CALIFORNIA COASTAL COMMISSION
SAN DIEGO AREA
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W21a-b

Staff: Nicholas Dreher-SD
Staff Report: November 3, 2010
Hearing Date: November 17, 2010

STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of Encinitas

LOCAL DECISION: Approved with conditions

APPEAL NO.: A-6-ENC-09-040 and A-6-ENC-09-041

APPLICANT: Leonard Okun AGENT: Sherman Stacey

PROJECT DESCRIPTION: Demolish existing one-story, approximately 16 ft. high, approximately 1,400 sq. ft. single-family residence that straddles two lots (lots 18 and 19), that is currently protected by a seawall, reconstructed midbluff and upper bluff wall, and construct:

1) on lot 18, a 2,986 sq. ft. two-story, 26 ft. high single family home with 447 sq. ft. garage and 1,677 sq. ft. basement on a 9,922 sq. ft. coastal blufftop lot (approximately 5,880 sq. ft. for the blufftop; 4,042 sq. ft. for the bluff face).
2) on lot 19, a 3,136 sq. ft. two-story, 25 ½ ft. high single family home with 459 sq. ft. garage and 1,798 sq. ft. basement on a 10,419 sq. ft. blufftop lot (approximately 5,880 sq. ft. for the blufftop; 4,539 sq. ft. for the bluff face).

PROJECT LOCATION: 828 Neptune Avenue, Encinitas, San Diego County.
APNs 256-011-13, 256-011-02, 256-011-03

STAFF NOTES:

The City of Encinitas approved two separate CDPs and thus there are two separate appeals/CDP applications. The applicant is the same for each CDP application and the property involved consists of two contiguous lots (18 and 19). The two proposed projects share similar issues and the applications are best understood if evaluated jointly. As a result, the de novo review is combined into one staff report; however, because the way the applications were considered separately by the City, there is a separate motion and resolution necessary for each Commission action (see page 4).

At its August 14, 2010 hearing, the Commission found Substantial Issue exists with respect to the grounds on which these two appeals were filed. This report represents the de novo staff recommendation.

Summary of Staff's Preliminary Recommendation:

Staff recommends the Commission deny the proposed projects on the grounds that the projects are inconsistent with the blufftop development provisions of the City's LCP that require new development be sited so it is safe without the reliance on shore or bluff protection. The primary issues raised by the subject developments relate to the definition of the "bluff edge" and whether there is a geologically safe location for the proposed development on the blufftop lots. The two proposed single-family homes will be set back approximately 40 ft. from the edge of the reconstructed bluff, each with a cantilevered second floor extending 8 ft. (lot 18) and 7.5 ft. (lot 19) toward the reconstructed bluff edge. However, based on the LCP definition of the bluff edge, the City should not have used the reconstructed bluff as the "bluff edge", but the bluff as it existed prior to construction of the upper bluff stabilization measures. Thus, the proposed homes will be sited closer to the actual bluff edge than permitted by the City's LCP. Notwithstanding this issue, the applicant's technical experts have determined (and the Commission staff geologist concurs) that due to the landslide potential that exists, there is no safe location to site new development on the bluff top lots without the need for shoreline protection. In other words, the only way to find the new proposed homes will be safe for their estimated life is to assume the existing shore and bluff protection will remain in its current stable condition. Thus, the proposed new homes require protection in order to be safe, which is inconsistent with the provisions of the certified LCP. Therefore, staff recommends that the proposed developments be denied.

When the Commission denies a project, the question sometimes arises whether the Commission's action constitutes a "taking" of private property without just compensation, as this is not allowed under the Fifth Amendment of the United States Constitution or under Section 30010 of the Coastal Act. The first step in this analysis is to define the property interest against which the taking will be measured. In this case, the single "parcel" subject to a potential takings claim consists of both of the lots on which the applicants' home is located. The denial of the applicants' proposed residences would not constitute a taking because denial would not constitute a taking under any of the tests that the courts have identified for establishing a taking. In short, if the Commission denies the applicants' request to demolish the existing single-family dwelling that straddles both lots and to construct a new residence on each lot, this denial would not preclude the applicant from applying for improvements to the existing structure on the site or for continued use of that existing structure. In these circumstances, it cannot be said that the Commission has made a final and authoritative decision about the use of the project site. Therefore, the Commission's denial cannot be a taking because a taking claim is not "ripe." Also, the lots contain an existing blufftop single-family residence and associated development. That makes the property valuable even after the denial of this project and provides a reasonable economic use, and thus the Commission's denial would not result in a categorical taking. Finally, the Commission's action does not constitute a taking under any of the three factors weighed by a Court under the Penn Central analysis. Consequently, the Commission's denial of the projects would be consistent with Coastal Act Section 30010 (and the United States Constitution).

Standard of Review: Certified City of Encinitas LCP and the public access and recreation policies of the Coastal Act.

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 #07-155-CDP; City Permit #08-73-CDP; Project plans "Neptune Residence" by Cohn+Associates Architecture Planning12/2/08; "Review Memorandum" by GEOPACIFIC INC. dated April 21, 2008; "Additional Geotechnical Recommendations" by Soil Engineering Construction, Inc. dated May 21, 2008; Soil Engineering Construction, 2006, "As-built slope stability analyses @ 40' setback, Okun residence, 828 Neptune Avenue, Encinitas", 1 p. letter report dated 28 November 2006 and signed by J.W. Niven and R.D. Mahony; Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 1 p. letter dated 21 May 2008 and signed by J.W. Niven; Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 10 p. letter report dated 21 May 2008 and signed by J.W. Niven and R.D. Mahony; Geopacific Inc., 2008, "Third party review, 08-073 CDP, 828 Neptune Avenue, Encinitas, California, APN 256-011-13 &-03, Applicant Mr. Leonard Okun", 2 p. review memorandum dated 21 August 2008 and signed by J. Knowlton; Soil Engineering Construction and The Trettin Company, 2009, "Monitoring report, 828 Neptune Avenue, Encinitas, California", 11 p. report dated December 2009 and signed by J.W. Niven, R.D. Mahony, and B. Trettin; Soil Engineering Construction, 2009, "Okun slope stability, 828 Neptune Avenue, Response to Coastal staff letter dated December 7, 2009", 3 p. letter report dated 15 December 2009 and signed by J.W. Niven; "Geotechnical Review Memorandum", by Coastal Commission Staff Geologist Mark Johnsson, dated September 30, 2010; 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; Finding of Substantial Issue A-6-ENC-09-040/Okun; Finding of Substantial Issue A-6-ENC-09-041/Okun; Emergency Permit Nos. 6-89-136-G/Adams, 6-89-297-G/Englekirk, 6-93-36-G/Clayton, 6-99-35-G/MacCormick, 6-99-75-G/Funke, Kimball, 6-99-131-G/Funke, Kimball, 6-00-171-G/Brown, Sonnie; 6-01-42-G/Brown, Sonnie; 6-01-62-G/Sorich; 6-85-396/Swift, 6-92-82/Victor, 6-93-131/Richards, et al, 6-93-136/Favero, 6-95-66/Hann, 6-98-39/ Denver/Canter, 6-98-131/Gozzo, Sawtelle and Fischer, 6-99-9/Ash, Bourgualt, Mahoney, 6-99-41/Bradley, 6-00-009/Ash, Bourgault, Mahoney, and 6-03-48/Sorich, Gault; Encinitas CDP Nos. 01-196 and 01-197 Bradley

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I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

1. **MOTION:** ***I move that the Commission approve Coastal Development Permit No. A-6-ENC-09-040 pursuant to the staff recommendation.***

STAFF RECOMMENDATION OF DENIAL:

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO DENY THE PERMIT:

The Commission hereby denies a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development will not be in conformity with the policies of the certified LCP and the public access policies of Chapter 3 of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

2. MOTION: ***I move that the Commission approve Coastal Development Permit No. A-6-ENC-09-041 pursuant to the staff recommendation.***

STAFF RECOMMENDATION OF DENIAL:

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO DENY THE PERMIT:

The Commission hereby denies a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development will not be in conformity with the policies of the certified LCP and the public access policies of Chapter 3 of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. Findings and Declarations.:

The Commission finds and declares as follows:

1. Project Description/History. The project as approved by the City involves the demolition of an existing one-story, 16 ft. high, approximately 1,400 sq. ft. single-family residence, built in 1929, that straddles two lots (Lots 18 and 19), and the construction of a 2,986 sq. ft. two-story, 25 ½ -ft high single-family home with a 447 sq. ft. garage and a 1,677 sq. ft. basement (total building area of 5,110 sq. ft.) on a 9,922 sq. ft. coastal blufftop lot (Lot 18) and construction of a 3,136 sq. ft. two-story, 25 ½ -ft. high single-family home with 459 sq. ft. garage and 1,798 sq. ft. basement (total building area of 5,393 sq. ft.) on a 10, 419 sq. ft. coastal blufftop lot (Lot 19). The Lot 18 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 and the Lot 19 residence will be located 40 ft. landward of a reconstructed bluff edge and the second floor will be cantilevered 7.5 ft. seaward of the first floor. While Lot 18 is 9,922 sq. ft., the blufftop area where the new home is proposed is comprised of approximately 5,880 sq. ft., with the bluff face, approximately 4,042 sq. ft. Similarly, while Lot 19 is 10,419 sq. ft., the blufftop area where the new home is proposed is comprised of approximately 5,880 sq. ft., with the bluff face, approximately 4,539 sq. ft.

In 1996, the bluff fronting the subject residence sustained a major landslide, followed by a series of smaller 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 with tiebacks and backfill (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 special 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 the Executive Director's authorization of the emergency permit for construction of this upper bluff wall, portions of the residence were undermined such that they extended 10 ft. seaward of the eroded 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 regular coastal development permit for the residential underpinning, upper bluff wall and backfill material as they were constructed pursuant to the emergency permit with the exception of the gravel. 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 #3 required an $11,687.20 in-lieu fee for sand supply mitigation, which the applicant paid to SANDAG on October 6, 2005. 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 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.

In 2005, there were two unrelated applications very similar to the subject proposed development located approximately 5 block south of the subject site, which the City of Encinitas approved (ref. Encinitas CDP Nos. 01-196 and 01-197/Bradley). These involved the demolition of an existing smaller home straddling the lot line of two lots and the subsequent construction of a new home on each of the blufftop lots. An existing seawall and mid and upper bluff walls protected the home and similar to the existing application, the new homes could not be sited safely on the lots without reliance on the existing shore and bluff protection and the Commission did not appeal those projects. While the same provisions of the certified LCP that applied to those developments apply to the subject development, the Commission erred in not appealing that previous project and has identified as a problem situations where applicants have been permitted shore and bluff structures to protect existing development and then later demolish and construct new development in reliance on the seawall's continued protection. The Commission finds that such practices are contrary to the intent of the City of Encinitas LCP (and the

Chapter 3 policies of the Coastal Act) which is to allow shoreline protective devices to protect existing, but not future development.

2. Consistency with Local Coastal Program Policies – Standard of Review. After the Commission has certified a Local Coastal Program (LCP), Section 30603 of the Coastal Act provides for appeals to the Coastal Commission of the certified local government's actions on certain types of development applications (including those proposing development between the sea and the first public road paralleling the sea and development within 300 feet of the top of the seaward face of any coastal bluff). In this case, the City of Encinitas Planning Commission's June 4, 2009 approval was appealed to the Commission in July of last year, and the Commission opened a public hearing on August 14, 2009, and found that the appeal raised a substantial issue.

In its "de novo" review of this application, the Commission's standard of review for the proposed development is whether it would conform with the policies and provisions of the City of Encinitas Local Coastal Program (LCP), which was certified by the Commission in November of 1994, and the public access and recreation policies of the Coastal Act. The LCP consistency issues raised by the proposed development are discussed in the following sections.

A. Coastal Blufftop Setback. Section 30.34.020(B) of the City's certified Implementation Plan 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.
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> 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:
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> 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 does not involve the above-cited exceptions to the 40 ft. minimum setback from the bluff edge for new development, therefore, the new residence must be sited 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.

One of the concerns raised by the proposed development is that the City relied on an incorrect bluff edge in order to measure the 40 ft. setback. As noted previously, the subject site includes existing shore and bluff protection. At the time of the upper bluff failures, a significant portion of the upper bluff collapsed, resulting in the loss of the western portion of the home with the bluff edge extending under the remaining residence. In order to protect the existing home, an upper bluff wall was necessary (and approved) that "reconstructed" a portion of the bluff seaward of the home, creating a small area between the home and the protection. The City, in its review, determined that the bluff edge for purposes of setbacks for the new homes, would be measured from the reconstructed bluff rather than the bluff as it existed after the bluff collapsed.

A reconstructed bluff edge is not the same as the natural bluff edge, for purposes of setbacks and siting of development. Staff interprets the IP provision to mean that the required setback starts at the top of the natural bluff edge. The existence of upper bluff protection or a reconstructed bluff top can obscure the natural bluff edge, making delineation of that natural edge difficult. The upper bluff protection in this case hides the natural bluff edge. Pursuant to the LCP provision cited above, where the exact location of the natural bluff edge is unclear, due to existing upper bluff reconstruction, a geologic/soil survey must be conducted to determine the natural bluff edge's exact location. This may involve soil borings extending through the fill to locate where native soils exist, allowing a topographic reconstruction of the buried bluff edge. Alternatively, geophysical methods such as ground-

penetrating radar or seismic reflection may be used to image the topography beneath the fills.

The first part of the definition cited above refers to a bluff edge that occurs naturally (i.e., has not been modified or covered up). 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 "Director" is required to determine the bluff edge "after evaluation of a geologic and soil report." In this particular case, the plans approved by the City identified the location of the natural bluff edge (ref. "Neptune Residence" by Cohn+Associates Architecture Planning dated 12/2/08), and after review of the plans and geotechnical information, the City staff and third party geotechnical reviewer determined the bluff edge to be the "natural bluff edge" that existed prior to construction of the upper bluff wall as depicted on the plans. It was the City Planning Commission that determined that the bluff edge for purposes of setback for the homes should be the edge of the upper bluff wall. Based upon the siting of the reconstructed bluff and the historical extent of the natural bluff edge due to past bluff failures, the Commission finds that the bluff edge for the purposes of determining the geologic setback for the homes is between 0 and 20 ft. landward of the present reconstructed bluff edge. Accordingly, the Commission will review the proposed setbacks and siting requirements based upon the bluff edge that existed prior to reconstruction rather than the reconstructed bluff edge.

B. Geologic Stability and Setback. Section 30.34.020(D) of the City's certified Implementation Plan states, in part:

> 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.** [emphasis added]. Each review/report shall consider, describe and analyze the following: (Ord. 95-04)
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> 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;
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> 2. Historic, current and foreseeable-cliff 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.

[. . .]

In addition, Resource Management (RM) Policy 8.5 of the LUP states, in part, that:

> The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible.

In addition, Public Safety (PS) Policy 1.3 of the City's LUP requires that:

> The City will rely on the Coastal Bluff and Hillside/Inland Bluff Overlay Zones to prevent future development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse.

In addition, PS Policy 1.6 of the LUP requires that:

> The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:
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> [. . .]
>
> e. Permitting pursuant to the Coastal Bluff Overlay Zone, bluff repair and erosion control measures on the face and at the top of the bluff that are necessary to repair human-caused damage to the bluff, and to retard erosion which may be caused or accelerated by land-based forces such as surface drainage or ground water seepage, providing that no alteration of the natural character of the bluff shall result from such measures, where such measures are designed to minimize encroachment onto beach areas through an alignment at and parallel to the toe of the coastal bluff, where such measures receive coloring and other exterior treatments and provided that such measures shall be permitted only when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply; and
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> f. Requiring new structures and improvements to existing structures to be set back 25 feet from the inland blufftop edge, and 40 feet from coastal blufftop edge with exceptions to allow a minimum coastal blufftop setback of no less than 25 feet. For all development proposed on coastal blufftops, a site-specific geotechnical report shall be required. The report shall indicate that the coastal setback will not result in risk of foundation damage resulting from bluff erosion or retreat to the principal structure within its economic life and with other engineering evidence to justify the coastal blufftop setback. [. . .]

> [. . .] 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 applicants shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.
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> This does not apply to minor structures that do not require a building permit, except that no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary accessory buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet from the bluff top edge; and
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> g. Permanently conserving the bluff face within an open space easement or other suitable instrument.

The subject site is located within the City's Coastal Bluff Overlay Zone and the proposed homes will be sited as close as 28 ft. from the natural edge of an approximately 96 ft.-high coastal bluff subject to marine erosion. As proposed, the second stories of the new homes will be as close as 20-20.5 ft. from the natural bluff edge as they will be cantilevered 7.5 to 8 ft.

Coastal bluffs in this area are subject to a variety of erosive forces and conditions (e.g., wave action, reduction in beach width, block failures and landslides). As a result, the bluffs and blufftop lots in the Encinitas area are considered a hazard area. Furthermore, in 1986 the Division of Mines and Geology mapped the entire Encinitas shoreline as an area susceptible to landslides, i.e., mapped as either "Generally Susceptible" or "Most Susceptible Areas" for landslide susceptibility (ref. Open File Report, "Landslide Hazards in the Encinitas Quadrangle, San Diego County, California", dated 1986). The Encinitas shoreline has been the subject of numerous Executive Director approved emergency permits for seawall and upper bluff protection devices (ref. Emergency Permit Nos. 6-89-136-G/Adams, 6-89-297-G/Englekirk, 6-93-36-G/Clayton, 6-99-35-G/MacCormick, 6-99-75-G/Funke, Kimball, 6-99-131-G/Funke, Kimball, 6-00-171-G/Brown, Sonnie, 6-01-005-G/Okun, 6-01-040-G/Okun, 6-01-041/Sorich, 6-01-42-G/Brown, Sonnie and ; 6-01-62-G/Sorich). In addition, documentation has been presented in past Commission actions concerning the unstable nature of the bluffs throughout Encinitas (ref. 6-85-396/Swift, 6-92-82/Victor, 6-93-131/Richards, et al, 6-93-136/Favero, 6-95-66/Hann, 6-98-39/ Denver/Canter, 6-98-131/Gozzo, Sawtelle and Fischer, 6-99-9/Ash, Bourgualt, Mahoney, 6-99-41/Bradley, 6-00-009/Ash, Bourgault, Mahoney, and 6-03-48/Sorich, Gault and 6-05-30/Okun).

Section 30.34.020(D) of the City's certified IP and Public Safety Policy 1.6 of the LUP require that an applicant provide extensive geotechnical information documenting that any new development on the coastal bluff top will be safe over its lifetime from the threat of erosion so as to not require shoreline protection. In documenting that information, the geotechnical report must evaluate many factors, including an estimate of the long-term erosion rate at the site. To that end, the applicant's geotechnical consultants did provide

the information required by the LCP. However, the applicant's geotechnical consultants analyzed the site with the existing shore and bluff protection in place and provided no analyses that considered the site without the protection. The Commission's staff geologist has reviewed the applicant's site-specific estimation of long-term erosion at the subject site and concurs with its estimation based on site-specific historic information.

However, in order to find the appropriate geologic setback for the bluff top homes, the LCP requires not only that a long-term erosion rate be adequately identified but also that the geotechnical report demonstrate an adequate factor of safety against slope failure (i.e., landsliding), of 1.5 will be maintained for the entire 75 years (See Section 30.34.020(D) above). Moreover, Section 30.34.020(D) states that "[t]he 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." The applicant's geotechnical report of December 15, 2009 states that there is no place on the subject lot where stability can be assured for the next 75 years. The letter states that "[a]bsent the presence of the existing coastal bluff protective measures, this clay seam failure would remain active and the Okun lots should be deemed undevelopable." Furthermore, the report goes on to say that "[w]ithout the existing coastal bluff protective measures in the area encompassing the Okun property, and to the north and south of the Okun property, all of the residential structures on these lots would remain imminently threatened." The Commission's staff geologist has reviewed this report and concurs with these findings. The Commission's staff geologist indicates that normal bluff failure mechanisms along the Encinitas and Solana Beach shoreline include undercutting and/or sloughage due to erosion, whereas the proposed project will be located on a site subject to a landslide threat, which is triggered by an underlying clay seam. He has concluded that the existence of this clay seam, and the resulting potential for landslides, justifies a finding by the Commission that there is no safe location for new development on this site.

Seawalls and bluff stabilization measures, while formidable, are not permanent structures and have a finite life. They are subject to erosion, wave scour and other forces that ultimately undermine and require repair and/or replacement of such structures. There are numerous examples in San Diego County of seawalls and other bluff stabilization devices collapsing and failing. Thus, to allow the proposed homes to be sited in reliance on existing shore/bluff protection that will not necessarily be there for the 75 year life of the homes, is inconsistent with the LCP provisions cited above, as the homes will be located in areas that would eventually require shoreline protection, once the existing protection has failed. Moreover, the LCP policies are designed to allow shoreline protection solely to protect existing principal structures in danger from erosion. To allow new structures to be sited and designed in reliance on existing shoreline protection would essentially allow applicants to use shoreline protection to protect new development, inconsistent with the LCP.

The Coastal Commission, reviewing the proposed project in light of the City's LCP, has an obligation under LUP Public Safety Policy 1.3 and the IP Coastal Bluff and

Hillside/Inland Bluff Overlay Zones to prevent future development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse. The applicant has not demonstrated that the proposed new residences, set as close as 28 ft. from the natural bluff edge, will be safe over their estimated lifetime without reliance on shoreline protection, as required by the City's LCP. The applicant has also failed to demonstrate that the proposed homes would be designed so that they could be removed if threatened in the future, as required under LUP Public Safety Policy 1.6.

The applicant's consultants assert that the proposed development can be constructed safely due to the stability afforded by the existing upper bluff retaining wall and lower bluff seawall. As stated above, however, given that shoreline protection devices are not permanent and that new development must be designed to not need shoreline protection in the future, new development must be sited safely without reliance on an existing shoreline protective device. The applicant is proposing new development (two new homes) and therefore the proposed homes must be sited safely without reliance on the existing shore and bluff stabilization devices, because the bluff was reconstructed in order to protect the existing home, not any future redevelopment of the site. The Commission's staff geologist reviewed the site geology and the submitted analysis and determined that with the existing shore and bluff protection, the site is stable for purposes of constructing the proposed homes from a geologist's perspective. However, he has also concluded that without the existing shore and bluff protection, there is no place on the subject site to construct new homes such that they would be safe for 75 years. Given that the existing shore and bluff protection is to protect the existing residence and that the LCP requires new development to be sited such that it not need protection in the future, the Commission cannot find that the proposed development is consistent with the above cited provisions of the certified LCP.

In summary, the applicant has not adequately demonstrated, as is required under Section 30.34.020(D) of the certified IP, that the new homes will be sited in a safe location and that they will not require shoreline protection over their lifetimes. Therefore, the Commission finds that the proposed development is not consistent with the geologic stability and blufftop development policies of the City's Certified LCP and must be denied.

3. Water Quality. Recognizing the value of protecting the water quality of oceans and waterways for residents and visitors alike, the City's LCP requires that preventive measures be taken to protect coastal waters from pollution. The following policies are applicable:

Resource Management Policy 2.1 of the LCP states:

> In that the ocean water quality conditions are of utmost importance, the City shall aggressively pursue the elimination of all forms of potential unacceptable pollution that threatens marine and human health.

Resource Management Policy 2.3 of the LCP states in part:

> To minimize harmful pollutants from entering the ocean environment from lagoons, streams, storm drains and other waterways containing potential contaminants, the City shall mandate the reduction or the elimination of contaminants entering all such waterways . . .

The proposed development will be located at the top of the bluffs overlooking the Pacific Ocean. As such, drainage and run-off from the development could potentially affect water quality of coastal waters as well as adversely affect the stability of the bluffs. In order to protect coastal waters from the adverse effects of polluted runoff, the Commission has typically required that all runoff from impervious surfaces be directed through landscaping as a filter mechanism prior to its discharge into the street. In this case, however, directing runoff into blufftop landscape areas could have an adverse effect on bluff stability by increasing the amount of ground water within the bluff material, which can lead to bluff failures. Therefore, in this case, reducing the potential for water to be retained on the site and directing the runoff toward the street will be more protective of coastal resources. Therefore, the Commission finds the proposed project consistent with Resource Management Policies 2.1 and 2.3 of the Certified LCP. However, given the remaining concerns associated with geologic safety, the project as a whole cannot be found consistent with the certified LCP, and must be denied.

4. Public Access. The project site is located on the blufftop west of Neptune Avenue in Encinitas, which is designated as the first public roadway. As the proposed development will occur between the first public roadway and the sea, pursuant to Section 30.80.090 of the City's LCP, a public access finding must be made that such development is in conformity with the public access and public recreation policies of the Coastal Act. Section 30210 of the Coastal Act states:

> In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

In addition, Section 30212 of the Act is applicable and states, in part:

> (a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:
>
> (l) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
>
> (2) adequate access exists nearby....

Additionally, Section 30220 of the Coastal Act provides:

> Coastal areas suited for water-oriented recreational activities that cannot readily e provided at inland water areas shall be protected for such uses.

The beach fronting this location is used by local residents and visitors for a variety of recreational activities. As proposed, the development at the top of the bluff will not affect existing public access to the shoreline since no public access across the property to the beach currently exists because of the hazardous nature of the approximately 96 ft. high coastal bluff. In addition, public access to the beach below this home is currently available approximately 7 lots north of the subject site at the Beacon's public access path. Finally, by siting and designing the proposed development at a safe location so as to not require shoreline protection in the future, the Commission can be assured that no future shoreline devices will be constructed at this location that might otherwise impact public access and recreation along the shoreline or affect the contribution of sand to the beach from the bluff. However, in this particular case, the proposed new development cannot be sited safely on the site without reliance on shore/bluff protection. Therefore, the proposed development is inconsistent with the public access and recreation policies of the certified Local Coastal Program and Sections 30210, 30212 and 30220 of the Coastal Act and must be denied.

5. Visual Resources. The City's certified Land Use Plan contains several policies relating to the requirement that new development be designed to be compatible with existing development and the visual resources of the area. Land Use (LU) Policies 6.5 and 6.6 state as follows:

> The design of future development shall consider the constraints and opportunities that are provided by adjacent existing development. (LU Policy 6.5)
>
> The construction of very large buildings shall be discouraged where such structures are incompatible with surrounding development. The building height of both residential and non-residential structures shall be compatible with surrounding development, given topographic and other considerations, and shall protect public views of regional or statewide significance. (LU Policy 6.6)

In addition, RM Policy 8.5 of the LUP states, in part, that:

> The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible.

Finally, Section 30.34.020B.8 of the Implementation Program states:

> The design and exterior appearance of buildings and other structures visible from public vantage points shall be compatible with the scale and character of the surrounding development and protective of the natural scenic qualities of the bluffs.

The proposed project involves the demolition of an existing single-family residence that straddles two lots (Lots 18 and 19), construction two large homes (with a total building area for Lot 18 of 5,110 sq. ft and 5,393 sq. ft. for Lot 19). The proposed residences will be located in a residential neighborhood containing one to two story single- and multi-family residences. The proposed new homes will not exceed the height, bulk and scale of the existing surrounding development and therefore can be found compatible with the surrounding neighborhood. In addition, public views of the shoreline or other coastal resources will be unaffected by the proposed residence.

However, significant impacts to the visual quality of this scenic coastal area result from the seawall and bluff reconstruction which must be retained to protect the new structures, as proposed. Such an impact can be found consistent with Policy 8.5 only for protection of existing structures, not for new development. The Commission finds that the proposed residences do not adversely affect visual resources and are consistent with LU Policies 6.5 and 6.6 of the City's IP. However, given the remaining concerns associated with geologic stability, the project as a whole cannot be found consistent with the LCP or Coastal Act and must be denied.

7. Local Coastal Planning. In November of 1994, the Commission approved, with suggested modifications, the City of Encinitas Local Coastal Program (LCP). Subsequently, on May 15, 1995, coastal development permit authority was transferred to the City. The project site is located within the City's permit jurisdiction and, therefore, the standard of review is the City's LCP.

Based on specific policy and ordinance language requirements in the LCP, the City of Encinitas is required to develop a comprehensive program for addressing the shoreline erosion problem in the City. The intent of the plan is to look at the shoreline issues facing the City and to establish goals, policies, standards and strategies to comprehensively address the identified issues. To date, the City has conducted several public workshops and meetings on the comprehensive plan to identify issues and present draft plans for comment. However, at this time, no action to adopt the plans has been scheduled for local review by the Encinitas City Council.

As discussed in the above findings, the proposed residential developments are inconsistent with the policies of the LCP. When the Commission reviews a proposed project that is inconsistent with the certified LCP, there are several options available to the Commission. In many cases, the Commission will approve the project but impose reasonable terms and conditions to bring the project into conformance with the LCP. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission denies the proposed projects

because the proposed projects are significantly out of conformance with the LCP, due to inadequate coastal blufftop setbacks. For these two lots there are no feasible conditions that could bring the projects into conformance with the LCP. Potential alternatives may include, but are not limited to retention and rehabilitation of the existing residence, or one replacement residence located at least 40 ft. inland of the natural bluff edge with recognition that the residence may not be safe for its economic lifetime. Other potential options have not been fully evaluated at this time and may be found consistent with the certified LCP. These are the kinds of issues that should be addressed in a comprehensive manner through the LCP process. Thus, the Commission is denying these two projects at this time due to their inconsistency with the certified LCP. The Commission finds that approval of the subject proposal would prejudice the City's ability to continue to implement its certified LCP and to prepare the comprehensive program for addressing the shoreline erosion problems in the City as called for in Public Safety Policy 1.7 of the certified LUP.

8. Takings. As discussed above, the two houses proposed for development are inconsistent with the LCP and must be denied. When the Commission denies a project, a question may arise as to whether the denial results in an unconstitutional "taking" of the applicant's property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

> *The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Commission must assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project while still complying with Section 30010. If the Commission concludes that its action might constitute a taking, then Section 30010 requires the Commission to approve some level of development, even if the development is otherwise inconsistent with LCP or Coastal Act policies. In this latter situation, the Commission will propose modifications to the development to minimize its LCP or Coastal Act inconsistencies, while still allowing some reasonable amount of development.[1]

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, its denial of the project would constitute a taking. The

[1] For example, in CDP A-3-SCO-00-033 (Hinman), the Commission in 2000 approved residential development on a site that was entirely ESHA even though it was not resource dependent development and thus was inconsistent with the LCP (which was the standard of review in that case).

Commission finds that, under any of the prevailing takings tests, the denial of the project would not constitute a taking.

General Takings Principles

The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."[2] Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation…has first been paid to, or into court for, the owner."

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee, supra*, 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). The Commission's actions here would be evaluated under the standards for a regulatory taking.

The Supreme Court itself has recognized that case law offers little insight into when, and under what circumstances, a given regulation may be seen as going "too far" (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014). In its recent takings cases, however, the Court has identified two circumstances in which a regulatory taking might occur. The first is the "categorical" formulation identified in *Lucas, supra.* In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved (*Id*. at p. 1014). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" or rendered it "valueless" (*Id.* at pp. 1016-1017 [emphasis in original]) (see *Riverside Bayview Homes, supra*, 474 U.S. at p. 126 [regulatory takings occur only under "extreme circumstances"]).[3]

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co.* (*Penn Central*) *v. New*

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[2] The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

[3] Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra,* 505 U.S. at pp. 1028-1036).

York (1978) 438 U.S. 104, 124. This test generally requires an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations (*Id*. at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *id.* [rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*]).

Before a Landowner May Establish a Taking, Government Must Have Made a Final Determination Concerning the Use to Which the Property May Be Put

Before a landowner may seek to establish a taking under either the Lucas or Penn Central formulations, however, it must demonstrate that the taking claim is "ripe" for review. This means that the takings claimant must show that government has made a "final and authoritative" decision about the use of the property (e.g., *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Premature adjudication of a takings claim is highly disfavored, and the Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it" (*Id.* at p. 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (e.g., *McDonald, supra*).

In this case, although the Commission has denied the applicant's request to demolish the existing single-family dwelling that straddles both parcels and construct a new residence on each parcel, the Commission's denial does not preclude the applicant from applying for improvements to the existing structure on the site or for continued use of that existing structure. In these circumstances, it cannot be said that the Commission has made a final and authoritative decision about the use of the project site. Therefore, the Commission's denial cannot be a taking because a taking claim is not "ripe."

Even if the Taking Claim Were Ripe, the Commission's Action Would Not Constitute a Taking

As a threshold matter, before a taking claim can be analyzed it is necessary to define the parcel of property against which the taking claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable parcel of property on which development is proposed. The issue is complicated in cases where the landowner owns or controls adjacent or contiguous parcels that are related to the proposed development. In these circumstances, courts will analyze whether the lots are sufficiently related so that they should be aggregated as a single parcel for takings purposes. In determining whether lots should be aggregated, courts have looked to a number of factors such as unity of ownership, the degree of contiguity, the dates of acquisition and the extent to which the parcel has been treated as a single unit (e.g., *District Intown Properties, Ltd. v.*

District of Columbia (D.C.Cir.1999) 198 F.3d 874, 879-880) [nine individual lots treated as single parcel for takings purposes]; *Ciampitti v. United States* (1991) 22 Cl.Ct. 310, 318).

Applying these factors, the Commission concludes that the property to be analyzed for takings purpose is a single parcel comprised of two lots (lots 18 and 19 at APN 256-011-13), which are each proposed for development with a single-family residence, after the existing residence that straddles the lots is demolished. There are many reasons to support this. First, this parcel has been treated as a single unit since at least 1929, when the existing house was constructed almost equally across the two parcels (i.e. about 50% of the house is located on each lot). The Applicant purchased the entire property and the existing house for a single purchase price, and the parties to the sale did not assign separate values or purchase prices to the two lots. Second, both lots were purchased by the applicant at the same time, so the date of acquisition supports aggregation. Third, the two lots are contiguous, framed by Neptune Avenue inland and the bluff and the beach seaward, and are subject to the same local land use designation (R-UL, Residential – Urban Low Density) and zoning (R-1-6). Finally, there is unity of ownership because the applicant purchased the single 256-011-13 parcel (lots 18 and 19) and still currently own both lots.

In summary on this point, the takings doctrine treats APN 256-011-13 as a single parcel for the purpose of determining whether a taking occurred. Because this single parcel contains a residential structure and provides the applicant substantial use of both lots, the Commission's denial of demolition of the existing residence that straddles both lots and construction of two new houses, one on each lot, is not a taking under any formulation of the takings doctrine. This analysis follows.

The Denial of the Project Would Not Constitute a Categorical Taking

As discussed, the first test is whether there has been a categorical taking of property under the *Lucas* standards. To constitute a categorical taking, the regulation must deny all economically viable use of property; in other words, it must render the property "valueless" (*Lucas, supra*, 505 U.S. at p. 1012). If the property retains any value following the Government's action, the *Lucas* categorical taking formulation is unavailable and the property owner must establish a taking under the three-part *Penn Central* test (see *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 330; *Palazollo, supra*, 533 U.S. at pp. 630-632). Because permit decisions rarely render property "valueless", courts seldom find that permit decisions constitute takings under the *Lucas* standard.

In *Norman v. US*, the court found that "if there is no destruction of *all* use, then there is no categorical taking" (*Norman v. US*, (2004) 63 Fed.Cl. 231, 258. [emphasis in original]). There is no categorical taking of property even if the government takes away a property's most beneficial use. (*Ibid.*) "[T]he destruction of one "strand of the bundle [of property rights] is not a taking. Only where Congress takes away every beneficial use does a categorical taking occur" (*Maritrans, Inc. v. United States* (2003) 342 F.3d 1344,

1354). In *Maritrans*, the Federal Circuit found no categorical taking of property where a statute limited plaintiff's use of its single hull tank barges but plaintiff still had some other beneficial use of its barges for shipping operations. (*Id.*) Moreover, in *Cooley v. United States* ((2003) 324 F.3d 1297, 1305), the court found no categorical taking when the Corps of Engineers denied a Section 404 wetland fill permit, resulting in a 98.8% decrease in the economic value of plaintiff's property.

In this case, the relevant parcel (including both lots 18 and 19) contains an existing blufftop single-family residence. That makes the property extremely valuable even after the denial of this project, and there is no categorical taking.

Therefore, the Commission's denial of demolition of the existing residence and construction of two new residences leaves the applicant with significant uses, all of which have economic value to the applicant, for which the applicant would (and did) pay valuable consideration. In these circumstances, the Commission's denial does not render APN 256-011-13 valueless and does not constitute a categorical taking under *Lucas*.

The Denial of the Permit is Not a Taking Under the Ad Hoc *Penn Central* Test

If a regulatory decision does not constitute a taking under *Lucas*, a court may consider whether the permit decision would constitute a taking under the ad hoc inquiry stated in *Penn Central Transp. Co. v. New York City* ((1978) 438 U.S. 104, 123-125). This ad hoc inquiry generally requires an examination into factors such as the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations. When applied to the facts of this case, each of these factors demonstrates that the Commission's denial is not a taking.

Reasonable Investment-Backed Expectations. This absence of reasonable investment-backed expectations is usually dispositive of a takings claim under the *Penn Central* standards (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005, 1008-1009). The reasonableness of an investment-backed expectation must be based on more than a "unilateral expectation or an abstract need" (*Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 161). In addition, a government action that prevents an applicant from either pursuing the most profitable or "the highest and best use" of his property does not, in and of itself, constitute a taking (*MacLeod v. County of Santa Clara*, (1984) 749 F.2d 541, 547-548, *cert. denied*, 472 U.S. 109 (1985)). In the case of this project, the applicant cannot show that the denial of his proposal to demolish the existing residence and construct two new residential structures on each lot deprives him of his reasonable investment-backed expectations.

As discussed above, when the applicant purchased the property, the entire property had a single APN number (APN 256-011-13). The applicant purchased the entire property, which included an approximately 1,527 square foot residence (APN 256-011-13) on a 20,341 square foot parcel,[4] for a single purchase price in 1975. When the applicant

[4] This square footage includes lots 18 and 19.

purchased the property, the entire site was already being used to support the existing residential development that straddled both lots, leading a reasonable person to conclude that that was the appropriate use of the lots. In addition, the applicant has not provided the Commission with any evidence that when he purchased the property he intended to develop the lots with two separate houses. To the contrary, it appears that the applicant believed that his home was on a single lot, so he could not have had a reasonable expectation that he could develop two separate homes at some point in the future.[5]

Even if the applicant had known that he was purchasing two separate lots, a reasonable person also would have viewed the lots and investigated the physical constraints to redevelopment. This investigation would have revealed the lots' hazardous location atop an actively eroding bluff. A reasonable person also would have investigated the regulatory constraints regarding redevelopment of the site. When the applicant purchased the property it was subject to the permitting and regulatory requirements of the California Coastal Plan, (created by Proposition 20), codified at that time in Public Resources Code 27000 et seq. While these provisions were not as detailed as those in the subsequent Coastal Act or the City of Encinitas's LCP, they included requirements to protect public access to beaches and limiting alteration of natural landforms. Proposition 20 Section 27403(d) states that "[a]ll permits shall be subject to reasonable terms and conditions in order to ensure:… Alterations to existing land forms and vegetation, and construction of structures shall cause minimum adverse effect to scenic resources and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake." A purchaser of a blufftop home subject to the provisions of this Coastal Plan would have known that redevelopment of that lot would potentially be limited to ensure consistency with its requirements.

In addition, real estate agents and sellers familiar with the site likely would have assumed that the buyer was buying the property for its existing residential use, which has been in effect since the late 1920s, instead of for the purpose of demolition of the existing residence and redevelopment of the site with two residences. Given these considerations, a purchaser of this property should not have expected to be able to develop two homes on this site.

Ultimately, the effect of the Commission's action is to prevent the applicant from constructing two separate homes, but it allows him to continue to use his property in the manner in which it was used when he purchased it. The applicant is still free to reside in his single-family residence or to sell the home and lots as a unit, as they have been bought and sold since the original house was constructed nearly 80 years ago. While the Commission's action may not allow the applicant to obtain a different, potentially more profitable use of these lots, courts have routinely rejected landowners' attempts to satisfy the reasonable investment-backed expectation element with speculative profit expectations, finding that the Fifth Amendment does not protect such expectations (*Andrus v. Allard* (1979) 444 U.S. 51, 66; *Penn Central*, *supra*, 438 U.S. at p. 130; *Macleod*, 749 F.2d at pp. 547-549). Thus, the Commission's action merely prohibits the

[5] Personal communication with Leonard Okun and Sherman Stacey on October 12, 2010

applicant from pursuing an additional use of his property, but it does not prevent him from continuing to use it for its original purpose – one single-family residence.

In summary on this point, the applicant did not have a reasonable, investment-backed expectation that he could demolish the existing residence and construct two new residences on the site.

Economic Impact. The second prong of the *Penn Central* analysis requires an assessment of the economic impact of the regulatory action on the applicant's property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished (*Tahoe-Sierra Pres. Council, Inc., supra,* [citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 [applying *Penn Central*, court finds that diminution of property's value by 91% not a taking]).

Commission staff requested that the applicant provide information regarding his purchase price and other related information that could help the Commission assess a potential takings claim. The applicant declined to provide that information to Commission staff. Thus, there is limited information available to Commission staff on the valuation of this property. Records indicate, however, that the value of the improved property for tax purposes is $166,000, which is presumably close to the applicant's purchase price in 1975. Even after the Commission's actions, the applicant will retain an approximately 1,400 square foot blufftop ocean-view single-family dwelling on lots totaling 20,341 square feet. This home continues to retain significant value because of the lots' location and its existing residential use. While staff does not have an appraisal of this property, records show that in 2005 a $1.375 million deed of trust was recorded against the property, indicating that as of 2005, a bank believed the property to be worth at least $1.375 million. Thus, even with only one home on the property, it appears that the applicant's property is still valuable, and he is in a position to make a significant profit if he were to sell it.

While these lots might be worth more with two homes on them, rather than the one existing home, courts have found that even a 90 or 95% diminution in the value of a property would not meet the economic impact factor of *Penn Central*. (*Haas,* 605 F.2d at 1121, *Rith*, 270 F.3d at 1352). The applicant has not provided staff with evidence that denial of the proposed project will result in anywhere near a 90-95% diminution in the value of this property. Moreover, as noted above, even after the Commission's action, the applicant's property will be worth substantially more than what he paid for it. In sum, although the Commission's action may cause some diminution in the value of this property, it would not be such a significant impact to meet this part of the test laid out in *Penn Central*.

Ad-Hoc Takings: Character of the Commission's Action. The final prong of the *Penn Centra*l test requires a consideration of the character or nature of the regulatory action. A

regulatory action that is an exercise of the police power designed to protect the public's health, safety and welfare is much less likely to effect a taking (*Keystone Bituminous Coal Ass'n, supra*, 480 U.S. at pp. 488-490; *Penn Central, supra*, 438 U.S. at p. 127) than, for example, a government action that is more like a physical appropriation of property (see *Loretto, supra*, 458 U.S. 419).

In this case, the Commission's denial of a portion of the applicant's proposal promotes important policies that protect the public's health, safety and welfare. Detailed earlier in this report, these policies include the fostering of public safety from geologic and physical hazards, and the preservation of scenic resources and character. At the same time, the Commission's action involves no physical occupation or appropriation of the applicant's property interests. Consequently, application of the third prong of *Penn Central* strongly weighs against a finding that the denial of this project constitutes a taking.

For all of these reasons, the Commission's denial of this project would not constitute a taking under the ad hoc *Penn Central* standards.

9. Conclusion. For all of the above reasons, the Commission concludes that its denial of the applicant's proposal would not constitute a taking and therefore is consistent with Coastal Act Section 30010.

10. California Environmental Quality Act (CEQA) Consistency. Section 13096 of the Commission's administrative regulations requires Commission approval of a Coastal Development Permit to be supported by a finding showing the permit is consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project, as conditioned, is not consistent with the policies of the City's LCP relating to blufftop development, geologic stability, water quality, public access and visual resources. In addition, the project is not consistent with applicable Chapter 3 policies of the Coastal Act. There are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is inconsistent with applicable CEQA requirements.

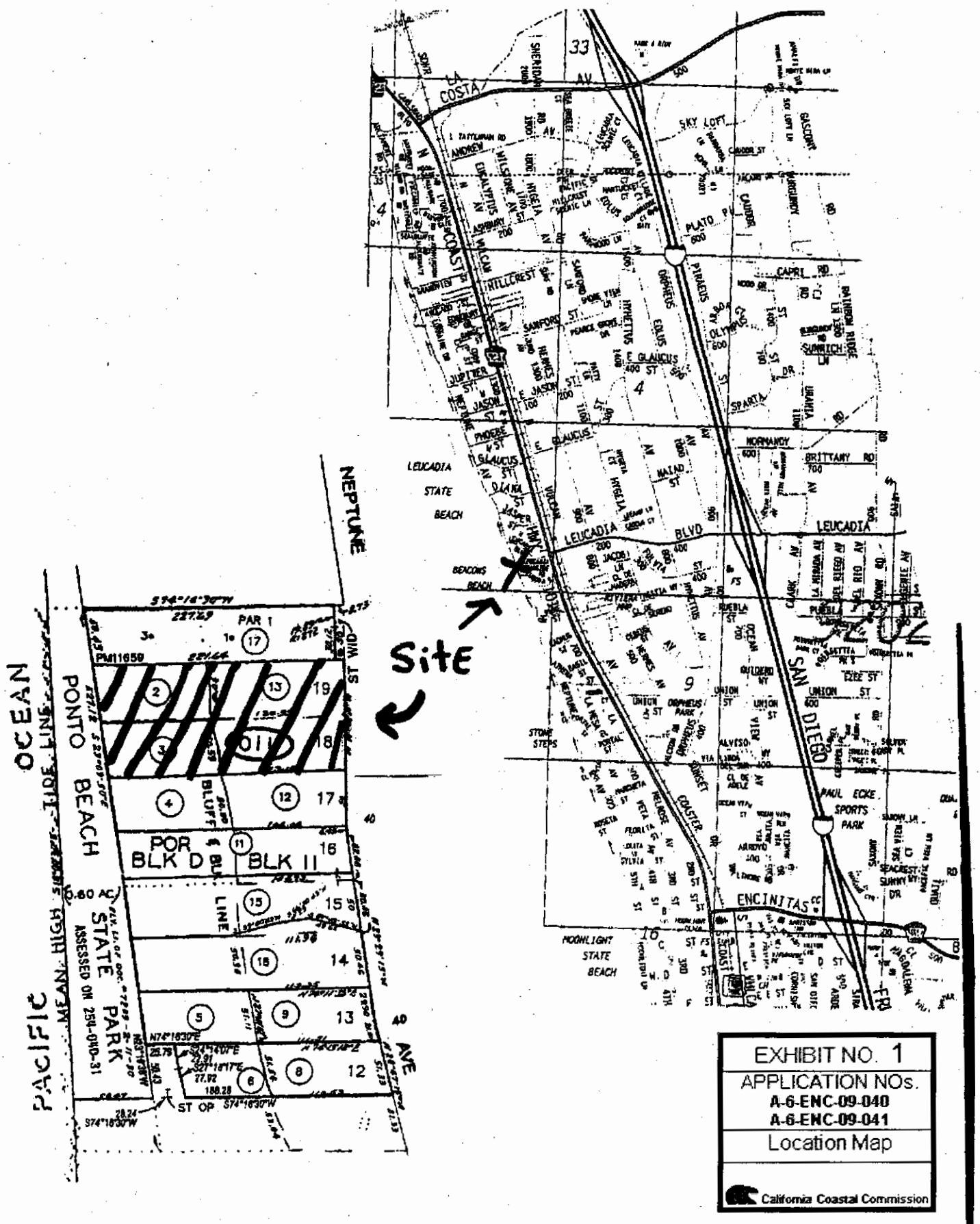


EXHIBIT NO. 1
APPLICATION NOs. **A-6-ENC-09-040** **A-6-ENC-09-041**
Location Map
California Coastal Commission

PROJECT DATA

ZONE: R-II

A.P.N.: 256-011-15

LEGAL DESCRIPTION:

LOTS 18 OF BLOCK 11 MAP 1691, ENCINITAS, CALIFORNIA

LOT SIZE:

GROSS 9,922 S.F.
NET 9,443 S.F.

LOT COVERAGE:

1,854 S.F. / 9,922 S.F. = 18.9%
1,854 S.F. / 9,443 S.F. = 19.7%

BUILDING AREA

LIVING SPACE (1ST & 2ND FLRS)	2,486 S.F.
GARAGE (1ST FLOOR)	447 S.F.
BASEMENT (LIVING AND GARAGE)	1,677 S.F.
TOTAL	5,610 S.F.

FLOOR AREA RATIO CALCULATION

LIVING SPACE (1ST & 2ND FLRS)	2,486 S.F.
GARAGE AREA BEYOND 400 S.F.	41 S.F.
TOTAL	5,055 S.F.

ACTUAL FLOOR AREA RATIO 5,055 S.F. / 9,922 S.F. = .50
5,055 S.F. / 9,442 S.F. = .54

FLOOR AREA PER STORY

BASEMENT	1,671 S.F.
FIRST FLOOR	1,754 S.F.
SECOND FLOOR	1,644 S.F.
TOTAL	5,610 S.F.

BUILDING AREA TOTALS

TOTAL GARAGE (1ST FLOOR & BASEMENT)	771 S.F.
TOTAL LIVING AREA (BSMT, FIRST & SECOND)	4,504 S.F.
TOTAL	5,610 S.F.

DECK AREA:

SECOND FLOOR DECKS 216 S.F.

DRIVEWAY/ CONC. AREA FOR PARKING

DRIVEWAY AREA	555 S.F.	55.5% OF FRONT
FRONT SETBACK AREA	999 S.F.	SETBACK AREA

LOT SLOPE:

EXISTING AVERAGE SLOPE ON SITE IS VIRTUALLY FLAT LEVEL.
SEE SPOT ELEVATIONS
AVERAGE LOT SLOPE IS APPROXIMATELY .52%

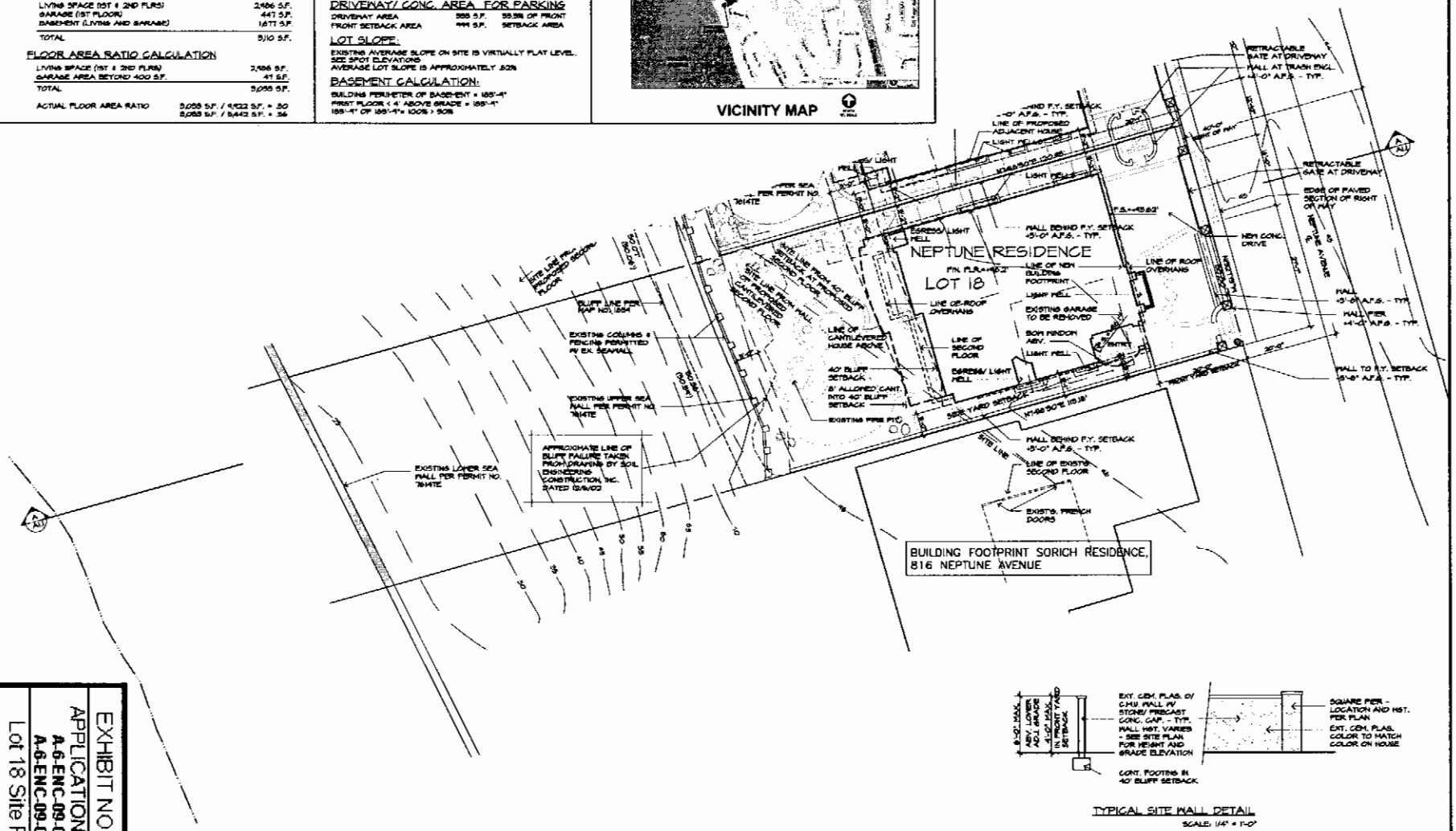
BASEMENT CALCULATION:

BUILDING PERIMETER OF BASEMENT = 185'-4"
FIRST FLOOR < 4' ABOVE GRADE = 185'-4"
185'-4" OF 185'-4" = 100% > 90%

VICINITY MAP

LEUCADIA

VICINITY MAP



TYPICAL SITE WALL DETAIL
SCALE: 1/4" = 1'-0"

SITE PLAN

SCALE: 1" = 10'-0"

DATE/PURPOSE
5/20/08 CDP1
12/29/08 CDP2

NEPTUNE RESIDENCE
ENCINITAS, CALIFORNIA
NEPTUNE AVENUE

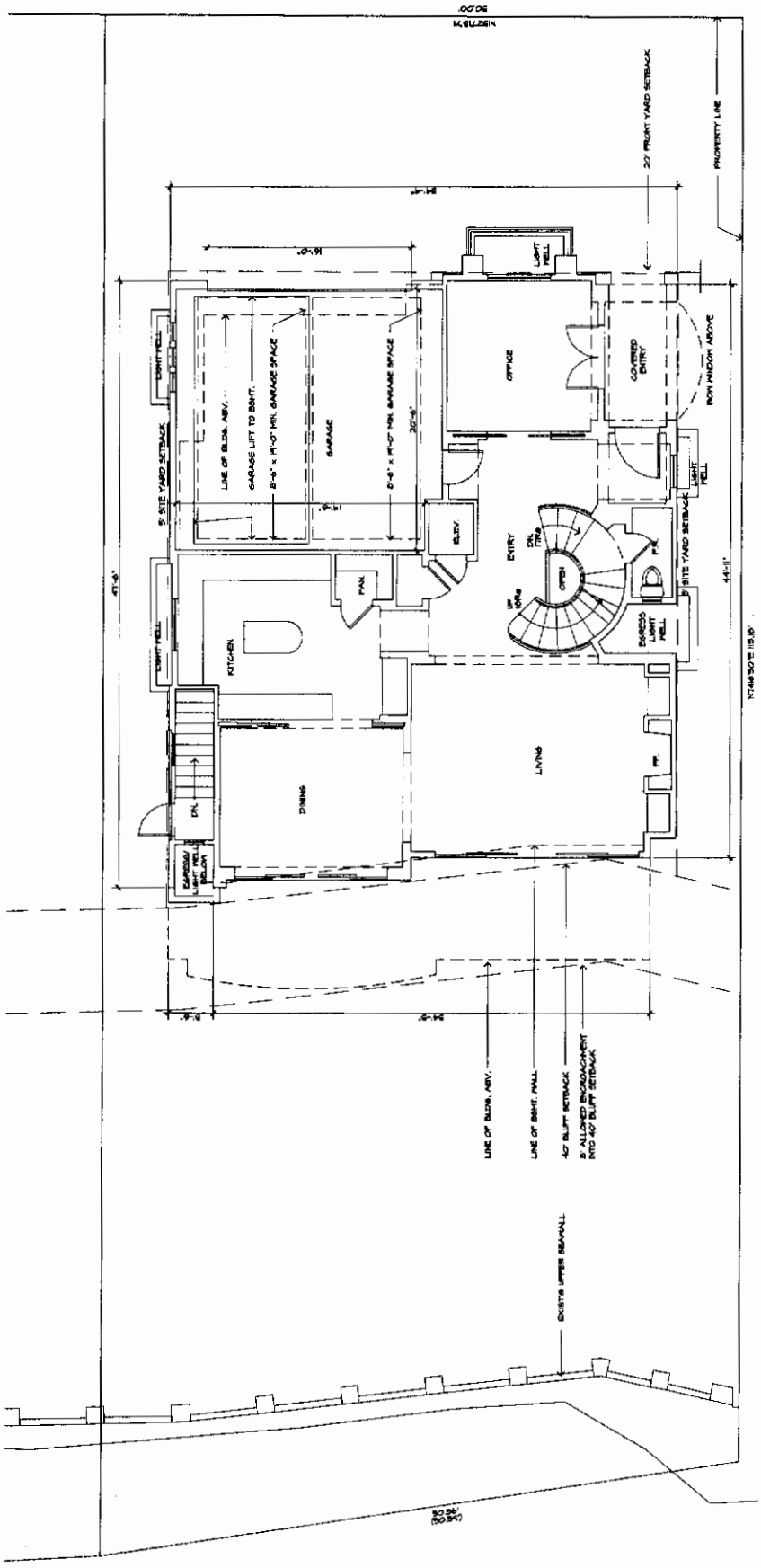
COHN + ASSOCIATES
ARCHITECTURE PLANNING

LICENSED ARCHITECT — No. C15000 — STATE OF CALIFORNIA

DATE 12/2/08
SCALE 1"=10'-0"
DRAWN BC/JH
JOB 0807.1
FILE CK_NT_SITE-0408
SHEET A1
OF SHEETS

EXHIBIT NO. 2a
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 18 Site Plan

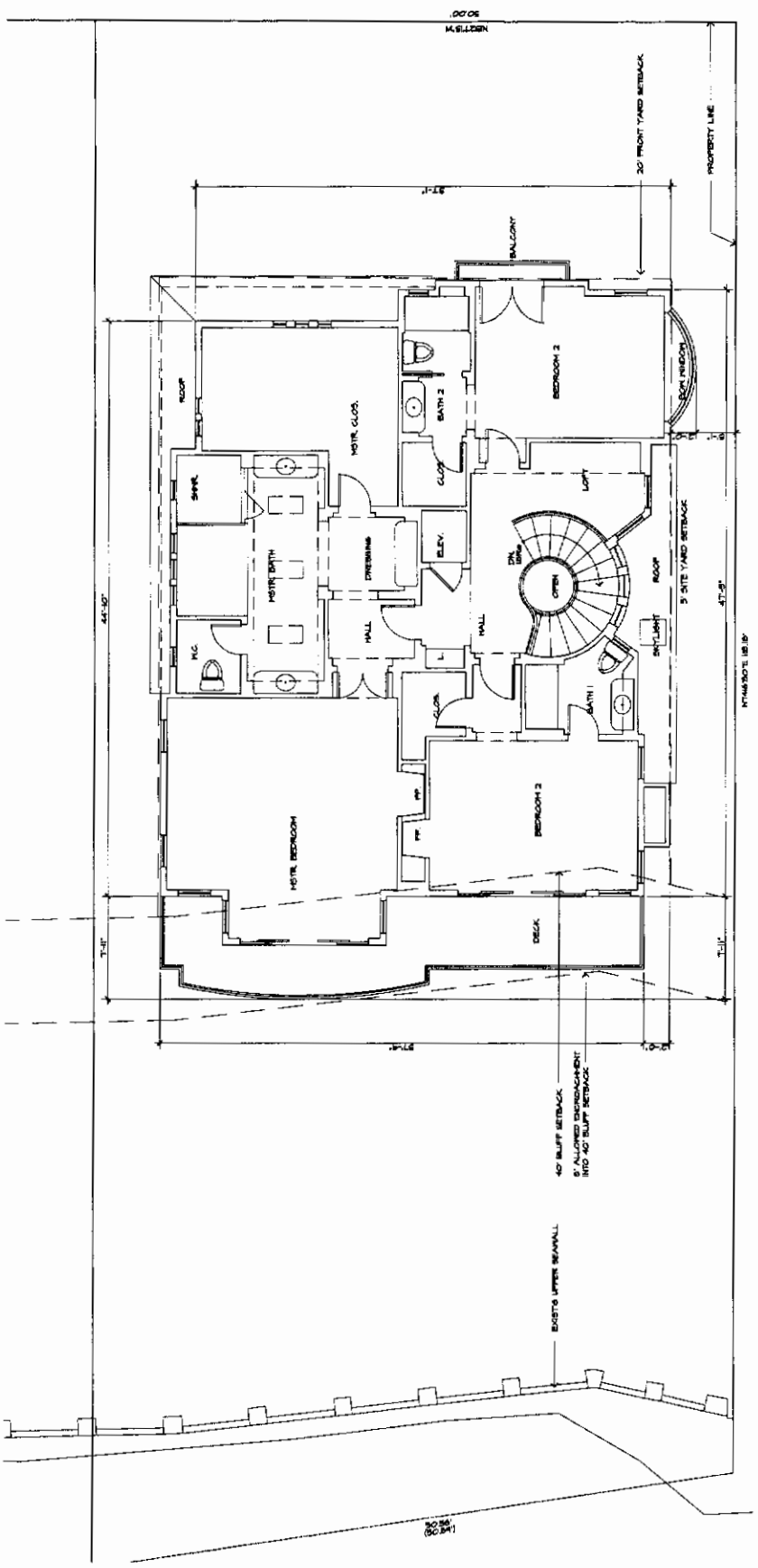
California Coastal Commission



FIRST FLOOR PLAN

SCALE: 1/4" = 1'-0"

EXHIBIT NO. 2b
APPLICATION NOs. **A-6-ENC-09-040** **A-6-ENC-09-041**
Lot 18 First Floor Plan
California Coastal Commission



SECOND FLOOR PLAN

SCALE: 1/4" = 1'-0"

EXHIBIT NO. 2c

APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041

Lot 18 Second Floor Plan

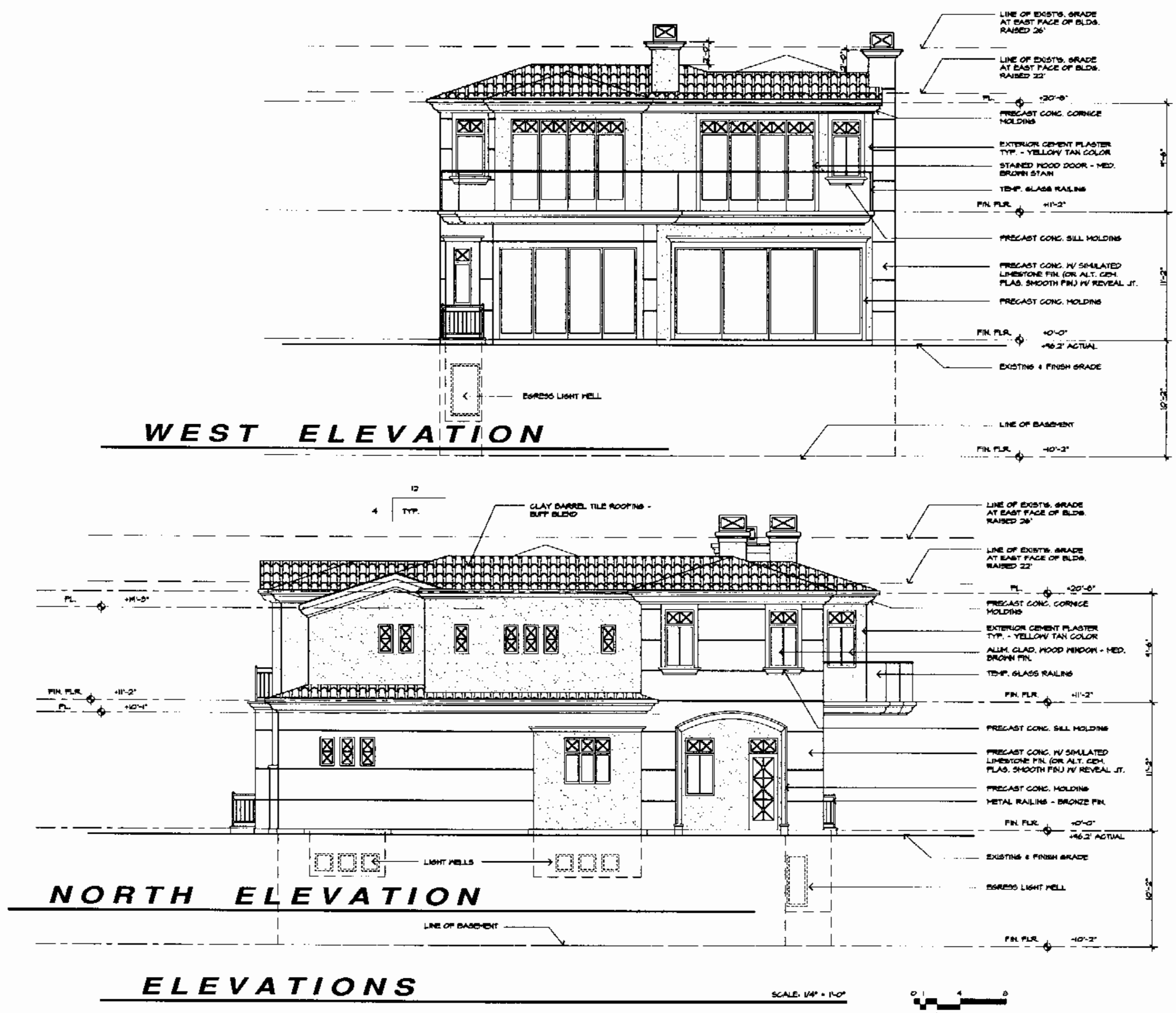
California Coastal Commission

EXHIBIT NO. 2d

APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041

Lot 18 Basement Plan

California Coastal Commission



NEPTUNE RESIDENCE

NEPTUNE AVENUE

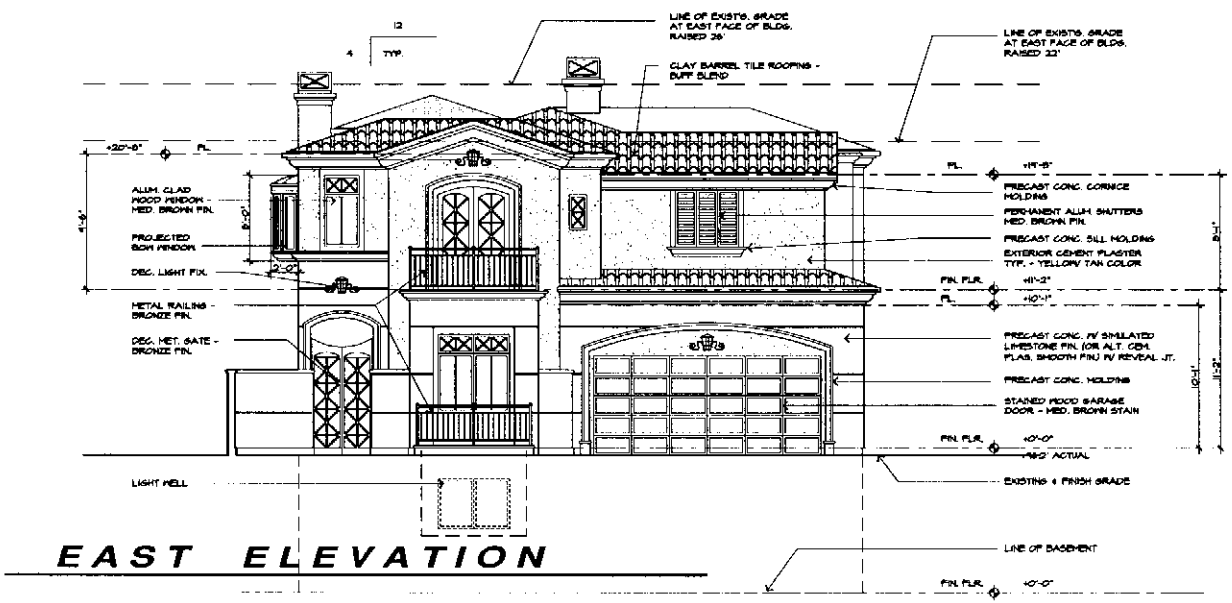
ENCINITAS, CALIFORNIA

COHN + ASSOCIATES
ARCHITECTURE PLANNING

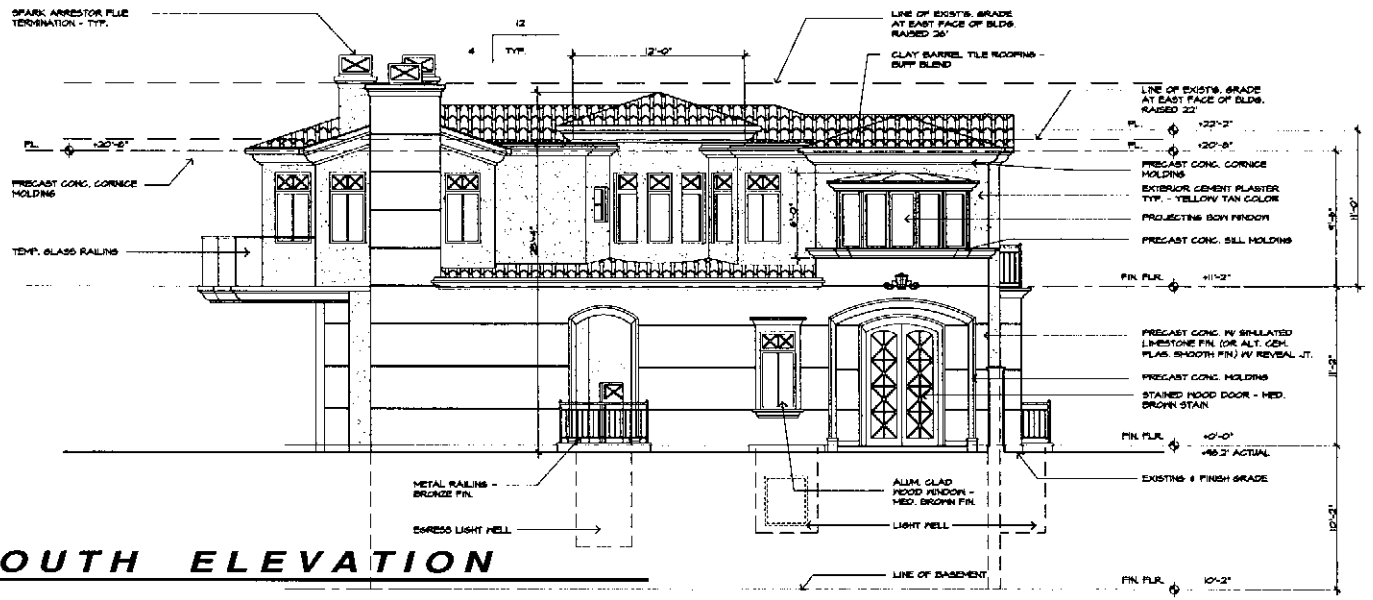
DATE 6/27/06
SCALE 1/4"=1'-0"
DRAWN JH
JOB 0607.1
FILE NT_ELEV
SHEET A7

EXHIBIT NO. 2e
APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 18 Elevations
(West and North)

California Coastal Commission



EAST ELEVATION



SOUTH ELEVATION

ELEVATIONS

SCALE: 1/4" = 1'-0"

DATE/PURPOSE
5/1/06 CDP1
10/24/06 CDP2
CDP3

NEPTUNE RESIDENCE

NEPTUNE AVENUE ENCINITAS, CALIFORNIA

COHN + ASSOCIATES ARCHITECTURE PLANNING

LICENSED ARCHITECT BRENT L. COHN No. C12680 EXP. 6/2008 STATE OF CALIFORNIA

DATE	8/27/08
SCALE	1/4"=1'-0"
DRAWN	JH
JOB	0607.1
FILE	NT_ELEV
SHEET	A6
OF	SHEETS

EXHIBIT NO. 2f
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 18 Elevations (East and South)

California Coastal Commission

Plotted on: Tuesday, October 26, 2010

PROJECT DATA

ZONE: R-1

A.P.N.: 256-011-15

LEGAL DESCRIPTION:
LOTS 19, OF BLOCK 11
MAP 1089, ENCINITAS, CALIFORNIA

LOT SIZE: GROSS 10,414 S.F.
NET 9,525 S.F.

LOT COVERAGE:
1,440 S.F. / 10,414 S.F. = 10.6%
1,440 S.F. / 9,525 S.F. = 56.1%

BUILDING AREA

LIVING SPACE (1ST & 2ND FLRS)	3,336 S.F.
GARAGE (1ST FLOOR)	484 S.F.
BASEMENT (LIVING AND GARAGE)	1,748 S.F.
TOTAL	5,568 S.F.

FLOOR AREA RATIO CALCULATION

LIVING SPACE (1ST & 2ND FLRS)	3,336 S.F.
GARAGE AREA BEYOND 400 S.F.	84 S.F.
TOTAL	3,418 S.F.

ACTUAL FLOOR AREA RATIO 3,418 S.F. / 10,414 S.F. = .31
3,418 S.F. / 9,525 S.F. = .36

FLOOR AREA PER STORY

BASEMENT	1,748 S.F.
FIRST FLOOR	1,406 S.F.
SECOND FLOOR	1,891 S.F.
TOTAL	5,545 S.F.

BUILDING AREA TOTALS

TOTAL GARAGE (1ST FLOOR & BASEMENT)	784 S.F.
TOTAL LIVING AREA	4,854 S.F.
TOTAL	5,545 S.F.

DECK AREA:
SECOND FLOOR DECKS 274 S.F.

DRIVEWAY/ CONC. AREA FOR PARKING

DRIVEWAY AREA	956 S.F.	55.7% OF FRONT
FRONT SETBACK AREA	1001 S.F.	SETBACK AREA

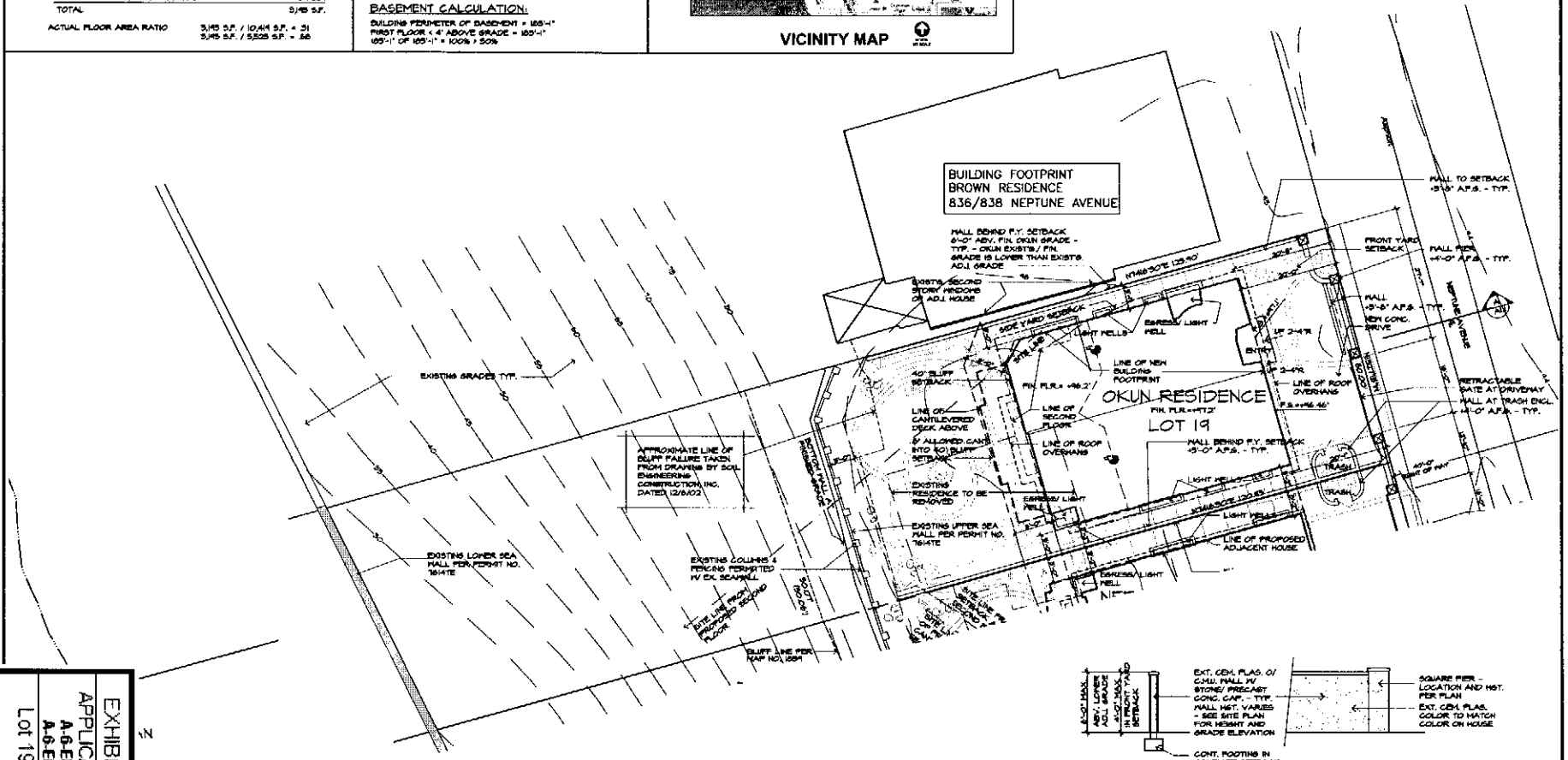
LOT SLOPE:
EXISTING AVERAGE SLOPE ON SITE IS VIRTUALLY FLAT LEVEL.
SEE SPOT ELEVATIONS
AVERAGE LOT SLOPE IS APPROXIMATELY 2%

BASEMENT CALCULATION:
BUILDING PERIMETER OF BASEMENT = 165'-1"
FIRST FLOOR < 4' ABOVE GRADE = 165'-1"
165'-1" OF 165'-1" = 100% > 50%

VICINITY MAP

LEUCADIA

VICINITY MAP



TYPICAL SITE WALL DETAIL
SCALE: 1/4" = 1'-0"

SITE PLAN

OKUN RESIDENCE

NEPTUNE AVENUE
ENCINITAS, CALIFORNIA

DATE/PURPOSE
5/30/08 CDP
10/24/06 CDP 2

COHN + ASSOCIATES
ARCHITECTURE PLANNING

LICENSED ARCHITECT BRETT L. COHN No. C15980 REN. 8/2009 STATE OF CALIFORNIA

DATE 12/2/05
SCALE 1"=10'-0"
DRAWN BC/JH
JOB 0607
FILE OK_NT_SITE_2456
SHEET A1
OF SHEETS

EXHIBIT NO. 2g
APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 19 Site Plan

California Coastal Commission

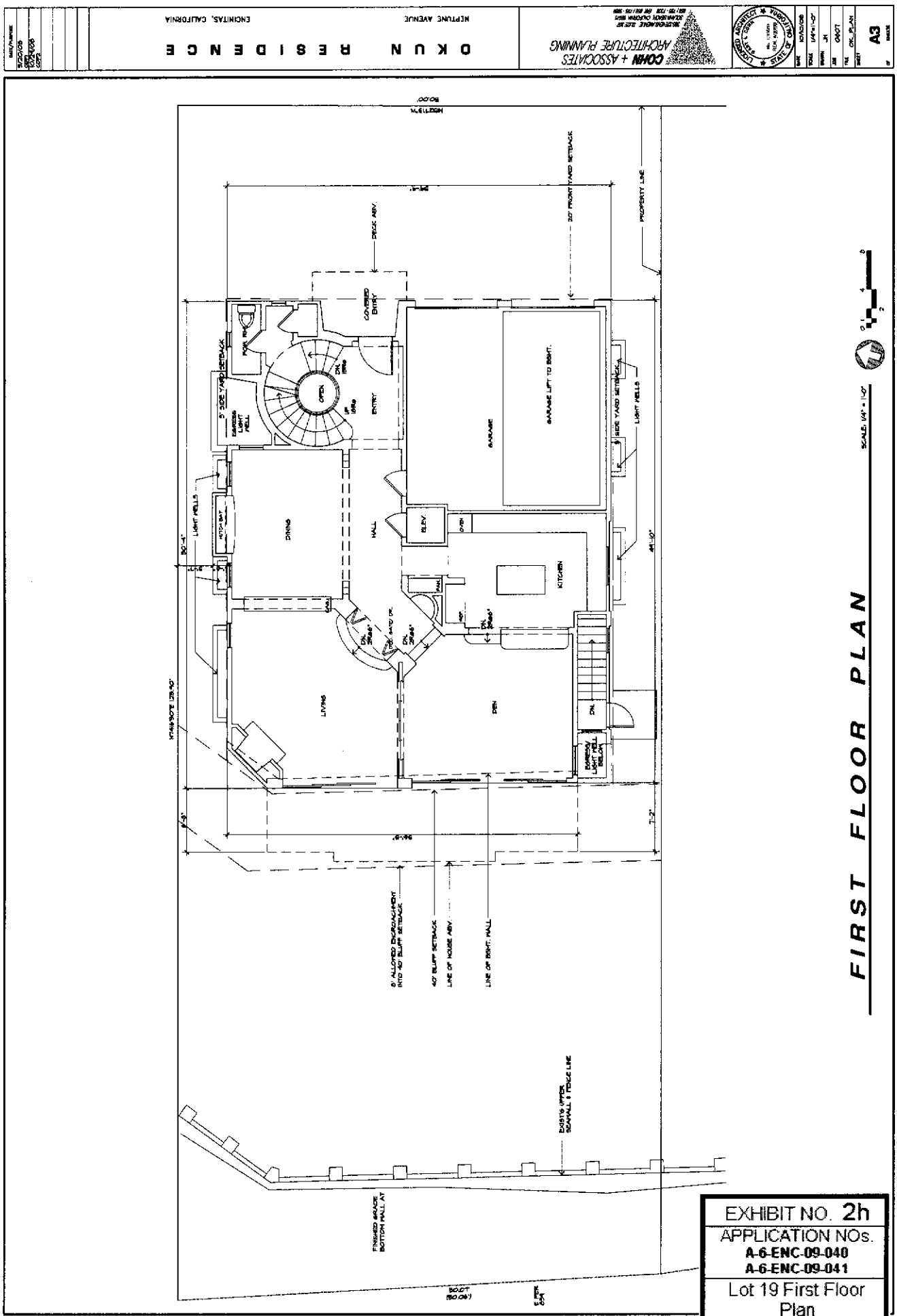


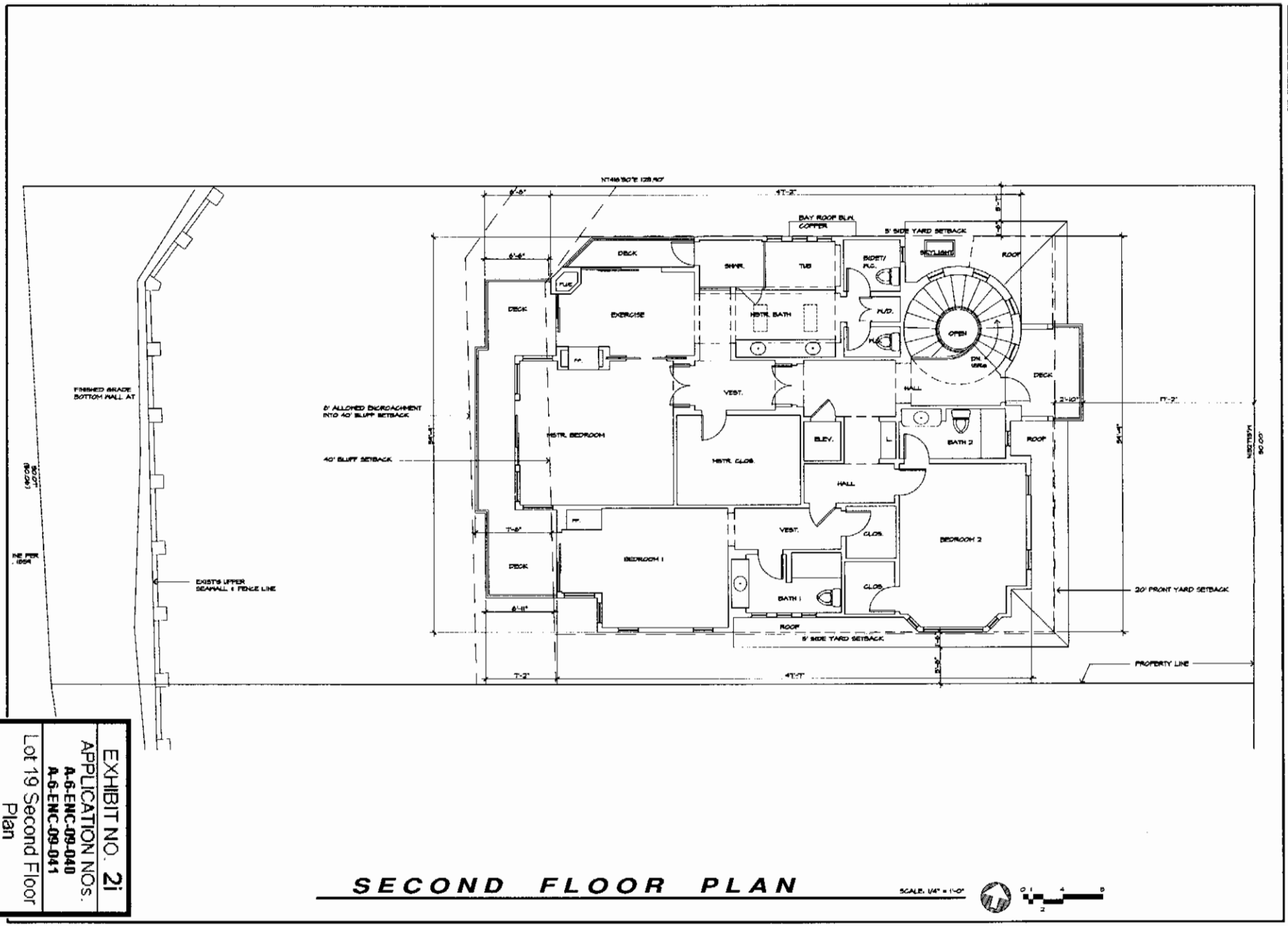
EXHIBIT NO. 2h

APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041

Lot 19 First Floor Plan

California Coastal Commission

Plotted on: Monday, October 25, 2010



SECOND FLOOR PLAN

SCALE: 1/4" = 1'-0"

EXHIBIT NO. 2i
APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 19 Second Floor Plan

California Coastal Commission

Plotted on: Monday, October 25, 2010

DATE/PURPOSE
5/20/08
10/24/08

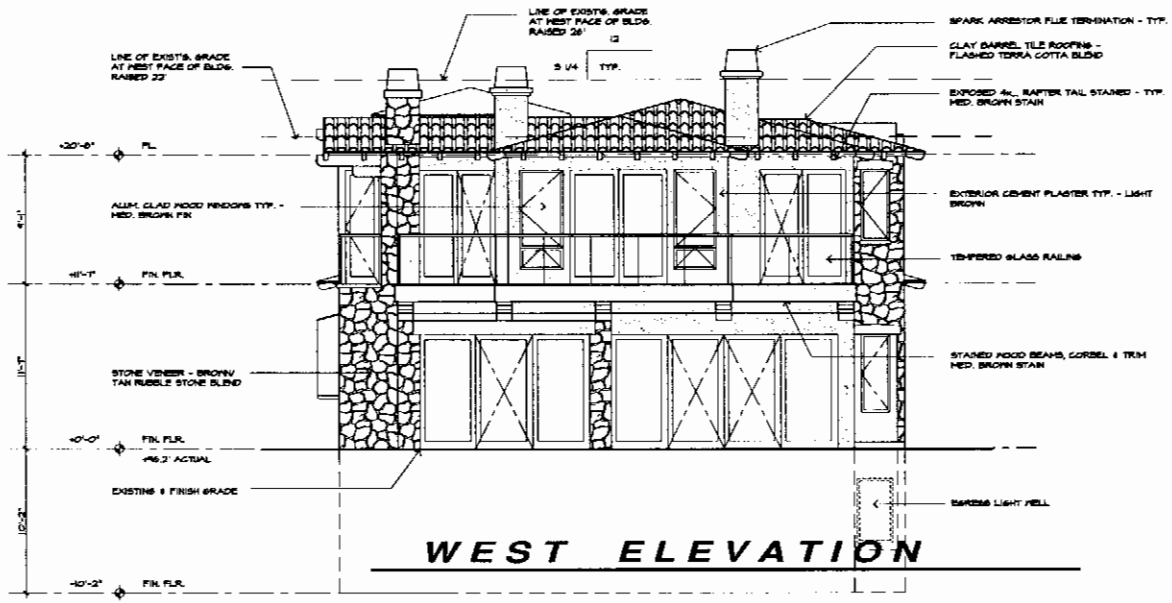
OKUN RESIDENCE
ENCINITAS, CALIFORNIA
NEPTUNE AVENUE

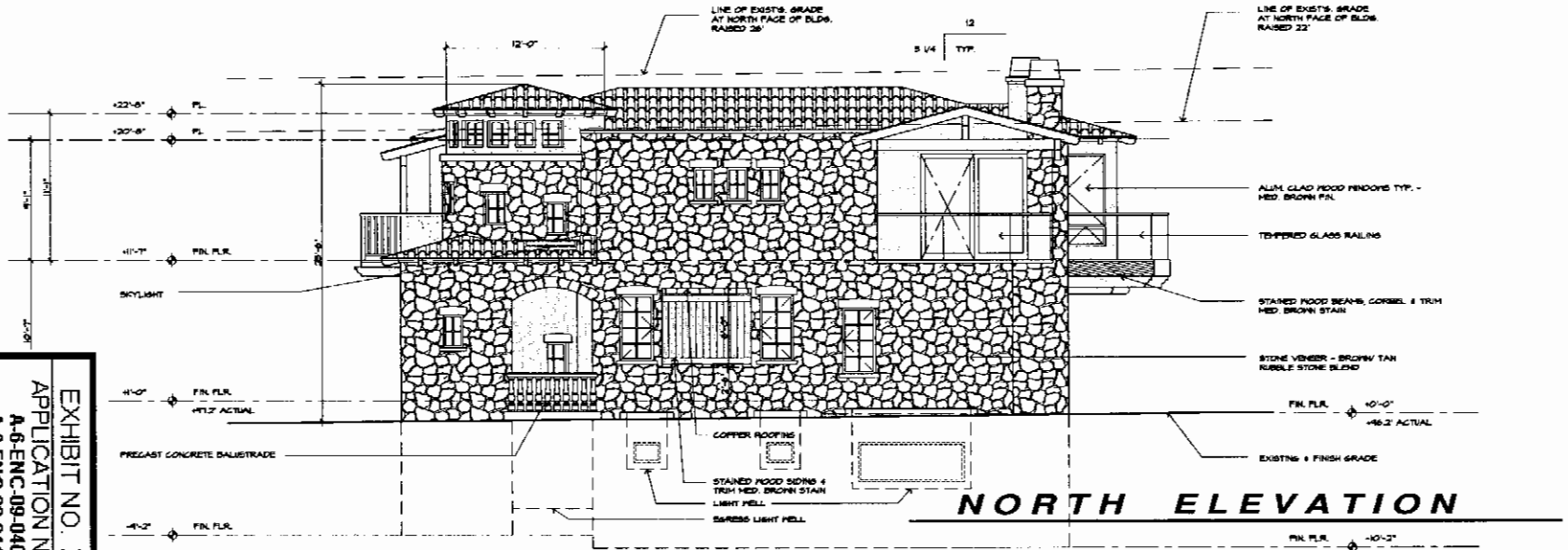
COWN + ASSOCIATES
ARCHITECTURE PLANNING

DATE 10/10/08
SCALE 1/4"=1'-0"
DRAWN JH
JOB 0607
FILE OK_PLAN
SHEET A4

EXHIBIT NO. 2j
APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 19 Basement Plan
California Coastal Commission

Posted on Monday, October 25, 2010





ELEVATIONS

SCALE: 1/4" = 1'-0"

EXHIBIT NO. 2k
APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 19 Elevations (West and North)

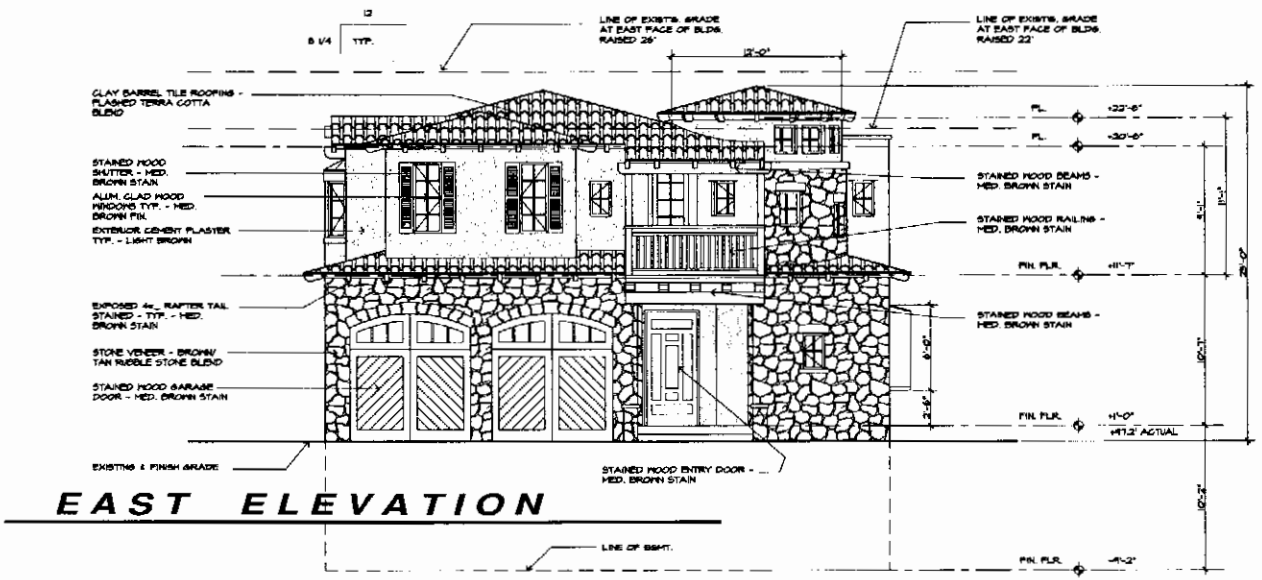
California Coastal Commission

OKUN RESIDENCE
NEPTUNE AVENUE
ENCINITAS, CALIFORNIA

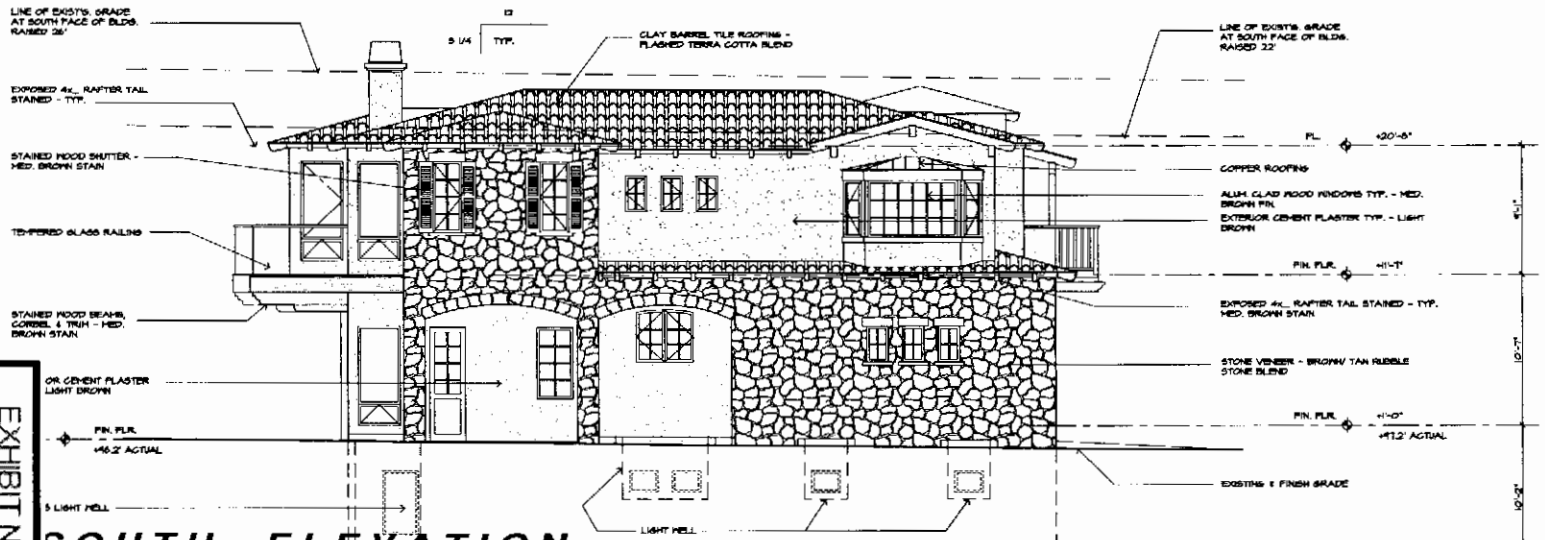
COWN + ASSOCIATES
ARCHITECTURE PLANNING

DATE 10/27/08
SCALE 1/4"=1'-0"
DRAWN JH
JOB 0601
FILE OK ELEV
SHEET A7

Plotted on: Tuesday, October 28, 2010



EAST ELEVATION



SOUTH ELEVATION

ELEVATIONS

SCALE: 1/4" = 1'-0"

0 1 4 8

2

OKUN RESIDENCE

ENCINITAS, CALIFORNIA

NEPTUNE AVENUE

COHN + ASSOCIATES
ARCHITECTURE PLANNING

LICENSED ARCHITECT
STATE OF CALIFORNIA

DATE 10/27/08
SCALE 1/4"=1'-0"
DRAWN JH
JOB 0807
FILE OK_ELEV
SHEET A6
OF SHEETS

EXHIBIT NO. 21
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 19 Elevations (East and South)

California Coastal Commission

Plotted on: Tuesday, October 28, 2010

EXHIBIT NO. 3

APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041

Aerial View

California Coastal Commission

EXHIBIT NO. 4

APPLICATION NOs.
A-6-ENC-09-040
A-6-ENC-09-041

Beach View

California Coastal Commission

STATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

30 September 2010

GEOTECHNICAL REVIEW MEMORANDUM

To: Nick Dreher, Coastal Program Analyst
From: Mark Johnsson, Staff Geologist
Re: A-6-ENC-09-40; A-6-ENC-09-41 (Okun)

With respect to the above referenced appeals, I have reviewed the following documents:

1) Soil Engineering Construction, 2006, "As-built slope stability analyses @ 40' setback, Okun residence, 828 Neptune Avenue, Encinitas", 1 p. letter report dated 28 November 2006 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).

2) Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 1 p. letter dated 21 May 2008 and signed by J.W. Niven (CE 57517).

3) Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 10 p. letter report dated 21 May 2008 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).

4) Geopacific Inc., 2008, "Third party review, 08-073 CDP, 828 Neptune Avenue, Encinitas, California, APN 256-011-13 &-03, Applicant Mr. Leonard Okun", 2 p. review memorandum dated 21 August 2008 and signed by J. Knowlton (RCE 55754 CEG 1045).

5) Soil Engineering Construction and The Trettin Company, 2009, "Monitoring report, 828 Neptune Avenue, Encinitas, California", 11 p. report dated December 2009 and signed by J.W. Niven (CE 57517), R.D. Mahony (CEG 847 GE 554), and B. Trettin.

6) Soil Engineering Construction, 2009, "Okun slope stability, 828 Neptune Avenue, Response to Coastal staff letter dated December 7, 2009", 3 p. letter report dated 15 December 2009 and signed by J.W. Niven (CE 57517).

In addition, I have visited the base of the coastal bluff at this site many times over the past several years, most recently on 10 June 2010 when I also observed the bluff top lot and the existing structure.

Reference (1) documents that the completed seawall, mid-bluff gravel fill, and upper bluff retaining wall together have a factor of safety exceeding 1.5 for the static condition and 1.1 for the pseudostatic condition. Together with the recent monitoring report (Reference 5), these analyses demonstrate that any structure at the bluff top will be stable indefinitely, provided that the shoreline protection system is maintained adequately.

Conversely, given the nature of the slide that occurred in 1999 on this and adjacent properties, without this shoreline protection system, there is no place on the subject lot where stability can be assured for the next 75 years (reference 6). Indeed, similar geologic conditions lead to an ancient slide in the 600 block of Neptune Avenue, and the street curves around the headscarp. Similarly, a slide ¼ mile to the north of the subject site destroyed the former beach access stairs and has a headscarp essentially coincident with the narrow parking lot adjacent to the street.

The bluff edge can retreat either by gradual erosion or by landsliding. When the bluff edge retreats by landsliding the top of the headscarp becomes the new bluff edge. It has been the Commission's practice in general that if fill is placed over the bluff edge, it does not change the position of the bluff edge—the bluff edge still exists beneath the fill. As demonstrated by the City's review letter (Reference 4), this has also been the position of the City in the past.

I hope that this review is helpful. Please do not hesitate to contact me with any further questions.

Sincerely,

Signature on file

Mark Johnsson, Ph.D., CEG, CHG
Staff Geologist