

CALIFORNIA COASTAL COMMISSION

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



F15a & b

Staff: L. McEachern-SD
Staff Report: 12/20/2012
Hearing Date: 1/9-11/2013

STAFF REPORT: REVISED FINDINGS

Appeal No.: A-6-ENC-09-040 and A-6-ENC-09-041

Applicant: Leonard Okun

Agent: Sherman Stacey

Location: 828 Neptune Avenue, Encinitas, San Diego County
(APNs 256-011-13, 256-011-02, 256-011-03)

Project Description: Demolish existing one-story, approx. 16 ft. high, approx. 1,200 sq. ft. single-family residence that straddles two lots (lots 18 and 19) which contain an existing seawall, reconstructed midbluff and upper bluff wall and construct:

- 1) On Lot 18, an approximately 5,000 sq. ft. single family residence including garage and basement on a 9,922 sq. ft. coastal blufftop lot (approx. 5,880 sq. ft. for the blufftop and 4,042 sq. ft. for the bluff face).
- 2) On Lot 19, an approximately 5,000 sq. ft. single family residence including garage and basement on a 10,419 sq. ft. blufftop lot (approx. 5,880 sq. ft. for the blufftop and 4,539 sq. ft. for the bluff face).

STAFF NOTES:

Staff recommends the Commission adopt the following revised findings in support of the Commission's action on July 11, 2012. In its action, the Commission approved the permit with modification to Special Condition #1, Revised Final Plans. Specifically, the Commission required that the setback be revised such that the homes be located a minimum

of 40 ft. from the edge of the upper bluff wall as required by the City of Encinitas. The Commission found that the project, as conditioned, was consistent with the LCP, so the findings related to a potential taking under the California and U.S. Constitutions are deleted in these revised findings. The findings addressing conditions of approval that were contained in the “takings” section of the report, are moved to the “Hazards” section of the Revised Findings and underlined and identified as “revised” findings, although they were only moved from one portion of the report to another with very few revisions. The amended motions begin on Page 6. Modifications to Special Conditions begin on Page 8. Findings to support these modifications can be found starting on Page 21.

Date of Commission Action: July 11, 2012.

Commissioners on Prevailing Side: Bochco, Burke, Brennan, Kinsey, McClure, Mitchell, Sanchez and Stone

SUMMARY OF STAFF RECOMMENDATION

~~Staff recommends the Commission approve the proposed demolition of the existing residence, and revise the plans for the proposed residences to instead approve an approximately 2,145 sq. ft. building envelope beginning 65 ft. landward of the existing upper bluff retaining wall, spanning lots 18 and 19 of the Applicant’s property, upon which the Applicant may design/construct one or two residences or one duplex (see **Exhibit 6**). The City’s LCP requires that new residential development be 1) sited so it is safe without the need for future bluff protection; 2) sited in a safe location for a 75 year design life of the structure; and 3) sited no closer than 40 feet from the bluff edge. The primary issues raised by the subject developments relate to landslide potential, bluff stability and the siting of new development in a hazard area so as not to require future shoreline protection that adversely impacts coastal resources. The existing shoreline protection was permitted to protect the existing residence under an emergency permit in 2001 and a follow up permit to that emergency permit was approved in 2005 (CDP# 6-05-030).~~

~~As proposed, the two single family homes would be set back approximately 40 ft. from the edge of a bluff retaining wall, each with a cantilevered second floor extending 8 ft. (lot 18) and 7.5 ft. (lot 19) toward the retaining wall. However, the actual bluff edge is the natural bluff edge as it existed prior to construction of the upper bluff stabilization measures, rather than the retaining wall and fill behind the wall. Thus, as proposed, the homes would be sited closer to the actual bluff edge than permitted by the City’s LCP. Notwithstanding this issue, using assumptions regarding the composition of the bluff required by the Commission’s geologist, 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 for a 75 year design life 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 at least 75 years is to assume the existing shore and bluff protection will remain in its current stable condition or that new shore and bluff protection will be constructed in the future.~~

When the Commission finds a project inconsistent with the LCP and accordingly subject to denial, 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. Application of IP Section 30.34.020, by itself, would require denial of the project, because the project would not be safe for a minimum 75-year design life, and it would be approximately 20 feet from the natural bluff edge, where no less than a 40-ft. setback is the standard. Thus, staff recommends the Commission approve some new development, as described below, to avoid a potential taking of private property without just compensation.

The Applicant's technical experts and the Commission's staff geologist agree that there is a location to site development that is safe today, even without reliance on the existing bluff protection, which begins 63 feet landward of the retaining wall. This setback is also consistent with the LCP requirement that development be setback no less than 40 feet from the bluff edge. The Applicant's geotechnical experts have demonstrated that development can be safely sited on the blufftop lot today and have assured staff that without the seawall, which was designed and constructed to protect the existing residence proposed to be demolished, two residences can be safely sited 63 feet from the upper bluff retaining wall on this bluff top lot (approximately 50-60 feet from the natural bluff edge). While safe today, the portion of the lot beginning 63 feet landward of the retaining wall still would not provide a reasonably safe site upon which to site development for a minimum 75-year design life without the need for future shoreline protection.

Accordingly, staff recommends a 65-ft setback, which establishes an approximately 2,145-sq. ft. building envelope (with side yard setbacks of 5 ft. and front yard setback of 20 ft.). Staff is recommending the Commission approve this development envelope as the most landward location to site residential development while avoiding a potential taking and as an area consistent with the LCP to the maximum extent possible under these site-specific circumstances. This development envelope could accommodate development of one residence, two residences or a duplex (one structure with two living units). These uses and this development intensity would be consistent with development in the surrounding area. For purposes of slope stability, there is no significant difference between one or two homes/structures; however, there could potentially be two separate owners in the future who would be bound by the conditions of approval of this CDP for the residence. **Special Condition 1** requires revised plans to be submitted to the Executive Director to approve the resulting revised development plans consistent with the Commission's action.

Special Conditions 2 and 3 require the Applicant to submit a study, subject to the Executive Director's review and approval, to reassess the stability of the home 10 years from the approval of this permit and every 10 years thereafter, to ensure the subject development remains safely sited taking into consideration status of the previously approved seawall (CDP #6-05-030), which, through condition of approval, must either be removed or re-approved subject to additional mitigation by July 2022. If the required study shows that the principal structure(s) is no longer safely located, the Applicant(s) are

~~required to submit a permit amendment to undertake measures required to remove the residence(s) or reduce the size of the residence(s) to reduce the hazard potential.~~

~~Therefore, Staff is recommending approval of the demolition as proposed and is recommending that the proposed development be revised (the Applicant may choose one residence, two residences or a duplex) and confined to an approximately 3,780 sq. ft. building envelope beginning no less than 65 ft. from the upper bluff retaining wall (see **Exhibit 6** for approximate location), to ensure any approved development is consistent with the City of Encinitas' certified Local Coastal Plan to the maximum extent possible under these site specific circumstances.~~

~~Commission staff recommends **approval** of coastal development permits A-6-ENC-09-040 and A-6-ENC-09-041, as conditioned.~~

TABLE OF CONTENTS

I. MOTION AND RESOLUTION.....	6
II. STANDARD CONDITIONS.....	7
III. SPECIAL CONDITIONS.....	8
IV. FINDINGS AND DECLARATIONS.....	14
A. PROJECT DESCRIPTION.....	14
B. HISTORY.....	14
C. STANDARD OF REVIEW.....	18
D. COASTAL BLUFFTOP SETBACK.....	19
E. GEOLOGIC STABILITY.....	22
F. WATER QUALITY.....	32
G. PUBLIC ACCESS.....	33
H. VISUAL RESOURCES.....	34
I. LOCAL COASTAL PLANNING.....	35
J. TAKINGS.....	30
K. APPROVAL.....	38
L. CONCLUSION.....	42
M. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) CONSISTENCY.....	48

APPENDICES

Appendix A – Substantive File Documents

EXHIBITS

Exhibit 1 – Location Map

Exhibit 2 – Project Plans (2a-1)

Exhibit 3 – Aerial View

Exhibit 4 – Beach View

Exhibit 5 – Staff Memoranda

Exhibit 6 – ~~Staff Recommended Development Envelope~~

Exhibit 7 – Open Space Bluff Face Restriction

I. MOTIONS AND RESOLUTIONS

Motion 1: *I move that the Commission adopt the revised findings in support of the Commission's action on July 11, 2012 concerning approval, with conditions, of Coastal Development Permit No. A-6-ENC-09-040*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote on the motion. Passage of this motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings. The Commissioners eligible to vote are:

Commissioners Bochco, Brennan, Burke, Kinsey, McClure, Mitchell, Sanchez and Stone.

RESOLUTION TO ADOPT REVISED FINDINGS:

The Commission hereby adopts the findings set forth below for *Coastal Development Permit No. A-6-ENC-09-040* on the ground that the findings support the Commission's decision made on July 11, 2012 and accurately reflects the reasons for it.

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

~~Staff recommends a **YES** vote. Passage of this motion will result in approval 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:

~~*The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development will 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 complies with the California Environmental Quality Act because there are no feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.*~~

Motion 2: *I move that the Commission adopt the revised findings in support of the Commission's action on July 11, 2012 concerning approval, with conditions, of Coastal Development Permit No. A-6-ENC-09-041*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote on the motion. Passage of this motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings. The Commissioners eligible to vote are:

Commissioners Bochco, Brennan, Burke, Kinsey, McClure, Mitchell, Sanchez and Stone.

RESOLUTION TO ADOPT REVISED FINDINGS:

The Commission hereby adopts the findings set forth below for **Coastal Development Permit No. A-6-ENC-09-041** on the ground that the findings support the Commission's decision made on July 11, 2012 and accurately reflects the reasons for it.

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

~~Staff recommends a **YES** vote. Passage of this motion will result in approval 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:**~~

~~*The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development will 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 complies with the California Environmental Quality Act because there are no feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.*~~

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized

agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Final Revised Plans.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for review and written approval of the Executive Director, final plans for the proposed development chosen by the Applicant as either one residence, two residences or one duplex structure within the approved ~~2,145-sq.-ft.~~ building envelope described in section 1 below. Said plans shall first be approved by the City of Encinitas and be revised as follows:
 - (1) The Applicant shall submit a surveyed site plan depicting a development envelope located no less than ~~65~~ 40 feet landward of the existing upper bluff retaining wall, to be surveyed by a licensed surveyor to determine the exact building area on the blufftop lot, including the location of the retaining wall, natural bluff edge, side yard setbacks, front yard setbacks and property lines;
 - (2) The surveyed location of either one single family residence, one duplex, or two single family residences (one on each lot), that are consistent with all of the following criteria:
 - (a) The residence(s) are to be sited entirely within the surveyed building envelope that begins at no less than ~~65~~ 40 feet landward of the existing upper bluff retaining wall;
 - (b) The residence(s) must be designed so that they can easily be removed once the approved location is no longer safe;

- (c) The residence(s) must conform in height, size, and bulk with the applicable zoning regulations and be keeping with the character of the surrounding area;
- (d) The residence(s) may include a basement level;
- (e) The residence(s) may include a reduced front yard setback (if approved pursuant to a variance from the City of Encinitas);
- (f) All runoff from the site shall be collected and directed away from the bluff edge towards the street; and
- (g) Existing and any proposed accessory improvements (i.e., patios, walls, windscreens, etc.) located in the geologic setback area on the site shall be detailed and drawn to scale on the final approved site plan and shall include measurements of the distance between the accessory improvements and the ~~natural bluff edge~~ upper bluff wall taken at 3 or more locations. The locations for these measurements shall be identified through permanent markers, benchmarks, survey position, written description, or other method that enables accurate determination of the location of structures on the site. All existing and proposed accessory improvements shall be placed at grade, be capable of being removed if threatened and located no closer than 5 feet landward of the ~~natural bluff edge~~ upper bluff wall.

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

2. **Limited Approval for Structures on Property.** By acceptance of this permit, the applicant agrees, on behalf of himself and all successors and assigns, to the following limitations on use of the blufftop residential parcels (APNs 256-011-13, 256-011-02, 256-011-03):
 - (A) The applicant agrees to remove the approved residence(s), either in part or entirely, should it become unsafe for occupancy in the future;
 - (B) Every ten years from the date of approval of this CDP (i.e., the first date being July 11, 2022), the permittee(s) shall submit a geotechnical/engineering report assessing bluff stability and whether the approved residence(s) remains in a safe location. To comply with this condition, the permittee(s) and/or successor(s) in interest shall submit to the Commission a site assessment evaluating the site conditions to determine whether or not alterations to the residence(s) or removal of the residence(s) is necessary to avoid risk to life or property. In the event more than one residence or unit is developed as a result of this approval, and more than one owner is associated with this property as a whole, all owners must submit an application to the Commission as co-applicants;

(C) The study shall be based upon a site specific analysis of site stability, bluff alteration due to natural and manmade processes, and the hazard potential at the site. The required study shall include the following:

- (1) An analysis of site stability based on the best available science and updated standards, of beach erosion, wave run-up, sea level rise, inundation and flood hazards prepared by a licensed civil engineer with expertise in coastal engineering and a slope stability analysis, prepared by a licensed Certified Engineering Geologist and/or Geotechnical Engineer or Registered Civil Engineer with expertise in soils, in accordance with the procedures detailed in the Local Coastal Program (LCP) and the City Zoning Code;
- (2) An analysis of the condition of the existing shoreline and bluff protection and any impacts it may be having on public access and recreation, scenic views, sand supplies, and other coastal resources. Pursuant to the requirements of CDP # 6-05-030, the submittal shall include an evaluation of the means to remove the existing shoreline protection which was permitted to protect the existing structure to be demolished; and
- (3) An evaluation of the means to remove in whole or in part the subject permitted residence(s) if and when either becomes unsafe for occupancy.

The bluff stability analysis required pursuant to this condition shall be submitted concurrent with the CDP amendment required pursuant to CDP # 6-05-030 for the existing, previously-permitted seawall and bluff retention devices. No removal, modification or expansion of the approved residence(s), shoreline protection, or additional bluff or shoreline protective structures shall occur, without approval of an amendment to CDP #A-6-ENC-09-040 & 041 by the Coastal Commission.

The submitted analysis shall address all the structures existing on the subject property and, depending on the results of the bluff stability analysis, include proposals to remove or retain the existing residences, seawall and bluff stabilization measures. If the required study shows that the principal structure(s) is no longer safely located, the permittee(s) shall submit a permit amendment to undertake measures required to remove the residence(s) or reduce the size of the residence(s) to reduce the hazard potential.

3. No Future Bluff or Shoreline Protective Device.

- (A) By acceptance of this permit, the applicant agrees, on behalf of himself and all successors and assigns, that the residence(s) will remain only as long as it is reasonably safe from failure and erosion without having to propose any shore or bluff stabilization to protect the residence(s) in the future. Thus, no new bluff

or shoreline protective device(s), including reconstruction of existing bluff and shoreline protective devices, shall be constructed or undertaken to protect the development approved pursuant to Coastal Development Permit Nos. A-6-ENC-09-040/-041, including, but not limited to, the residence(s) with the attached garage, patio and BBQ area, and driveway in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, ground subsidence or other natural hazards in the future;

- (B) By acceptance of this Permit, the applicant further agrees, on behalf of himself and all successors and assigns, that the landowner(s) shall remove the development authorized by this permit, including the residence(s) with the attached garage, and driveway if any government agency has ordered that the structures are not to be occupied due to any of the hazards identified above. In the event that portions of the development fall to the beach before they are removed, the permittee(s) shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit; and
 - (C) In the event the edge of the bluff recedes to within 10 feet of the principal residence(s) but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed geologist or civil engineer with coastal experience retained by the permittee(s), that addresses whether any portions of the residence(s) are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the principal residence(s) without shore or bluff protection, including but not limited to removal or relocation of portions of the residence(s). The report shall be submitted to the Executive Director and the appropriate local government official. If the Executive Director determines based on the geotechnical report that the residence(s) or any portion of the residence(s) is unsafe for occupancy, the permittee(s) shall, within 90 days of submitting the report, apply for a coastal development permit amendment to remedy the hazard which shall include removal of the entire residence or threatened portion of the structure.
4. **Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against the parcel(s) governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels

governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

5. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the applicant acknowledges and agrees: (i) that the site may be subject to hazards from landslide, bluff retreat, erosion, subsidence, and earth movement; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.
6. **Best Management Practices and Construction Responsibilities.** The permittee(s) shall comply with the following construction-related requirements:
 - (A) All debris resulting from demolition and construction activities shall be removed and disposed of at an authorized disposal site;
 - (B) Temporary sediment control Best Management Practices (BMPs) such as straw bales, fiber rolls, or silt fencing shall be installed prior to, and maintained throughout, the construction period to intercept and slow or detain runoff from the construction, staging, and storage/stockpile areas, allow entrained sediment and other pollutants to settle and be removed, and prevent discharge of sediment and pollutants toward the bluff edge. When no longer required, the temporary sediment control BMPs shall be removed. Fiber rolls shall be 100% biodegradable, and shall be bound with non-plastic biodegradable netting such as jute, sisal, or coir fiber; photodegradable plastic netting is not an acceptable alternative. Rope used to secure fiber rolls shall also be biodegradable, such as sisal or manila; and
 - (C) On-site vegetation shall be maintained to the maximum extent possible during construction activities;
7. **Final Landscaping Plan.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and written approval final landscaping plans approved by the City of Encinitas. The plans shall be updated to reflect the approved development envelope pursuant to **Special Condition 1** and must otherwise be in substantial conformance

with the conceptual landscape plans by Cohn and Associates, dated 10/28/2008, and shall include the following:

- (A) All landscaping shall be drought-tolerant and native or non-invasive plant species. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property;
- (B) Any existing permanent irrigation located on the bluff top site shall be removed or capped and no permanent irrigation system may be installed;
- (C) A written commitment by the applicant that, five years from the date of the issuance of the coastal development permit for the residential structure, the applicant will submit for the review and written approval of the Executive Director a landscape monitoring report prepared by a licensed Landscape Architect or qualified Resource Specialist that certifies whether the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition.

The monitoring report shall include photographic documentation of plant species and plant coverage. If the landscape monitoring report indicates the landscaping is not in conformance with or has failed to meet the performance standards specified in the landscaping plan approved pursuant to this permit, the applicant, or successors in interest, shall submit a revised or supplemental landscape plan for the review and written approval of the Executive Director. The revised landscaping plan must be prepared by a licensed Landscape Architect or Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

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

8. **Future Development.** This permit is only for the development described in coastal development permit No. A-6-ENC-09-40 & 41. Pursuant to Title 14 California Code of Regulations Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) shall not apply. Accordingly, any future improvements to the proposed single family residence(s), including but not limited to repair and maintenance identified as requiring a permit in Public Resources Code section 30610(d) and Title 14 California Code of Regulations section 13252(a)-(b),

shall require an amendment to permit No. A-6-ENC-09-40 & 41 from the California Coastal Commission or shall require an additional coastal development permit from the California Coastal Commission or from the applicable certified local government.

9. **Open Space Bluff Face Restriction.** No development, as defined by Section 30106 of the Coastal Act, shall occur seaward of the upper bluff retaining wall on the parcels governed by this permit, except for: (a) repair and maintenance of existing seawalls and bluff protective devices and (b) maintenance of landscaping.

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction, prepared by a licensed surveyor, of the portion of the subject property affected by this condition, as generally described above and shown on **Exhibit 6 7** attached to this staff report.

IV. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION

The project as approved by the City involves the demolition of an existing one-story, 16 ft. high, approximately 1,200 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 an artificial bluff retaining wall 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 an artificial bluff retaining wall 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 consisting of 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 consisting of approximately 4,539 sq. ft.

B. HISTORY OF SITE AND SURROUNDING AREA

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 an

approximately 300¹ sq. ft. portion 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 approximately 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 which was not permitted. 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

¹ The 300 sq. ft. figure is the result of subtracting the current area estimation provided by the applicant (1,200 sq. ft.) from the total area identified on Redfin.com (approximately 1527 sq. ft.).

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 partial sand supply mitigation, which the applicant paid to SANDAG on October 6, 2005. Special Condition #3 also required the permittee (subject Applicant) or successor to apply for and obtain a permit amendment that either 1) requires the removal of the seawall within its initial design life (22 years) or 2) requires reapproval subject to additional mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life. Special Condition #5 of that permit required that monitoring reports be submitted for Executive Director review every year for three years and then every three years thereafter for the life of the seawall. Although the seawall was completed in 2005, the applicant has failed to submit any of the monitoring reports as required by Special Condition #5 of the seawall permit, in an apparent violation of Coastal Development Permit #6-05-30.

In 2005, there were two unrelated applications similar to the subject proposed development located approximately 5 blocks 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, there was no safe location on the lots that would not require protection over the life of the structures. Those projects were not appealed to the Commission.

The coastal development permit for the present project (Okun) was originally approved by the City of Encinitas Planning Commission on June 4, 2009. On July 7, 2009, the project was appealed to the Coastal Commission and at its August 14, 2009 hearing, the Commission found Substantial Issue exists with respect to the grounds on which these two appeals were filed.

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 applications were considered separately by the City, there is a separate motion and resolution necessary for each Commission action (see page 5).

On December 9, 2009, Commission staff requested additional information regarding the project, specifically related to the required monitoring reports and the adequacy of the existing shore and bluff protection. On January 11, 2010, staff received the Applicant's

Monitoring Report, Dated December 2009. While staff reviewed the submitted materials and discussed the content with the Applicant, it was made clear to staff that a local San Diego hearing was the most desirable to the Applicant and requested delay of a hearing until it was local. On September 30, 2010, staff received an email from Mr. Stacey, requesting the October meeting in Oceanside (San Diego County).

On November 3, 2010, Commission staff issued a De Novo staff report for the November 17, 2010 Commission Hearing in Santa Monica, recommending denial of the proposed project. On November 12, 2010, staff received a letter wherein the applicant exercised his right to postponement, pursuant to Title 14 of the California Code of Regulations Section 13073. On December 3, 2010, Mr. Stacey informed staff that he intended to submit additional materials in light of the previously released staff recommendation. On December 8, 2010, Mr. Stacey informed staff that the preparation of the additional information he intended to send had been delayed and that he understood the January 2011 hearing would not be possible.

On January 10, 2011, staff received a supplemental geotechnical report including site borings dated January 7, 2011, in response to certain findings made in the 2010 de novo staff recommendation report. On January 13, 2011, Staff met with the applicant's representative, Sherman Stacey, via phone conversation, wherein Staff reaffirmed its denial recommendation, even in light of the new geotechnical information, as the new information did not conclusively rule out the existence of a clay seam layer within the bluff. On January 18, 2011, the applicant's geotechnical expert submitted additional boring logs and a report regarding the existence of a clay seam layer within the bluff.

On January 19, 2011, the Commission's geologist requested additional materials from the applicant's geotechnical experts via email. On February 7, 2011, the applicant's geotechnical experts discussed the project with Commission staff and subsequently information regarding clay seams was sent to the applicant's experts so they could continue their analysis. On March 17, 2011, the applicant's representative contacted staff to state that 1) additional geotechnical analyses and an analysis of factors related to a regulatory "takings" claim were forthcoming and 2) that he hoped for a June hearing date.

On May 2, 2011, staff received updated geotechnical analyses from the applicant's experts. When submitted, staff made it clear given the approaching deadlines that June would not be possible and that more time would be necessary to review the submitted material. Staff contacted Mr. Stacey by phone on August 25, 2011 and Mr. Stacey asked that this item be scheduled for the November 2011 hearing and that he planned to send staff the takings analysis sometime around Labor Day weekend. On September 2, 2011, staff received an email from Mr. Stacey that read: "If you can confirm scheduling of Okun hearing for November, I will get you my memorandum on taking by the end of next week." On September 16, 2011, staff received the takings analysis (15 pages) from Mr. Stacey via email, wherein Mr. Stacey requested a meeting sometime prior to the November 2011 hearing. On October 10, 2011, Staff received an email from Mr. Stacey, wherein he restated his desire to have a meeting to discuss the staff recommendation and

stated that the applicant was amenable to revisions to the project description involving caisson supports. On October 13, 2011, staff informed Mr. Stacey via phone call that staff would not be prepared to make a recommendation to the Commission in November 2011, in order to more thoroughly evaluate the analysis Mr. Stacey provided regarding takings in the hopes of approving the project with conditions. During the October 13, 2011 phone conversation with staff, Mr. Stacey discussed the possibility of a January 2012 or March 2012 hearing date.

During November and December of 2011, staff left voicemail messages for Mr. Stacey, attempting to contact him to discuss a timeline for a hearing and whether January was the Applicant's preference. On December 9, 2011, staff received an email from Mr. Stacey asking whether staff would like to meet to discuss the recommendation for a January 2012 hearing date. On December 9, 2011, staff responded via email that March, not January would be better to allow staff time to better evaluate an approval with conditions recommendation. On December 12, 2011, staff received an email from Mr. Stacey regarding his disappointment that staff would not be bringing the recommendation to the January 2012 hearing and the March hearing was not acceptable. On December 14, 2011, Staff informed Mr. Stacey that staff was continuing to have internal discussions on this matter in order to try to get to a recommendation of approval. On January 12, 2012, staff received an email from Mr. Stacey requesting a meeting with staff and alerting staff to a study he intended to submit to staff. Shortly thereafter, a meeting was scheduled for February 13, 2012. On January 20, 2012, staff received from Mr. Stacey, a 200+ page study of development along Neptune Avenue and nearby streets in Encinitas, California, dated January 16, 2012. On February 13, 2012, staff met with Mr. Stacey to discuss the project and informed him at that time that additional time would be needed to properly evaluate the voluminous study provided and that therefore a March hearing date would not be possible. In April 2012, Mr. Stacey requested that staff take a recommendation to the June hearing. In May 2012, Mr. Stacey threatened to file a request in court to issue an order directing Commission staff to take this item to hearing in July 2012.

C. 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 2009, 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.

D. 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.

- (1) *With the following exceptions, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. Exceptions are as follows:*
 - a. *Principal and accessory structures closer than 40 feet but not closer than 25 feet from the top edge of the coastal bluff, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below. This exception to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is setback a minimum of 25 feet from the coastal blufftop edge and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future. Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.*
 - b. *Minor accessory structures and improvements located at grade, including landscaping, shall be allowed to within 5 feet of the top edge of the coastal bluff. Precautions must be taken when placing structures close to the bluff edge to ensure that the integrity of the bluff is not threatened. For the purposes of the Coastal Bluff Overlay Zones, "minor accessory structures and improvements" are defined as those requiring no City approval or permit including a building or grading permit, and not attached to any principal or accessory structure which would require a permit. Grading for reasonable pedestrian access in and around a principal or accessory structure may be permitted by the City Engineer following review of a site specific soils report.*
 - c. *Essential public improvements providing coastal access, protecting natural resources, or providing for public safety, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below, including but not limited to, walkways leading to approved public beach access facilities,*

open fences for safety or resource protection, public seating benches, lighting standards, and signs.

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

[. . .]

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

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 is not an addition or expansion and, thus, 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 consisted of construction of a bluff retaining wall seaward of the home, and the placement of fill material between the bluff edge and retaining wall so that there was a small area of “land” created 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 edge of the retaining wall, rather than the from the top of the bluff as it existed before the retaining wall and fill were added to the property.

~~A retaining wall with backfill is not the same as the bluff edge. The IP provision defining “bluff edge” provides direction on how to determine the bluff edge when “bluff stabilizing devices exist on a subject property.” Specifically, the location of the bluff edge must be determined after evaluating geologic and soils reports. If the bluff edge were the edge of the bluff stabilizing device, as the applicant claims, then there would be no need for the IP to include instructions on how to determine the bluff edge when there is a bluff stabilizing device on site.~~ This IP provision is necessary because the existence of upper bluff protection or a reconstructed bluff top can obscure the natural bluff edge, making delineation of the actual bluff edge difficult. The upper bluff protection in this case hides the bluff edge. Thus, pursuant to the IP, a geologic/soil survey must be conducted to determine the bluff edge’s exact location.

In this particular case, the plans approved by the City identified the location of the 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 location of the “natural bluff edge” that existed prior to construction of the upper bluff wall, as depicted on the plans. The City’s permit file indicates the City staff found the retaining wall location was not the top of bluff edge for purposes of measuring the 40 ft. setback, and that the setback should be measured from the previous top of slope prior to the construction of the upper bluff wall. (ref. Letter from GeoPacific Inc. dated 8/21/08 attached as Exhibit #9). The City Planning Commission, however, in its approval of the project determined that the bluff edge for purposes of setback for the homes should be the edge of the upper bluff wall contrary to the typical interpretation of the bluff edge utilized by City and Commission staff.

As cited above, the City has the authority to determine the location of the bluff edge based on information and input from technical specialists. Based on their review, the

Planning Commission determined that the bluff edge for the purposes of measuring setbacks for new development, in this particular case, is the edge of the upper bluff wall. On appeal, the Commission reviews a project de novo, analyzing technical information and making its own determination. Based on the information submitted, the Commission finds that, in this particular case, for the purposes of measuring the setbacks for proposed new development, the western edge of the existing upper bluff wall should be used. Based upon the siting of the constructed bluff retaining wall and backfill and the historical extent of the natural bluff edge, the Commission finds that the bluff edge for the purposes of determining the geologic setback for the homes meanders between 0 and 12 ft. landward of the present retaining wall. Accordingly, consistent with the IP, the Commission will review the proposed setbacks and siting requirements based upon the bluff edge that existed prior to construction of the bluff retaining wall and the addition of backfill.

E. GEOLOGIC STABILITY.

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 effect 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)*

- (1) *Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;*
- (2) *Historic, current and foreseeable-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:

[. . .]

- (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*
- (f) Requiring new structures and improvements to existing structures to be setback 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.*

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

(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 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 bluff edge as they will be cantilevered 7.5 to 8 ft seaward of the first floor.

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, Bourgault, 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 future shoreline protection. In addition, Public Safety (PS) Policy 1.3 of the City's LUP prevents new 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 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. The Commission's staff geologist has reviewed the Applicant's site-specific estimation of long-term erosion at the subject site and concurs with his estimated erosion rate, based on site-specific historic information. However, the applicant's geotechnical consultants analyzed the site with the existing shore and bluff protection in place and provided little analysis that considered the site without this protection. Approval of future protective structures for new development is not consistent with several provisions of the certified LCP.

In addition, in order to find the appropriate geologic setback for new bluff top homes such as those proposed, 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."

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. Some recent examples include one in July of 2008, where a bluff retaining structure failed on a site just a couple blocks north of the subject site (1086/1086 Neptune Avenue) resulting in the issuance of emergency permit to build new bluff retaining structures (ref. 6-08-039-G/Blue Curl). Another example occurred in December 2010 and January 2011 where a bluff retaining structure failed and then the seawall failed at 1500/1520 Neptune Avenue resulting in the issuance of an emergency permit and then follow-up regular permit for new shore and bluff protection (ref. 6-11-3-G/Frick & Lynch and 6-88-464-A2).

Moreover, in this case, at the time the seawall was permitted, the applicant indicated the design life of the existing seawall is 22 years; the seawall was constructed 12 years ago. The permit approving that seawall acknowledges the \$11,687 payment was for partial mitigation for the impacts of the project on local shoreline sand supply, in-lieu of providing the total amount of sand to replace the sand and beach area that will be lost due to the impacts of the proposed protective structure. The required in-lieu fee mitigation covers certain impacts only through the identified 22-year design life of the seawall. (ref. CDP #6-05-030 attached as Exhibit #8). The permit condition of approval requires the

applicant or successor in interest to apply for and obtain an amendment that either requires removal of the seawall within its initial design life or requires mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life. The seawall on this property will therefore be reevaluated and potentially removed in 10 years. The condition requiring reevaluation of seawalls approved with a beach sand mitigation fee, after the initial design life has passed, has been applied since the Commission has been administering the beach sand mitigation program, and is similar to the special condition requiring the beach sand mitigation fee applied for the seawall on the neighboring property to the south (ref. CDP #6-03-48/Sorich & Gault). The intent is to allow the Commission to reassess the seawall's condition, impacts and continued need, and to require additional mitigation if the seawall continues to be remain. In this particular case, the Commission could require removal of the seawall or allow it to remain as long as no reconstruction, additions or substantial alterations are required. Pursuant to Special Condition #2 of this permit for new development on the site, the Commission would not be required to approve reconstruction of the seawall to protect the proposed new development on the property. ~~Thus, there are potential limits to the life of the existing seawall in its current condition.~~ To allow the proposed homes to be sited in reliance on ~~either existing or~~ future shore/bluff protection is inconsistent with the LCP provisions cited above. Again, the LCP policies are designed to allow shoreline protection solely to protect existing principal structures in danger from erosion. ~~The proposed new residences would be relying on a seawall to be present to stabilize this property for the life of the new development. To allow new structures to be sited and designed in reliance on existing or future shoreline protection would essentially allow applicants to use shoreline protection to protect new development and perpetuate the presence of shoreline armoring, inconsistent with the LCP.~~ Thus, the Commission must consider where to site the proposed development so that there will not be a need to propose protection by shoreline protective devices to protect the development 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 without reliance on shoreline protective devices. 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. To assure that a 1.5 factor of safety would be maintained for the life of any proposed development, the bluff retreat expected over that time would have to be added to the calculation of where the 1.5 factor of safety would be located today. In the absence of a site-specific study, the

Commission has typically used a figure of 0.49 ft/yr (adapted from a 1999 study of Benumof and Griggs) for the future long-term average bluff retreat rate in this part of Encinitas. And the applicant's geologists have determined that the 1.5 factor of safety is met at 63 feet from the retaining wall. Assuming a 75-year design life, this translates to 37 feet of bluff retreat. Thus, given this data, to site the development safely without reliance on shoreline protective devices for a 75 year life, the Commission's staff geologist would recommend a 100-foot setback for siting development (63 feet for today's 1.5 factor of safety plus 37 feet of future erosion). The lots are not much more than 100 feet deep, however, so there is no place to site development on these lots consistent with the LCP standard.

In addition to the LCP provisions cited above, Policy 1.3 of the LUP also prohibits "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 structural measures to protect them. As explained above, the applicant's geotechnical report finds just the opposite, that the proposed residences will not be safe for 75 years without reliance on the existing structural measures, inconsistent with certified LCP standards. However, in this particular case, the blufftop property currently contains a seawall, geogrid and an upper bluff retention wall. As noted previously in this report, all of these structures have been approved by the Commission and/or the City of Encinitas. In approving these structures, neither the City nor the Commission required that these protective structures be removed when the existing blufftop home was redeveloped, nor stated that any new development on the blufftop property could not rely on the existing protective measures. In addition, the approvals required the protective structures be monitored and maintained. Thus, the existing protective structures are legally permitted and will provide protection to development on the blufftop as long as they remain permitted structures. The applicant's consultants and the Commission's staff Geologist both agree that the existing protective structures may remain indefinitely, as long as they are maintained and, that the proposed residential structures will not be subject to threat if they are sited 40 ft. from the upper bluff retaining wall (as proposed) as long as the existing protective structures are in place and functioning as designed. The Commission does not typically endorse new development that relies on existing protective measures to be sited safely. However, in this particular case, the City's LCP does not specifically state that new development cannot rely on existing protective structures. It states that new development cannot rely on **future** protective structures.

The question is raised however, as to what happens if the existing protective structures fail or are destroyed and/or removed in the future. As noted above, without these structures in place, the proposed residential structures would be subject to threat. As the LCP prohibits new development from requesting protective structures in the future, **Special Condition 3** is imposed. This condition requires that the applicant waive any rights to construct shoreline protection under 30235 of the Coastal Act or the certified LCP. In addition, the condition states that the residence(s) will remain only as long as it

is reasonably safe from failure and erosion without having to propose any shore or bluff stabilization to protect the residence(s) in the future. Thus, no new bluff or shoreline protective device(s), including reconstruction of existing bluff and shoreline protective devices, shall be constructed or undertaken to protect the development approved pursuant to this Coastal Development Permit, consistent with the certified LCP.

In addition, given that the LCP requires new development to be sited such that it does not represent a hazard to its owner or occupants, and that future erosion is expected on this site, the Commission imposes **Special Condition 2**. This condition requires that the applicant agree to remove the approved residences, in part or entirely, should they be subject to threat in the future. Only with these conditions can the project be found to be consistent with Section 30.34.020(D) of the LCP, which prohibits new development from requiring future shoreline protection.

As discussed above, the subject property is protected by full shoreline protection, including a Commission-approved seawall at the toe of the bluff (CDP#6-05-030). CDP# 6-05-030 contained a special condition requiring the Applicant to submit an amendment application to the Commission in 2022 to either remove the seawall within its initial design life or to retain it subject to the reevaluation of mitigation for impacts to local sand supply. The potential removal of the permitted lower seawall in 2022 raises concerns regarding the site's overall stability and may implicate any development sited on the bluff top as a result of this permit action. Accordingly, the required reevaluation of the subject development's safety (pursuant to **Special Condition 2**) must coincide with the seawall's evaluation in 2022 as required in CDP#6-05-030. Therefore, the Commission finds an evaluation of the subject development's safety 10 years from this approval, and every 10 years thereafter, is appropriate, given that reassessment should coincide with the seawall reevaluation to ensure all conditions on the site related to stability and hazards are appropriately considered.

The site reassessment required under **Special Condition 2** shall recognize the hazardous condition of this bluff and will consist of an evaluation of the geological conditions on the entire property, to determine whether the property can continue to safely support the approved development. To comply with this condition, the permittee(s) and/or successor(s) in interest shall submit to the Commission a site assessment evaluating the site conditions to determine whether or not alterations to the residence(s) or removal of the residence(s) is necessary to avoid risk to life or property. In the event more than one residence or unit is developed as a result of this approval, and more than one owner is associated with this property as a whole, all owners must submit the required study to the Commission's Executive Director as co-applicants. The study shall be based upon a site specific analysis of site stability, bluff alteration due to natural and manmade processes, and the hazard potential at the site. The required study shall include the following: (1) An analysis of site stability based on the best available science and updated standards, of beach erosion, wave run-up, sea level rise, inundation and flood hazards prepared by a licensed civil engineer with expertise in coastal engineering and a slope stability analysis, prepared by a licensed Certified Engineering Geologist and/or Geotechnical Engineer or Registered Civil Engineer with expertise in soils, in accordance with the procedures

detailed in the Local Coastal Program (LCP) and the City Zoning Code; (2) An analysis of the condition of the existing shoreline and bluff protection and any impacts it may be having on public access and recreation, scenic views, sand supplies, and other coastal resources. Pursuant to the requirements of CDP # 6-05-030, the submittal shall include an evaluation of the means to remove the existing shoreline protection which was permitted to protect the existing structure to be demolished; and (3) An evaluation of the means to remove in whole or in part the subject permitted residence(s) if and when either becomes unsafe for occupancy.

If the required study shows that the principal structure(s) is no longer safely located, the permittee(s) shall submit a permit amendment to undertake measures required to remove the residence(s) or reduce the size of the residence(s) to reduce the hazard potential. The bluff stability analysis required pursuant to this condition shall be submitted concurrent with the CDP amendment required pursuant to CDP # 6-05-030 for the existing, previously-permitted seawall and bluff retention devices. No modification or expansion of the approved residence(s), shoreline protection, or additional bluff or shoreline protective structures shall be constructed, without approval of an amendment to this coastal development permit by the Coastal Commission.

Given that the proposed residences can be sited safely while the existing protective devices are in place at 40 ft. from the bluff edge, **Special Condition 1** requires submittal of final plans for the proposed residential structures which document that the homes are sited no closer than 40 ft. from the top edge of the upper bluff wall, with the exception that the portions of the homes proposed to be cantilevered consistent with the LCP are permitted. In addition, Special Condition #1g requires that all new or existing accessory improvements be at-grade, be capable of being removed if threatened and be located no closer than 5 ft. from the edge of the upper bluff wall. The existing wall, windscreen and patio area approved as part of the upper bluff wall can remain.

Moreover, consistent with Policy 1.6, **Special Conditions 1, 2 and 3** require this development to be designed to be removed in whole or in part should it become threatened by landslide, erosion or other natural processes. To ensure that future owners are aware of the significant geologic hazards on this site and the conditions imposed on this development by this permit, **Special Condition 4** requires the applicants to record a deed restriction imposing the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property. **Special Condition 5** requires the applicant to assume the risk of siting development at the top of the bluff and to release the Commission from liability should the residence(s) become threatened in the future, because the applicant is choosing to site this development in a known hazardous location, so he should bear the risks of developing in such a location. **Special Condition 9** requires an open space bluff face restriction, consistent with LUP Public Safety Policy 1.6(g), which requires permanent conservation of the bluff face with an open space easement to reduce unnatural causes of bluff erosion.

In summary, the applicant is proposing two new homes on the blufftop property with a setback of 40 ft. from the upper bluff wall. In order to be sited safely at this location, the

new homes must rely on the protective devices that exist on the beach and bluff. Again, while the Commission does not typically approve new development when it must rely on existing protection, in this particular case, the protective devices are existing, were approved by both the City and the Commission and were not conditioned such that they could not be used for protection when the blufftop was redeveloped. The City's LCP requires that new blufftop development not rely on **future** protective devices to be safe, but does not prohibit reliance on existing legally-approved devices. Thus, the proposed new homes can be sited at 40 ft. from the upper bluff retaining wall only if the applicant and futures owners understand and waive rights to future shore and bluff protection. Instead, should the existing protective devices ever fail, be destroyed or removed, then the applicant understands that rather than propose new protective devices, the home(s) must be removed once they are subject to threat. It is only with this requirement and the included special conditions that the Commission finds that the proposed development is consistent with the above cited provisions of the certified LCP.

~~Thus, the proposed project is inconsistent with LUP Policy 1.3 and Municipal Code sections 30.34.020 of the certified LCP because reliance on existing approved protective devices for new development is not permitted by the certified LCP. For purposes of these policies, requiring the presence of an existing seawall to assure stability is the same as proposing a future structure to provide protection for the life of the development. The proposed residences will not be safe in the future without a seawall. It is immaterial if the seawall currently exists and is required to protect the proposed residences or if a seawall is proposed in the future. The fact that the proposed residences require protection by a seawall is inconsistent with the above stated LCP policies and Section 30253 of the Coastal Act from which they were derived.~~

~~The applicant has also failed to demonstrate that the proposed homes are consistent with the LCP provision requiring that they be designed and constructed so that they could be removed in the event of endangerment (LUP Public Safety Policy 1.6).~~

~~The Applicant's geologist submitted an updated geologic report dated April 19, 2011, which demonstrates to the Commission's staff geologist's satisfaction that a 1.5 factor of safety is obtained today at a point 63 feet landward of the retaining wall, without relying on stability provided by that retaining wall and lower bluff protection. However, this 63-foot setback location is only safe today, without taking into account the approximately 37 feet of expected erosion over a 75 year life of the proposed residences. As stated above, to account for such erosion, development would need to be sited no less than 100 ft. landward of the bluff edge, which would establish a safe area landward of the Applicant's inland property line and preclude any development on the subject bluff top property. Therefore, the currently safe location 63 feet landward of the retaining wall, which is based only on a current factor of safety at or above 1.5, is still not consistent with the LCP requirement that development be sited safe for its design life, accounting for slope stability and erosion over the lifetime of the development.~~

~~In summary, the proposed project is inconsistent with the certified LCP for the following reasons: 1) the proposed residences are sited less than 40 feet from the bluff edge; 2) the applicant has not demonstrated the proposed residences will be reasonably safe over their~~

~~design life (75—year minimum) without reliance on future shoreline protection; and 3) the proposed residences have not been designed and constructed so they can be removed in the event of endangerment. For these reasons, the Commission finds that the development as proposed is inconsistent with the City’s certified LCP, which justifies denial of the proposed development.~~

F. 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. The proposed project would result in additional impervious surface area on the bluff top property. This increased surface area will direct increased amounts of rainwater runoff to feed into the bluff directly unless directed elsewhere. Additionally, the proposed irrigation plan (dated 10/28/08) incorporates certain irrigation fixtures that will result in the introduction of water to the bluff, which will contribute to decreased bluff stability due to increased weight of groundwater. As proposed, the project does not sufficiently account for the potential impacts caused by increased runoff to the bluff and irrigating the bluff. Therefore, in order to avoid inconsistency with LCP Policies 2.1 and 2.3 (resource management) the Commission is imposing **Special Conditions 1 and 7** to ensure that 1) runoff discharges are directed toward the street to reduce impacts to bluff stability and to reduce contaminant discharge on site and 2) onsite irrigation be non-permanent to reduce impacts to bluff stability.

Additionally, **Special Condition 7** requires the permittee to submit a monitoring report to the Commission every 5 years demonstrating consistency with the condition. Only through this condition can the Commission to ensure runoff is directed toward the street and that irrigation techniques will be more protective of coastal resources. To address some of these concerns during actual construction, **Special Condition 6** requires the applicant to conform to best management practices and construction responsibilities throughout construction at the project site, to ensure all resulting debris is properly removed/disposed, temporary sediment control measures are put in place and on-site vegetation is maintained to the maximum extent possible during construction. Therefore, the Commission finds the proposed project, as conditioned, consistent with Resource Management Policies 2.1 and 2.3 of the Certified LCP.

G. 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:*
 - (1) *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 that “Coastal areas suited for water-oriented recreational activities that cannot readily be 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 in the most landward portion of the property and conditioning the permit to prohibit shoreline protection in the future, 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. Therefore, the proposed development is consistent with the public access and recreation policies of the certified Local Coastal Program and Sections 30210, 30212 and 30220 of the Coastal Act.

H. 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) and the construction of 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. As discussed below, the Commission is approving a building envelope that can accommodate 1-2 new residences. As required by **Special Condition 1**, the proposed new homes must conform to the underlying R11 zoning and will not exceed the height, bulk and scale of the existing surrounding development and

therefore can be found compatible with the surrounding neighborhood. The home(s) will be located on the most landward portion of the lot for site stability purposes, further minimizing the visual impact from development on this individual site. In addition, public views of the shoreline or other coastal resources will be unaffected by the proposed residence.

The Commission finds that the proposed residences do not adversely affect visual resources and are consistent with LUP Policies 6.5 and 6.6 of the City's LCP.

I. 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 would deny the proposed projects because the proposed projects are significantly out of conformance with the LCP, due to inadequate coastal blufftop setbacks and cannot be brought into conformance with special conditions applied to the project. However, given the potential that a denial of new residential development on this site might constitute a taking of private property without just compensation, the Commission is approving some reduced development with conditions that are designed to make the project as consistent with the LCP as is possible without constituting a taking. Thus, the Commission is approving a revised design at this time that will set the proposed development back onto the most landward area of the property. Under the particular subject facts and circumstances, the Commission finds that approval of a the proposed homes with a setback of 40 ft. from the edge of the upper blurr wall 2,145 sq. ft. development area will not 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.

J. TAKINGS

~~As discussed above, the two houses proposed for development are inconsistent with the hazards policies of the certified LCP and therefore the LCP requires the proposed development must be denied. When the Commission denies a project, however, 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 situation, the Commission proposes modifications to the development to minimize its LCP or Coastal Act inconsistencies, while still allowing some reasonable amount of development.²~~

~~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. As discussed further below, the Commission finds that to avoid a taking in compliance with Section 30010, the Commission determines it will allow a reasonable residential development on the subject property.~~

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.”³ Article 1, section 19 of~~

² 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).

³ The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & O. R. Co. v. Chicago* (1897) 166 U.S. 226).

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.

In recent takings cases, the United States Supreme Court (Court) has identified two circumstances in which a regulatory taking might occur. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014. 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.*). 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”]).⁴

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 York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the sufficiency of the applicant’s property interest, 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*]).

⁴ 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).

~~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, and as discussed further below, although the LCP instructs the Commission to deny the proposed development that would be constructed inconsistent with the hazards provisions of the LCP, application of such policies would preclude the applicant from siting any new development on the site. In these circumstances, the applicant might successfully argue that the Commission has made a final and authoritative decision about the use of the subject property. Therefore, the applicant might successfully argue that the Commission’s denial is a taking because a takings claim is “ripe.”~~

~~Determination of Unit of Property Against Which Takings Claim Will be Measured~~

~~As a threshold matter, before a takings 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 can 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* (Cl.Ct. 1991) 22 Cl.Ct. 310, 318].~~

~~In this case, the applicant owns both of the adjacent parcels to be developed with single-family residences. He purchased them at the same time for a single purchase price in 1975. At the time, and currently, there was one single family residence straddling both lots. Although the applicant submitted two separate applications for development of the two new single family residences, he submitted the applications at the same time, and they are contingent on the applicant demolishing the existing residence, so there is a unified development scheme for development of these two parcels. The parcels have been bought and sold as a single unit at least since 1929, and the applicant acknowledges~~

that he believed that he was only buying a single parcel when he purchased the property.⁵ Thus, this application meets all of the criteria for when a court should aggregate parcels when determining the property subject to a takings claim.

Therefore, the evidence establishes that for purposes of assessing the amount of development to be approved on these lots, the Commission should treat 828 Neptune Ave. as a single parcel for the purpose of determining whether a taking occurred.

The Commission Will Allow a Reasonable Residential Development on the Subject Property to Avoid a Taking in Compliance with Section 30010 of the Coastal Act

CATEGORICAL TAKING

The Commission interprets Section 30010, together with the *Lucas* decision, to mean that if Commission denial of the project would deprive an applicant's property of all reasonable economic use, the Commission may be required to allow some development even if a Coastal Act or LCP policy would otherwise prohibit it, unless the proposed project would constitute a nuisance under state law. In other words, the City of Encinitas Certified Local Coastal Plan cannot be read to deny all economically beneficial or productive use of land because LUP Public Safety Policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D) cannot be interpreted to require the Commission to act in an unconstitutional manner. In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property of some economically viable use.

As described above, the subject parcel was designated in the City of Encinitas Implementation Plan for residential use. The parcel is currently being used for residential purposes, as it has been since at least 1929. If the Commission were to deny this permit, there would still be a residence on this property, so denial of the proposed project would not deprive the applicant's property of all reasonable economic use. Thus, under the *Lucas* takings analysis, the Commission's denial of the project would likely not constitute a taking.

TAKING UNDER *PENN-CENTRAL*

The Commission has already determined that it is likely not necessary to approve some new residential use on this property to avoid a categorical taking under *Lucas*, but a court may also 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 sufficiency of the applicant's property interest, the regulation's economic impact, and the regulation's interference with reasonable, investment-backed expectations.

SUFFICIENCY OF INTEREST

⁵ Discussed during in-person meeting in San Diego District Office on October 12, 2010.

In the subject case, the applicant purchased 828 Neptune Ave. for \$129,000 on January 24, 1975. On that same date, a *Grant Deed* was recorded in Book 1975 Page number 75-017112 in the Official Records of the San Diego County Recorder's Office, effectively transferring and vesting fee simple ownership to the applicant. Based upon an examination of a copy of this document the Commission concludes that the applicant has demonstrated that he has a sufficient real property interest in the subject parcel to allow pursuit of the proposed project.

REASONABLE INVESTMENT-BACKED EXPECTATIONS

In this case, the applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a residence; however, it could be argued that a reasonable person would not have had a reasonable expectation to build two homes on this site, when it only had one home on it at the time it was purchased and not even the applicant knew at the time of purchase that the property consisted of multiple lots. In addition, the applicant purchased a home that was approximately 1,527 square feet, and a reasonable person would not have had a reasonable expectation that he could demolish the existing house and construct two new homes of approximately 5,000 square feet each (including basement), which is triple the size of the one existing home on the lot and larger than the average home size in the immediate area at the time the applicant purchased the property.

To determine whether the applicant had an investment-backed expectation to construct two 5,000 square foot homes at 828 Neptune Ave., it is necessary to assess what the applicant invested when he purchased that lot. To determine whether an expectation to develop a property as proposed is reasonable, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the applicant's proposed use, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

The applicant purchased 828 Neptune Ave. for a single purchase price of \$129,000. When the applicant purchased the property in 1975, there was already a single family residence on the site and there was no indication that development of a residence on this site was inconsistent with applicable law. In fact, the property was zoned for residential use and there were numerous existing homes on bluff top parcels all along Neptune Ave. in Encinitas. Consequently, the applicant may have had a reasonable investment-backed expectation that he had purchased a lot that could be developed with a single family residence, and his investment reflected that current and presumably future use.

To assess whether the applicant had a reasonable expectation to build the two proposed 5,000 square foot houses, the Commission calculated the average size of the 50 single family residences that exist today that appear to have been constructed in or before

1975.⁶ The average size of those homes today was approximately 1,900 square feet. A reasonable person therefore may have expected to build an approximately 1,900 square foot home on the bluff top lot purchased by the applicant.

Therefore, the applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be redeveloped with a somewhat larger residence; however he likely did not have a reasonable expectation that he could construct two homes that were twice as large as the average home size at the time he purchased his property, given the average home size on the seaward side of Neptune Ave. when he purchased his property. In addition, a landslide has naturally occurred since the applicant has owned the property, which resulted in the loss of a portion of the land and existing residential structure. This event was predictable at the time the applicant purchased the property, and the uncertainty regarding the stability of the bluff should reasonably have a negative effect on any potential investment-backed expectations for redevelopment of the property. In sum, a reasonable person would not have had a reasonable investment-backed expectation that after purchasing one approximately 1,500 sq. ft. home, he could subsequently develop two 5,000 sq. ft. homes in this area of Encinitas.

ECONOMIC IMPACT

The *Penn Central* analysis also 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 (see *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]).

As noted previously, the subject property is planned and zoned for residential use in the City's LCP. According to the LCP, the residential land-use designation permits a variety of residential development types found within the coastal areas, ranging from single-family detached units to single-family attached units, such as condominiums, townhouses, and senior housing. The minimum lot size is 3,950 net square feet and the maximum density is 11 units per net acre.

⁶ To calculate this figure, Commission staff took the "effective date" of homes on Neptune Ave., as identified by the applicant, and assumed that the current square footage of those homes is the same as it was in 1975. It is likely that this number is at least slightly inflated, however, as it may not take into account any significant remodels or additions to those homes since 1975. Commission staff also verified these figures by researching these properties on the website: www.redfin.com, which typically shows the year constructed and the year remodeled for properties, although these appeared to always be the same date, suggesting that they more likely corresponded to the most recent remodel, rather than the construction date. Commission staff did not independently verify that the dates reported on www.redfin.com were accurate.

~~If the Commission were to deny the proposed application, there would still be an existing residence on this property, so arguably the Commission's action would be insufficient to diminish the property's value to the degree that would constitute a taking. Under most circumstances, the Commission would find that denial of new development, when there is an existing use on the property, would not meet this portion of the *Penn Central* test. The facts presented here are, however, unique, and under these circumstances, a court could find that denial of the project would meet this portion of the *Penn Central* test.~~

~~The applicant's home was constructed in 1929, more than 80 years ago. The Commission has calculated the "economic life" of residential structures to be typically approximately 75-100 years. In addition, an approximately 300 square foot portion of the applicant's home was destroyed when it fell off of the bluff after a significant bluff failure in 1996. As described above, the bluff edge is actually approximately 5-10 feet underneath the home, meaning that portions of the home are technically about 5-10 feet seaward of the bluff edge, so it is only stable due to significant shoreline protection and fill material used to shore up the home. The Encinitas LCP also contains strict limitations on a landowner's ability to expand existing residences on blufftop lots. LUP Section 1.7 (Public Safety) limits additions to only 250 square feet, which is less than the square footage that the applicant lost in the bluff failure. Thus, at best, the applicant could add 250 square feet to a home supported partially on fill which would need perpetual protection from shoreline protective devices to continue to exist at all. Under these circumstances (the age of the home, the location of the home, and the strict limitations on redeveloping the existing home), a court could conclude that even though there would be an existing home if the Commission denied the permit, the denial would still have a substantial enough economic impact on the value of the subject property to meet this portion of the *Penn Central* test.~~

~~To address this potential takings claim and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit therefore allows for the construction of a residential development, although not precisely the residential development proposed by the applicant, to provide a reasonable economic use of the subject property. This determination is based on the Commission's finding in this staff report that residential development is commensurate with the investment-backed expectations for the property, and that no non-residential uses otherwise allowable under the certified LCP would provide an economic use.~~

~~A Taking Cannot Be Avoided Because the Project Could Not Be Prohibited Under Background Principles of State Property Law~~

~~Finally, *Lucas* provides that a regulatory action does not constitute a taking if the restrictions inhere in the title of the affected property; that is, "background principles" of state real property law would have permitted government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036). These background principles include a State's traditional public nuisance doctrine or real property interests that preclude the proposed use, such as restrictive easements. Here, the proposed project would not constitute a public nuisance, so as to preclude a finding that the Commission's denial of the project would constitute a taking.~~

California Civil Code Section 3479 defines a nuisance as follows:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

California Civil Code Section 3480 defines a public nuisance as follows:

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

There is no evidence that construction of the proposed residences set significantly back from the bluff edge on the subject property would create a nuisance under California law. The site is located in a developed residential area where the single family residential development is compatible with surrounding land uses. While the proposed location of the homes would potentially make them more likely to be threatened by bluff failures and instability in the future, there is insufficient evidence at this time to find that the proposed homes would create a public health risk unless they become undermined and fall to the public beach below the bluff. Furthermore, the proposed use is residential, rather than, for example, industrial, which might create noise or odors or otherwise create a public nuisance.

Therefore, the Commission finds the proposed project would not constitute a public nuisance that would preclude a finding that the regulatory action constitutes the taking of private property without just compensation.

CONCLUSION

To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit approval allows for the construction of at least one residence to provide a reasonable economic use of the subject property. In view of the evidence that: (1) denying residential use on the property could potentially sufficiently diminish the economic value of the property to meet the economic value prong of the *Penn Central* test; (2) residential use of a small portion of the property would provide an economic use; and (3) an applicant would have had a reasonable investment backed expectation that a fully mitigated residential use would be allowed on the property, there is a reasonable possibility that a court might determine that the final denial of a residential use, based on the inconsistency of this use with LCP Policies and LCP Zoning would constitute a taking. Therefore, the Commission determines that the City's LCP in this case does not preclude development of a residence on this bluff top lot.

~~Having reached this conclusion, however, the Commission also finds that the Coastal Act only instructs the Commission to construe the City's LCP in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore the hazard protection policies of the LCP in acting on this appeal. Thus, the Commission must still comply with the requirements of the LCP by siting the proposed development, to the maximum extent feasible, to ensure that it will be reasonably safe for its economic life (at least 75 years) without the need for future shoreline protection, designed to be removed in the event the structure becomes threatened and that the development will be set back consistent with the reasonable safe location and no less than 40 feet from the bluff edge. To achieve consistency with the LCP's hazards policies in light of constitutional takings issues, the project must be reduced in scope from that proposed, and relocated as far landward as possible.~~

K. APPROVAL

Maximizing LCP Conformity While Avoiding Takings

~~As explained above, Coastal Act Section 30010 requires that the Commission will not act in such a way as to take an applicant's property without just compensation, but this provision does not authorize the Commission to completely avoid application of the policies and standards of the certified LCP, including LUP Public Safety Policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D). Instead, the Commission is only directed to avoid construing these applicable policies in a way that would take private property for public use. Aside from this instruction, the Commission is still otherwise directed to enforce the requirements of the LCP. Therefore, in this situation, the Commission must still comply with LUP Public Safety Policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D), by requiring the applicant to site development on this property as far landward as possible.~~

~~As discussed above, the proposed development is inconsistent with LCP Public Safety policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D) regarding siting development in a reasonably safe location for the design life of the structure (75-year minimum evaluation period), set back a minimum of 40 feet from the bluff edge and sited such that the development will not require future shoreline protection. As also discussed above, accounting for the 37 feet of erosion over a 75-year design life, any residence(s) would need to be constructed no less than 100 feet landward of the retaining wall to ensure a safe location for its design life without relying on future shoreline protection.~~

~~However, the Commission, in approving development consistent with Coastal Act Section 30010, cannot site new development beyond existing property lines, but it must maximize LCP conformity to the extent possible given site circumstances and constraints. Thus the Commission must site new development near the landward property line while still allowing reasonable home sites. Commission staff analyzed approximate square footage of existing single family residences on the seaward side of Neptune Avenue within Encinitas by using the figures for property square footage listed on the website: www.zillow.com. This analysis of similarly situated residences demonstrates that the~~

~~surrounding residential developments in the area average approximately 2,600 sq. ft. floor area. Accordingly, in order to give the Applicant the minimum amount of development to avoid a taking of private property without just compensation, while maximizing consistency with the LCP, the Commission finds that a development envelope allowing a home that is similar in size to surrounding residential development is reasonable.~~

~~Given the typical bulk and scale of homes in this area of Encinitas, staff has determined the Commission finds that a setback of 4065 feet landward of the artificial retaining wall would allow the applicant to construct a home similar to those in the surrounding area. This conclusion is based on identifying a building envelope that allows the applicant enough room and flexibility, taking into consideration the City's required side yard setbacks, (but not a potential variance from the City to allow a reduction of the front yard setback which would result in an even larger building envelope), to design a home with reasonable articulation and design (rather than just a box) at similar bulk and scale to surrounding development.~~

~~This setback is therefore established to be as landward as possible while still allowing a residence that is consistent with community character and is similar in bulk and scale to those in the surrounding area. This setback would create a development envelope equal to an area of approximately 2,145 sq. ft., due to the fact that the width of the two lots together is 100 feet. However, this approximately 2,145 sq. ft. building envelope does not take into consideration that the applicant could obtain a variance from the City to reduce the 20 ft. front yard setback, which would give the applicant an even larger building envelope. Within this approximately 2,145 square foot development envelope, the applicant could construct development that is consistent with the LCP, with the exception of the geologic setback conditions with which it cannot be consistent. Under existing zoning, the principal structures that could be constructed are one or two reasonably sized residences or a duplex. Therefore, the Commission imposes **Special Condition 1**, which requires the applicant to survey the property to accurately identify, subject to the Executive Director's review and approval, the exact building envelope allowed in this approval. **Special Condition 1** also requires the applicant to submit to the Commission for Executive Director review and approval, final project plans for construction of one or two single family residences, or a duplex, sited at least 65 feet landward from the existing upper bluff retaining wall and demonstrating that the proposed development is: sited entirely within the surveyed building envelope; designed so that it can be easily removed once the approved location is no longer safe; and consistent with zoning requirements regarding height, size and bulk and that it is in keeping with the character of the area. As noted above, **Special Condition 1** allows the applicant to seek a reduction in the City's required front yard setback to achieve an even larger building envelope in which to construct the residential development. Finally, the revised final plans shall include details regarding any existing or proposed accessory improvements.~~

~~The applicant claims that a setback greater than 40 feet from the bluff edge, such as that required by Special Condition 1, would in and of itself constitute a taking of the~~

applicant's property without just compensation. The Commission does not believe that a court would find a larger setback to constitute a taking.

The Applicant provided an analysis involving approximately 230 residences in Encinitas. Based upon his analysis, only 14 of those residences were setback more than 40 feet from the bluff edge and 50 were setback approximately 40 feet from the bluff edge. The study indicates that approximately 60 of the total addresses/lots have residences constructed prior to 1973. For a number of reasons, explained below, the study's analysis is misleading. First, the only relevant setbacks are those required by the Commission or the City of Encinitas after the passage of the Coastal Act and certification of the City's LCP that involved construction of new development on these bluffs. It is only after the properties became subject to Coastal Act and LCP hazards policies that relevant setbacks would have been imposed, and only with construction of new homes would new setbacks have been imposed. Of the 230 addresses identified by the applicant, Commission staff only had at least one record of some form of development on site for approximately 100 of them. Of the 100 addresses, approximately 76 did not involve construction of new single family residences, or demolition of an existing home and replacement with one or more single family residences. The majority of the records involved additions to the home, interior remodels and shoreline protective structures, all of which would not have an impact on the setback of the principal residence. Therefore, the inclusion of such developments is irrelevant and misleading when attempting to identify the City's and Commission's records regarding primary residence setbacks.

Moreover, it is worth noting that the Applicant's study regarding bluff top setbacks for development approximates setbacks based upon recent aerial and oblique images, which do not account for the conditions at the time development was undertaken, which according to the majority of the identified staff records includes homes built in the late 1970's and 1980's. Thus, although the setback appears to be fewer than 40 feet today, it would have been larger when the development was actually constructed, as current aerial photos would not reflect the loss of the seaward portions of these properties due to the highly erodible nature of the bluffs in Encinitas.⁷

Commission staff identified 24 of the 230 addresses that involved construction of a new single family residence (either entirely new or following demolition of an existing residence) since the Coastal Act's inception. Nine (5 new and 4 demo/rebuilds (including CDP#6-81-205/Frick and Lynch — involving reconstruction of a fire-damaged residence, which is subject to the limitations in Coastal Act 30610)) of these were approved by the Commission and 15 of these approved by the City of Encinitas (4 new and 11 demo/rebuilds) and not appealed to the Coastal Commission. The setback was not consistently identified in the records in the Commission's permit tracking system. In cases where reference was made to a setback, it corresponded to City-approved permits and was at least 40 feet.

⁷ Based upon the accepted 0.49 ft/year bluff retreat rate in Encinitas, the bluff edge would be approximately 15 feet closer to a residence constructed in 1980 (30 years ago).

Thus, despite the applicant's arguments to the contrary, the Commission does not believe a court would find that a required setback of 65 feet from the artificial retaining wall would constitute a taking of private property without just compensation.

Given that the LCP requires new development to be sited such that it does not represent a hazard to its owner or occupants, and that future erosion is expected on this site, the Commission imposes **Special Condition 2**, requiring a re-assessment of hazards on this site in 2022. As discussed above, the subject property is protected by full shoreline protection, including a Commission approved seawall at the toe of the bluff (CDP#6-05-030). CDP# 6-05-030 contained a special condition requiring the Applicant to submit an amendment application to the Commission in 2022 to either remove the seawall within its initial design life or to retain it subject to the reevaluation of mitigation for impacts to local sand supply. The potential removal of the permitted lower seawall in 2022 raises concerns regarding the site's overall stability and may implicate any development sited on the bluff top as a result of this permit action. Accordingly, the required reevaluation of the subject development's safety (pursuant to **Special Condition 2**) must coincide with the seawall's evaluation in 2022 as required in CDP#6-05-030. Therefore, the Commission finds an evaluation of the subject development's safety 10 years from this approval, and every 10 years thereafter, is appropriate, given that reassessment should coincide with the seawall reevaluation to ensure all conditions on the site related to stability and hazards are appropriately considered.

The site reassessment required under **Special Condition 2** shall recognize the hazardous condition of this bluff and will consist of an evaluation of the geological conditions on the entire property, to determine whether the property can continue to safely support the approved development. To comply with this condition, the permittee(s) and/or successor(s) in interest shall submit to the Commission a site assessment evaluating the site conditions to determine whether or not alterations to the residence(s) or removal of the residence(s) is necessary to avoid risk to life or property. In the event more than one residence or unit is developed as a result of this approval, and more than one owner is associated with this property as a whole, all owners must submit the required study to the Commission's Executive Director as co-applicants. The study shall be based upon a site specific analysis of site stability, bluff alteration due to natural and manmade processes, and the hazard potential at the site. The required study shall include the following: (1) An analysis of site stability based on the best available science and updated standards, of beach erosion, wave run up, sea level rise, inundation and flood hazards prepared by a licensed civil engineer with expertise in coastal engineering and a slope stability analysis, prepared by a licensed Certified Engineering Geologist and/or Geotechnical Engineer or Registered Civil Engineer with expertise in soils, in accordance with the procedures detailed in the Local Coastal Program (LCP) and the City Zoning Code; (2) An analysis of the condition of the existing shoreline and bluff protection and any impacts it may be having on public access and recreation, scenic views, sand supplies, and other coastal resources. Pursuant to the requirements of CDP # 6-05-030, the submittal shall include an evaluation of the means to remove the existing shoreline protection which was permitted to protect the existing structure to be demolished; and (3) An evaluation of the means to

~~remove in whole or in part the subject permitted residence(s) if and when either becomes unsafe for occupancy.~~

~~If the required study shows that the principal structure(s) is no longer safely located, the permittee(s) shall submit a permit amendment to undertake measures required to remove the residence(s) or reduce the size of the residence(s) to reduce the hazard potential. The bluff stability analysis required pursuant to this condition shall be submitted concurrent with the CDP amendment required pursuant to CDP # 6-05-030 for the existing, previously permitted seawall and bluff retention devices. No modification or expansion of the approved residence(s), shoreline protection, or additional bluff or shoreline protective structures shall be constructed, without approval of an amendment to this coastal development permit by the Coastal Commission~~

~~Moreover, consistent with Policy 1.6, **Special Conditions 1, 2 and 3** require this development to be designed to be removed in whole or in part should it become threatened by landslide, erosion or other natural processes. **Special Condition 3** prohibits the development of any shoreline protective device to protect the proposed new residential development. To ensure that future owners are aware of the significant geologic hazards on this site and the conditions imposed on this development by this permit, **Special Condition 4** requires the applicants to record a deed restriction imposing the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property. **Special Condition 5** requires the Applicant to assume the risk of siting development at the top of the bluff and to release the Commission from liability should the residence(s) become threatened in the future, because the applicant is choosing to site this development in a known hazardous location, so he should bear the risks of developing in such a location. **Special Condition 9** requires an open space bluff face restriction, consistent with LUP Public Safety Policy 1.6(g), which requires permanent conservation of the bluff face with an open space easement to reduce unnatural causes of bluff erosion.~~

L. CONCLUSION

~~For all of the above reasons, the Commission concludes that its approval of the applicant's proposal, with the specified conditions, is sited in the landward portion of the site, in an attempt to maximize LCP consistency while avoiding a "taking," consistent with Coastal Act Section 30010.~~

MK. 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.

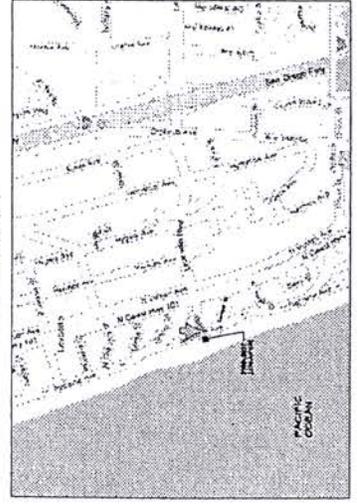
The proposed project, as conditioned, is consistent with the policies of the City's LCP relating to blufftop development, geologic stability, water quality, public access and visual resources. In addition, the project is consistent with applicable Chapter 3 policies of the Coastal Act. There are no feasible 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 consistent with applicable CEQA requirements.

(G:\Reports\Appeals\2009\A-6-ENC-09-40 41 revised findings stfprt.doc)

APPENDIX A - SUBSTANTIVE FILE DOCUMENTS

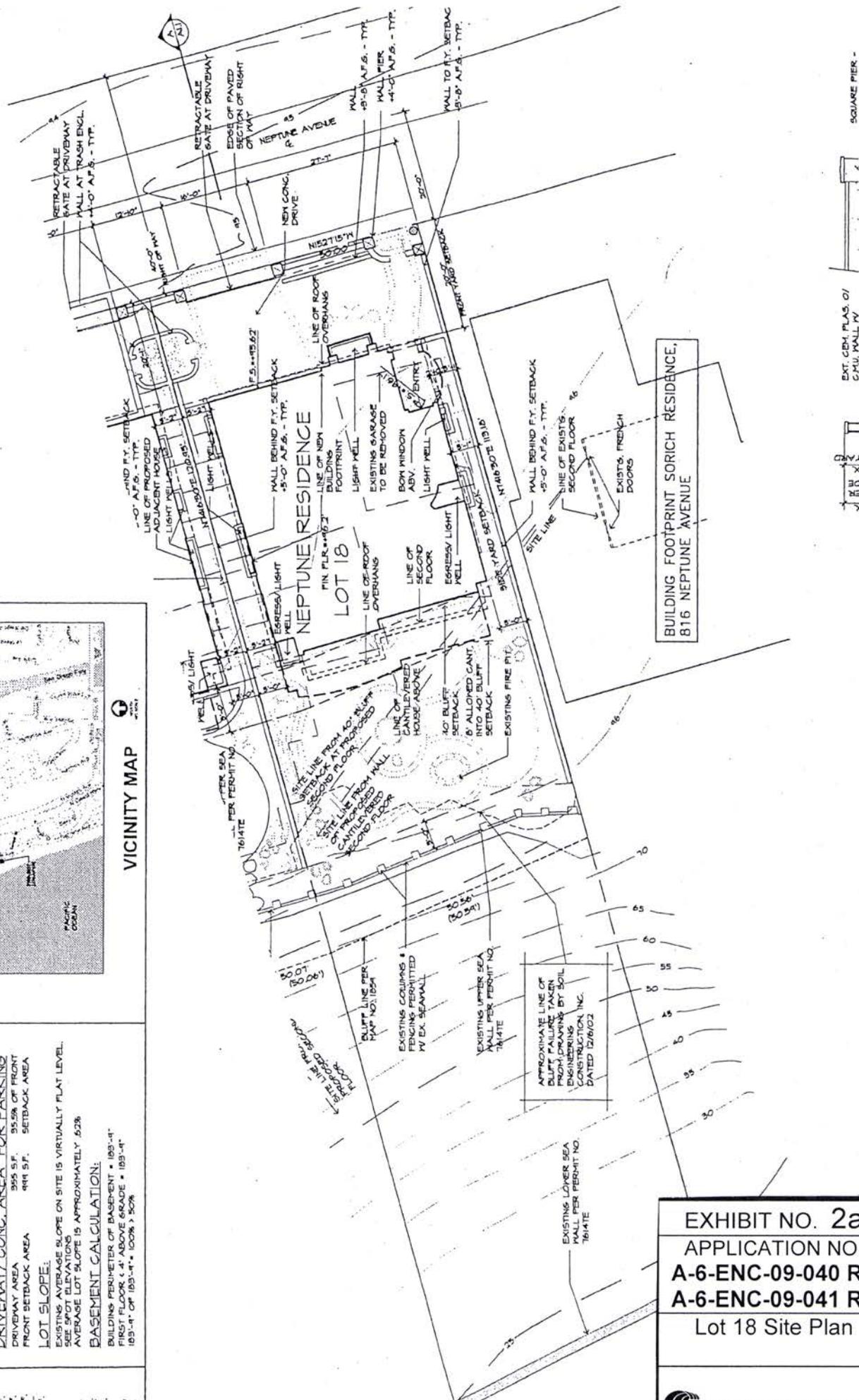
City of Encinitas Certified LCP; Appeal applications by Commissioners Wan and Shallenberger dated 7/7/09; Case Number 08-189 PCIN; City Permit #07-155-CDP; City Permit #08-73-CDP; “Study of Development of Oceanfront along Neptune Avenue and Streets South to Moonlight State Beach, City of Encinitas, California,” prepared by Gary Cohn and Sherman Stacey, dated January 16, 2012; 11 p. letter with attachments dated September 16, 2011, from Sherman Stacey; “Feasibility for Construction Evaluation,” prepared by GeoSoils, Inc., dated April 19, 2011; “Review and Discussion of Documents and Comments in CCC Staff Report,” prepared by GeoSoils, Inc., dated January 7, 2011; Project plans “Neptune Residence” by Cohn+Associates Architecture Planning 12/2/08; “Review Memorandum” by GEOPACIFIC INC. dated April 21, 2008; “Additional Geotechnical Recommendations” by Soil Engineering Construction, Inc. dated May 21, 2008; 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, Bourguault, Mahoney, 6-99-41/Bradley, 6-00-009/Ash, Bourguault, Mahoney, and 6-03-48/Sorich, Gault; Encinitas CDP Nos. 01-196 and 01-197 Bradley; CDP #6-03-48/Sorrich & Gault

LEUCADIA



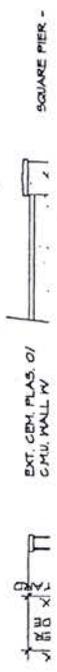
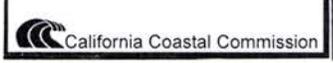
VICINITY MAP

FLOOR AREA PER STORY	
BASEMENT	1,877 SF.
FIRST FLOOR	1,744 SF.
SECOND FLOOR	1,691 SF.
TOTAL	5,310 SF.
BUILDING AREA TOTALS	
TOTAL GARAGE (1ST FLOOR & BASEMENT)	771 SF.
TOTAL LIVING AREA (1ST, FIRST & SECOND)	4,539 SF.
TOTAL	5,310 SF.
DECK AREA:	
SECOND FLOOR DECKS	216 SF.
DRIVEWAY CONC. AREA FOR PARKING	
DRIVEWAY AREA	395 SF. 35.5% OF FRONT
FRONT SETBACK AREA	484 SF. 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 = 183'-1"	
FIRST FLOOR < 4' ABOVE GRADE = 183'-1"	
183'-1" OF 183'-1" x 100% = 20%	



BUILDING FOOTPRINT SORICH RESIDENCE,
816 NEPTUNE AVENUE

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



SQUARE PER -

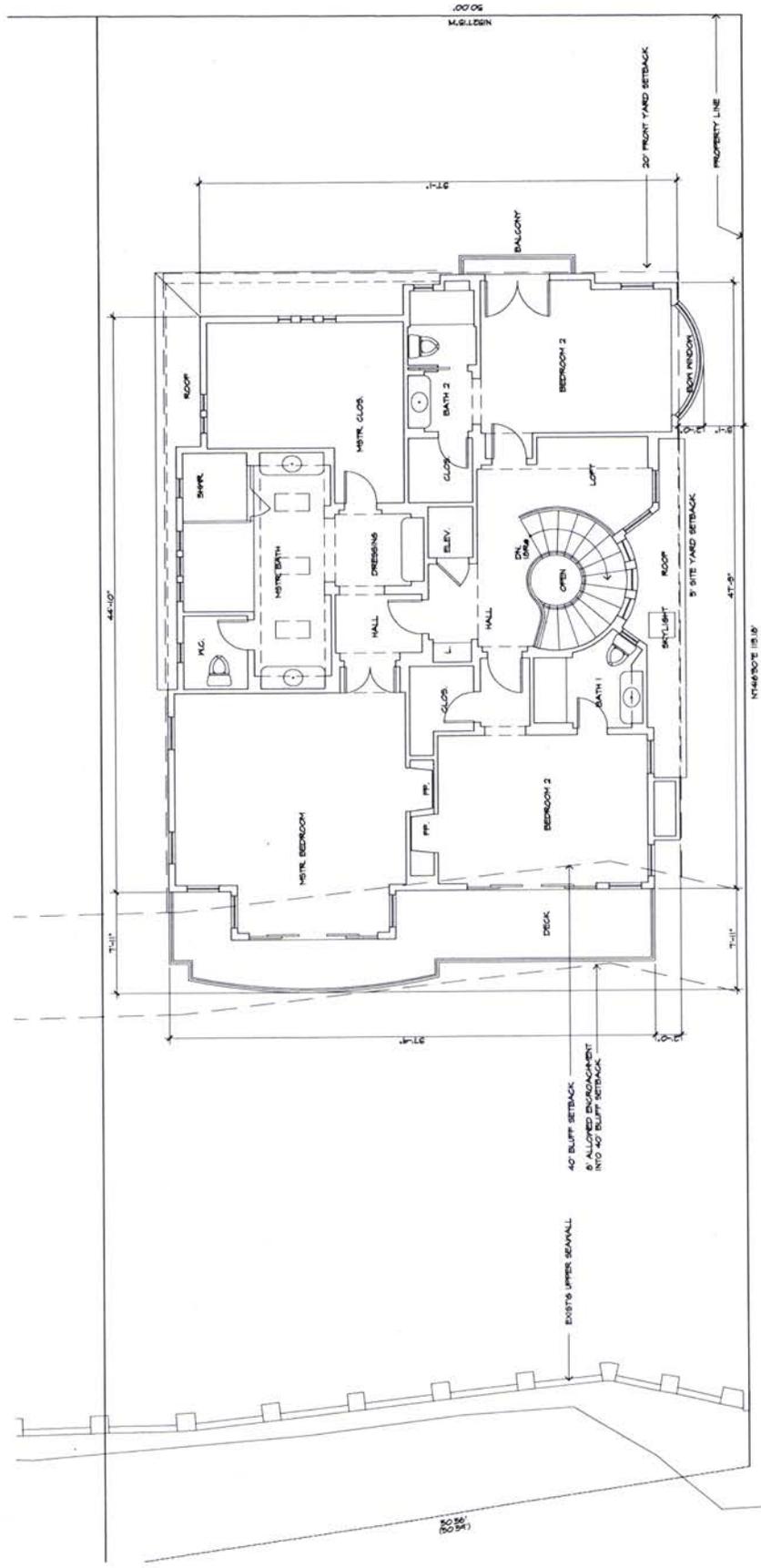
EXT. CON. PLAS. OI
CHU. MALL N

DATE: 02/10/09
 DRAWN BY: J.A.
 CHECKED BY: J.A.
 PROJECT: NEPTUNE RESIDENCE

NEPTUNE AVENUE
 ENCINITAS, CALIFORNIA
NEPTUNE RESIDENCE

COHN + ASSOCIATES
 ARCHITECTURE PLANNING
 10100 SAN MARINO AVENUE SUITE 100
 SAN MARINO, CALIFORNIA 91103
 TEL: 909/391-1888 FAX: 909/391-1889

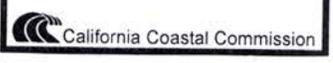
STATE OF CALIFORNIA
 ARCHITECT & PLANNING BOARD
 LICENSE NO. 10100
 DATE: 02/10/09
 SCALE: 1/4" = 1'-0"
 SHEET: 1 OF 1
 PROJECT: NEPTUNE RESIDENCE
A4



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

SECOND FLOOR PLAN

EXHIBIT NO. 2c
 APPLICATION NO.
A-6-ENC-09-040 RF
A-6-ENC-09-041 RF
 Lot 18 Second Floor
 Plan



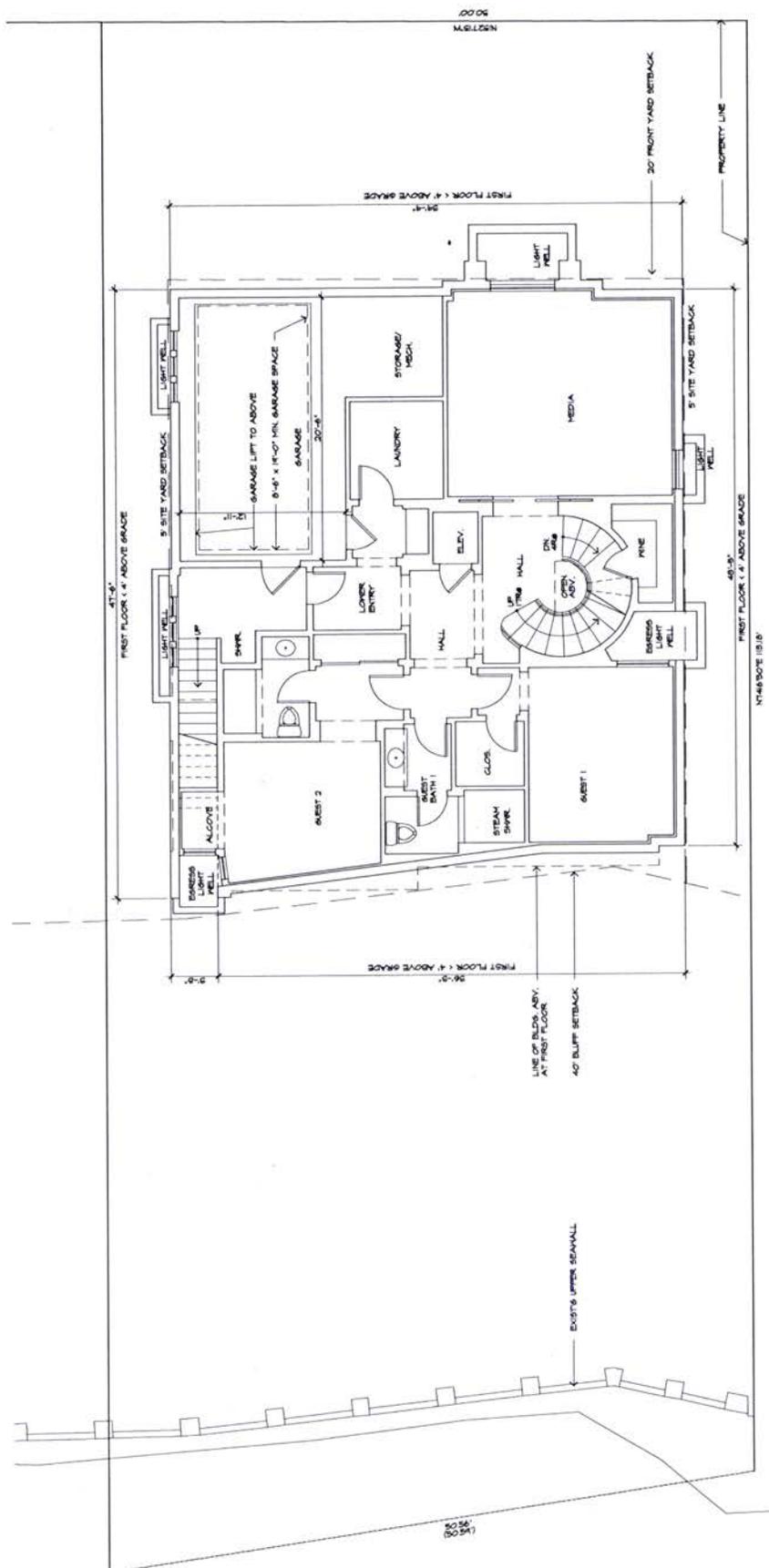
SCALE	1/4" = 1'-0"
DATE	10/20/08
BY	JM
CHECKED	JM
PROJECT	NEPTUNE RESIDENCE
SHEET	A2

NEPTUNE RESIDENCE
NEPTUNE AVENUE
ENCINITAS, CALIFORNIA

COHN + ASSOCIATES
ARCHITECTURE PLANNING
3550 LA JOLLA VILLAGE DRIVE
SAN DIEGO, CA 92108
(619) 551-1000



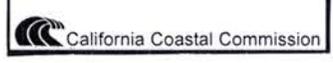
PROJECT	NEPTUNE RESIDENCE
SHEET	A2
DATE	10/20/08
SCALE	1/4" = 1'-0"
BY	JM
CHECKED	JM
PROJECT	NEPTUNE RESIDENCE
SHEET	A2



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

BASEMENT PLAN

EXHIBIT NO. 2d
APPLICATION NO.
A-6-ENC-09-040 RF
A-6-ENC-09-041 RF
Lot 18 Basement
Plan

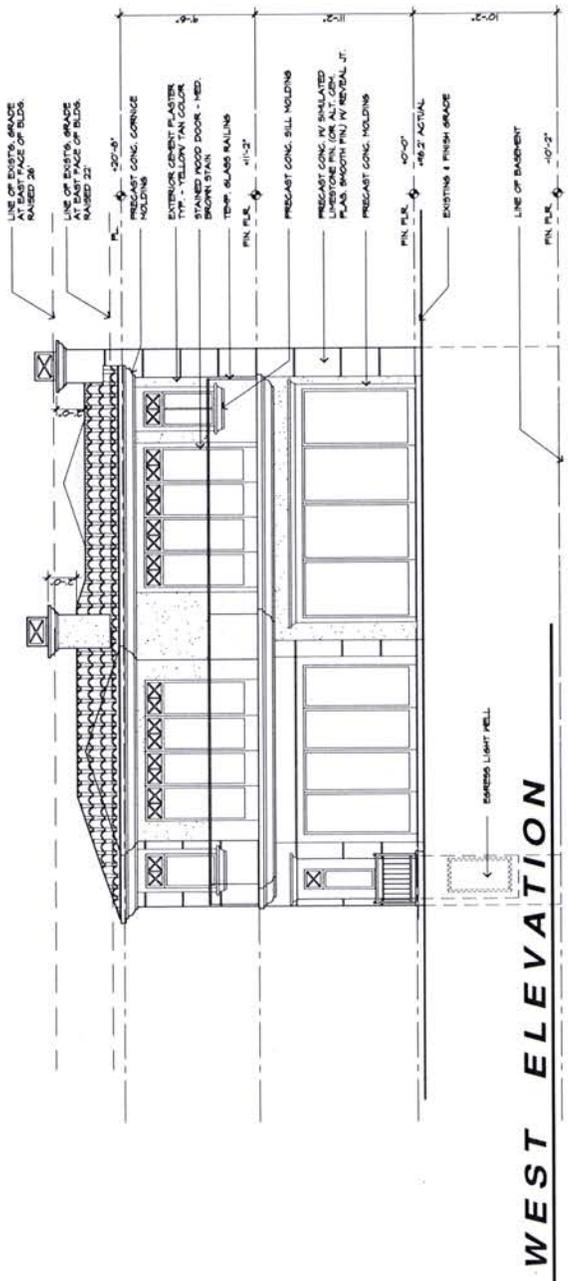


DATE/NUMBER	
BY/CHKD	
APP/REV	
DATE	

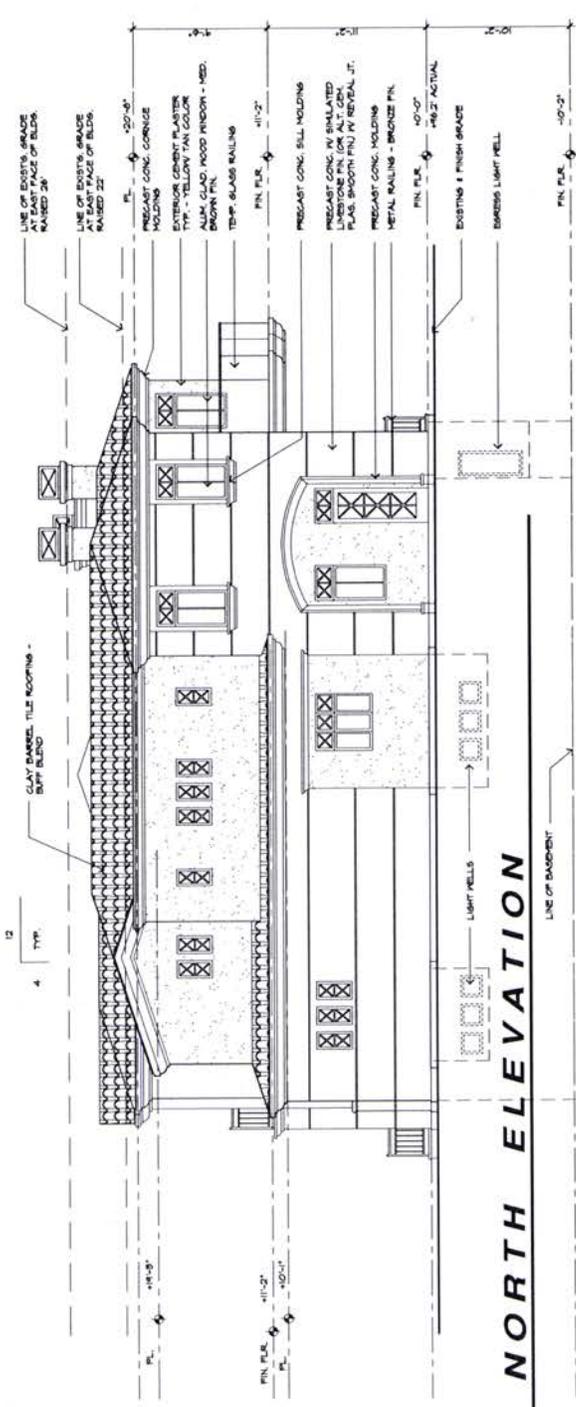
NEPTUNE AVENUE
ENCINITAS, CALIFORNIA
NEPTUNE RESIDENCE

COHN + ASSOCIATES
ARCHITECTURE PLANNING
3650 LAKEVIEW DRIVE
SAN MARCO, CALIFORNIA 92078
(760) 741-1107

PROJECT NO.	18-0000
DATE	8/27/08
SCALE	1/4" = 1'-0"
SHEET	04/071
TITLE	LOT 18 ELEV.
DATE	
SHEET	A7



WEST ELEVATION



NORTH ELEVATION

ELEVATIONS



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

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

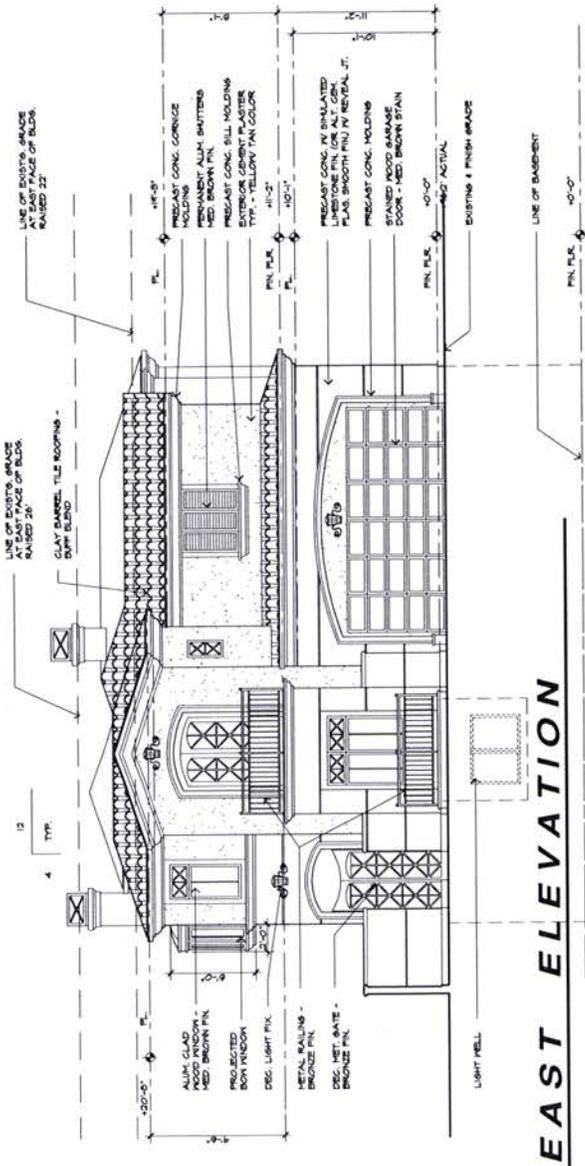


DATE	10/24/09
BY	SPD
CHECKED	
DATE	
BY	
CHECKED	
DATE	
BY	

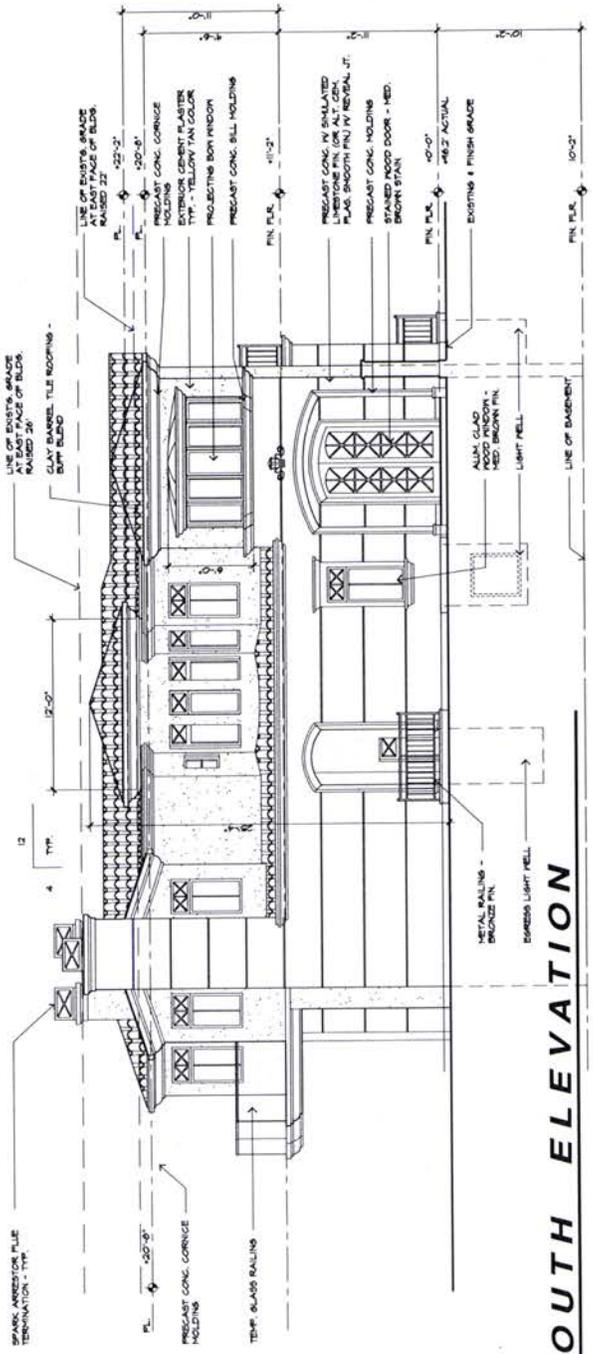
NEPTUNE RESIDENCE
NEPTUNE AVENUE
ENCINITAS, CALIFORNIA

COHN + ASSOCIATES
ARCHITECTURE PLANNING
16300 VIA RANCHO DEL MAR, SUITE 100
SAN DIEGO, CA 92128
TEL: 619.451.1100
WWW.COHNA.COM

SCALE: 1/4" = 1'-0"
DATE: 10/24/09
DRAWN BY: JH
PROJECT: NEPTUNE RESIDENCE
SHEET: A6
OF: 10



EAST ELEVATION

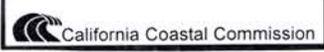


SOUTH ELEVATION

ELEVATIONS



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

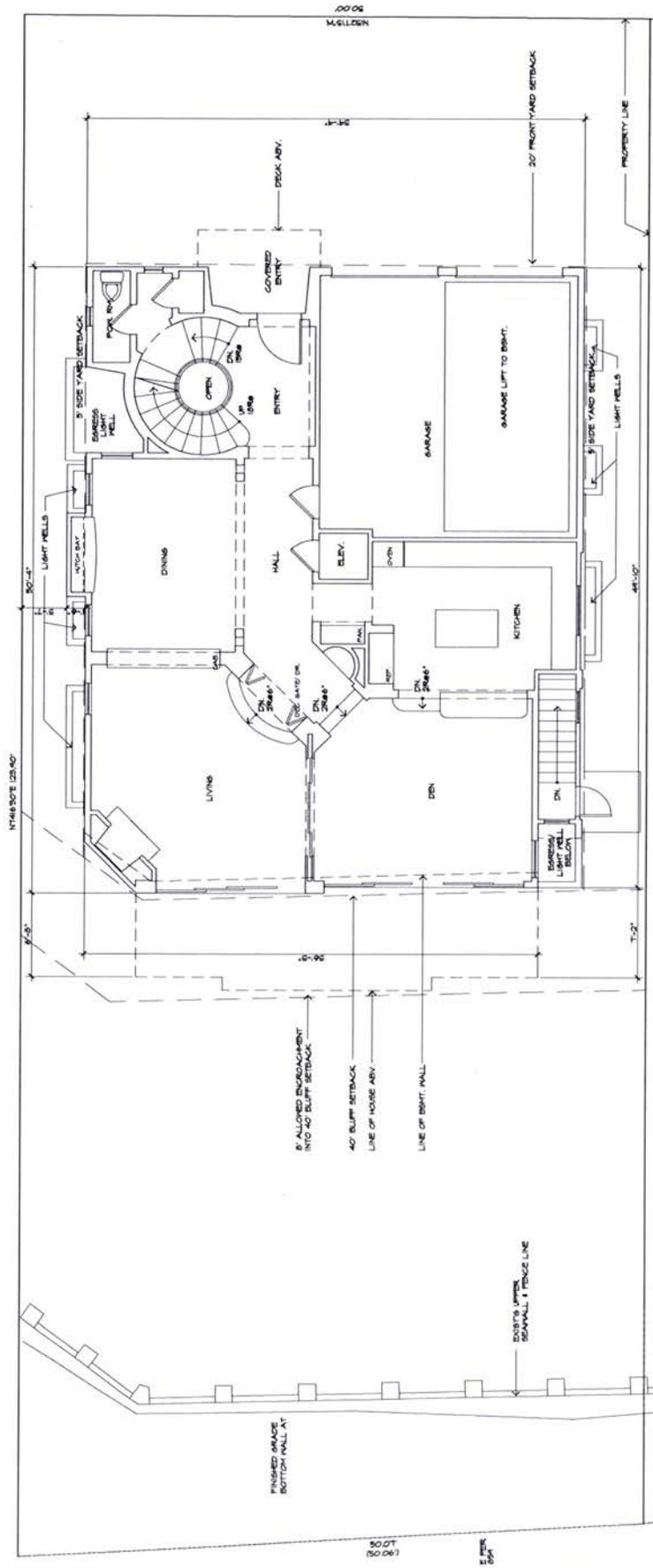


DATE	12/20/08
BY	JK
CHECKED	JK
SCALE	AS SHOWN
PROJECT	OKUN RESIDENCE

OKUN RESIDENCE
HEPUNE AVENUE
ENCINITAS, CALIFORNIA

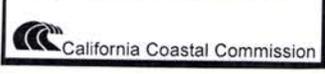
COHN + ASSOCIATES
ARCHITECTURE PLANNING
2000 W. SANDHILL ROAD, SUITE 200
SAN MARINO, CALIFORNIA 91766
TEL: 909.391.8888
FAX: 909.391.8889

PROJECT NO.	08-001
DATE	12/20/08
SCALE	1/4" = 1'-0"
DRAWN	JH
APP.	CMPT
FILE	OKUN PLAN
SHEET	A3
OF	1



FIRST FLOOR PLAN

EXHIBIT NO. 2h
APPLICATION NO.
A-6-ENC-09-040 RF
A-6-ENC-09-041 RF
Lot 19 First Floor
Plan



DATE	10/20/09
BY	JH
CHECKED	JH
SCALE	1/4" = 1'-0"
TITLE	OC PLAN
PROJECT	A2
NO.	1
REV.	
DATE	
BY	
CHECKED	
SCALE	
TITLE	
PROJECT	
NO.	
REV.	

OKUN RESIDENCE
 REFTUNE AVENUE
 ENCINITAS, CALIFORNIA

COHN + ASSOCIATES
 ARCHITECTURE PLANNING
 10000 SANDHILL DRIVE, SUITE 200
 SAN DIEGO, CA 92131
 TEL: 619.594.9888
 FAX: 619.594.9889

REGISTERED ARCHITECT
 STATE OF CALIFORNIA
 NO. 12345
 EXPIRES 12/31/2010

DATE: 10/20/09
 SCALE: 1/4" = 1'-0"
 DRAWN: JH
 IN CHARGE: JH
 TITLE: OC PLAN
 PROJECT: A2

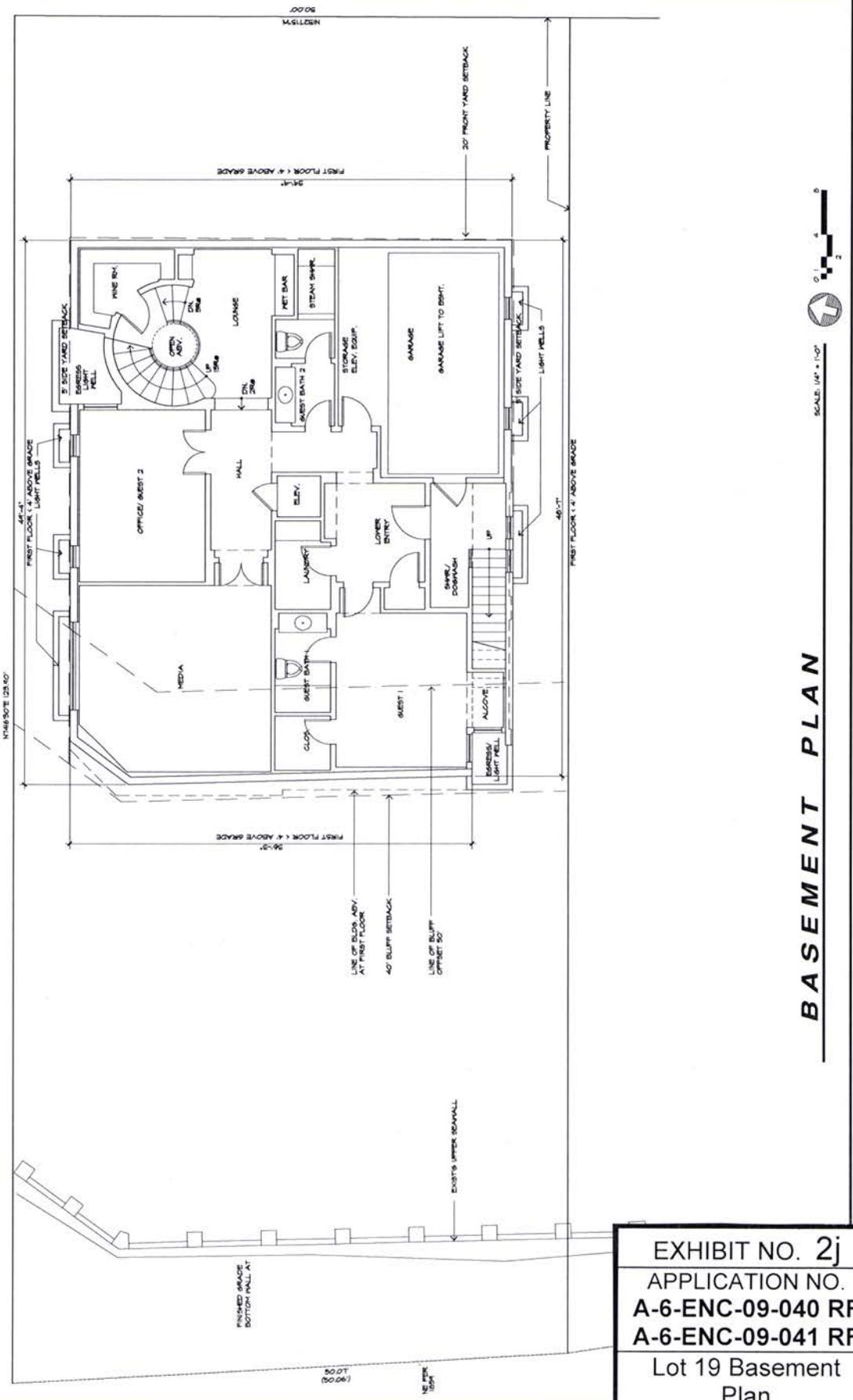


EXHIBIT NO. 2j
 APPLICATION NO.
 A-6-ENC-09-040 RF
 A-6-ENC-09-041 RF
 Lot 19 Basement
 Plan

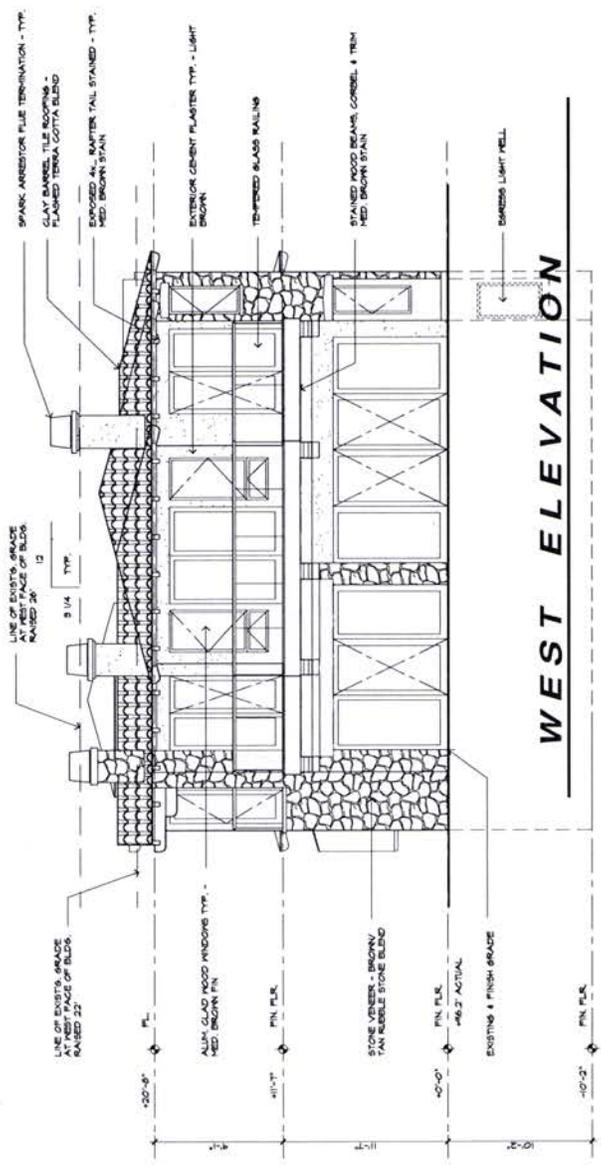


DATE/NUMBER	
3/1/08	
02/07/08	
02/07/08	

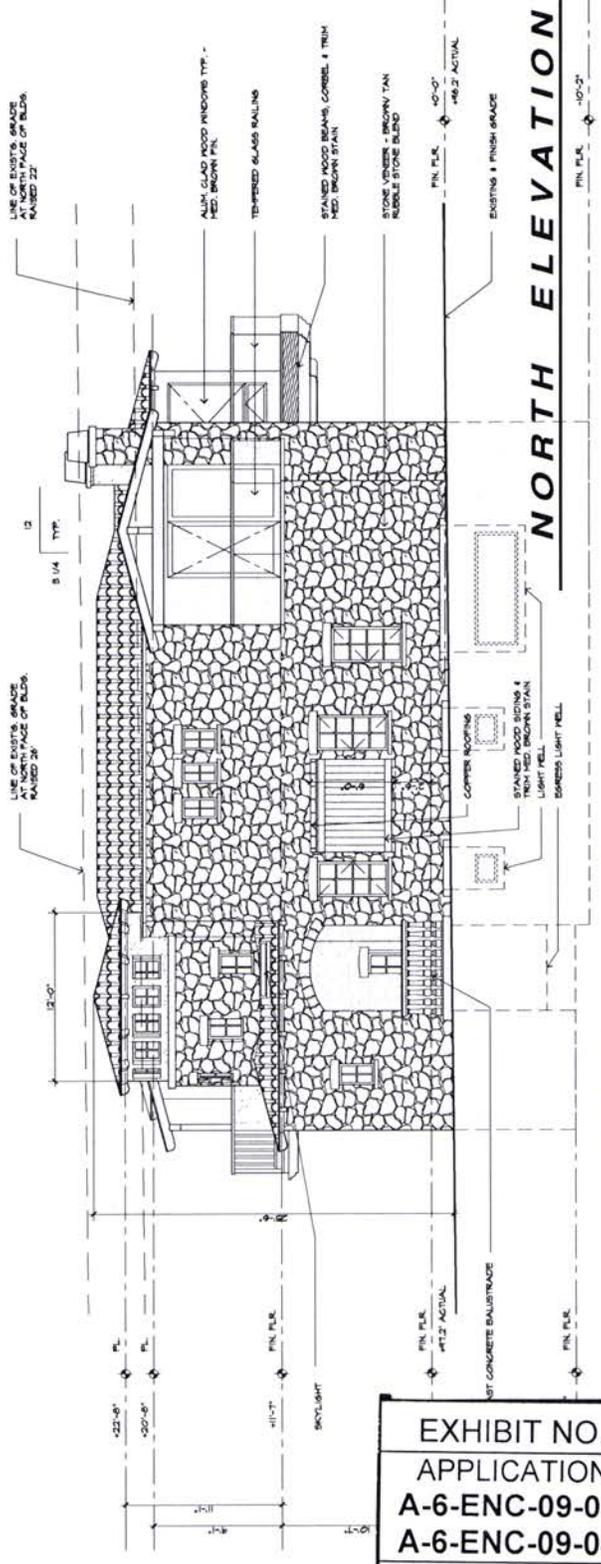
OKUN RESIDENCE
ENCINITAS, CALIFORNIA
NEPTUNE AVENUE

COHN + ASSOCIATES
ARCHITECTURE PLANNING
2200 AVENUE 100, SUITE 100
ENCINITAS, CA 92024
TEL: (760) 941-1100
WWW.COHNA.COM

SEAL: REGISTERED ARCHITECT
NO. 102708
SCALE: 1/4" = 1'-0"
DATE: 02/07/08
DRAWN: JH
IN CHARGE: JH
FILE: 09-041
SHEET: 02 OF 02
A7



WEST ELEVATION



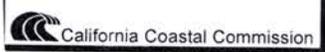
NORTH ELEVATION

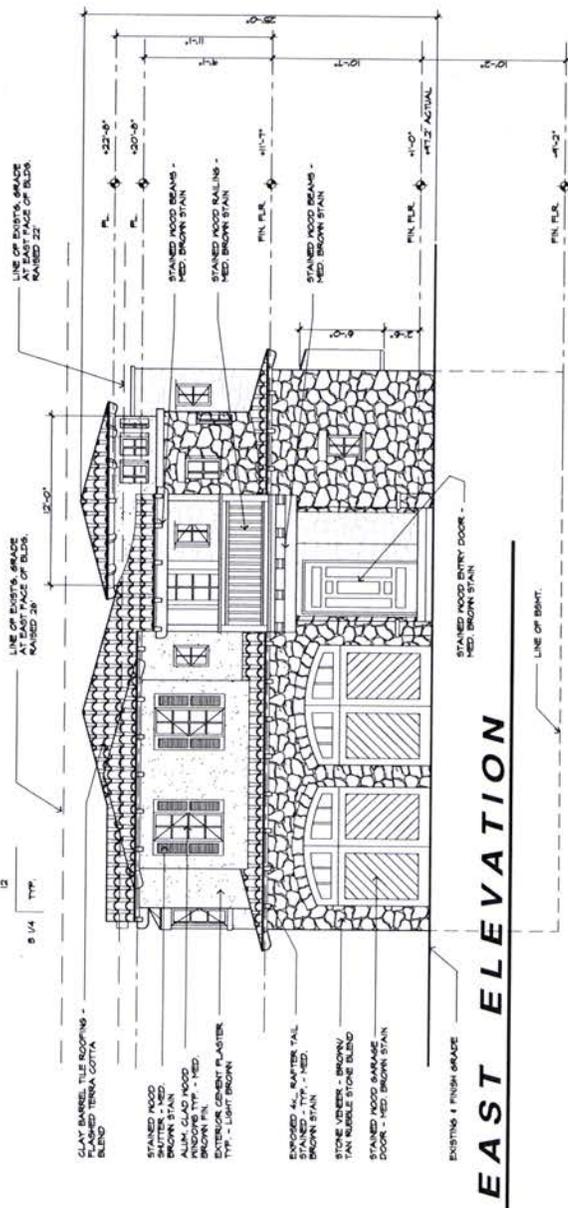
ELEVATIONS

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

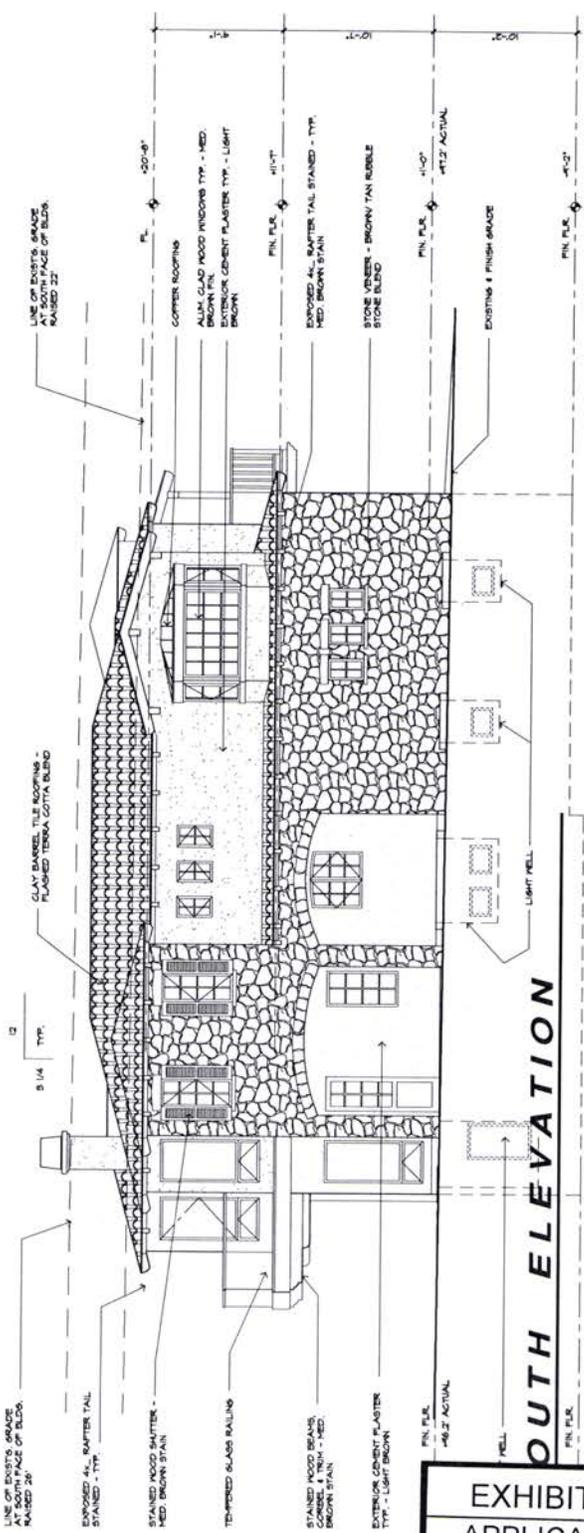


EXHIBIT NO. 2k
APPLICATION NO.
A-6-ENC-09-040 RF
A-6-ENC-09-041 RF
Lot 19 Elevations
(West and North)





EAST ELEVATION



SOUTH ELEVATION

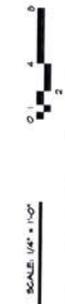


EXHIBIT NO. 21
APPLICATION NO.
A-6-ENC-09-040 RF
A-6-ENC-09-041 RF
Lot 19 Elevations
(East and South)



Copyright © 2002-2010 Kenneth & Gabrielle Adelman. All Rights Reserved.

EXHIBIT NO. 3
APPLICATION NO. A-6-ENC-09-040 RF A-6-ENC-09-041 RF
Aerial View
 California Coastal Commission



EXHIBIT NO. 4
APPLICATION NO.
A-6-ENC-09-040 RF
A-6-ENC-09-041 RF
Beach View

CALIFORNIA COASTAL COMMISSION

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



17 October 2011

SUPPLEMENTARY 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).
- 7) GeoSoils, 2011, "Feasibility for construction evaluation, 828 Neptune Avenue (Lots 18 and 19 of Block 11, Map 1859), Encinitas, California 92024", 10 p. geotechnical report dated 19 April 2011 and signed by J.P. Franklin (CEG 1340) and D.W. Skelly (RCE 47857).

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.

The purpose of this supplemental geotechnical review memo is to report on reference (7), and how the results therein affect the safe building envelope on the subject lots. I provided my own feel is a suitable geologic model and rock/soil strength parameters to the applicant's design team, and asked that they calculate where (if anywhere) on the bluff top a 1.5 factor of safety

EXHIBIT NO. 5
APPLICATION NO.
A-6-ENC-09-040 RF
A-6-ENC-09-041 RF
Staff Memoranda
1 of 4
California Coastal Commission

could be attained if the existing seawall, gravel backfill and slope, and upper bluff retaining wall were not present. As stated in reference (7), the consultants object both to performing an analysis of hypothetical conditions and to the geologic model I provided. As discussed in my review memo of 30 September 2010, the geologic model I provided is based on experience at the subject site during original permitting of the seawall, gravel, and retaining wall, as well as at other sites in northern Encinitas. I feel that this geologic model is the appropriate model for the site.

The consultants' analysis loaded the bluff with the proposed building (which is partially excavated into the bluff) and defined the bluff edge as the edge of the retained fill behind the upper bluff retaining wall. As mentioned in my review memo of 30 September 2010, this is not how I would identify the bluff edge. The Geosoils report demonstrates to my satisfaction, however, that a 1.5 factor of safety is obtained at a point 63 feet from the retaining wall. To assure that a 1.5 factor of safety would be maintained for the life of any proposed development, the bluff retreat expected over that time would have to be added to the 63-foot figure. In the absence of a site-specific study, the Commission has typically used a figure of 0.49 ft/yr (adapted from a 1999 study of Benumof and Griggs) for the future long-term average bluff retreat rate in this part of Encinitas. Assuming a 75-year design life, this translates to 37 feet of bluff retreat. My recommended setback given these data would thus be 100 feet. This value should be measured from the natural bluff edge, which is now buried beneath the retained fill. I note that such a setback does not yield a buildable space on either of the lots.

Reference (7) goes on to demonstrate, however, that placing the houses in the proposed locations but using caisson foundations 55 feet deep, with or without tiebacks, yields a factor of safety exceeding 1.5 (static) and 1.1 (pseudostatic).

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

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Johnsson", with a long horizontal flourish extending to the right.

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

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,

A handwritten signature in black ink, appearing to read "Mark Johnsson", with a long horizontal flourish extending to the right.

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