

CALIFORNIA COASTAL COMMISSION

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Filed: January 12, 2010
49th Day: March 3, 2010
Staff: Fernie Sy-LB
Staff Report: January 27, 2010
Hearing Date: February 10-12, 2010
Commission Action:

**STAFF REPORT: APPEAL**
SUBSTANTIAL ISSUE

LOCAL GOVERNMENT: City of Dana Point

LOCAL DECISION: Approval with Conditions

APPEAL NUMBER: A-5-DPT-10-010

APPLICANT: Toni King

PROJECT LOCATION: 318 Monarch Bay Drive
Dana Point, Orange County

PROJECT DESCRIPTION: Repair and re-vegetation of an eroded coastal bluff, consisting of grading activities that will create a series of terraces, geogrid, new fill soil placed to match the former contours of the slope, and drainage system, with native landscaping, on site developed with a single-family home

APPELLANTS: Commissioners Shallenberger and Wan

SUMMARY OF STAFF RECOMMENDATION

The staff recommends that the Commission, after public hearing, determine that a **SUBSTANTIAL ISSUE** exists with respect to the grounds on which the appeal has been filed. The appellants contend that the project approved by the City is inconsistent with policies regarding development on coastal bluff faces and visual resources in the certified Local Coastal Program. As described in the findings of this report, the project approved by the City does not protect the coastal bluff and is inconsistent with the development and visual resource policies of the LCP. The Dana Point Planning Commission approved the proposed project finding that the proposed remediation activities would be the least environmentally damaging feasible alternative, would minimize potential long-term land-form alteration by improving stability and safety, and would result in a restoration of the natural character of the bluff face. However, information contained in the geotechnical reports cast doubt on the actual need for bluff repair since these reports clearly state that the existing residence is not in danger from slope failure; and reconstructing the bluff with grading, geotextile fabric, and drainage devices does not restore the natural landform, it actually degrades it. While the house is in no danger from bluff failure and the need for protective measures like the bluff repair is not necessary, it appears that potentially the bluff repair is being proposed to protect accessory structures on site (i.e. the patio and lawn). If accessory structures are threatened, they should be removed and not protected. Protective devices to protect

appurtenant structures are inconsistent with the City's certified LCP. Also, the proposed development does not take into account the natural tendency of bluffs to erode. Bluffs erode and doing so adds to the visual character of the bluff landform. Furthermore, allowing bluff repair at this site and surrounding areas would lead to cumulative adverse visual resource impacts. Thus, the appeal raises a substantial issue regarding the conformity of the locally approved development with the City of Dana Point certified Local Coastal Program (LCP). Therefore, staff is recommending that the Commission find that a substantial issue exists with respect to the grounds upon which the appeal was filed.

The motion to carry out the staff recommendation is found on page 5.

SUBSTANTIVE FILE DOCUMENTS:

City of Dana Point Certified Local Coastal Program
Appeal of Commissioners Shallenberger and Wan
City Permit Record for local Coastal Development Permit CDP09-0001
Local Coastal Development Permit CDP08-001

I. APPELLANT'S CONTENTIONS

Summary of Appeal Contentions

The local Coastal Development Permit, CDP09-0001, approved by the City of Dana Point Planning Commission, is inconsistent with the certified Dana Point Local Coastal Program (LCP). The permit is inconsistent with the certified LCP policies regarding development and visual resources for the following reasons.

Development

The City's approved local Coastal Development Permit, CDP09-0001, is inconsistent with the development policies (regarding development adjacent to and on coastal bluffs) of the City's certified LCP. The geotechnical reports prepared for the project raise questions regarding the necessity of bluff repair. These reports conclude that the home is in no danger from bluff failure. Thus, bluff repair is not necessary to protect the existing structure and thus doing so would be inconsistent with the certified LCP. With that, the proposed bluff repair seems to be proposed more so for protection of appurtenant structures on site, such as the patio and lawn. A protective device (i.e. bluff repair) for the sole purpose of protecting an accessory structure is inconsistent with the certified LCP. Therefore, the development approved by the City's approved local Coastal Development Permit, CDP09-0001, is inconsistent with the development policies of the City's certified LCP.

Visual Resources

The City's certified LCP contains policies to protect visual resources. As stated previously, the proposed bluff repair is not necessary to protect an existing structure from danger due to erosion. Numerous geotechnical reports have confirmed this. Additionally, the repair of the bluff resulting in the in grading of the bluff and placement of geofabric and various drainage pipes on the bluff, would result in adverse impacts upon the bluff. The natural character of the bluff and its visual resources would be

permanently scarred by the proposed bluff repair. These visual impacts would be long term. Also, the natural tendency of bluffs to erode is ignored by the proposal to repair the bluff. Bluffs naturally erode and this contributes to the visual characteristics of the bluff landform. The bluff repair would degrade the natural landform. Additionally, allowing bluff repair to take place at this site and other adjacent sites would lead to a cumulative effect that would result in adverse visual impacts upon the character of the surrounding area. Therefore, the development approved by the City's approved local Coastal Development Permit, CDP09-0001, is inconsistent with the visual resource policies of the City's certified LCP.

II. LOCAL GOVERNMENT ACTION

Local Coastal Development Permit CDP09-0001 was approved by the Dana Point Planning Commission on December 7, 2009. Based on the date of receipt of the Notice of Action, the ten (10) working day appeal period for local Coastal Development Permit CDP09-0001 began on December 28, 2009 and ran through January 12, 2010. An appeal of local Coastal Development Permit CDP09-0001 was received from Commissioners Shallenberger and Wan on January 12, 2010 (see Exhibit #1), within the allotted ten (10) working day appeal period.

III. APPEAL PROCEDURES

After certification of Local Coastal Programs, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on Coastal Development Permits. Developments approved by cities or counties may be appealed if they are located within the appealable areas, such as those located between the sea and the first public road paralleling the sea, or within 100-feet of any wetland, estuary, or stream, or within 300-feet of the top of the seaward face of a coastal bluff. Furthermore, developments approved by counties may be appealed if they are not a designated "principal permitted use" under the certified LCP. Finally, any local government action on a proposed development that would constitute a major public work or a major energy facility may be appealed, whether approved or denied by the city or county. [Coastal Act Section 30603(a)].

Section 30603(a)(1) and (a)(2) of the Coastal Act establishes the project site as being in an appealable area because it is located between the sea and the first public road paralleling the sea and is within 300 feet of the inland extent of the beach and within 300 feet of the top of the seaward face of a coastal bluff .

Section 30603 of the Coastal Act states, in part:

- (a) *After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:*
 - (1) *Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.*

- (2) *Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.*

The grounds for appeal of a local government action approving a Coastal Development Permit for development in the appealable area are stated in Section 30603(b)(1), which states:

- (b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in this division.*

The action currently before the Commission is to find whether there is a "substantial issue" or "no substantial issue" raised by the appeal of the local approval of the proposed project. Section 30625(b)(2) of the Coastal Act requires the Commission to hold a de novo hearing on the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds for appeal.

If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered moot, and the Commission will proceed to the de novo portion of the public hearing on the merits of the project. The de novo portion of the hearing may be scheduled at the same hearing or a subsequent Commission hearing. The de novo hearing on the merits of the project uses the certified LCP as the standard of review. In addition, for projects located between the first public road and the sea, findings must be made that any approved project is consistent with the public access and recreation policies of the Coastal Act. Sections 13110-13120 of the California Code of Regulations further explain the appeal hearing process.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have an opportunity to address whether the appeal raises a substantial issue. The Chair will set the time limit for public testimony at the time of the hearing. As noted in Section 13117 of the California Code of Regulations, the only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing.

Upon the close of the public hearing regarding whether the appeal raises a substantial issue, the Commission will vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project.

If the appeal is found to raise a substantial issue, at the de novo hearing, the Commission will hear the proposed project de novo and all interested persons may speak. The de novo hearing will occur at a subsequent meeting date. All that is before the Commission at this time is the question of substantial issue.

IV. STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE

MOTION: I move that the Commission determine that Appeal No. A-5-DPT-10-010 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

STAFF RECOMMENDATION:

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

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-5-DPT-10-010 presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

V. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Project Description

The subject site is located in the Monarch Bay Terrace residential community, an established community of single-family residences of similar size and scale in the Monarch Beach area of Dana Point (Exhibit #2). According to the City, the site comprises of two, legal lots fronting a coastal bluff totaling .43 acres (18,731 square feet) and per adopted City zoning maps, the subject properties are zoned as Residential Single-Family 4 (RSF-4), located within the City's Coastal Overlay District, as well as the Appeal Jurisdiction of the California Coastal Commission. The bluff is adjacent to a beach that is accessible to the public.

The subject address is developed with a single-story, single-family residence that is presently undergoing remodeling and an addition (approved via locally issued CDP08-0001 (5-DPT-08-089) and other entitlements) that is adding 522 additional square feet to the structure's existing 4,286, for a new total of 5,708 square feet. These additions are to the side and front (street side) of the structure and are not located on the seaward (coastal bluff side) of the structure.

The proposed project consists of a repair and re-vegetation of a coastal bluff resulting from a failure that occurred in mid 2007 (based on the geotechnical reports). The failure resulted from purported oversaturation of the bluff by an unattended garden hose and resulted in a debris field beginning just below the edge of the bluff and continuing uninterrupted to the sandy beach below. The remediation request is the result of

concern about the potential for continued and/or future destabilization of either the subject property or neighboring properties over time.

The proposed project more specifically will consist of a “partial slope reconstruction” of the upper one-third of the failure that will consist of grading activities that will create a series of terraces (fill keys) comprised of tightly compacted soil, and punctuated by (sub-surface) drains (Exhibit #3). In addition, a geogrid and new fill soil, placed to match the former contours of the slope, will be positioned atop the fill keys and re-vegetated with a native landscaping palette. With these improvements in place, it is intended that the bluff be stabilized against potential future erosion that might slowly threaten the subject property over time, as well as to restore the natural contours and landscaping of the slope prior to the initial failure.

B. Factors to be Considered in Substantial Issue Analysis

Section 30625(b)(2) of the Coastal Act states that the Commission shall hear an appeal of a local government action carried out pursuant to Section 30600(b) unless it finds that no substantial issue exists as to conformity with the certified Local Coastal Program or the public access policies of the Coastal Act. The term “substantial issue” is not defined in the Coastal Act or its implementing regulations. Section 13115(b) of the Commission’s regulations simply indicates that the Commission will hear an appeal unless it “finds that the appellant raises no significant questions”. In previous decisions on appeals, the Commission has been guided by the following factors.

1. The degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the Local Coastal Program;
2. The extent and scope of the development as approved by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government’s decision for future interpretations of its LCP; and,
5. Whether the appeal raises local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government’s coastal permit decision by filing petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

As stated in Section III of this report, the grounds for appeal of a coastal development permit issued by the local government after certification of its Local Coastal Program are specific. In this case, the local Coastal Development Permit may be appealed to the Commission on the grounds that it does not conform to the certified Local Coastal Program or with the public access policies of the Coastal Act. The Commission must then decide whether a substantial issue exists with respect to the grounds on which an appeal has been filed in order to decide whether to hear the appeal de novo.

In making the substantial issue assessment, the Commission typically considers whether the appellants’ contentions regarding the inconsistency of the local government action

with the certified LCP raise significant issues in terms of the extent and scope of the approved development, the support for the local action, the precedential nature of the project, whether a significant coastal resource would be affected, and whether the appeal has statewide significance.

In this case, the appellants contend that the City's approval of the proposed project does not conform to the requirements of the certified LCP regarding development and visual impacts.

Staff is recommending that the Commission find that a **substantial issue** does exist with respect to whether the approval of the project is consistent with the provisions of the certified Local Coastal Program for the reasons set forth below.

C. Substantial Issue Analysis

1. Development

LAND USE PLAN/Conservation and Open Space Element (COSE)/Conservation of Significant Natural Features/

GOAL 2: Conserve significant topographical features, important watershed areas, resources, soils and beaches.

Policy 2.13: Bluff repair and erosion control measures such as retaining walls and other similar devices shall be limited to those necessary to protect existing structures in danger from erosion to minimize risks to life and property and shall avoid causing significant alteration to the natural character of the bluffs. (Coastal Act/30251, 30253)

Policy 2.29: Except as allowed under Conservation Open Space Element Policy 2.21 **no shoreline protection structure shall be permitted for the sole purpose of protecting an accessory structure.** Any such accessory structure shall be removed if it is determined that the structure is in danger from erosion, flooding or wave uprush and that a shoreline protection structure is necessary to protect it or if the adjacent bluff edge encroaches to within 10 feet of the structure as a result of erosion, landslide or other form of bluff collapse. Accessory structures, including, but are not limited to, trails, overlooks, benches, signs, stairs, landscaping features, and similar design elements shall be constructed and designed to be removed or relocated in the event of threat from erosion, bluff failure or wave hazards. [emphasis added].

The Dana Point Planning Commission approved the proposed bluff repair. However, information contained within the geotechnical reports raise questions about the need for the bluff repair. In fact, these geotechnical reports clearly state that the existing single-family residence is not in danger from failure of the slope.

Several geologic reports and letters have been prepared by the applicant's geologist, Geofirm, which characterize site geology and provide recommendations relative to the 2007 bluff face failure. The July 6, 2007 Geofirm report provided the following analysis of the bluff failure: "Based on

discussion with you, a hose was left running at the top of slope above the failure area, saturating the soils and causing the failure. The failure, which can be characterized as a debris flow, is approximately 135 feet long, extending from the slope at the rear of the graded pad down to the beach level. The width of the failure ranges from approximately 5 to 25 feet wide. The depth of the failure ranges from approximately 2 to 6 or more feet. The upper half of the failure is primarily erosional, exposing subsurface soil and bedrock. Although intact soils in the lower half of the failure were mobilized onto the beach, the lower portion of the failure is primarily depositional, consisting of mud and debris formerly from the upper reaches of the slope.” A subsequent Geofirm report dated November 5, 2007, states that bluff repair was necessary to prevent the retreat of the unstable failure scarp into the building pad and beneath the existing building. The geologist recommended a partial slope reconstruction, as described previously, to repair the bluff failure.

While the July 6, 2007 and November 5, 2007 Geofirm reports suggest that bluff repair is necessary, subsequent reports and letters from Geofirm raise questions as to whether bluff repair is even necessary since the existing residence has not been endangered by the bluff failure. In a Geofirm report dated May 9, 2008, it states that the level portion of the lot is not currently involved in the failure and that the residence is founded in competent bedrock and is not in danger. This statement makes it clear that the portion of the lot where the existing residence is located is not threatened by any bluff instability, where measures such as bluff repair would be required. Therefore, the appeal raises a substantial issue regarding whether the proposed bluff repair would be consistent with COSE Policy 2.13. While the house is not endangered, this report goes on to state that the patio and the lawn could be impacted by continued bluff erosion. However, as discussed further below, the City’s LCP prohibits the construction of bluff protective works to protect secondary appurtenances such as patios and lawns.

Lastly, a letter from Geofirm dated July 1, 2009 repeated the conclusion that the existing residence is not in any danger: *“Since publishing our Reference 4 report, which was based on the logging of three supplemental rear yard test pits, it has consistently been our opinion that the residence is not in imminent danger nor is it anticipated to be in imminent danger over the long term. The residence is entirely founded in competent San Onofre bedrock and is anticipated to remain grossly stable even if the existing failure is allowed to erode into the loose materials underlying the hardscape.”* These statements clearly show that the bluff is stable and that the residence is not threatened by the landslide, nor will it be threatened in the future over its anticipated economic life even if the landslide area continues to erode. Rather, it appears that the proposed bluff repair is being sought to deal with “potential” bluff failure that could impact site appurtenances, and approval of protective devices to protect accessory structures is prohibited by the LCP (see COSE Policy 2.29). If accessory structures are threatened, they should be removed.

The appeal raises a substantial issue regarding the project’s consistency with COSE Policy 2.13 because the proposed bluff repair is not necessary to protect an existing structure from danger from erosion. The existing residence, a primary structure, is not in danger from bluff instability as is stated numerous times in various geologic reports. In addition, bluff repair to protect a patio,

considered a secondary structure, is also inconsistent with this policy and Policy 2.29.

Therefore, for the reasons cited above, the appeal raises a substantial issue regarding whether the development as approved by the City is inconsistent with the development policies of the City's certified LCP.

2. Visual Resources

**LAND USE PLAN/Conservation and Open Space Element
(COSE)/Conservation of Significant Natural Features/**

GOAL 2: Conserve significant topographical features, important watershed areas, resources, soils and beaches.

Policy 2.9: *Preserve significant natural features as part of new development. Permitted development shall be sited and designed to minimize the alteration of natural landforms. Improvements adjacent to beaches shall protect existing natural features and be carefully integrated with landforms. (Coastal Act/30240, 30250, 30251, 30253)*

Policy 2.11: *Preserve Dana Point's bluffs as a natural and scenic resource and avoid risk to life and property through responsible and sensitive bluff top development including, but not limited to, the provision of drainage which directs runoff away from the bluff edge and towards the street, where feasible, and restricting irrigation and use of water-intensive landscaping within the setback area to prevent bluff erosion. (Coastal Act/30251, 30253)*

The City authorization of the proposed development raises concerns with regard to the City's interpretation of its LCP visual resource policies and potential cumulative impacts associated with this type of development. The City makes findings that the proposed development is consistent with LCP requirements regarding the protection of the scenic quality of coastal bluffs in that reconstructing the bluff to its preexisting contours will restore the scenic quality of the bluff. This interpretation ignores the long term visual impact that the grading, geofabric, and drainage devices/pipes, will have in conjunction with such reconstruction. The natural character of the bluff and its visual resources would be adversely and permanently impacted. It must be noted that the natural tendency of bluffs are to erode. Such erosion contributes to the visual characteristics of the bluff landform. Reconstructing the bluff with grading, geotextile fabric and drainage devices doesn't restore the natural landform, it would actually degrade it. Furthermore, encouraging such bluff reconstruction on this site and surrounding sites would lead to cumulative adverse visual impacts that would degrade the scenic quality of this coastal area.

Therefore, for the reasons cited above, the appeal raises a substantial issue regarding the conformity of the development as approved by the City with the visual resource policies of the City's certified LCP.

3. Additional Substantial Issue Assessment

In considering whether an appeal raises a substantial issue one factor the Commission considers is the significance of the coastal resources affected by the decision. In this case, the coastal resource affected is the coastal bluff, which contains significant visual resources. Visual resources are significant coastal resources that allow the public to enjoy the Coastal Zone. At the base of this bluff is an adjacent public beach and public views of the coastal bluff would be adversely impacted with the proposed development. Therefore, the resource affected area is indeed significant and the adverse impacts created by the proposed development upon the significant resources are considerable.

Another factor the Commission considers in determining whether an appeal raises a substantial issue is whether the appeal raises local issues, or those of regional or statewide significance. In this case, the appeal raises issues of at least regional, and possibly statewide, significance. The proposed development would adversely impact the coastal bluff and by allowing the bluff repair to take place here and other adjacent sites it would lead to cumulative adverse visual impacts. The proposed development would negatively impact the public view of the coastal bluff from the adjacent public beach. Allowing such unnecessary bluff repair activities would also set a precedent for allowing similar types of development statewide and thus resulting in impacts to coastal bluff resources. Thus, the appeal raises issues of regional and statewide significance.

4. Conclusion

For the reasons described above, the appeal raises a substantial issue regarding whether the development approved by the City is consistent with the development and visual resource policies of the City's certified LCP. Further, the inconsistencies raise issues with regard to significant coastal resources. Finally, the inconsistencies are of regional and statewide, not just local, concern. As described above, these issues raise a substantial issue with regard to the grounds upon which the appeal was filed. Therefore, the Commission finds that the appeal raises a substantial issue.

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Page 3

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

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

SECTION V. Certification

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

Signed: *Laura J. Van*
Appellant or Agent

Date: 1/12/10

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

Signed: _____

Date: _____

COASTAL COMMISSION

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

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SECTION V. Certification

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

Signed: Mary K. Schellenberger
Appellant or Agent

Dated: 1/12/10

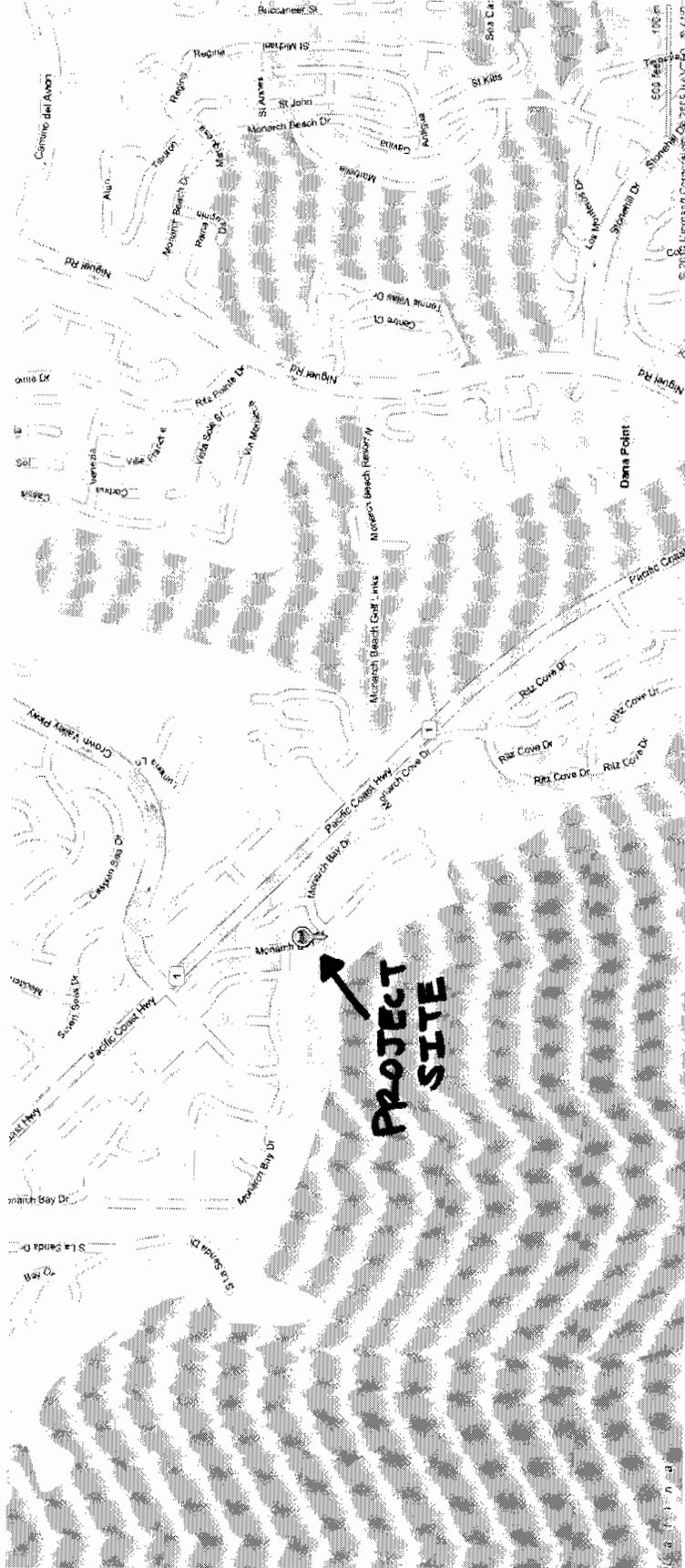
Agent Authorization: I designate the above identified person(s) to act as my agent in all matters pertaining to this appeal.

Signed: _____

Dated: _____

COASTAL COMMISSION

EXHIBIT # 1
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COASTAL COMMISSION

