing single-family residence that straddles two lots (Lots 18 and 19) and construction of a 2,986 sq. ft. two-story single-family home with 447 sq. ft. garage and 1,677 sq. ft. basement on a coastal blufftop lot. The residence will be located 40 ft. landward of a reconstructed bluff edge and the second floor will be cantilevered 8 ft. seaward of the first floor. The project as approved by the City is inconsistent with City's LCP as it relates the requirements for siting of new development on a coastal blufftop.

1. Section 30.34.020(B) of the City's certified Implementation Plan (IP) requires that principal structures be located no closer than 40 ft. inland of the natural bluff edge. The City allowed the project to be sited 40 ft. inland of the western edge of an upper bluff retaining wall which extends up to approximately 15 feet seaward of the natural bluff edge. As result the home will be sited as close as 25 ft. from the natural bluff edge which is inconsisnt with the requirements of Section 30.34.020(B) that states, in part:

In addition to development and design regulations which otherwise apply, the following development standards shall apply to properties within the Coastal Bluff Overlay Zone. In case of conflict between the following standards and other standards, regulations and guidelines applicable to a given property, the more restrictive shall regulate.

1. With the following exceptions, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. Exceptions are as follows:

a. Principal and accessory structures closer than 40 feet but not closer than 25 feet from the top edge of the coastal bluff, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below. This exception to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is setback a minimum of 25 feet from the coastal blufftop edge and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future. Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

b. Minor accessory structures and improvements located at grade, including landscaping, shall be allowed to within 5 feet of the top edge of the coastal bluff. Precautions must be taken when placing structures close to the bluff edge to ensure that the integrity of the bluff is not threatened. For the purposes of the Coastal Bluff Overlay Zones, "minor accessory structures and improvements" are defined as those requiring no City approval or permit including a building or grading permit, and not attached to any principal or accessory structure which would require a permit. Grading for reasonable pedestrian access in and around a principal or accessory structure may be permitted by the City Engineer following review of a site specific soils report.

c. Essential public improvements providing coastal access, protecting natural resources, or providing for public safety, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below, including but not limited to, walkways leading to approved public beach access facilities, open fences for safety or resource protection, public seating benches, lighting standards, and signs.

d. Drainage improvements within 5 feet of the top edge of coastal bluff as required to satisfy Section 30.34.020(B)5 of this Code.

[...]

The project that was approved by the City does not involve the above-cited exceptions to the 40 ft. minimum setback from the bluff edge for new development, therefore, the City is required to site the new residence no closer than 40 ft. inland of the natural bluff edge. In addition, "bluff edge" is defined in the City's certified IP as:

BLUFF EDGE shall mean the upper termination of a bluff. When the top edge of the bluff is rounded away from the face of the bluff as a result of erosional processes related to the presence of the steep bluff face, the edge shall be defined as that point nearest the bluff beyond which the downward gradient of the land surface increases more or less continuously until it reaches the general gradient of the bluff. In a case where there is a step-like feature at the top of the bluff face, the landward edge of the topmost riser shall be taken to be the bluff edge. In those cases where irregularities, erosion intrusions, structures or bluff stabilizing devices exist on a subject property so that a reliable determination of the bluff edge cannot be made by visual or topographic evidence, the Director shall determine the location of the bluff edge after evaluation of a geologic and soil report.

This definition quite clearly refers to the natural bluff edge and does not make an allowance for a reconstructed artificial bluff edge. In addition, as the definition describes, if there is an irregularity to the bluff edge such as when an bluff stabilizing device is located over the natural bluff edge (which is the case here), then the Planning Director is required to determine the bluff edge "after evaluation of a geologic and soil report." The purpose of

evaluating a geologic or soil report is to assist the Director in locating the natural bluff edge when it is covered over by a structure or device. In this case, the City chose to ignore that requirement and allowed the applicant to use the seaward edge of the upper bluff retention device as the "bluff edge". In addition, the plans approved by the City identified the location of the natural bluff edge, but the City failed to require the applicant to site the residence 40 ft. inland of the natural bluff edge.

2. Since the City has failed to site the residence at a minimum of 40 ft. landward of the natural bluff edge as required by the LCP, the proposed second floor cantilevered of 8 feet seaward of the 40 ft. geologic setback is also inconsistent with the LCP. Section 30.34.020(C)(1) of the certified IP allows for a second floor extension that extends no more than 20% seaward of the minimum 40 ft. geologic setback:

... A Second Story cantilevered portion of a structure which is demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area may be permitted 20% beyond the top edge of bluff setback if a finding can be made by the authorized agency that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure.

In this case, since the home was approved to be located within 25 ft. of the natural bluff edge, the proposed second floor extension would be located within 17 ft. of the bluff edge and would represent an approximate 42% seaward extension from the required minimum 40 ft. geologic setback which is inconsistent with Section 30.34.020(C)(1) of the certified LCP.

4. Public Safety (PS) Policy 1.6 of the certified LUP requires that any new structure on the bluff be designed and constructed in a manner so that it could be removed in its entirety if threatened in the future and requires the applicant to agree to participate in the development of the Comprehensive Plan addressing coastal recession and shoreline erosion:

POLICY 1.6: The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:

[...]

In all cases, all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the applicant shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

While the applicant has provided a written agreement to participate in the development of a Comprehensive Plan, the City approval did not require that the home be designed and constructed so that it could be removed in the future if threatened as required by PS Policy 1.6. Instead the City simply accepted a statement from the applicant that "noted that the project could be moved either as a unit or as structurally separable units." In addition, the

City approval identified that “[t]his in no way represents a commitment on the part of the owner or owner’s successor to remove the structure(s) at any time.” In order to comply with this requirement of the RM Policy 1.6, the City should have required submission of final plans documenting the way in which the home would be designed and constructed so as to be removed if threatened. Therefore, the City’ approval is inconsistent with PS Policy 1.6 of the certified LUP.

5. Section 30.34.020(D) of the certified IP, requires that the applicant submit a soils report or geotechnical review that demonstrates the proposed residence will safe over its lifetime so as to not require shoreline protection:

APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. The review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. Each review/report shall consider, describe and analyze the following:

1. Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;
2. Historic, current and foreseeable-cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;
3. Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features, such as bedding, joints and faults;
4. Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;
5. Impact of construction activity on the stability of the site and adjacent area;
6. Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);

7. Potential erodibility of site and mitigating measures to be used to ensure minimized erosion problems during and after construction (i.e., landscaping and drainage design);
8. Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data; (Ord. 95-04)
9. Potential effects of seismic forces resulting from a maximum credible earthquake;
10. Any other factors that might affect slope stability;
11. Mitigation measures and alternative solutions for any potential impacts.

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. The report shall use a current acceptable engineering stability analysis method and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project.

In addition to the above, each geotechnical report shall include identification of the daylight line behind the top of the bluff established by a bluff slope failure plane analysis. This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:

- Cover all types of slope failure.
- Demonstrate a safety factor against slope failure of 1.5.
- Address a time period of analysis of 75 years.

Any newly proposed structure, other than a minor accessory structure or improvement, or a preemptive measure, which is proposed closer than 40 feet to the edge of the bluff shall be demonstrated to be behind the identified daylight line. Analysis methods alternate to a slope failure plane analysis which predict an equivalent level of safety may be proposed, and must be accepted in the City's review of the geotechnical report.

[. . .]

As identified above, in order to provide that information the applicant is required to evaluate a series of listed geologic concerns as well as to perform a slope stability analysis that evaluates existing conditions as well as conditions after 75 years. In particular, Section 30.34.020(D) requires that the geotechnical information demonstrate a safety factor against slope failure of 1.5 addressing a period of analysis of 75 years. In this case, slope stability analysis was limited to existing conditions and did not include an evaluation of

75 years as required by the LCP. Therefore, it cannot be determined whether a home that is sited only 25 ft. landward of the natural bluff edge will be safe over 75 years. Therefore, on this issue as well, the City action is inconsistent with the LCP.

In summary, the City's approval of the proposed residence is inconsistent with the policies of the certified LCP relating to siting of new development on a coastal blufftop so as to assure it will be safe from failure and erosion over its lifetime without requiring shoreline protection.

The Trettin Company

GOVERNMENT RELATIONS PROJECT DEVELOPMENT

July 28, 2009

TO: Honorable Chair and Commission Members
 California Coastal Commission

FROM: Bob Trettin, agent
 Dr. Leonard Okun
 828 Neptune, Encinitas, CA 92024

RE: Request for Finding of No Substantial Issue;
 Commission Appeal # A-6-ENC-09-040
 Commission Appeal # A-6-ENC-09-041

RECEIVED

JUL 29 2009

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

**Brief History of Bluff Protective Actions and Improvements
And
Discussion as to Why No Substantial Issue Exists in Current Appeals**

In September, 2005, after more than nine years of expense and heart-breaking anxiety for the applicant, the California Coastal Commission ignored a coastal staff recommendation of denial and approved Dr. Leonard Okun's coastal bluff protective device (a seawall that had been constructed some five years earlier under Coastal Emergency Permit). At this point, almost four years ago, Dr. Okun thought the bad times were behind him and he could proceed on the permitting to reconstruct failed portions of his long-time home.

Now we have reached a point where, at the Commission's August hearing, coastal staff has forwarded an appeal of the City of Encinitas' CDP approval allowing Dr. Okun to construct two new homes on his two legal lots. We believe that this is tragic miscarriage of Coastal Commission procedures, and an extremely punitive action taken against a man who has done nothing but adhere to local and state requirements.

We don't believe that any reasonable individual could find that the City of Encinitas acted in non-conformance with its Municipal Code in approving Dr. Okun's project. We are confused to be at a point where Dr. Okun is once again being brought before the Coastal Commission in a negative manner. Upon your review, we plead that the Commission act in August to find no substantial issue relative to this current appeal.

Dr. Leonard Okun's coastal bluff property experienced substantial failure in May, 1996. A significant tension crack appeared across Dr. Okun's residence, bisecting two rooms (approx. 800 sq. ft.). This crack was approximately 20' east of the 1996 top-of bluff and extended to the north, through a block wall and onto the neighboring properties. Dr. Okun chose to address this emergency by immediately working with the City of Encinitas and the California Coastal Commission.

9606 Laurentian Drive San Diego, California 92129
(858) 484-0212 FAX (858) 484-6943

EXHIBIT NO. 6
APPLICATION NO. A-6-ENC-09-40
Applicant's Response to Appeal
Page 1 of 9
 California Coastal Commission

In June, 1996, just after Dr. Okun had secured an emergency permit to construct a shotcrete wall on the face of the upper bluff to stabilize this failure and protect his structure, an entire section of the bluff south of Beacon's Beach experienced significant collapse. This collapse destroyed Dr. Okun's early emergency repairs and he lost the two rooms along the western portion of his property. In addition, the lower coastal bluff was literally pushed out along a clay seam, resulting in significant loss of mid and lower bluff materials.

In response to this tragic event which impacted several properties, Dr. Okun's neighbors to the north, instead of merely addressing a serious geotechnical event, filed litigation against Dr. Okun, his engineering / contracting firm and the City of Encinitas.

Over the course of the next several years, Dr. Okun battled litigation, which appeared frivolous, and ultimately proved successful in demonstrating that fault could not be attributed to others in the cataclysmic event of a natural bluff failure.

During the years between 1996 and 2001, Dr. Okun and his representatives worked diligently with the City of Encinitas and California Coastal Commission to obtain all appropriate coastal emergency permits and to initiate the regular MUP and CDP process. Unfortunately, his neighbors were not equally diligent. After receiving initial coastal emergency permits, the neighbors constructed a lower seawall that was not in conformance with the issued permits. Further, after the litigation had ended, the neighbor to the immediate north, who is a civil engineer, again threatened litigation if he was not allowed by Dr. Okun to manage the bluff restoration project for both properties. Instead of overseeing the implementation of Dr. Okun's mid-bluff reconstruction as permitted, the neighbor instead installed virtually all granular rock from the mid-bluff to upper bluff, across his property and Dr. Okun's. This neighbor also placed the granulated rock approximately 20' higher on the bluff than authorized in the emergency permit – presumably to avoid building an upper bluff wall on his own property.

Then, even though the neighbor was in violation of virtually all his emergency permit work, he prohibited Dr. Okun from removing any of the granular rock adjacent to their property boundary under the threat of litigation if his property was disturbed.

Coastal staff, at a meeting conducted at the City of Encinitas, initially indicated that they might support a landscape treatment proposal that called for the granular rock to be buried under significant amounts of imported soil. Ultimately, however, when the plan was completed, Dr. Okun's final city MUP/CDP was delayed by coastal staff for almost two years as they urged the city and Dr. Okun's representatives to find some other alternative. Finally, coastal staff allowed the landscape plan to proceed and Dr. Okun secured his regular City of Encinitas MUP/CDP for the complete project in March, 2005. Then in September, 2007 – more than 9 years after the first failure – the CDP for Dr. Okun's seawall was brought to a Coastal Commission public hearing. Unfortunately, prior to Dr. Okun's Coastal Commission hearing, coastal staff had initiated a new mitigation requirement: the beach recreation mitigation measure. After all Dr. Okun had experienced, and the permitting delays that had been imposed by litigation, ongoing failure and coastal staff's involvement in delaying the city permitting process, coastal staff then recommended that the Coastal Commission deny Dr. Okun's permit because it did not address this new beach recreation mitigation.

Because this mitigation had been conceived at the 11th hour of Dr. Okun's long and harrowing nightmare, and perhaps because coastal staff had caused some of the delays in the processing of Dr. Okun's permits, **the Coastal Commission acted in a unanimous vote to approve Dr. Okun's project.** As a side note, Dr. Okun's immediate neighbor to the north (Brown) has not taken any actions necessary to complete a Major Use Permit with the City of Encinitas or a Coastal Development Permit with the California Coastal Commission. This neighbor remains in significant violation of the emergency coastal permits that he was issued. Another neighbor two homes to the north (Sonn timer) has signed a Consent Order with the Coastal Commission and initiated action to obtain all necessary permitting.

After his 2005 Coastal Commission approval, Dr. Okun completed the hand-sculpted color treatment to his seawall (non-emergency work for which his emergency permits could not be extended). Further, all of the original rip-rap in front of his seawall (which had been approved for emergency placement prior to the seawall's construction) was removed. He also implemented a very costly coastal bluff landscape plan – an undertaking that has received tremendous reviews from city staff (see attached site photo).

Yet, in June, 2006, Dr. Okun received a letter from coastal commission staff, copied to Coastal Commissioners, citing his property as having numerous violations (unfinished seawall, unpermitted rip-rap, etc.) and threatening to negate his Coastal Development Permit. Apparently, a coastal intern had photographed the neighbor to the north (who does have countless violations and, as noted, has not actively pursued final permits) and mistakenly identified the property as Dr. Okun's.

After documenting that Dr. Okun's project was fully in compliance with all permits – an effort that required photo documentation and written correspondence from his representatives, **Dr. Okun received a verbal acknowledgement from coastal enforcement staff that his property was in compliance and that they had erred in sending him the initial letter. When he asked that they inform the Coastal Commissioners of this acknowledgement – since those Commissioners had received the original letter of violation – coastal staff declined his request.**

Despite the coastal staff's last-minute recommendation for denial of his seawall project – and despite their having erroneously cited him for coastal violations, Dr. Okun believed that his ordeal was drawing to an end.

His family home, which he had owned for many years, had been reduced through failure to less than 1200 square feet. His long-stated goal was to restore this old Spanish architectural structure by completing an addition that included the lost 800 square feet (due to failure) and by adding 250 sq. feet (the maximum allowed by the City of Encinitas and the Coastal Commission under current code). During the bluff restoration process, Dr. Okun had met jointly with City of Encinitas staff and coastal staff, and had received assurances that his proposed reconstruction and limited addition could be allowed. He was told that any restoration and/or new construction would need to be setback 40' from the top of his wall, which was identified as the new top-of-bluff.

Ironically, however, after finally receiving the Commission's unanimous approval for his lower coastal bluff seawall (over a staff recommendation for denial), he was informed by the city that coastal staff now adamantly opposed allowing him to recover the 800 sq. ft. that had been lost to failure.

At his wit's end and in poor health caused by more than a decade of turbulence and cost surrounding his family home, Dr. Okun gave up on the concept of restoring this residence. He hired an architect to design two new homes on the two lots that were an element of his bluff restoration project. In this process, Dr. Okun chose not to seek any variances from what was allowed under the city's Municipal Code. He wanted no controversy – no further delays. His goal has been to sell one home to help, in some respect, recoup the almost \$2 million in debt accrued during his now 13 year struggle to save his home. He plans on spending the balance of his life in the second home.

Having attended meetings with city staff and coastal staff prior to initiating this process, Dr. Okun and his representatives were led to believe that he would be required to establish a 40 foot setback from the restored top-of-bluff (as this is approximately 20 feet to the east of his previous, failed rear yard's location, it amounted to an approximate 60 foot setback from the pre-failure top-of-bluff). It was a new shock to learn during the process that coastal staff was now telling city staff that the new homes should be setback 40 feet from the point of his original upper bluff failure. The original failure had consumed his entire rear yard, caused the loss of two rooms and had undercut his living room, which was saved by his final bluff protective devices.

As can be noted in the current appeal, coastal staff has stated that the Encinitas Municipal Code requires a 40 foot' setback from the *natural* bluff. Dr. Okun is at a complete loss as to how to respond to this assertion because the Encinitas Municipal Code clearly states that a 40' setback is required from *the top of bluff*. Coastal staff has added the word "natural" without any justification.

In March, 2009, prior to considering Dr. Okun's proposal to build two new homes, the Encinitas City Planning Commission conducted a special hearing to determine from which point the top of bluff should be determined for calculating the 40 foot setback. Despite knowing of coastal staff's effort to reinterpret the city's Municipal Code, the Planning Commission concurred that the Municipal Code guidelines allowed for a determination on a case-by-case basis. The Commission secured testimony from the city engineer's office that there was no geotechnical engineering issue associated with their decision – the proposed new residences were secure for their life by the presence of the upper bluff wall that was certified for 75 years. In fact, a setback of even 40 feet was unnecessary from an engineering perspective – but required by Municipal Code.

Under Dr. Okun's city approval, he can build a garage and home that has a depth of approximately 50 feet on the north lot and approximately 47 feet on the south lot.

If coastal staff were successful in this current appeal, Dr. Okun would be limited to new residential structures that had an approximate depth (behind the city-required two-car garage) of less than 8 feet on the north lot and less than 10 feet on the south lot. A draft site plan depicting the foundation plan that coastal staff would impose is attached. This draft site plan also illustrates the size, scope and distance from the bluff of the immediate residential structures to the north and south of Dr. Okun's lots.

Dr. Okun's existing residence – what remains – is situated approximately 10' from the top-of-bluff (top-of-wall). The current proposal would remove this residence and new construction would be situated 40 feet to the east of the top-of-bluff, in accordance with the City of Encinitas Municipal Code. Seemingly, the project approved by the City of Encinitas should have been well-received by coastal staff.

Dr. Okun thought his troubles were behind him and was truly appreciative of the Coastal Commission's 2005 unanimous approval of his lower coast seawall. At that time, city officials and Coastal Commissioners acknowledged that he was the only impacted party in the 1996 failures who had followed all appropriate city and state rules. Now, however, it appears that coastal staff would like to change the rules.

Coastal staff has informed Dr. Okun's representatives that, if the Commission finds substantial issue and moves the matter to a de Novo hearing, he will need to completely revise his project and start over, without any hope of having a hearing until 2010. If he refuses to revise his project, staff has noted that it would still take until January, 2010 or February 2010 to schedule a de Novo hearing, where they will recommend project denial. After more than 14 years of following the rules, Dr. Okun could wind up with nothing but an insurmountable debt and declining health.

We hope and pray that the Commission concurs that no substantial issue can be found in this current appeal.

Respectfully submitted,

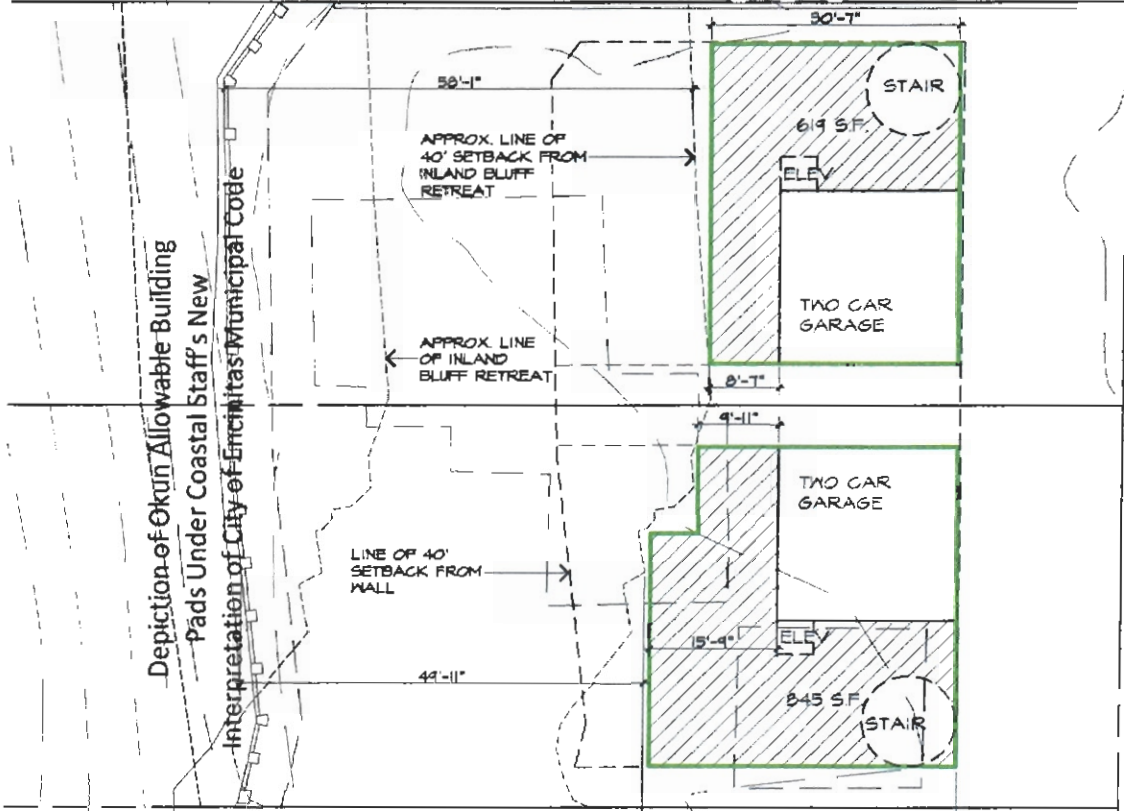
Signature on file

BOB TRETTIN, agent
Dr. Leonard Okun
828 Neptune Avenue

Attachments:

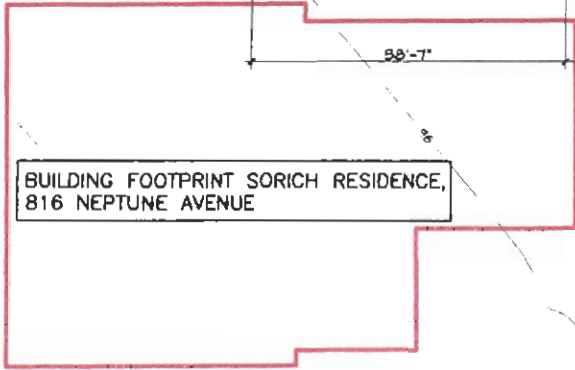
1. Site Plan Depiction of Okun Building Pads Based on New Coastal Staff Setback Interpretation
2. Photo documentation of Okun Coastal Bluff Protective Measures and Bluff Landscaping
3. City of Encinitas Municipal Code; 30.34.020; Coastal Bluff Overlay Zone

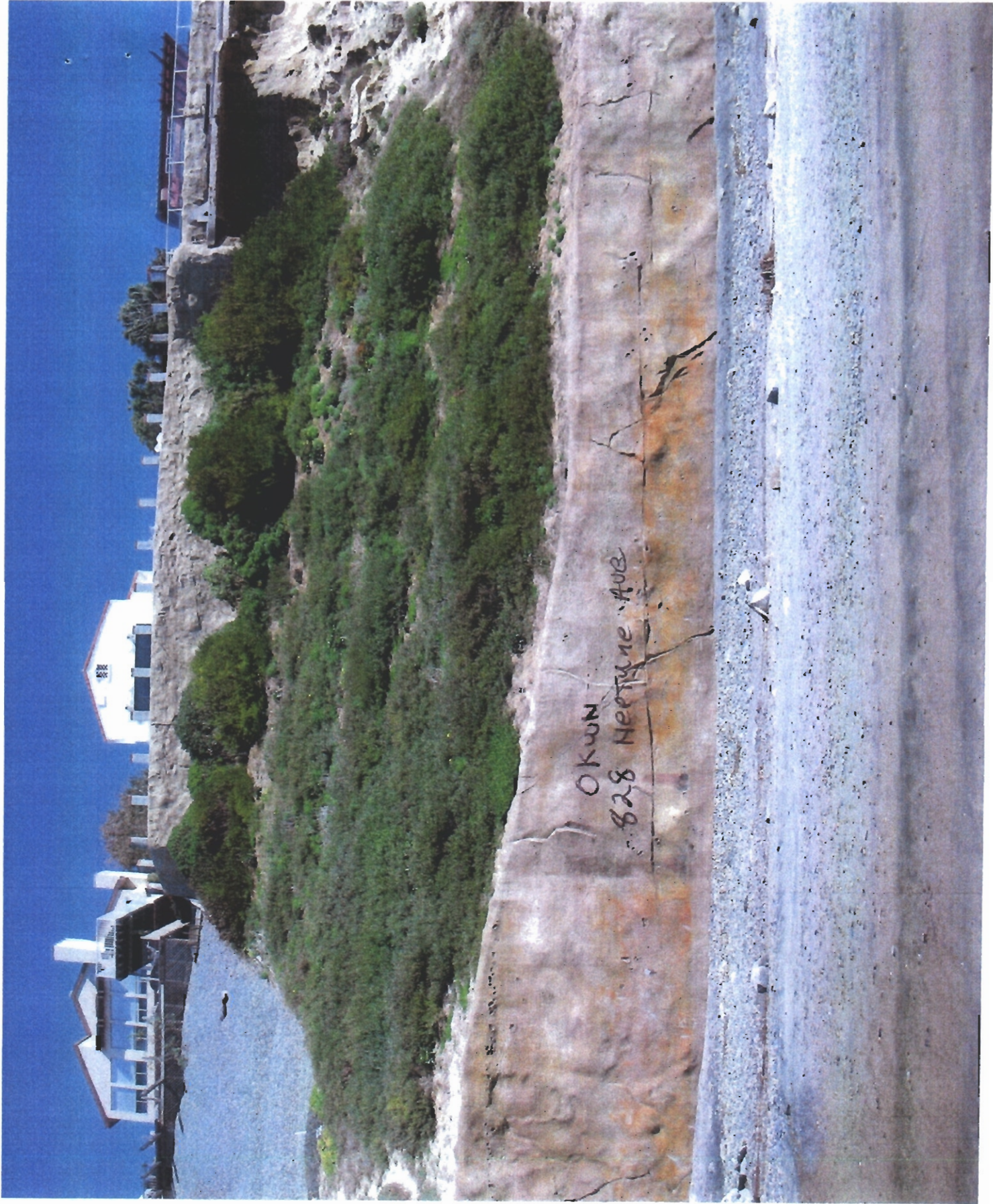
BUILDING FOOTPRINT
BROWN RESIDENCE
836/838 NEPTUNE AVENUE



Depiction of Okun Allowable Building
Pads Under Coastal Staff's New
Interpretation of City of Encinitas Municipal Code

BUILDING FOOTPRINT SORICH RESIDENCE,
816 NEPTUNE AVENUE





CHAPTER 30.34SPECIAL PURPOSE OVERLAY ZONES30.34.010 Specific Plan Overlay Zone.

A. The Specific Plan Overlay Zone is derived from Section 65450 et seq., of the California Government Code which provides for the preparation and adoption of specific plans for all or any part of the area covered by the General Plan to insure its systematic implementation. Each specific plan must be consistent with the General Plan and the specific plan may not allow more intensive land uses than those described in the General Plan for each land use designation.

B. The Specific Plan is intended to regulate development within the City in accordance with the General Plan by allowing the creation of specific development criteria for certain areas and properties to promote more functional use of land, revitalization of existing development, and greater compatibility with surrounding land uses and environmental conditions.

30.34.020 Coastal Bluff Overlay Zone.

A. **APPLICABILITY.** The Coastal Bluff Overlay Zone regulations shall apply to all areas of the City where site-specific analysis of the characteristics of a parcel of land indicate the presence of a coastal bluff.

B. **DEVELOPMENT STANDARDS.** In addition to development and design regulations which otherwise apply, the following development standards shall apply to properties within the Coastal Bluff Overlay Zone. In case of conflict between the following standards and other standards, regulations and guidelines applicable to a given property, the more restrictive shall regulate. (Ord. 91-19)



1. With the following exceptions, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. Exceptions are as follows:

a. Principal and accessory structures closer than 40 feet but not closer than 25 feet from the top edge of the coastal bluff, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below. This exception to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is setback a minimum of 25 feet from the coastal blufftop edge and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future. Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City. (Ord. 95-04)

b. Minor accessory structures and improvements located at grade, including landscaping, shall be allowed to within 5 feet of the top edge of the coastal bluff. Precautions must be taken when placing structures close to the bluff edge to ensure that the integrity of the bluff is not threatened. For the purposes of the Coastal Bluff Overlay Zones, "minor accessory structures and improvements" are defined as those requiring no City approval or permit including a building or grading permit, and not attached to any principal or accessory structure which would require a permit. Grading for reasonable pedestrian access in and around a principal or accessory structure may be permitted by the City Engineer following review of a site specific soils report. (Ord. 92-31)

c. Essential public improvements providing coastal access, protecting natural resources, or providing for public safety, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below, including but not limited to, walkways leading to approved public beach access facilities, open fences for safety or resource protection, public seating benches, lighting standards, and signs. (Ord. 91-19)