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Encinitas, CA 92024

W13A

Hearing Date: Feb. 6, 2013

APPLICANT'S RESPONSE TO STAFF REPORT FILED 1/17/13

APPEAL NO. A-6-ENC-11-073

APPLICANT MATTHEW GORDON

## APPLICANT'S RESPONSE TO STAFF REPORT FILED 1/17/13

Staff has failed to show that a Substantial Issue exists for the Commission's determination. Applicant has submitted irrefutable evidence the railroad tie stairs down Applicant's bluff existed prior to 1973 and Staff has offered no credible evidence Applicant's stairs did not exist prior to 1973.

In the first instance, the Commission is referred to APPLICANT'S RESPONSE TO STAFF REPORT RECOMMENDATIONS heretofore appended to Staff's Report and filed before the Commission earlier in January 2013. Applicant's initial response presented a more thorough presentation of Applicant's position relative to the Staff's recommendations than is set forth here.

This Response is by way of answer to Staff's most recent recommendations to the Commission.

### I

Staff makes no challenge to Applicant's evidence by way of witness statements heretofore submitted to the Commission proving that the railroad tie stairway was installed in 1962, eleven years before the effective date of the Coastal Act in 1973.

Applicant submitted to the Coastal Commission the statements of six long time Encinitas residents proving the pre-1973 existence of the railroad tie stairway. They are attached to Applicant initial Response as Exhibit A, Exhibit A-A, Exhibit A-2, and Exhibit B to Applicant's Response to the Staff Report's Recommendations. I summarize those Exhibit statements here:

Exhibit A. Jack Gazdik letter. He relates that his father built Applicant's home in 1954 and in 1962 his father "installed" the stairs down to the beach.

Exhibit A-A. Rodney McCoubrey letter. Rodney is a long time surfer at Beacons beach since the 1960s and he states that the Applicant's stairway has "been here as long as I have surfed here." He states further that "a few times" he used the stairway to reach Neptune Avenue.

Exhibit A-2.

Hildegard Stubbs has resided at 919 Neptune Ave., across the street from the Gordon's, since 1970, and that Applicant's stairs existed since 1970. She used to sit on those stairs from time to time to watch the waves.

Margaret and Susan Edwards have resided at 1473 Neptune Ave. since 1953. They state: "We have used the beach stairs both at Beacon's Beach and also the railroad tie stairs going down the cliff from your [Matthew Gordon's] house since the 60s."

Exhibit B. Steve Kwik, geologist, states he has surfed at Beacons beach since 1969. He states: The railroad tie stairway in question has been in place since at least 1969 when I began frequenting the area."

The Staff does not contradict or in any way contest any of the foregoing witness statements. They are uncontroverted. There is no issue respecting these witnesses' veracity or the truth of their statements.

II

Nor does Staff challenge the Encinitas Planning Commission's findings.

"...The bluff face contains a pre-1972 on-grade access path consisting of railroad ties extending from the upper portion of the

bluff face underneath an existing wooden deck leading down to the beach below...”

Instead, Staff simply states there is no evidence the railroad tie stairs were in existence pre-1973 without explaining why the foregoing witness statements or the Planning Commission’s conclusion is not competent or for that matter conclusive evidence of the fact of the existence of the stairway pre-1973. Staff’s argument was heard and rejected by the Encinitas Planning Commission. (Pg.10 Staff Report.)

There is some suggestion in Staff’s papers that there may have been a path to the beach down Applicant’s bluff prior to 1973 but that sometime after 1973 the path was improved with railroad ties and, therefore, the stairs are not pre-coastal. This is simply a fabrication. It has been pointed out by the City of Encinitas’ staff geologist and the consulting geologist on a site visit that it would be impossible to walk a path without stairs straight down an 85 foot bluff. Staff’s argument is simply a fabrication because six witnesses identified above state that the stairs were built in 1962 and existed pre-1973. Furthermore, compare the gradual switchback path from the bluff top down to Beacon’s beach immediately to the north with the straight down stairs on Applicant’s bluff. Beacon’s beach bluff is 450 feet wide and can accommodate a switchback while Applicant’s lot is only 50 feet wide without the width necessary for a switchback. The stairs are straight down.

Further, Staff mentions in its Report that Applicant installed retaining walls to support the stairway. There are three small retaining walls not connected to the stairway nor otherwise related to the stairway in any manner. They help to mitigate the massive runoff of water over the bluff edge during heavy rains running off Neptune Avenue. They help to hold the soil in place under Applicant’s house and the neighboring house to the south. Soil that

otherwise would be carried away because of the steep angle of the bluff face and the nature of the unconsolidated, sandy soil. Removal of these assemblies would jeopardize our homes and perhaps necessitate the construction of a seawall retaining system not only to protect our homes but the parking lot above Beacon's beach as well.

### III

Staff does not contradict Applicant's evidence the railroad tie stairs existed pre-1973. However, in an attempt to show there were no pre-1973 stairs, Staff's offers its exhibits 4, 5, 6, and 7 that Staff describes as "historic aerial photographs" of Appellant's bluff. They are not historical photographs. The four exhibits consist of computer manipulated images that are not photographs at all, nor are they historic. Staff failed to disclose that those four exhibits are computer derived images taken from high altitude photos of the Encinitas coastal region. Photographs that were never focused on Applicant's bluff nor intended to depict bluff detail. They were taken from altitude with a camera pointed inland in another direction. See Applicant's exhibits D, E, F, and G. In short, Staff's computer manipulated images Exhibits 4, 5, 6, and 7, are not original photos taken by a camera aimed at Applicant's bluff. Those images were taken from a regional coastal photograph high altitude camera photographing the Encinitas coastal region. They could not be expected to depict Applicant's bluff detail. Staff never authenticated these images simply because it could not. Consider, further, that the California Coastal Records web site that originated these regional aerial photographs states that those regional photos from prior to 2002 are from deteriorated 35mm slides found and "partially restored." Further, the web site states the regional photos themselves are not original photos and that they lack resolution. Even with California Coastal Records condemnation of the quality and reliability of its own photos on its web site, the Staff is not

forthcoming by disclosing the true provenance of its exhibits. Staff, however, now admits that the photos it offers are not "historical." In its last Report, Staff now refers to these computer manipulated images taken from deteriorated regional coastal photographs as "oblique aerial photographs." If Staff were being entirely forthcoming it would admit its exhibits are not photographs of Appellant's bluff but rather computer derived images from regional photographs taken at altitude with a camera pointed over Encinitas, miles away, not at Applicant's bluff. Nor does Staff disclose the images are taken from regional photos that California Coastal Records itself describes as deteriorated and only partially restored. In that those regional photos themselves are admittedly deteriorated, the computer manipulated images derived from those photos are derivative and improperly offered as evidence even beyond the fact they were taken at altitude from a camera pointed in some other direction away from Applicant's bluff.

Should the Commission desire to compare true photographs of Appellant's bluff with Staff's images Exhibits 4, 5, 6, and 7, the Commission is referred to Staff's Exhibits 8 and 10 where the camera is aimed at Applicant's bluff depicting with clarity bluff detail including the stairs. The Exhibits 8 and 10 photographs illustrate why Staff's Exhibits 4, 5, 6 and 7 considering their provenance and lack of resolution must be disregarded as evidence of anything.

Staff's Exhibits 4, 5, 6, and 7 considering their provenance and the history of the regional photos from which they were taken have no evidentiary value. These images would be inadmissible for any purpose in any court. At best, those manipulated images taken from deteriorated photos were never intended to photograph bluff detail. They lack any evidentiary weight and do not overcome Applicant's first hand evidence the stairs were built in 1962, fifty one years ago, and existed pre-1973 and the Planning Commission's finding the stairs were pre-1973.

#### IV

Lastly, Staff argues at length the stairs are incompatible with local policy. If the Commission concludes that the railroad tie stairs were pre-1973, they were “grandfathered” and that is the end of the issue. However, the Commission should know that the Planning Commission considered local policy and environmental factors. After taking evidence at a public hearing, the Encinitas Planning Commission concluded the railroad tie stairs were compatible and consistent with surrounding uses and local policies. See Applicant’s Exhibit I to Applicant’s Response to Staff Report Recommendations:

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

The Planning Commission having heard and weighed the evidence submitted to it and being conversant with local policy and environmental concerns and there being no credible contrary evidence, there is no substantial issue and the Planning Commission deserves to be affirmed and the appeal dismissed.

Respectfully submitted:

*Signature on File*

Matthew Gordon, Applicant

February 1<sup>st</sup> 2013

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FEB 04 2013

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

Dear Honorable Commissioners,

I am the applicant Matthew Gordon at 878 Neptune Avenue Encinitas 92024.

This letter is in reference to Permit Number A-6 ENC-11-073 Appeal of local CDP granted to 878 Neptune Ave to be heard on February 6<sup>th</sup> in the City of Redondo Beach on my home.

The Staff report dated 1-17-2013 – refer to summary - Pg 2-3 concludes as its basis for the existence of a substantial issue that “There is no evidence of the stairway” based solely on “A review of “oblique aerial photographs” dated 1972, 1979 & 1987..”

The “oblique aerial photographs” are not photographs! They are computer manipulated images. They are scanned from deteriorated 35mm slides found and partially restored. They are taken approximately 2 miles from shoreline focused and aimed for a panoramic view east inland. The camera was not aimed at applicants bluff. To quote the California Coastal Records Web Site “Little is known about the original photography, e.g., the type of film used, and the slides are in deteriorating condition due to the fading of the color film dyes.”

<http://www.californiacoastline.org>

Contrary to staff argument such computer manipulated images do not show the non-existence of the pre-existing stairway. These images taken from deteriorated regional photographs would not in any event show bluff stairs. The California Coastal Conservancy says on its web site the pre 2002 images should be taken as a general representation of the times “viewed in the context” and, therefore, these images should not be used for the purpose staff is using them. The fact that the staff no longer characterizes these as “historical aerial photographs”, arguably, the staff admits these images do not constitute evidence of the non-existence of the stairway. You must ignore the conclusion of staff based upon their own tacit admission these images are not evidence of the non existence of the stairway. Staffs images, do not have the resolution or detail to show the non existence of the stairway. Therefore Commissioners must disregard staffs Exhibits 4, 5, 6 & 7.

In absence of evidence of the non existence of the stairs before 1973, the Encinitas Planning Commission considered the applicants evidence and found the stairs were

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pre coastal. Please see “**APPLICANTS RESPONSE TO STAFF REPORT RECOMMENDATIONS**” **January 15<sup>th</sup> 2013, 19 Exhibits A-0 pages 16-66.**

In further evidence of the failure of the staff images to depict bluff detail, see the stairs on the Beacons Bluff as depicted in the 1987 URS Exhibit K-A photo. Yet no stairs exist on the Coastal Conservancy 1987 image. (See staff exhibit no. 6)

(Eric Stevens at the Coastal Commission said he has distributed color copies to the Commissioners that he asked me to provide. These photographs are important because they are of good quality and not copies of copies so you can clearly see the detailed images.)

Staffs photos Exhibits 8 & 10 from the California Coastal records from 2002 forward are focused on the bluffs and are detailed photos that do show the bluff stairs at 878 Neptune Ave.

Under these circumstances and existing record as determined by the Encinitas Planning Commission California Coastal Commissioners should defer to and give great weight to the local governing authority that approved the Coastal Development Permit and the evidence received supporting the determination the private stairway on the subjects site pre-existed the 1973 California Coastal Act.

The City of Encinitas, the Encinitas Planning Commission, hired consultants and private citizens all agree the stairs are pre 1973 and in conformance with all local policies and consistent with the local environment. **(Please refer to Exhibit I in the “APPLICANTS RESPONSE TO STAFF REPORT RECOMMENDATIONS”)**

In the event the Commissioners determine a substantial issue exists applicant requests that the date of the De Novo hearing be set sometime in the future to allow for the submission of additional testimony and evidence to support applicant. Applicant needs time to understand the staffs De Novo request as stated in pages 19-20 & 21.

Thank you for your consideration,

*Signature on File*

Matthew Gordon  
878 Neptune Avenue  
Encinitas, CA 92024

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W132

Re: Permit Number A-6 ENC- 11-073, Appeal of the local CDP granted to 878 Neptune Ave.

My name is John Wigmore. I reside in Encinitas, CA 92024 on the bluff front on Neptune Avenue, south of Applicant Matthew Gordon..

Commission Officers Wendy Mitchell and Brian Brennan state Gordon's railroad tie stairway is a non-conforming use and inconsistent with local policy notwithstanding the Encinitas Planning Commission, Encinitas City Staff and local citizens testifying before the Planning Commission concur the stairs are consistent with local policy and the surrounding uses and policies. There is no local opposition to the stairs.

Further there is no credible evidence contravening at least six long-time residents in the area that Gordon's stairs were built in 1962 and have been in existence ever since, over fifty one years, long preceding the California Coastal Act effective in 1973. Appellants only evidence is blurred computer manipulated images from aerial photos of the Encinitas coastal region failing to reveal any bluff detail.

The surrounding community is a family neighborhood with generations of the same families. We know one another and we know what is consistent with the environment on the bluffs in our neighborhood. For fifty one years the 878 Neptune Beach access stairs have been a part of that.

Years ago, I am told, when Beacons Beach access bluff collapsed, the stairs in front of 878 Neptune were the only nearby access to the Beacons beach. Local residents remember their importance to access Beacons beach. We are told the Beacons bluff is unstable and will collapse again. Signs posted on the Beacons bluff say "Use at your own risk." The commissioners are on notice. For life safety reasons, it would be a mistake to remove the 878 Neptune stairs. They are an emergency alternative.

Many houses north of Beacons have obtrusive wooden beach stairs. They are pre-Coastal. One look at the 878 Neptune stairway and one concludes it is less obtrusive and more compatible than every other existing beach stairway in the area. If the two appealing commissioners had ever visited the site, they would conclude the bluff stairs are consistent and perfectly fit the local environment. One could argue, the stairs are so unobtrusive only the surfers see them. They often sit on the stairs to prepare their boards.

Further, during the heavy winter rains, storm waters flow off Neptune Avenue onto the stairs. They carry the storm waters down the bluff face thereby preventing serious bluff erosion. If for no other reason, the stairs continued existence is essential to the preservation of the bluff.

Why do the appealing commissioners seek to interfere in our local community and undo what has been beneficial to the community and to the bluff ecology for decades? Why do they wish to undo our local community legal process and oppose its residents? What purpose is served?

The appeal appears to be an overzealous, bureaucratic effort without purpose in disrespect of local City government process. Nor does the appeal evidence concern for the local residents and established uses and custom particularly after the City of Encinitas has considered the issues and decided the matter.

In light of the fact there is substantial evidence the stairs are pre-Coastal and no credible evidence proving the stairs are not pre-Coastal and that the local Government has properly considered the facts and decided the issues, the appeal should be dismissed for lack of a substantial issue.

Respectfully,

*J* Signature on File W132

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CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

LETTER OF SUPPORT

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**CALIFORNIA COASTAL COMMISSION**

SAN DIEGO AREA  
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SAN DIEGO, CA 92108-4421  
(619) 767-2370



# W13a

Filed: 9/26/11  
49th Day: Waived  
Staff: EStevens-SD  
Staff Report: 1/17/13  
Hearing Date: 2/6-8/13

## **STAFF REPORT: RECOMMENDATION ON APPEAL** **SUBSTANTIAL ISSUE & DE NOVO**

**Local Government:** City of Encinitas

**Decision:** Approved with Conditions

**Appeal Number:** A-6-ENC-11-073

**Applicant:** Matthew Gordon

**Location:** On the bluff face below 876 and 878 Neptune Avenue, Encinitas (San Diego County) (258-311-07)

**Project Description:** Removal of portions of an unpermitted private stairway leading from a blufftop single family residence to the beach, retention of portions of the unpermitted private stairway, retention of unpermitted retaining walls, authorization for replacement of unpermitted railroad ties on the bluff face, and construction of a retractable staircase on the upper bluff.

**Appellants:** Commissioner Brian Brennan and Commissioner Wendy Mitchell

**Staff Recommendation:** Substantial Issue and Partial Approval with Conditions and Partial Denial on De Novo

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## **STAFF NOTES**

This appeal was originally scheduled for the November 2012 Commission meeting. However, in order to respond to the staff recommendation, the applicant requested to postpone the hearing. The applicant has subsequently submitted a written response to the previous staff report, which is included in its entirety following Staff Report Exhibit 17. The applicant's primary contention is that the resolution of the photographs of the bluff face referenced in this report is too low to determine if a private railroad tie accessway existed prior to February 1, 1973, the effective date of the Coastal Zone Conservation Act (Prop 20).

## **SUMMARY OF STAFF RECOMMENDATION**

Staff recommends that the Commission, after public hearing, determine that **substantial issue** exists with respect to the grounds on which the appeal has been filed. The locally approved project includes the removal, retention, and replacement of portions of a private stairway on a coastal bluff installed after implementation of the Coastal Act, that to date does not have any coastal development permit history. Therefore, the entire private stairway is an unpermitted structure and must be reviewed as a proposal for new development. Based on a review of oblique aerial photographs of the bluff face at the subject site, dated 1972, 1979, or 1987, there is no evidence of the stairway. The earliest recorded evidence of any type of pathway from the bluff top home to the beach is 1989. However, it is unclear if that pathway followed the alignment of the current private stairway or if railroad ties had been installed or if it was merely a dirt trail without any structural components. At some point between 1989 and 2002 a small raised staircase was installed to connect the subject bluff top home's lower patio to the upper bluff and in 2002, a railroad tie pathway is visible. Then in 2004, the applicant constructed major improvements to the railroad tie pathway. The unpermitted improvements included construction of a larger raised stairway connecting the applicant's patio to the top of the bluff, three upper bluff retaining walls to support the new raised stairway, and numerous smaller retaining walls along the pathway, treads, risers, and stringers within the same alignment as the existing railroad ties along the majority of the pathway, railings and a privacy gate.

The City of Encinitas approved Coastal Development Permit #10-069 for removal of portions of the unpermitted private stairway and retention and replacement of portions of the stairway. The applicant and the City of Encinitas assert that a railroad tie stairway was constructed on the subject bluff face prior to the implementation of the Coastal Act. However, due to the fact that the applicant has not submitted substantial evidence to support his claim that a stairway existed in this location prior to February 1, 1973 (effective date of the Coastal Zone Conservation Act), it must be reviewed as a proposal to construct a new private stairway on the coastal bluff. In other words, the Commission reviews the proposed project and site conditions as though none of the subject development has been placed on the bluff face. The City of Encinitas certified Local Coastal Program prohibits construction of new private stairways on coastal bluffs and requires that even permitted private stairways be phased out over time. In addition, the City approved the construction of a retractable raised stairway to connect the lower patio of the bluff top home to the upper bluff, which is inconsistent with Local Coastal Program regulations that require all structures to be located a minimum of five feet landward of the bluff edge. Approval of a new private stairway on the bluff is also inconsistent with Local Coastal Program policies that relate

to protection of scenic qualities of the bluffs and require that new development be visually compatible with the character of the surrounding development. Finally, approval of a new private stairway in this location is inconsistent with Local Coastal Program policies requiring retention of bluffs in their natural states in order to minimize geologic hazards.

Staff recommends that, on de novo, the Commission take one vote adopting a two-part resolution, which would approve portions of the development and deny other portions of the development.

Staff recommends the Commission **approve** the applicant's request for removal of some of the unpermitted improvements from the bluff face, which include above-grade wooden stairs, treads, risers, stringers, handrails, and landings in sections 1-8 and removal of portions of the wooden retaining walls that are not retaining soil and all posts and handrails down to grade and a wooden gate in sections 9-17 (Exhibit 3). Special Condition 1 has been included to require that the applicant submit final plans that consist solely of removal of portions of the unpermitted stairway and do not include any additions to or retention of the unpermitted private stairway. Special Condition 2 requires that the applicant record a deed restriction to ensure that the Special Conditions of this permit run with the subject property. Special Conditions 3 and 4 have been included to ensure that the unpermitted development proposed to be removed is done so in a timely manner. As conditioned, removal of portions of the unpermitted private stairway can be found consistent with the certified City of Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act.

Staff recommends that the Commission **deny** the applicant's request for retention of the three upper bluff wooden retaining walls, replacement of at-grade railroad ties, and construction of an upper bluff retractable stair access in sections 1-8, retention of wooden treads, risers, and stringers in sections 9-15, removal of a wooden gate in section 16, and retention of railroad ties in sections 9-17 (Exhibit 3). As stated above, the private stairway is unpermitted and the proposed project must be reviewed as new development taking into consideration the site conditions as though none of the unpermitted development is on the bluff face. Retention or replacement of any portion of the private access stairway is inconsistent with City of Encinitas certified Local Coastal Program policies that prohibit construction of new private stairways on coastal bluffs or within five ft. of the coastal bluff edge. In addition, the development is inconsistent with the LCP provisions that relate to protection of scenic qualities of the bluffs and require that new development be compatible with the character the surrounding development. Finally, approval of a new private stairway is inconsistent with Local Coastal Program policies to retain bluffs in their natural states in order to minimize the geologic hazard.

Therefore, staff recommends that the Commission determine that **substantial issue exists** and that the Commission, on de novo, **partially approve as conditioned and partially deny** coastal development permit application A-6-ENC-11-073.

Standard of Review: certified City of Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act.

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## **APPENDICES**

### Appendix A – Substantive File Documents

#### **EXHIBITS**

- Exhibit 1 – Project Location
- Exhibit 2 – Stairway Ownership
- Exhibit 3 – Site Plan
- Exhibit 4 – 1972 oblique Aerial Photograph
- Exhibit 5 – 1979 oblique Aerial Photograph
- Exhibit 6 – 1987 oblique Aerial Photograph
- Exhibit 7 – 1989 oblique Aerial Photograph
- Exhibit 8 – 2002 oblique Aerial Photograph
- Exhibit 9 – 2004 oblique Aerial Photograph
- Exhibit 10 – 2006 oblique Aerial Photograph
- Exhibit 11 – 2012 oblique Aerial Photograph
- Exhibit 12 – Letter from Neighbor to the South
- Exhibit 13 – Private Railroad Tie Accessway to the South
- Exhibit 14 – Mislabel Stairway Photograph
- Exhibit 15 – Appeals
- Exhibit 16 – City of Encinitas Planning Commission Agenda Report
- Exhibit 17 – City of Encinitas Planning Commission Resolution
- Exhibit 18 – Applicant’s Response to Staff Report

## HEARING PROCEDURES

The Commission will not take public testimony during this phase of the appeal hearing unless at least three Commissioners request it. The only persons qualified to testify before the Commission at the “substantial issue” stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. If the Commission finds that the appeal raises a substantial issue, it will proceed directly to the de novo portion of the hearing during which it will take public testimony and any person may testify. Written comments may be submitted to the Commission during either phase of the hearing.

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### **I. APPELLANTS CONTEND THAT**

The appellants contend that the City of Encinitas’ (City) decision is inconsistent with several provisions of the City's Local Coastal Program related to protection of coastal bluffs and public views. In particular, the appellants allege that the applicant has not provided evidence to prove that the existing private stairway or existing railroad ties are pre-coastal and the City’s decision did not address the lower bluff portion of the railroad ties on State Parks property. In addition, appellants contend that the subject development is inconsistent with Local Coastal Program provisions that (1) encourage the retention of coastal bluffs in their natural state, (2) require that appearance of structures visible from public vantage points be protective of the natural scenic qualities of the bluffs, (3) discourage and phase out private access to the beach over the bluffs and prohibit new private accessways, (4) discourage structures that are not consistent with the established pattern of development.

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### **II. LOCAL GOVERNMENT ACTION**

The Encinitas Planning Commission approved the coastal development permit No. 10-069 on August 4, 2011. Specific conditions were attached to the CDP that, among other things, required an open space easement from the bluff edge to the western property line that prohibits alteration of landforms, removal of vegetation, and removal/erection of structures except as permitted within the CDP and future permitted emergency measures, and that the removal and alterations of portions of the private stairway must be consistent with the recommendations provided by the applicant’s geotechnical engineer consultant.

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### **III. APPEAL PROCEDURES**

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits.

Section 30603(b)(1) of the Coastal Act states:

*The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.*

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

*With respect to appeals to the commission after certification of a local coastal program that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.*

If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to the de novo portion of the hearing on the merits of the project, then, or at a later date. If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project then, or at a later date, reviewing the project de novo in accordance with sections 13057-13096 of the Commission's regulations. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program (LCP).

In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3. In other words, in regard to public access questions, the Commission is required to consider not only the certified LCP, but also applicable Chapter 3 policies when reviewing a project on appeal.

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

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question as to conformity with the certified local coastal program" or, if applicable, the public access and public recreation policies of Chapter 3 of the Coastal Act (Cal. Code Regs. titl. 14 section 13155(b)). In previous decisions on appeals, the Commission has been guided by the following factors:

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

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

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#### **IV. STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE**

The staff recommends the Commission adopt the following resolution:

**MOTION:**     *I move that the Commission determine that Appeal No. 6-ENC-11-073 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

#### **STAFF RECOMMENDATION:**

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

#### **RESOLUTION TO FIND SUBSTANTIAL ISSUE:**

The Commission hereby finds that Appeal No. *A-6-ENC-11-073* presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

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## V. FINDINGS AND DECLARATION

### A. PROJECT DESCRIPTION/PERMIT HISTORY

The proposed project is located on the bluff face fronting a blufftop lot currently developed with a single family residence<sup>1</sup>. The project site is located in the City of Encinitas directly adjacent to the south side of the Beacons public beach access path (Exhibit 1). The proposed project involves the removal, replacement, and retention of portions of an unpermitted private stairway and three unpermitted upper bluff retaining walls associated with the stairway on a coastal bluff. The retaining walls and the majority of the private stairway are located on the applicant's property, while the lower bluff portion of the private stairway is located on land owned by California State Parks (Exhibit 2). The City's approval only covered the portion of the private stairway located on the applicant's property and did not address the portion of the private stairway located on State Parks' property. The portion of the unpermitted private stairway on State Parks' property is not a part of the subject appeal and will be addressed through a separate enforcement action.

At some point prior to 1990, but well after passage of Prop 20, a private railroad tie accessway was installed on the bluff face of the subject site. Between 1989 and 2002, a small, raised unpermitted staircase was installed to connect the lower patio with the upper bluff (Exhibits 7 & 8). In 2004, the applicant constructed major improvements to the existing unpermitted private railroad tie pathway. The unpermitted improvements included the construction of a large raised stairway connecting the applicant's patio to the top of the bluff, three upper bluff retaining walls, and numerous smaller retaining walls along the pathway, treads, risers, and stringers within the same alignment as the existing railroad ties along the majority of the pathway, railings and a privacy gate. An oblique aerial photograph from 2006, taken by the California Coastal Records Project, shows the improvements that were added to the railroad ties (Exhibits 9 & 10).

On September 19, 2005, the City issued a stop work order for the work on the face of the bluff. In a letter from the City to the applicant dated June 16, 2008, the City states:

*“A review of aerial photos taken of the area together with a series of historical photos (attached) has been done and it is evident that work has taken place on the bluff behind your residence. This work has changed what were dirt paths into improved stairs, landings and other improvements without benefit of a coastal development permit...”[emphasis added]*

In a letter from the City to the Applicant dated July 9, 2009, the City states:

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<sup>1</sup> In 1974, the San Diego Regional Commission issued a CDP for an addition to the structure and referred to it as a single family residence (CDP F1763). The CDP issued by the City for this property, which is subject to this appeal, also referred to the structure as a single family residence (CDP 10-069). However, the applicant states that the property is actually a duplex. At this time the entire structure is used as a single family residence, thus this report will refer to it as a single family residence. Staff has not received any permit history or documentation showing that the property was converted to a duplex, thus this issue remains unresolved.

*“...improvement and enhancement of the existing dirt path from the house to the beach, has taken place on the bluff behind your residence. This work has modified what were dirt paths into improved stairs, landings, hand rails and other improvements without the benefit of coastal development permit and that this work occurred after the 1973 cutoff which would allow the work to be “grandfathered” as pre-existing conditions...all elements constructed after 1973 within the coastal bluff zone must be removed.” [Emphasis added]*

On August 4, 2011, the City subsequently approved a coastal development permit for removal of portions of the unpermitted private stairway and retention and replacement of portions of the stairway. The City also stated the following on the Planning Commission Agenda Report:

*“...The bluff face contains a pre-1972 on-grade access path consisting of railroad ties extending from the upper portion of the bluff face underneath an existing wooden deck leading down to the beach below...”*

The findings of the City approval did not contain any discussion as to why what was previously described as “dirt paths” was subsequently described as “a pre-1972 on-grade access path consisting of railroad ties.” However, a prior owner of the property submitted a letter to the City stating that the railroad tie stairway had been installed in 1962 and various members of the public stated to the City that the railroad ties existed prior to 1972.

The applicant’s geotechnical engineer prepared an evaluation to determine how much of each unpermitted retaining wall along the stairway could be removed without causing sloughing and surficial failures, primarily leaving in place walls currently retaining soil. The geotechnical engineer also concurred with applicant’s plan to remove the raised upper bluff stairway that connects the lower patio to the blufftop and to cut all railings and the gate down to grade. The removal, replacement, and retention plan approved by the City classifies the private stairway in 17 sections, which will be used to describe what the City’s approval authorizes. Additionally, the plan depicts three unpermitted upper bluff wooden retaining walls which the City is also authorizing the applicant to retain (Exhibit 3). It appears that the applicant has already removed some of the posts and handrails down to grade in sections 9-17 (Exhibit 11).

- 3 Upper Bluff Wooden Retaining Walls
  - Retain in entirety
- Sections 1-8
  - Remove above-grade wooden stairs, treads, risers, stringers, handrails and landings
  - Replace at-grade, wooden railroad ties or wooden (steps) with new at-grade wooden railroad ties in a like for like manner and maintain in the future
  - Construct a “non-permanent, removable, retractable stair access” from the existing home patio (deck) down to the upper bluff trail
- Sections 9-13
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain wood treads, risers, and stringers

- Retain railroad ties
- Sections 14-15
  - Retain wood treads, risers, and stringers
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 16
  - Remove wooden gate
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 17
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain railroad ties

The existing 2-story 1,974 sq. ft. blufftop single family residence is located on a 0.16 acre bluff top lot and was constructed in 1961. Thus, the existing single family residence is a pre-Coastal Act structure. One previous coastal development permit was issued for the subject site by the San Diego Regional Commission (predecessor to the Coastal Commission). CDP No. F1763 was issued on 7/26/1974 for the addition of a room, a bathroom, and a closet to the existing single family residence. The property located two houses to the south of the subject property (downcoast) also has a private railroad tie staircase that connects to the subject private stairway at section 17 of the site plan approved by the City (Exhibit 13). The property owner of the home at 870 Neptune Avenue, two houses to the south, previously submitted a letter to the City of Encinitas stating that he installed the railroad ties on his property and on the State Parks' property below the subject property in 1977 (Exhibit 12). A comparison of 1972 and 1979 oblique aerial photos shows the private bluff trail on the bluff below 870 Neptune Avenue in the 1979 photo and not in the 1972 photo. However, the private railroad tie accessway below 870 Neptune Avenue is not a part of the subject appeal and will be addressed through a separate enforcement action. The property directly north of the subject property is the Beacons public beach access and consists of a dirt switchback trail supported primarily by sand bags and generally maintained by the City of Encinitas.

The standard of review is the certified Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act.

## **B. UNPERMITTED DEVELOPMENT**

California voters passed the Coastal Zone Conservation Act (Proposition 20) in 1972, with the effective date being February 1, 1973. Prop 20 regulated development along the coast if the development took place from the mean high tide line inland 1,000 yards. (Former Pub. Res. Code, §§ 27001, 27104, 27400.) However, if a city or county issued a building permit and the applicant commenced development before November 8, 1972, then that established a presumption of a vested right (so long as there were no substantial changes made to the development) in that development such that that person did not have to comply with the development regulations under Prop. 20 for that particular development. (Former Pub. Res. Code, § 27404.) The subject site is within 1,000 yards of the mean high tide line and, thus, was

subject to Prop 20 jurisdiction. The appellants contend that there is no evidence that the private railroad tie pathway or any of the subsequent improvements were built or approved prior to November 8, 1972. When an applicant seeks approval of unpermitted development, the Commission reviews the application in a manner where it considers the physical characteristics of the site as though the unpermitted development has not occurred on the subject property. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) In doing so, a proposal to retain any portion of the existing unpermitted development is reviewed as a proposal for new development. Thus, in this case, the Commission must view the subject site as though the unpermitted development has not occurred on the site and determine whether or not the proposed retention of the unpermitted development (“new development”) is consistent with the relevant Local Coastal Program policies and the Coastal Act access and recreation policies.

Section 30608 of the Coastal Act states:

*(a) No person who has obtained a vested right in a development prior to the effective date of this division [the Coastal Act] or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Act of 1972 (former Division 18 (commenting with Section 27000)) shall be required to secure approval for the development pursuant to this division. However, that no substantial change may be made in any such development without prior approval having been obtained under this division.*

Based on review of oblique aerial photographs compiled by the California Coastal Records Project between 1972 and 2010, it appears that an unpermitted private wooden railroad tie staircase, beginning at the top of the approximately 85 ft. high bluff and continuing down to the beach, was installed sometime after the passage of Proposition 20. (See Former Pub. Res. Code, § 27404.)

The applicant has submitted a letter from a prior owner of the residence that contends that a private railroad tie pathway was installed from the existing single family residence down to the beach in 1962. The applicant has also submitted letters from five other people asserting that the railroad tie stairway existed prior to 1970. However, oblique aerial photographs dated 1972, 1979, and 1987 (Exhibits 4, 5, & 6) do not show a private railroad tie pathway from the applicant’s home to the beach.

The applicant previously submitted a photograph, dated 1971, that clearly shows the existence of subject railroad tie private pathway. However, the photograph is mislabeled and was actually taken some time after 1980. The photograph includes a house two doors to the south with a second story addition, at 870 Neptune Avenue. The second story addition was approved for that house by the San Diego Coast Regional Commission on September 19, 1980 (Reference CDP F9288). Oblique aerial photographs further support this fact, as photographs from 1972 and 1979 clearly show that 870 Neptune Avenue is only a one story structure. While the next available oblique aerial photograph from 1987 shows the 2<sup>nd</sup> story addition (Exhibit 14). The applicant has subsequently agreed that the photo was mistakenly mislabeled without his knowledge.

The earliest available photograph showing a private access path from the applicant's home to the beach is dated 1989. In that photograph only a very light trail can be seen, and it is not clear if railroad ties are present or if the photograph merely depicts an unimproved dirt path. In addition, it is also not clear if the visible dirt path follows the same alignment as the existing private stairway (Exhibit 7). Although the private accessway is first visible in the 1989 photograph, it may have existed previously. The available photographs of the site between 1972 and 1989 have a lower resolution than more current photographs. In 1987, a railroad tie public accessway existed to the north of the subject site at Beacon's beach. The 1987 photo does not clearly depict the railroad ties, but it is evident that some type of path exists. However, the 1987 photograph shows no evidence of a path at the subject site. Based on the available photographs and additional documents submitted by the applicant, there is no physical evidence that the railroad tie accessway is pre-coastal.

The applicant has submitted documentation showing that in 1990, Commission staff sent a short memo to the City of Encinitas in which Commission staff referred, for investigation and enforcement, a complaint from a member of the public that alleges the property owner of the subject property was constructing an illegal stairway without a permit at the subject property. The documentation also shows that the City issued a stop work order, but subsequently closed the violation and made the finding that the property owner was only replacing his steps. It does not appear that Commission staff followed up with the report of the violation at that time. Based on the submitted documentation, a private railroad tie pathway may have been installed prior to 1990.

The effective date of the Coastal Act is January 1, 1977. As noted above, the subject site was also subject to the permitting requirements of the Coastal Act's predecessor statute, the California Coastal Zone Conservation Act of 1972 (aka Proposition 20, "the Coastal Initiative"), which went into effect on February 1, 1973. Proposition 20 required a coastal development permit for new development on this site (because it is within 1000 yards landward of the mean high tide line) occurring after February 1, 1973. Neither the railroad ties nor the additional bluff improvements were permitted prior to passage of Proposition 20. Therefore, the proposal is treated as new development on the bluff face.

This report references oblique aerial photographs of the subject property taken periodically between 1972 and 2010, which are a part of the California Coastal Records Project. Based on information from the California Coastal Records Project website, the 1972 and 1979 photographs were the result of statewide oblique aerial surveys by the State Department of Boating and Waterways. These photographs were then scanned into digital form and a color restoration was completed prior to placement on the Coastal Records Project website. The California Coastal Commission contracted with the California Department of Water Resources to create the 1987 photograph set. In 1989 a second survey was conducted. The 1987 and 1989 photographs were then scanned into digital form and a color restoration was completed prior to placement on the Coastal Records Project website.

The subject property can be found in the photos by first locating the Beacon's Beach public access path and then finding the house directly to the south (downcoast) of the access area. Clicking on a photo will open a much larger version of the photo. The photos can be viewed at the following link:

<http://www.californiacoastline.org/cgi-bin/timecompare.cgi?image=7241023&latdeg=33.067336&longdeg=117.309751&flags=0&year=1972&hidden=0&oneimage=current/201003723-2008/200804336-2006/200604265-2004/200407557-2002/9176-1989/8920204-1987/8702111-1979/7954132-1972/7241023->

### C. PRIVATE STAIRWAY/CONSERVATION OF THE BLUFFS

The appellants contend that the retention, maintenance, and replacement of the unpermitted bluff private stairway is inconsistent with the City's Local Coastal Program which specifically prohibits private stairways on the bluff face and promotes the retention of coastal bluffs in a natural state.

The City's certified Local Coastal Program includes provisions that not only prohibit the construction of private stairways on the bluff but also provide for the "phase out" of existing private stairs. Public Safety Element Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

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

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [Emphasis added]*

The CDP issued by the City raises a substantial issue with regard to its consistency with the certified Local Coastal Program as it permits the retention and substantial replacement of portions of an unpermitted private stairway on the bluff. Because the bluffs in this area are

hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private access stairways and even provides for existing stairways to be phased out.

The City's approval, which allows for the retention and replacement of the various aspects of the unpermitted private stairway, is inconsistent with the Local Coastal Program policy that prohibits new private stairways on coastal bluffs and calls for the phase out of existing private access to the beach over the bluffs. The City's approval allows substantial improvements to the existing unpermitted railroad tie pathway in the form of new railroad ties, retention of numerous retaining walls, and the retention of new treads, risers, and stringers which essentially results in the construction of a brand new private bluff stairway. Based on Commission Staff site visits, it does not appear that the new treads, risers, and stringers are even flush with the existing unpermitted railroad ties. Thus, while the improvements may follow the same path as the railroad ties, they are not merely a minor repair or improvement. Regardless, all the development on the bluff face including the railroad ties is unpermitted and retention of any part of the staircase raises a significant issue with respect to the consistency of such development with Local Coastal Program policies that prohibit construction of private access stairways on coastal bluffs.

Additionally, the Local Coastal Program clearly states that no structures are allowed within 5 ft. of the bluff top edge. The "retractable" stair access from the lower patio to the upper bluff approved by the City is inconsistent with this policy, as it is a structure within 5 ft. of the bluff edge. The certified Local Coastal Program also discourages climbing upon and defacement of the bluff face which would be the result if this unpermitted private stairway is allowed to remain or be replaced. Development on coastal bluffs can result in impacts such as degradation and instability of the bluff.

As stated previously, there is no permit history for the original development of a stairway on the face of the bluff and it was not constructed prior to implementation of the Coastal Act, and as such it is considered to be unpermitted development. Thus, the current proposal must be treated as new development on the bluff face as opposed to maintenance or improvements to existing permitted or pre-coastal development. Therefore the project raises substantial issues both because it impacts the bluff as it is a permanent structure on the bluff face and because it consists of a private accessway, and public accessways are the only development allowed on the face of a coastal bluff. The project therefore raises a substantial issue with respect to the grounds on which the appeal was filed.

#### **D. PROTECTION OF SCENIC QUALITIES/GEOLOGIC CONDITIONS AND HAZARDS**

The appellants contend that that the private staircase is inconsistent with Local Coastal Program policies that protect the natural scenic qualities of the bluff faces, that discourage structures not consistent with the established pattern of development, and that minimize geologic hazards on the bluffs.

The following Local Coastal Program policies relate to the proposed development:

Resource Management Goal 8 of the LUP states the following:

*The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.*

Resource Management Policy 8.5 of the certified Encinitas LUP states, in part:

*The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard 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 Resource Management Policy 8.7 of the certified Encinitas LUP states that:

*The City will establish, as primary objectives, the preservation of natural beaches and visual quality as guides to the establishment of shoreline structures. All fishing piers, new boat launch ramps, and shoreline structures along the seaward shoreline of Encinitas will be discouraged.*

The certified Implementation Plan (IP) also requires that shoreline protective structures be designed to be protective of natural scenic qualities of the bluffs and not cause a significant alteration of the bluff face. In particular, Section 30.34.020(B)(8) 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.*

Finally, Section 30.34.020.C.2.b.(4) states:

*The proposed measure in design and appearance must be found to be visually compatible with the character of the surrounding area; where feasible, to restore and enhance visual quality in visually degraded areas; and not cause a significant alteration of the natural character of the bluff face.*

### Visual Impacts

Neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Public views of the site are primarily from the beach looking landward and while using the Beacon's public access trail directly adjacent to the site to the north. The bluffs in the immediate vicinity of the site are characterized by varying degrees of vegetation and some lower seawalls and some upper bluff retaining walls (the subject site is not protected by a seawall or an upper bluff retaining wall). Any permanent retention of bluff face development, such as the subject private stairway, will cause adverse impacts to public

views. In addition, unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. In fact, aside from the railroad tie pathway located two properties to the south, the subject site contains the only private improved stairway for approximately 20 houses to the south of the Beacon's accessway. Local Coastal Program policies assert that the visual quality of bluffs should be restored and enhanced. A private bluff staircase in this area is not the established pattern of development and thus raises a substantial issue with regard to its consistency with the certified Local Coastal Program.

### Geologic Impacts

The Division of Mines and Geology has mapped the entire Encinitas shoreline as an area susceptible to landslides and mapped the area as either "Generally Susceptible" or "Most Susceptible Areas" for geologic susceptibility. Because the bluffs are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private stairways and provides for existing private stairways to be phased out.

Because the bluff at this location has been determined to be highly unstable, the Local Coastal Program recognizes the inherent scenic values of the natural shoreline, the construction of a new private stairway is prohibited by PS Policy 1.6 of the City's Local Coastal Program, and the phasing out over time of other existing private stairways is required by Circulation Policy 6.7. Therefore, the Commission finds that the construction or retention of any portion of a private stairway on the bluff face is inconsistent with the certified Local Coastal Program and that the unpermitted development on the coastal bluff should not be retained. An active landslide exists at the Beacon's public access path to the north and west of the subject property. This landslide is deeply seated, while the private stairway is surficial and does not contribute to the stability of the bluff or prevent the Beacon's landslide from spreading further south. Lastly, private stairways encourage people to walk on the bluff face and which in turn can lead to increased erosion. Allowing the construction or retention of the retaining walls, treads, risers, and railroad ties raises a substantial issue with regard to their consistency with the visual or geologic protection policies of the certified Local Coastal Program.

### **E. CONCLUSION**

Based upon a review of all of the information provided to the Commission regarding this project, the Commission finds that the proposed development is incompatible in design and scale with the overall character of the surrounding area and does not meet the requirements of the certified Local Coastal Program which prohibits the construction of private stairways on the bluff face and calls for the phase out of existing private stairways. Therefore, the Commission finds that the appeal raises a substantial issue regarding the proposed development's conformity with the certified Local Coastal Program.

**F. SUBSTANTIAL ISSUE FACTORS**

As discussed above, there is strong factual and legal evidence that the City-issued CDP raises a substantial issue with regard to its consistency with the certified Local Coastal Program. The other factors that the Commission normally considers when evaluating whether a local government's action raises a substantial issue also support a finding of substantial issue. The locally-issued CDP will create an adverse precedent for interpretation of the City's Local Coastal Program. Finally, the objections to the project suggested by the appellant raise substantial issues of regional or statewide significance.

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## STAFF RECOMMENDATION ON THE COASTAL PERMIT

### VI. MOTION AND RESOLUTION ON DE NOVO

#### Motion:

*I move that the Commission adopt the staff recommendation to approve in part and deny in part coastal development permit No. A-6-ENC-11-073, with the approval subject to the conditions recommended by staff, by adopting the two-part resolution set forth in the staff report.*

Staff recommends a **YES** vote. Passage of this motion will result in approval, in part, of the permit as conditioned and denial, in part, 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:

##### **Part 1: Approval with Conditions of a Portion of the Development**

The Commission hereby **GRANTS, as conditioned**, a coastal development permit for the portion of the project consisting of removal of the unpermitted improvements from the bluff face, which include above-grade wooden stairs, treads, risers, stringers, handrails, and landings in sections 1-8 and removal of portions of the wooden retaining walls that are not retaining soil and all posts and handrails down to grade and a wooden gate in sections 9-17 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the certified Local Coastal Program and the public access policies of the Coastal Act, and will not have any significant adverse effects on the environment within the meaning of the California Environmental Quality Act.

##### **Part 2: Denial of the Remainder of the Development**

The Commission hereby **DENIES** a coastal development permit for the portion of the project consisting of retention of the three upper bluff wooden retaining walls, replacement of at-grade railroad ties, and construction of an upper bluff retractable stair access in sections 1-8, retention of wooden treads, risers, and stringers in sections 9-15, and retention of railroad ties in sections 9-17 and adopts the findings set forth below, on the grounds that the development would not be in conformity with the provisions of the certified Local Coastal Program and the public access policies of the Coastal Act, and would result in significant adverse impact on the environment within the meaning of the California Environmental Quality Act that are avoidable through feasible mitigation measures and/or alternatives to the proposal.

## VII. 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 of 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.

## VIII. SPECIAL CONDITIONS

The permit is subject to the following conditions:

1. **Final Revised Plans.** PRIOR TO THE ISSUANCE OF THIS PERMIT, the applicant shall submit to the Executive Director for review and written approval, final project plans consistent with the Stair and Retaining Wall Removal plan by the Shackelton Design Group dated 12/14/2010, except that they shall be revised to include the following:
  - a. New construction, retention, or replacement of any aspect of the private unpermitted stairway is prohibited.

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

2. **Deed Restriction.** PRIOR TO ISSUANCE OF THIS 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, as amended, 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.

3. **Prior to Issuance Condition Compliance.** WITHIN 60 DAYS OF APPROVAL OF THIS CDP, or within such additional time as the Executive Director may grant for good cause, the applicants shall satisfy all requirements specified in the conditions hereto that the applicant is required to satisfy prior to issuance of this permit. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.
4. **Condition Compliance.** WITHIN 90 DAYS OF APPROVAL OF THIS CDP, or within such additional time as the Executive Director may grant for good cause, the applicant shall have completed removal of the portions of the unpermitted private stairway as detailed in the revised final plan for 876/878 Neptune Avenue. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

## **IX. FINDINGS AND DECLARATIONS**

### **THE COMMISSION FINDS AND DECLARES AS FOLLOWS:**

#### **GENERAL FINDINGS APPLICABLE TO BOTH APPROVAL IN PART AND DENIAL IN PART**

##### **A. PROJECT DESCRIPTION/PERMIT HISTORY**

The proposed project is located on the bluff face fronting a blufftop lot currently developed with a single family residence<sup>2</sup>. The project site is located in the City of Encinitas directly adjacent to the south side of the Beacons public beach access path (Exhibit 1). The proposed project involves the removal, replacement, and retention of portions of an unpermitted private stairway

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<sup>2</sup> In 1974, the San Diego Regional Commission issued a CDP for an addition to the structure and referred to it as a single family residence (CDP F1763). The CDP issued by the City for this property, which is subject to this appeal, also refers to the structure as a single family residence (CDP 10-069). However, the applicant states that the property is actually a duplex. At this time the entire structure is used as a single family residence, thus this report will refer to as a single family residence. Staff has not received any permit history or documentation showing that the property was converted to a duplex, thus this issue remains unresolved.

and three unpermitted upper bluff retaining walls on a coastal bluff. The retaining walls and the majority of the private stairway are located on the applicant's property, while the lower bluff portion of the private stairway is on land owned by California State Parks (Exhibit 2). The City's approval only covered the portion of the private stairway on the applicant's property and did not address the portion of the private stairway located on State Parks' property. The portion of the private stairway on State Parks' property will be addressed through a separate enforcement action.

Sometime between 1989 and 2002, a small, raised unpermitted staircase was installed to connect the lower patio with the upper bluff (Exhibits 7 & 8). In 2004, the applicant constructed major improvements to an existing unpermitted private railroad tie pathway. The unpermitted improvements included the construction of a large, raised stairway connecting the applicant's patio to the top of the bluff, three upper bluff retaining walls, and numerous smaller retaining walls along the pathway, treads, risers, and stringers within the same alignment as the existing railroad ties along the majority of the pathway, railings and a wooden privacy gate. An oblique aerial photograph from 2006 shows the improvements that were added to the railroad ties (Exhibit 9 & 10). On September 19, 2005, the City issued a stop work order for the work on the face of the bluff. In a letter from the City to the applicant dated June 16, 2008, the City states:

*"A review of aerial photos taken of the area together with a series of historical photos (attached) has been done and it is evident that work has taken place on the bluff behind your residence. This work has changed what were dirt paths into improved stairs, landings and other improvements without benefit of a coastal development permit..." [emphasis added]*

In a letter from the City to the Applicant dated July 9, 2009, the City states:

*"...improvement and enhancement of the existing dirt path from the house to the beach, has taken place on the bluff behind your residence. This work has modified what were dirt paths into improved stairs, landings, hand rails and other improvements without the benefit of coastal development permit and that this work occurred after the 1973 cutoff which would allow the work to be "grandfathered" as pre-existing conditions...all elements constructed after 1973 within the coastal bluff zone must be removed." [Emphasis added]*

On August 4, 2011, the City subsequently approved Coastal Development Permit #10-069 for removal of portions of the unpermitted private stairway and retention and replacement of portions of the stairway. The City also stated the following on the Planning Commission Agenda Report:

*"...The bluff face contains a pre-1972 on-grade access path consisting of railroad ties extending from the upper portion of the bluff face underneath an existing wooden deck leading down to the beach below..."*

The findings of the City approval did not contain any discussion as to why what was previously described as "dirt paths" was now described as "a pre-1972 on-grade access path consisting of

railroad ties.” However, a prior owner of the property submitted a letter to the City stating that the railroad tie stairway had been installed in 1962 and various members of the public stated to the City that the railroad ties existed prior to 1972.

The applicant’s geotechnical engineer prepared an evaluation to determine how much of each unpermitted retaining wall along the stairway could be removed without causing sloughing and surficial failures, primarily leaving in place walls currently retaining soil. The geotechnical engineer also concurred with the applicant’s plan to remove the raised upper bluff stairway that connects the lower patio to the blufftop and to cut all posts and handrails and the gate down to grade. The removal, replacement, and retention plan approved by the City classifies the private stairway in 17 sections, which will be used to describe what the City’s approval authorizes. Additionally, the plan depicts three unpermitted upper bluff wooden retaining walls which the City is also authorizing the applicant to retain (Exhibit 3). It appears that the applicant has already removed some of the posts and handrails down to grade in sections 9-17 (Exhibit 11).

- 3 Upper Bluff Wooden Retaining Walls
  - Retain in entirety
- Sections 1-8
  - Remove above-grade wooden stairs, treads, risers, stringers, handrails and landings
  - Replace at-grade, wooden railroad ties or wooden (steps) with new at-grade wooden railroad ties in a like for like manner and maintain in the future
  - Construct a “non-permanent, removable, retractable stair access” from the existing home patio (deck) down to the upper bluff trail
- Sections 9-13
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain wood treads, risers, and stringers
  - Retain railroad ties
- Sections 14-15
  - Retain wood treads, risers, and stringers
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 16
  - Remove wooden gate
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 17
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain railroad ties

The existing 2-story 1,974 sq. ft. blufftop single family residence is located on a 0.16 acre bluff top lot and was constructed in 1961. Thus, the existing single family residence is a pre-Coastal Act structure. One previous coastal development permit has been issued for the subject site by the San Diego Regional Commission (predecessor to the Coastal Commission). The CDP was

issued on 7/26/1974 for the addition of a room, a bathroom, and a closet to the existing single family residence (F1763). The property two houses to the south of the subject property also has a private railroad tie staircase that connects to the subject private stairway at section 17 of the site plan approved by the City (Exhibit 13). The property owner of the home two houses to the south, at 870 Neptune Avenue, previously submitted a letter to the City of Encinitas stating that he installed a private railroad ties accessway on his property and on the State Parks' property below 878 Neptune Avenue in 1977 (Exhibit 12). It does not appear that a coastal development permit was ever issued for the railroad tie accessway. However, this will be addressed through a separate enforcement action. The property directly north of the subject property is the Beacons public beach access and consists of a dirt switchback trail supported primarily by sand bags.

The standard of review is the certified City of Encinitas Local Coastal Program and the public access policies of the Coastal Act.

## **B. APPROVAL FINDINGS AND DECLARATIONS**

Except as otherwise indicated, the findings in this section apply only to that portion of the application that is described in Part 1 of the Commission's resolution on this permit application, which portion is therefore being conditionally approved.

### **1. UNPERMITTED DEVELOPMENT**

Although unpermitted development including, but not limited to, the construction of a private stairway/accessway down a coastal bluff has occurred without the benefit of a coastal development permit, and there is no evidence that shows it was built prior to implementation of Prop 20, consideration of this application by the Commission has been based solely upon the public access and recreation policies of the Coastal Act and the certified City of Encinitas Local Coastal Program. Approval of this permit does not constitute a waiver of any legal action with regard to any violation of the Coastal Act or the City's Local Coastal Program that may have occurred, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit. Removal of any additional unpermitted development will be addressed through a separate enforcement action. Special Conditions 3 and 4 have been included to ensure that the unpermitted development proposed to be removed is done so in a timely manner.

### **2. PRIVATE STAIRWAY/CONSERVATION OF BLUFF**

The City's certified Local Coastal Program includes provisions that not only prohibit the construction of private stairways on the bluff but also provide for the "phase out" of existing private stairs. Public Safety Element Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

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

- a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

[ . . . ]

*f. . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [Emphasis added]*

In 2003, a geotechnical investigation was undertaken for the Beacon's beach access adjacent to the subject property. The investigation documented three landslides that have previously taken place in the near vicinity. First, a landslide occurred some time in the 20<sup>th</sup> century approximately 1,000 ft. south of the Beacon's accessway. Second, in 1982, a landslide occurred at the Beacon's beach access. The 2003 investigation states that the Beacon's landslide

*"... is strongly influenced by wave erosion that undercuts the weak claystones along the toe of the bluff..."*

The northern limit of this active landslide extends beyond the State beach boundary, while the southern limit is within the State beach boundary. Thus, as of 2003, the Beacon's landslide was north and west of the applicant's property and did not encroach within it. The investigation also states that the landslide has progressed upslope toward the parking lot since a previous 1990 investigation and will likely continue to progress upslope and could impact properties north and south of State beach. Most recently, in 1996, a separate landslide occurred just south of the subject property in the 800 block of Neptune Avenue. The geotechnical investigation states that this landslide

*"...probably resulted from a combination of weak bedding planes in the seacliff, extensive groundwater seepage, and wave erosion resulting in loss of lateral support and a weakened condition...The landslide involved relatively deep-seated translational movement along weak bedding planes at or near the seacliff toe."*

The applicant asserts that the stairway is necessary for bluff stability. However, the three landslides discussed above are deeply seated. Any influence that the subject stairway, its pilings, and the railroad ties have on bluff stability is only surficial in nature. The stairway components do not affect global bluff stability and their removal will not lead to the Beacon's landslide spreading further south. In fact, removal of the stairway will cause a decrease in the amount of impervious surface area on the bluff, which will decrease the amount and concentration of runoff, which may actually decrease bluff erosion. The Commission's staff geologist is very

familiar with this area of the Encinitas coast and has reviewed the evaluation by the applicant's geotechnical engineer and concurs that the retention of the raised stairway in sections 1-8 is not necessary for bluff stability and that the retaining walls identified by the applicant's geotechnical engineer and proposed to be removed can be removed without adversely impacting bluff stability. In addition, cutting the identified posts and handrails at-grade will not impact bluff stability. Thus, based on the bluff characteristics in this area described above, the Commission's staff geologist does not believe that the stairway is necessary for bluff stability, or that it cannot be removed.

Special Condition 1 has been included to ensure that the final plans consist solely of removal of portions of the unpermitted private stairway and do not include any additions to or retention of the unpermitted private stairway. Special Condition 2 requires that the applicant record a deed restriction to ensure that the Special Conditions of this permit run with the subject property.

As stated previously, neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as one for new development on the bluff face. All development on the bluff face including the railroad ties is unpermitted and retention of any part of the staircase is inconsistent with Local Coastal Program policies that prohibit construction of private access stairways on coastal bluffs. Because the bluffs in this area are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability through climbing upon or defacement of the bluff.

### **3. PROTECTION OF SCENIC QUALITIES/GEOLOGIC CONDITIONS AND HAZARDS**

The following Local Coastal Program provisions relate to the proposed development:

Resource Management Goal 8 of the LUP states the following:

*The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.*

Resource Management Policy 8.5 of the certified Encinitas LUP states, in part:

*The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard 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, Resource Management Policy 8.7 of the certified Encinitas LUP states that:

*The City will establish, as primary objectives, the preservation of natural beaches and visual quality as guides to the establishment of shoreline structures. All fishing piers, new boat launch ramps, and shoreline structures along the seaward shoreline of Encinitas will be discouraged.*

Public Safety Element Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

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

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [Emphasis added]*

The certified IP also requires that shoreline protective structures be designed to be protective of natural scenic qualities of the bluffs and not cause a significant alteration of the bluff face. In particular, Section 30.34.020(B)(8) 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.*

Finally, Section 30.34.020.C.2.b.(4) states:

*The proposed measure in design and appearance must be found to be visually compatible with the character of the surrounding area; where feasible, to restore and enhance visual quality in visually degraded areas; and not cause a significant alteration of the natural character of the bluff face.*

### Visual Impacts

Neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Public views of the site are primarily from the beach looking landward and while using the Beacon's public access trail directly adjacent to the north. The bluffs in the immediate vicinity of the site are characterized by varying degrees of vegetation and some lower seawalls and some upper bluff retaining walls (the subject site is not

protected by a seawall). Any permanent retention of bluff face development on private lots, such as the subject private stairway, would detrimentally alter the natural appearance of the bluff face and will, thus cause a significant adverse impacts to public views to and along the coast. In addition, unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. In fact, aside from the railroad tie pathway located two properties to the south, the subject site contains the only private improved stairway for approximately 20 houses to the south of the Beacon's accessway, leaving the remaining bluff face along this row of lots in a relatively natural state. Approval of the proposed removal of the identified portions of the private stairway is consistent with Local Coastal Program policies that assert that the visual quality of bluffs should be restored and enhanced.

### Geologic Impacts

The Division of Mines and Geology has mapped the entire Encinitas shoreline as an area susceptible to landslides and mapped the area as either "Generally Susceptible" or "Most Susceptible Areas" for geologic susceptibility. Because the bluffs are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private stairways and provides for existing private stairways to be phased out.

Because the bluff at this location has been determined to be highly unstable and the Local Coastal Program recognizes the inherent scenic values of the natural shoreline, the construction of a new private stairway is prohibited by PS Policy 1.6 of the City's Local Coastal Program and the phasing out over time of other existing private stairways is required by Circulation Policy 6.7. The Commission finds that removal of portions of the subject unpermitted private stairway on the bluff face is consistent with the certified Local Coastal Program and that the unpermitted development on the coastal bluff should not be retained. An active landslide exists at the Beacon's public access path to the north and west of the subject property. This landslide is deeply seated, while the private stairway is surficial and does not contribute to the stability of the bluff or prevent the Beacon's landslide from spreading further south. Lastly, private stairways encourage people to walk on the bluff face and in turn can lead to increased erosion. Allowing removal of the walls, treads, risers, and railroad ties is consistent with the visual and geologic protection policies of the certified Local Coastal Program. Therefore, the Commission finds that the removal of the identified portions of the unpermitted private stairway is consistent with the certified Local Coastal Program.

On April 23, 2010, the applicant's geotechnical engineer prepared an evaluation to determine how much of each unpermitted retaining wall along the stairway could be removed without causing sloughing and surficial failures; primarily leaving in place walls currently retaining soil (this evaluation did not consider removal of any portion of the three unpermitted upper bluff retaining walls). Subsequently, on May 10, 2011, the applicant's geotechnical engineer provided a letter to the City of Encinitas recommending that the raised stairway in sections 1-8 not be removed. The applicant's geotechnical engineer based this recommendation on his opinion that the stairway has allowed vegetation establishment and protection from rainfall, which provides a more stabilized surficial bluff face. However, on July 8, 2011, the applicant's geotechnical

engineer submitted a third letter to the City in which he agreed that the raised stairway in section 1-8 can be cut off at-grade, provided that the existing railroad ties and shallow bluff stability be inspected to determine whether or not the existing ties should be secured or replaced with new railroad ties, and that erosion reduction geofabric products may be required. No discussion was provided, as to why the applicant's geotechnical engineer changed his recommendation.

As stated previously, the Commission's staff geologist has reviewed the evaluation by the applicant's geotechnical engineer and concurs that the geotechnical data gathered in the evaluation for the site supports the conclusion that the retention of the raised stairway in sections 1-8 is not necessary for bluff stability and that the retaining walls identified by the applicant's geotechnical engineer and proposed to be removed can be removed without adversely impacting bluff stability. In addition, cutting the remaining posts and handrails at-grade will not impact bluff stability. Removal of the stairway portions will cause a decrease in the amount of impervious surface area on the bluff, which will decrease the amount and concentration of runoff, which may actually decrease bluff erosion. In addition, removal of portions of the stairway will help to reduce the visibility of the structure.

#### **4. PUBLIC ACCESS**

The project parcel is located between the sea and the first public roadway. Pursuant to Section 30.80.090 of the City's Local Coastal Program, 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:

- (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....

As approved by the City, the proposed development includes the removal of portions of an unpermitted private stairway down the coastal bluff. A public beach access path exists at Beacon's beach (less than 200 ft. from the property owner's residence), thereby making a private accessway unnecessary, especially given that new private accessways are prohibited and existing private accessways are required to be phased out by the City's certified Local Coastal Program.

In the case of the private stairway, it is only used by the private property owner and as such it is not open to the public. Therefore, since it is not open to the public, the approval of removal of portions of the private stairway will not have a negative impact on the public's ability to access the coast. The proposed development is consistent with the applicable public access policies of the Coastal Act and the City of Encinitas' Local Coastal Program.

## **5. LOCAL COASTAL PLANNING**

The project is located within the City of Encinitas, which has a certified Local Coastal Program. Based on the preceding discussion in this report, the Commission finds that the proposed development (removal of portions of a private access stairway on the bluff face), as conditioned, is consistent with all applicable provisions of the certified Local Coastal Program. The Commission also finds, that based on the above, the proposed development, as conditioned, would not prejudice the ability of the City of Encinitas to continue to implement its Local Coastal Program.

## **6. CEQA**

Section 13096 of the California Code of Regulations requires Commission approval of a coastal development permit to be supported by a finding showing the permit to be 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.

As described above, the proposed project has been conditioned to avoid adverse environmental impacts. Mitigation measures include a final plan condition that requires the removal of all plan notes that allow retention or replacement of any portion of the private stairway, a deed restriction that recognizes that all conditions of this permit run with the subject property, and timing requirements to ensure that the after-the-fact removal of portions of the stairway are undertaken in a timely manner. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and is consistent with the requirements of the Coastal Act to conform to CEQA.

## **C. DENIAL FINDINGS AND DECLARATIONS**

Except as otherwise indicated, the findings in this section apply only to that portion of the application that is described in Part 2 of the Commission's resolution on this permit application, which portion is therefore being denied.

### **1. UNPERMITTED DEVELOPMENT**

Although development including, but not limited to, the construction of a private stairway/accessway down a coastal bluff has been completed without the benefit of a coastal development permit, and there is no evidence that shows it was built prior to implementation of Prop 20 (See Former Pub. Res. Code, § 27404.), consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act and the certified City of Encinitas Local Coastal

Program. Approval of this permit does not constitute a waiver of any legal action with regard to any violation of the Coastal Act or the City’s Local Coastal Program that may have occurred, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit. Removal of any additional unpermitted development will be addressed through a separate enforcement action.

**2. PRIVATE STAIRWAY/CONSERVATION OF BLUFF**

The City’s certified Local Coastal Program includes provisions that not only prohibit the construction of private stairways on the bluff, but also provide for the “phase out” of existing private stairs. Public Safety Element Policy 1.6 of the City’s Land Use Plan (LUP) states, in part:

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

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [Emphasis added]*

The proposed project to retain portions of the private access stairway is not consistent with the certified Local Coastal Program as it permits the retention and substantial replacement of portions of an unpermitted private stairway on the bluff. Because the bluffs in this area are hazardous and susceptible to failure, the Local Coastal Program includes policies that are designed to reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private access stairways and provides for existing stairways to be phased out.

The applicant is proposing the retention and replacement of various aspects of an unpermitted private stairway, which is inconsistent with the Local Coastal Program policies that prohibit new private stairways and call for the phase out private access to the beach over the bluffs. Since the subject stairway is unpermitted, then the retention of any portion of the stairway is viewed as a

new development. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) The applicant is proposing substantial improvement to the existing unpermitted railroad tie pathway in the form of new railroad ties, retention of numerous retaining walls, and the retention of treads, risers, and stringers which essentially results in the construction of a brand new private bluff stairway. All the development on the bluff face including the railroad ties is unpermitted and retention of any part of the staircase is inconsistent with Local Coastal Program policies that prohibit construction of private access stairways on coastal bluffs.

Additionally, the Local Coastal Program clearly states that no structures are allowed within 5 ft. of the bluff edge. The “retractable” stair access from the lower patio to the upper bluff, that is proposed, is inconsistent with this policy, as it is a structure within 5 ft. of the bluff edge. The certified Local Coastal Program also discourages climbing upon and defacement of the bluff face which would be the result if this unpermitted private stairway is allowed to remain or be replaced.

As stated previously, there is no permit history for the original development of a stairway on the face of the bluff and it was not constructed prior to passage of Prop 20 (See Former Pub. Res. Code, § 27404.), and as such, it is considered unpermitted. The oblique aerial photographs taken in 1972 of the subject site do clearly show the Beacon’s beach public access path directly north of the subject site and the oblique aerial photograph in 1979 clearly shows the Beacon’s beach public access path directly north of the subject site and a path on the bluff face two properties to the south of the subject site. Thus, the applicant’s contention that the resolution of these oblique aerial photographs is too low to depict sufficient detail of the bluff face appears to be without merit. As detailed in the staff report, no physical evidence (photographs, permits, etc.) has been presented which shows that the private railroad tie accessway on the subject site was a pre-Prop 20 structure. In any case, even if the private railroad tie accessway did exist prior to Prop-20, there is little doubt that the myriad improvements to the private railroad tie accessway were constructed following passage of Prop 20 (See Former Pub. Res. Code, § 27404.) and are inconsistent with the certified LCP policies related to development on bluff faces. Thus, the proposed development is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Therefore the proposed project is inconsistent with the certified Local Coastal Program because it consists of a new private accessway located on a bluff face which is prohibited. Even if the railroad ties had pre-existed Proposition 20, the certified Local Coastal Program mandates phasing out of private stairways and the unpermitted improvements to the pathway would be inconsistent with the policies of the Local Coastal Program. Thus, retention of any portion of the private access stairway is not consistent with the certified Local Coastal Program, and therefore, must be denied.

### **3. PROTECTION OF SCENIC QUALITIES/GEOLOGIC CONDITIONS AND HAZARDS**

The following Local Coastal Program policies relate to the proposed development:

Resource Management Goal 8 of the LUP states the following:

*The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.*

Resource Management Policy 8.5 of the certified Encinitas LUP states, in part:

*The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard 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 Resource Management Policy 8.7 of the certified Encinitas LUP states that:

*The City will establish, as primary objectives, the preservation of natural beaches and visual quality as guides to the establishment of shoreline structures. All fishing piers, new boat launch ramps, and shoreline structures along the seaward shoreline of Encinitas will be discouraged.*

Public Safety Element Policy 1.6 of the City's LUP states, in part:

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

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [Emphasis added]*

The certified IP also requires that shoreline protective structures be designed to be protective of natural scenic qualities of the bluffs and not cause a significant alteration of the bluff face. In particular, Section 30.34.020(B)(8) 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.*

Finally, Section 30.34.020.C.2.b.(4) states:

*The proposed measure in design and appearance must be found to be visually compatible with the character of the surrounding area; where feasible, to restore and enhance visual quality in visually degraded areas; and not cause a significant alteration of the natural character of the bluff face.*

### Visual Impacts

Neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Public views of the site are primarily from the beach looking landward and while using the Beacon's public access trail. The bluffs in the immediate vicinity of the site are characterized by varying degrees of vegetation and some lower seawalls and some upper bluff retaining walls (the subject site is not protected by a seawall). Any permanent retention of bluff face development, such as the subject private stairway will cause adverse impacts to public views. In addition, unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. In fact, aside from the railroad tie pathway located two properties to the south, the subject site contains the only private improved stairway for approximately 20 houses to the south of the Beacon's accessway. Local Coastal Program policies encourage the retention of the coastal bluffs in their natural state to and provide that the visual quality of bluffs should be restored and enhanced. A private bluff staircase in this area is not the established pattern of development and does not protect the natural scenic qualities of the bluff face, and thus, is inconsistent with the certified Local Coastal Program. Furthermore, the certified LCP plainly prohibits the construction of new private accessways over bluffs, like the proposed accessway in this case.

### Geologic Impacts

The Division of Mines and Geology has mapped the entire Encinitas shoreline as an area susceptible to landslides and mapped the area as either "Generally Susceptible" or "Most Susceptible Areas" for geologic susceptibility. Because the bluffs are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private stairways and provides for existing private stairways to be phased out.

Since the bluff at this location has been determined to be highly unstable and the Local Coastal Program recognizes the inherent scenic values of the natural shoreline; the construction of new private stairways are prohibited by PS Policy 1.6 of the City's Local Coastal Program and phasing out over time of other existing private stairways is required by Circulation Policy 6.7, the Commission finds that the construction or retention of any portion of a private stairway on the bluff face is inconsistent with the certified Local Coastal Program and that the unpermitted development on the coastal bluff should not be retained. An active landslide exists at the Beacon's public access path to the north of the subject property. This landslide is deeply seated, while the private stairway is surficial and does not contribute to the stability of the bluff or prevent the Beacon's landslide from spreading further south. Lastly, private stairways encourage

people to walk on the bluff face and in turn lead to increased erosion. Allowing the construction or retention of the retaining walls, treads, risers, and railroad ties is not consistent with the visual or geologic protection policies of the certified Local Coastal Program.

Neither the railroad ties nor the additional bluff improvements were permitted prior to the passage of Proposition 20. (See Former Pub. Res. Code, § 27404.) Therefore, the proposal is treated as new stairway on the bluff face. Even if the railroad ties had been installed prior to the passage of Proposition 20, the substantial bluff improvements constructed in 2004, which included a raised stairway to connect the patio to the bluff, three upper bluff retaining walls, landings on the bluff face, treads, risers, and stringers, additional retaining walls and railings, would not be consistent with the certified Local Coastal Program and cannot be retained.

The applicant contends that the treads and risers are holding back soil and the retained soil has allowed thick vegetation to establish on the bluff face and that removing the private stairway will thus destabilize the bluff. In addition, the applicant contends that if the treads and risers are removed, any rainfall will fall directly on the bluff face and increase erosion. As stated above, an active landslide exists at the Beacon's public access path to the north and west of the subject property. Based on a review of available information, the Commission's staff geologist finds that this landslide is deeply seated, as are the other aforementioned landslides in the vicinity of the subject site. Any influence that the stairway, its pilings, and the railroad ties have on bluff stability is only surficial in nature. They will not affect global bluff stability and their removal will not lead to an increased risk that the Beacon's landslide will spread further south. Thus, the Commission's staff geologist does not believe that the stairway is necessary for bluff stability. In fact, removal of the stairway will cause a decrease in the amount of impervious surface area on the bluff, which will decrease the amount and concentration of runoff, which may actually decrease bluff erosion. Development on coastal bluffs can result in impacts such as degradation and instability of the bluff. Additionally, removing the private stairway will stop people from walking on the bluff face and will in turn lead to less surficial erosion. Allowing the retention and/or replacement of the retaining walls, treads, risers, and railroad ties is not consistent with the visual or geologic protection policies of the certified Local Coastal Program, and therefore, must be denied.

#### **4. PUBLIC ACCESS**

The project parcel is located between the sea and the first public roadway. Pursuant to Section 30.80.090 of the City's Local Coastal Program, 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:

(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....

The Commission has historically discouraged the construction of private access stairs from residential development to the beach, as it can deter public access. In some case, development such as private access stairs can create a perception that the beach fronting these sites is also private, leading to a decrease in public access. The proposed development includes the replacement and maintenance of portions of an unpermitted private stairway down the coastal bluff. The continued approval of development would therefore not only be inconsistent with the policies protecting development on a coastal bluff, but may also result in the perpetuation of development directly adjacent to a public beach and public land, thus potentially impacting public access. Aside from the perception that portions of the beach fronting private stairways may not be public, there are no additional identified public access impacts of the subject unpermitted private stairway. A public beach access path exists at Beacon's beach (less than 200 ft. from the property owner's residence), thereby making a private accessway unnecessary, especially given that new private accessways are prohibited, and even legally non-conforming private accessways are required to be phased out by the City's certified Local Coastal Program. In the case of the unpermitted private stairway, it is only used by the private property owner and as such it is not open to the public. The proposed development for the portion of the project consisting of replacement of at-grade railroad ties, and construction of an upper bluff retractable stair access in sections 1-8, retention of wooden treads, risers, and stringers in sections 9-15, and retention of railroad ties in sections 9-17 is inconsistent with the applicable public access policies of the Coastal Act and the City of Encinitas' Local Coastal Program and therefore must be denied.

## **5. LOCAL COASTAL PLANNING**

The City of Encinitas received approval of its Local Coastal Program in November of 1994 and began issuing coastal development permits on May 15, 1995. The City of Encinitas Planning Commission approved the subject development on August 4, 2011. The local decision was not appealed to the City Council. Because the development is located between the sea and the first coastal roadway, it falls within the Commission's appeals jurisdiction. On September 16, 2011, the development approval was appealed to the Coastal Commission. The standard of review is the policies and ordinances of the certified Local Coastal Program and the public access and recreation policies of the Coastal Act.

As noted previously, the proposed development is inconsistent with several policies of the City's certified Local Coastal Program. The project is inconsistent with many coastal bluff protection policies of the Local Coastal Program. The proposed retention and replacement of portions of the unpermitted stairway on the bluff is inconsistent with Local Coastal Program policies that

prohibit new private stairways and discourage and phase out existing private stairways. The retention and reconstruction of portions of the private stairway does not discourage climbing upon and defacement of the bluff face, the placement of a new ‘retractable’ staircase to connect the patio to the bluff top is not consistent with the policy requiring all structures be a minimum of 5 ft. from the bluff edge. The proposed retention or portions of the private stairway and the 3 upper bluff retaining walls does not protect the natural scenic qualities of the coastal bluffs and is not consistent with the character of the surrounding areas. Because each of these impacts is inconsistent with the previously cited Local Coastal Program policies, the proposed development must be denied. The Commission finds that approval of the subject proposal would prejudice the City’s ability to continue to implement its certified Local Coastal Program.

## **6. CEQA**

Section 13096 of the California Code of Regulations requires Commission approval of a coastal development permit to be supported by a finding showing the permit to be 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.

As stated previously, the development as proposed would result in visual and geologic impacts to the coastal bluff. In addition, there are feasible alternatives to the proposed development which would lessen its adverse effect. Thus, the proposed development is not the least environmentally damaging alternative and cannot be found consistent with the requirements of the City of Encinitas Local Coastal Program, nor with the applicable CEQA requirements. Thus, the proposed project must be denied.

## **7. CONCLUSION**

In conclusion, given the unpermitted nature of the private stairway and the 3 upper bluff retaining walls; the prohibition in the Local Coastal Program of private stairways on the bluff face and the requirement to phase out existing private stairways, the replacement or maintenance of any portion of the unpermitted stairway or the upper bluff walls would cause significant adverse environmental impacts on coastal resources. As such, approval of a portion of the project, as described in Part 2 of the resolution above, represents a development that the Commission has determined to be inconsistent with the certified policies of the City’s Local Coastal Program. This portion of the project, therefore, shall be denied as submitted.

## **APPENICES**

### **APPENDIX A**

#### **SUBSTANTIVE FILE DOCUMENTS**

- Certified City of Encinitas Local Coastal Program (LCP)
- Appeal by Commissioner Brian Brennan dated 9/16/2011
- Appeal by Commissioner Wendy Mitchell dated 9/16/2011
- Notice of Final Action received 9/1/2011
- Planning Commission Resolution No. PC 2011-21 received 9/1/2011
- Video archive of City of Encinitas Planning Commission Meetings on 6/2/2011 and 8/4/2011
- Geotechnical Evaluation by Geotechnical Exploration, Inc. dated 4/23/2010
- Geotechnical Review Documents dated 9/1/2012, 7/8/2011, 6/23/2011, and 5/10/2011;
- Site Plans dated 12/14/2010; 6/2/2011 and 8/4/2011
- Planning Commission Agenda Packet
- Letters from the City of Encinitas to Matthew Gordon and Slowikowska Rober dated 7/9/2009, 6/16/2008, and 5/28/2008
- Memo from Syd Willard to Bud Getty dated 12/14/1982
- Letter from John G. Wigmore to the City of Encinitas Planning Commission dated 5/27/2011 and 6/8/2008
- Letter from Stephen Ostrow to the City of Encinitas dated 5/17/2004 and 1/12/2004;
- F1763 (Gazdik), F9288 (Wigmore)
- California Coastal Records Project oblique aerial photographs dated 1972, 1979, 1987, 1989, 2002, 2004, 2006, 2008, and 2010
- San Diego County Regional Coastline Photographs Volume III dated 6/25/1972
- Binder from the applicant to Commission staff including numerous documents, letters, emails and photos related to the subject property received 11/17/2011
- Email submittal from the applicant to Commission staff including numerous documents and photos related to the subject property received 10/15/2012
- In person submittal from the applicant to Commission staff including numerous documents and photos related to the subject property received 10/15/2012
- “Applicant’s Response to Staff Report Recommendations” received 1/7/2013 and 1/15/2013

# PROJECT LOCATION



Beacons Public Beach Access

Project Location

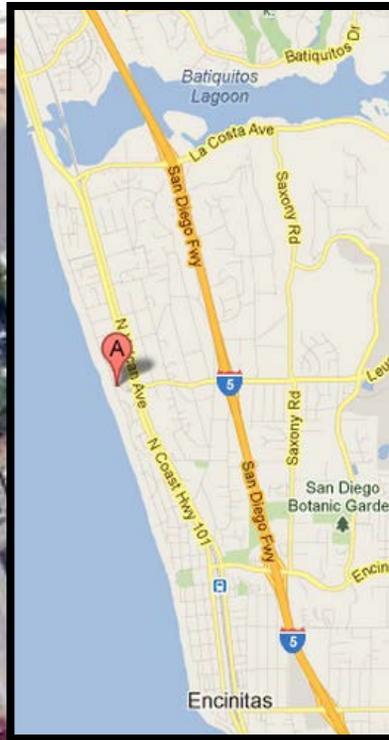


EXHIBIT NO. 1  
APPLICATION NO.  
**A-6-ENC-11-073**  
Project Location





# SITE PLAN

**TOP OF BLUFF**

**3 Upper Bluff  
Wooden  
Retaining Walls**

**BASE OF BLUFF**

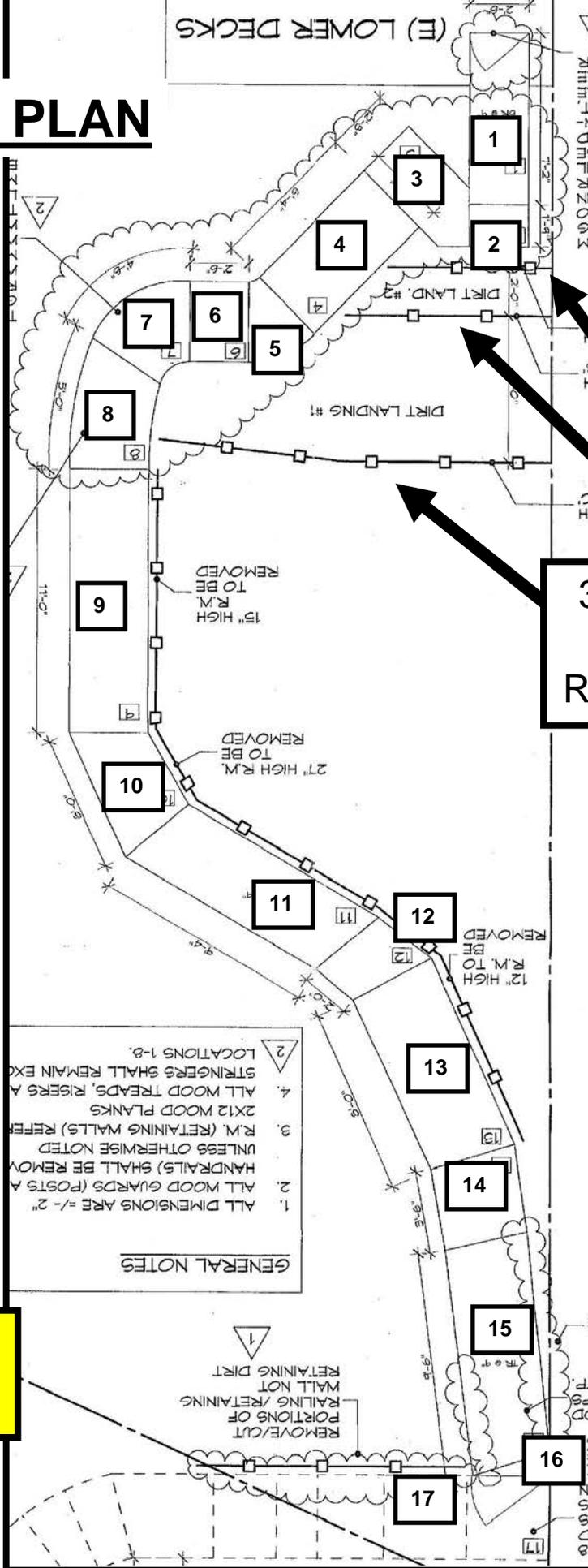


EXHIBIT NO. 3
APPLICATION NO. <b>A-6-ENC-11-073</b>
Site Plan
 California Coastal Commission

**1972**

No Railroad Ties Visible



Subject Site

See Link on Page 14 of Staff Report for a larger more detailed image

EXHIBIT NO. 4  
APPLICATION NO.  
**A-6-ENC-11-073**

1972 Photo



California Coastal Commission

**1979**

**No Railroad Ties Visible**



**See Link on Page 14 of Staff Report for a larger more detailed image**

**EXHIBIT NO. 5**

APPLICATION NO.

**A-6-ENC-11-073**

1979 Photo



California Coastal Commission

**1987**

No Railroad Ties Visible



See Link on Page 14 of Staff Report for a larger more detailed image

EXHIBIT NO. 6

APPLICATION NO.

**A-6-ENC-11-073**

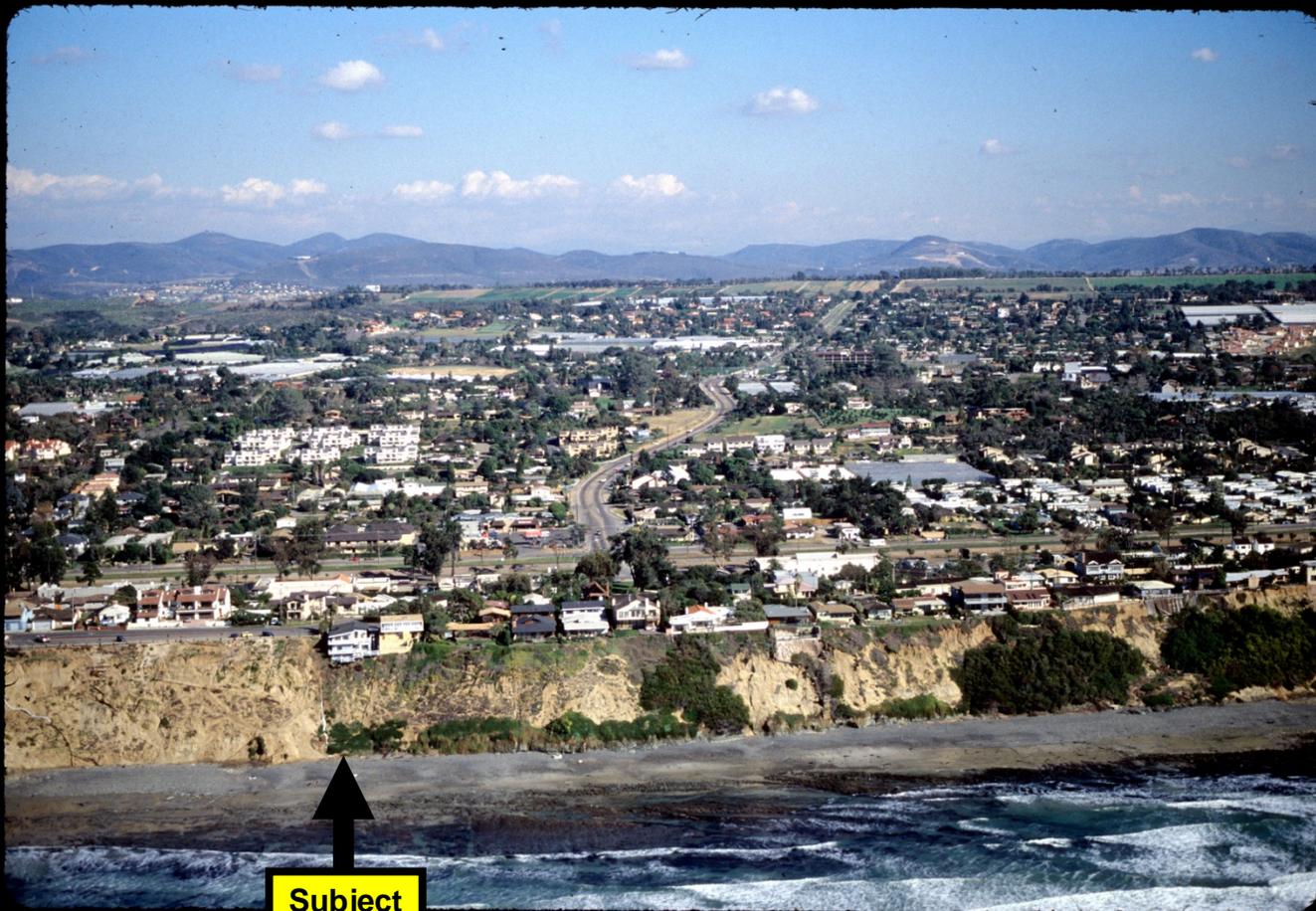
1987 Photo



California Coastal Commission

**1989**

No Railroad Ties Visible, Path Visible



**Subject Site**

See Link on Page 14 of Staff Report for a larger more detailed image

EXHIBIT NO. 7  
APPLICATION NO.  
**A-6-ENC-11-073**

1989 Photo



California Coastal Commission

**2002**

**Railroad Ties Visible and Raised Staircase from Patio**



**EXHIBIT NO. 8**

APPLICATION NO.

**A-6-ENC-11-073**

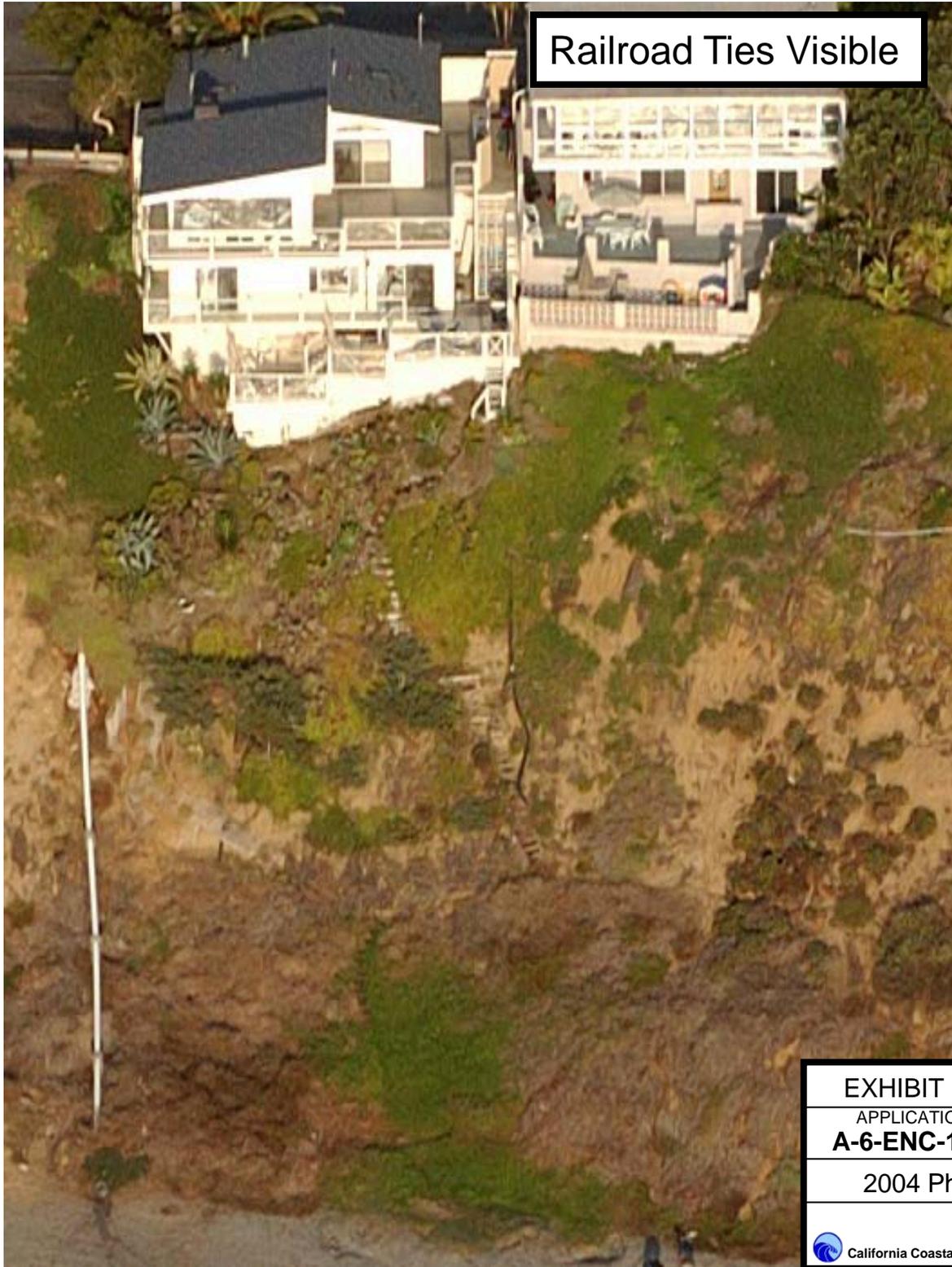
2002 Photo



California Coastal Commission

**See Link on Page 14 of Staff Report for a larger more detailed image**

**2004**



Railroad Ties Visible

EXHIBIT NO. 9  
APPLICATION NO.  
**A-6-ENC-11-073**

2004 Photo



California Coastal Commission

**See Link on Page 14 of Staff Report for a larger more detailed image**

**2006**

**Extensive Unpermitted Improvements**



**EXHIBIT NO. 10**

APPLICATION NO.

**A-6-ENC-11-073**

2006 Photo



California Coastal Commission

**See Link on Page 14 of Staff Report for a larger more detailed image**

**2012**

**Stairway overgrown with vegetation**

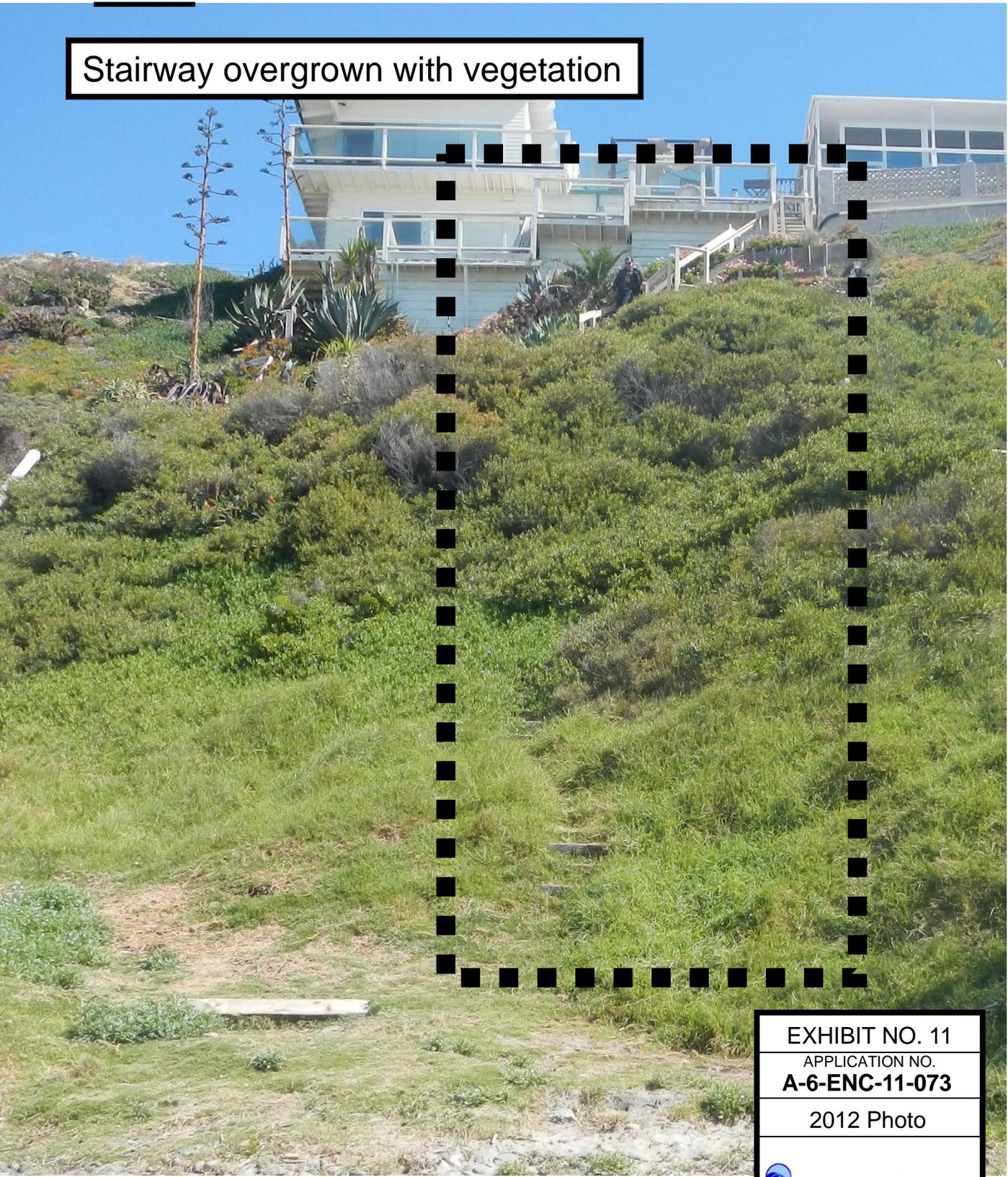


EXHIBIT NO. 11
APPLICATION NO. <b>A-6-ENC-11-073</b>
2012 Photo
 California Coastal Commission

CCC Staff Photograph

# LETTER FROM NEIGHBOR

*W. J. Knowlton*

JOHN G. WIGMORE  
870 Neptune Avenue  
Encinitas, CA 92024  
T. (760)942-1430  
[jgwigmore@yahoo.com](mailto:jgwigmore@yahoo.com)

June 8, 2008

Mr. Phil Cotton  
City Manager  
City of Encinitas  
505 South Vulcan Ave.  
Encinitas, CA 92024

EXHIBIT NO. 12
APPLICATION NO. <b>A-6-ENC-11-073</b>
Neighbor's Letter
 California Coastal Commission

Re: Beach Access and Stairway - 870 and 876- 878 Neptune Ave.

Dear Mr. Cotton:

Matthew and Robin Gordon who reside at 876-878 Neptune Avenue have asked me to write to you to relate the history of my family's use of the beach access and stairway from my home to Beacon's Beach.

In April 1977 I purchased the house at 870 Neptune Ave. as a second home and beach house. I have owned the property ever since. When I purchased the home, my family consisted of my wife, a life long beach goer and strong swimmer, my four children then aged 15, 13, 7 and 5. I bought the house because we all loved the ocean. I was an avid surfer and had spent the preceding 10 years surfing at Malibu, north of Santa Monica. We lived in West Los Angeles at that time. To me, it was critical that the Neptune beach house have beach access. It was the primary reason I purchased the house. When we moved in, in 1977, there was a path to the beach already in place. It switch- backed down from my bluff edge to the north boundary, then across the lower portion of the bluff fronting 872 Neptune (now the Bohans' house) and then across the south- western corner of 876-878 Neptune (now the Gordons' house) joining the existing access in front of the Gordons' house and then down the lower bluff path to Beacons beach. Immediately following my acquisition of 870 Neptune, using two foot X "8" X "8" rail road ties, I personally built a stairway down the bluff to the beach on the existing path already in place. The railroad ties were embedded into the face

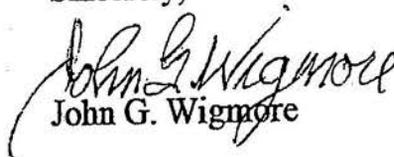
of the path on the bluff. The stair way was and is unobtrusive. From the bottom of the bluff, the stairway is not visible in places. It is low impact; there has never been an erosion problem. However, from time to time, the lower portion of the path leading down the bluff below the Gordons' house was covered over by sand moving down from above burying the railroad ties. Further, bluff growth would grow over and obscure the lower stairway. Nonetheless, we used the stairway continuously. I renewed the railroad ties on the lower path below the Gordons' in 2004. Subsequently, the Gordons fastened a new wood fascia over the lower stairway railroad ties, as it now exists.

In September 1991 we moved into 870 Neptune as our permanent, full time residence. My wife died in 1994.

Every year in the spring after the winter rains and before Memorial Day, I clear the stairway using hand shears, a lopper and a broom. I did so this spring of 2008. Below the Gordons' house, where the grass is thick, I used a weed whacker that I had rented from Rebel Rents on Pacific Coast Highway.

Since we purchased the house at 870 Neptune in 1977, over all those years, the stairway has been used continuously without interruption by me, my children and our friends, to go to and from the beach and our house on the bluff. Since the Gordons purchased their house at 876-878 Neptune, the Gordons and Wigmores have shared the use of the stairs below their home.

Sincerely,

  
John G. Wigmore

Cc: Matthew and Robin Gordon

# PRIVATE RAILROAD TIE ACCESSWAY TO THE SOUTH



EXHIBIT NO. 13

APPLICATION NO.

**A-6-ENC-11-073**

Railroad Ties South



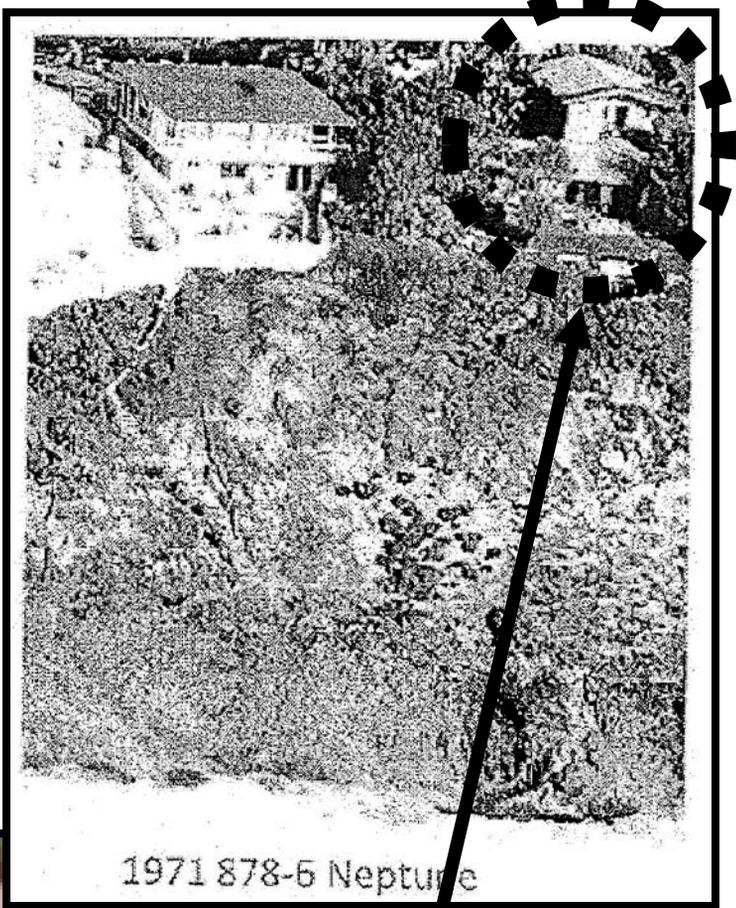
California Coastal Commission

CCC Staff Photograph 2012

**MISLABELED**  
**STAIRWAY**  
**PHOTO**

No 2<sup>nd</sup> Story  
in 1979

Copyright (C) 2002-2010 Kenneth &  
Gabrielle Adelman, California Coastal  
Records Project,  
[www.Californiacoastline.org](http://www.Californiacoastline.org)



Photograph  
Submitted by  
Applicant

2<sup>nd</sup> Story  
Construction  
after 1980



1979 Photograph

EXHIBIT NO. 14
APPLICATION NO. <b>A-6-ENC-11-073</b>
Mislabeled Photo
 California Coastal Commission

## CALIFORNIA COASTAL COMMISSION

DIEGO AREA  
 METROPOLITAN DRIVE, SUITE 103  
 DIEGO, CA 92108-4402  
 767-2370



APPEAL FROM COASTAL PERMIT  
 DECISION OF LOCAL GOVERNMENT

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

SECTION I. Appellant(s)

Name: Commissioner Brian Brennan  
 Mailing Address: 45 Fremont St.  
Suite 2000  
San Francisco, CA 94105  
 Phone Number: (415) 904-5200

SECTION II. Decision Being Appealed

1. Name of local/port government: City of Encinitas
2. Brief description of development being appealed: Removal of portions of a private, unpermitted access stairway constructed on the bluff face leading from the blufftop to the beach, allow retention of portions of the unpermitted stairway and retaining walls, and authorize construction of a replacement stairway of railroad ties and a retractable staircase element on the upper bluff.
3. Development's location (street address, assessor's parcel no., cross street, etc.): 876 & 878 Neptune Avenue, Encinitas, San Diego County. APN 258-311-07
4. Description of decision being appealed:
  - a. Approval; no special conditions:
  - b. Approval with special conditions:
  - c. Denial:

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

TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-6-ENC-11-073

DATE FILED: 9/16/11

DISTRICT: San Diego

RECEIVED

SEP 16 2011

EXHIBIT NO. 15
APPLICATION NO. A-6-ENC-11-073
Appeals
California Coastal Commission

CALIFORNIA  
 COASTAL COMMISSION  
 SAN DIEGO COAST DISTRICT

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

- a.  Planning Director/Zoning Administrator
- b.  City Council/Board of Supervisors
- c.  Planning Commission
- d.  Other

Date of local government's decision: 8/4/11

Local government's file number (if any): 10-069 CDP

SECTION III. Identification of Other Interested Persons

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

Name and mailing address of permit applicant:

Matthew Gordon  
878 Neptune Avenue  
Encinitas, CA 92024

---

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

---

SECTION IV. Reasons Supporting This Appeal

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

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

*See Attachment "A" Dated 9/16/11*

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

SECTION V. Certification

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

Signed: *Signature on File* \_\_\_\_\_  
Appellant or Agent

Date: 9/16/11

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

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Attachment "A"

A-6-ENC-11-073

876 and 878 Neptune Ave., Encinitas

9/16/11

The project approved by the City of Encinitas at 876 & 878 Neptune Avenue (APN# 256-011-04) would authorize removal of portions of a private, unpermitted access stairway constructed on the bluff face, allow retention of portions of the unpermitted stairway and retaining walls, and authorize construction of a replacement stairway of railroad ties and a retractable staircase element on the upper bluff. The development on the bluff face currently consists of numerous retaining walls and a stairway leading from the blufftop to the beach made of railroad ties and wooden treads, railings, and a privacy gate.

The City's LCP specifically prohibits private access stairways on the bluff face because such structures on the bluff face result in visual impact to the natural landform of the bluff, and also can result in impacts on geologic stability. The LCP provisions are intended to retain the bluffs as natural open space and limit the proliferation of private access stairways by phasing out of existing private access stairways over time. Therefore, authorizing any portions of the unpermitted private access stairway and construction of new stairway elements is not consistent with the certified LCP.

The subject property is located on the west side of Neptune Avenue, directly adjacent to the south of the Beacon's Beach Public Access. A multi-story duplex is located on the blufftop; the duplex and its beach facing decks appear to be seaward of the bluff edge. There are currently no seawalls on the bluff or beach fronting the project site.

Specifically the City's action requires removal of the raised section of stairs leading from a deck on the blufftop to bluff face, removal of all railings and a privacy gate on the midbluff portion of the staircase, and removal of sections of retaining walls that are not retaining soil. However, the City's action authorizes retention of all railroad ties and treads on top of the railroad ties and retention of numerous portions of retaining walls that are retaining soil. Additionally, the City approval authorizes the applicant to replace the raised staircase on the upper bluff with a 'non-permanent, removable, retractable stair' and to install a railroad tie staircase on the upper bluff.

According to the City, the unpermitted stairway was installed in approximately 2004. A historic aerial photograph from October 23, 2004 shows only railroad ties on the midbluff and a small staircase from the deck to the bluff. Approximately  $\frac{3}{4}$  of the bluff is owned by the blufftop property owner, while the lower  $\frac{1}{4}$  of the bluff is owned by California State Parks. The City did not address the portion of the unpermitted stairway that is in State Parks property.

Issues:

- Based on analysis of historic photos, it does not appear that the railroad tie staircase existed prior to the Coastal Act. A historic aerial photo from January 1989 does not appear to show any railroad ties on the subject bluff face. There is some evidence of a foot trail, but no stairway. Thus, the stairway is unpermitted.

- The stairs are placed directly on the bluff face in an area that has been described as an active landslide area (Beacon's Beach Access has been described as an active landslide and a large landslide occurred in the mid 1990s just a few lots south of the subject site). LCP policies encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards; a stairway placed directly on a coastal bluff has the potential to cause increased erosion and instability to the bluff.
- Unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. There are very few private staircases on the bluff face in this area. In fact, the subject site contains the only private stairway for approximately 20 houses to the south of the Beacon's accessway. LCP policies assert that the visual quality of bluffs should be restored and enhanced. A bluff staircase in this area is not the established pattern of development.
- If in fact, portions of the stairway/retaining walls cannot be removed without potentially impacting bluff stability (which must be verified through independent analysis), alternatives to phase out the stairway, rather than authorize it as consistent with the LCP must be considered.
- The section of the stairway on the lower portion of the bluff located on State lands was not addressed by the City permit.

LCP Policies:

Public Safety Element Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

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

- a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;

[...]

- 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;

- f. ...no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge;...
- g. Permanently conserving the bluff face within an open space easement or other suitable instrument...(emphasis added)

In addition, Circulation Policy 6.7 states as follows:

Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. (emphasis added)

Resource Management Goal 8 of the LUP: The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.

Resource Management Policy 8.5 states, in part: The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards and as a scenic resource...(emphasis added)

## CALIFORNIA COASTAL COMMISSION

DIEGO AREA  
 METROPOLITAN DRIVE, SUITE 103  
 DIEGO, CA 92108-4402  
 767-2370



APPEAL FROM COASTAL PERMIT  
 DECISION OF LOCAL GOVERNMENT

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

SECTION I. Appellant(s)

Name: Commissioner Wendy Mitchell  
 Mailing Address: 12949 Blairwood Dr.  
Studio City, CA 91604

Phone Number: (415) 904-5200

SECTION II. Decision Being Appealed

1. Name of local/port government: City of Encinitas
2. Brief description of development being appealed: Removal of portions of a private, unpermitted access stairway constructed on the bluff face leading from the blufftop to the beach, allow retention of portions of the unpermitted stairway and retaining walls, and authorize construction of a replacement stairway of railroad ties and a retractable staircase element on the upper bluff.
3. Development's location (street address, assessor's parcel no., cross street, etc.)  
876 & 878 Neptune Ave, Encinitas, San Diego County. APN 258-311-07
4. Description of decision being appealed:
  - a. Approval; no special conditions:
  - b. Approval with special conditions:
  - c. Denial:

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

TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-6-ENC-11-073

DATE FILED: 9/16/11

DISTRICT: San Diego

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 CALIFORNIA  
 COASTAL COMMISSION  
 SAN DIEGO COAST DISTRICT

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

- a.  Planning Director/Zoning Administrator                      c.  Planning Commission
- b.  City Council/Board of Supervisors                              d.  Other

Date of local government's decision: 8/4/11

Local government's file number (if any): 10-069 CDP

**SECTION III. Identification of Other Interested Persons**

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

Name and mailing address of permit applicant:

Matthew Gordon  
868 Neptune Avenue  
Encinitas, CA 92024

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

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**SECTION IV. Reasons Supporting This Appeal**

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



Attachment "A"  
A-6-ENC-11-073  
876 and 878 Neptune Ave., Encinitas  
9/16/11

The project approved by the City of Encinitas at 876 & 878 Neptune Avenue (APN# 256-011-04) would authorize removal of portions of a private, unpermitted access stairway constructed on the bluff face, allow retention of portions of the unpermitted stairway and retaining walls, and authorize construction of a replacement stairway of railroad ties and a retractable staircase element on the upper bluff. The development on the bluff face currently consists of numerous retaining walls and a stairway leading from the blufftop to the beach made of railroad ties and wooden treads, railings, and a privacy gate.

The City's LCP specifically prohibits private access stairways on the bluff face because such structures on the bluff face result in visual impact to the natural landform of the bluff, and also can result in impacts on geologic stability. The LCP provisions are intended to retain the bluffs as natural open space and limit the proliferation of private access stairways by phasing out of existing private access stairways over time. Therefore, authorizing any portions of the unpermitted private access stairway and construction of new stairway elements is not consistent with the certified LCP.

The subject property is located on the west side of Neptune Avenue, directly adjacent to the south of the Beacon's Beach Public Access. A multi-story duplex is located on the blufftop; the duplex and its beach facing decks appear to be seaward of the bluff edge. There are currently no seawalls on the bluff or beach fronting the project site.

Specifically the City's action requires removal of the raised section of stairs leading from a deck on the blufftop to bluff face, removal of all railings and a privacy gate on the midbluff portion of the staircase, and removal of sections of retaining walls that are not retaining soil. However, the City's action authorizes retention of all railroad ties and treads on top of the railroad ties and retention of numerous portions of retaining walls that are retaining soil. Additionally, the City approval authorizes the applicant to replace the raised staircase on the upper bluff with a 'non-permanent, removable, retractable stair' and to install a railroad tie staircase on the upper bluff.

According to the City, the unpermitted stairway was installed in approximately 2004. A historic aerial photograph from October 23, 2004 shows only railroad ties on the midbluff and a small staircase from the deck to the bluff. Approximately  $\frac{3}{4}$  of the bluff is owned by the blufftop property owner, while the lower  $\frac{1}{4}$  of the bluff is owned by California State Parks. The City did not address the portion of the unpermitted stairway that is in State Parks property.

Issues:

- Based on analysis of historic photos, it does not appear that the railroad tie staircase existed prior to the Coastal Act. A historic aerial photo from January 1989 does not appear to show any railroad ties on the subject bluff face. There is some evidence of a foot trail, but no stairway. Thus, the stairway is unpermitted.

- The stairs are placed directly on the bluff face in an area that has been described as an active landslide area (Beacon's Beach Access has been described as an active landslide and a large landslide occurred in the mid 1990s just a few lots south of the subject site). LCP policies encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards; a stairway placed directly on a coastal bluff has the potential to cause increased erosion and instability to the bluff.
- Unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. There are very few private staircases on the bluff face in this area. In fact, the subject site contains the only private stairway for approximately 20 houses to the south of the Beacon's accessway. LCP policies assert that the visual quality of bluffs should be restored and enhanced. A bluff staircase in this area is not the established pattern of development.
- If in fact, portions of the stairway/retaining walls cannot be removed without potentially impacting bluff stability (which must be verified through independent analysis), alternatives to phase out the stairway, rather than authorize it as consistent with the LCP must be considered.
- The section of the stairway on the lower portion of the bluff located on State lands was not addressed by the City permit.

LCP Policies:

Public Safety Element Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

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

- a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;

[...]

- 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;

- f. ...no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge;...
- g. Permanently conserving the bluff face within an open space easement or other suitable instrument...(emphasis added)

In addition, Circulation Policy 6.7 states as follows:

Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. (emphasis added)

Resource Management Goal 8 of the LUP: The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.

Resource Management Policy 8.5 states, in part: The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards and as a scenic resource...(emphasis added)



**CITY OF ENCINITAS  
PLANNING COMMISSION  
AGENDA REPORT  
Meeting Date: August 4, 2011**

TO: Planning Commission  
VIA: *TC* Tom Curriden, City Planner  
FROM: Planning and Building Department  
*R* Roy Sapa'u, Senior Planner

EXHIBIT NO. 16
APPLICATION NO. <b>A-6-ENC-11-073</b>
Agenda Report
 California Coastal Commission

**RECEIVED**  
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CALIFORNIA  
COASTAL COMMISSION  
SOUTH COAST DISTRICT

**SUBJECT:** Continued public hearing to consider an application requesting a Coastal Development Permit to remove existing wooden stairs, treads, risers, railings and retaining walls installed on the face of the coastal bluff. The subject property is located in the R-11 (Residential 11) zone, the Coastal Bluff Overlay Zone, the Ecological Resource/Open Space/Parks (ER/OS/P) Zone and within the California Coastal Commission Appeal Jurisdiction of the Coastal Zone. **CASE NUMBER:** 10-069 CDP; **APPLICANT:** Steve Shackelton; **LOCATION:** 876 & 878 Neptune Avenue (APN: 258-311-07).

**BACKGROUND:** The Planning Commission considered the subject application on June 2, 2011. At the hearing, the Planning Commission heard testimony from the property owner, the project geotechnical engineer and three (3) members of the public. The property owner and project geotechnical engineer expressed concerns including objections to the requirements and recommendations made by staff regarding Sections 1 thru 8 of the stairway as depicted on the attached project drawing (**Exhibit PC-6**). Both were concerned that the removal of the structures in Sections 1 thru 8 as recommended by staff (and depicted on the project drawings) would create erosion problems that could lead to soil sloughing. The three members of the public who spoke at the hearing echoed the same concern. The project planner and City's Geotechnical expert were not present at the hearing to address the concerns. Therefore, after hearing public testimony, the Planning Commission continued the public hearing to the August 4, 2011 Planning Commission meeting to allow staff and the property owner and project geotechnical engineer to resolve issues raised at the hearing.

On June 16, 2011, staff (including Jim Knowlton of GeoPacifica, City's Third Party Geotechnical Consultant) met with Matthew Gordon (property owner), Les Reed (project geotechnical engineer) and Steve Shackelton (project architect) on the project site to discuss the concerns and issues raised at the June 2, 2011 Planning Commission hearing. Staff indicated to the owner and owner's representatives that all structures that were installed on the face of the coastal bluff without proper permits must be removed. All wooden risers, treads, stairs, stringers, handrails and landings in Sections 1 thru 8 that are above grade must be removed in their entirety. Any structures (i.e. posts

footings) that are physically embedded into the bluff face must be cut at grade. Furthermore, all existing railroad ties underneath the wooden stairs to be removed in Sections 1 thru 8 can remain and be replaced subject to review and approval by the City Planning and Engineering Departments. The owner agreed in letter correspondences from the project architect and geotechnical engineer attached hereto as **Exhibit PC-3**. Both letters stated that the project remains as previously proposed and depicted on the project drawings presented to the Planning Commission on June 2, 2011 and attached hereto as **Exhibit PC-6**. Furthermore, both express support of staff's previous recommendation made in the June 2, 2011 staff report. Therefore, no changes are proposed to the project design and staff's recommendations as presented to the Planning Commission on June 2, 2011.

The subject property is developed with a single-family residence and is bordered on the west by a coastal bluff overlooking the Pacific Ocean. The bluff face contains a pre-1972 on-grade access path consisting of railroad ties extending from the upper portion of the bluff face underneath an existing wooden deck leading down to the beach below. In 2004, the property owner installed new wooden stairs, treads, risers and railings placed over existing railroad ties without obtaining necessary permits from the City of Encinitas and/or California Coastal Commission. In addition, the owner constructed a stairway access with wooden railings and steps from the lower deck on the bluff top to the on-grade path on the bluff face directly below it without permits. In 2008, the City of Encinitas recorded a notice of violation on the subject property for the unpermitted improvements. The applicant was required to obtain necessary permit from the City for the removal of the unpermitted structures. The applicant is proposing to remove the unpermitted structures as delineated on the project drawings attached hereto as **Exhibit PC-6**.

**REQUIRED PERMITS AND FINDINGS:** Because site-specific analysis indicates the presence of a coastal bluff, the regulations contained in Municipal Code Section 30.34.020 (Coastal Bluff Overlay Zone (CBOZ)) apply and the Planning Commission is the authorized agency for reviewing and granting discretionary approval for any proposed development within the Coastal Bluff Overlay Zone. Pursuant to Section 30.34.020B.2 of the Municipal Code, no structure, facility, improvements or activity shall be allowed on the face or at the base of a coastal bluff except for public beach access facilities, preemptive measures and landscape maintenance including removal of nonnative vegetations when accomplished by hands. In addition, Section 13252 of Title 14 of the California Code of Regulations requires that any repair or maintenance to structures including placement or removal of any solid materials within 50 feet of the edge of a coastal bluff or within 20 feet of coastal waters requires a coastal development permit. The applicant requests approval of a Coastal Development Permit to remove existing wooden stairs, treads, risers, and railings on the bluff face starting at the top edge of the bluff leading down to the beach below. The proposed project will comply with all applicable provisions of Section 30.34.020 (Coastal Bluff Overlay Zone) of the Municipal Code.

A site specific geotechnical review is required for coastal bluff development to address the standards contained in Section 30.34.020 D of the Municipal Code. A geotechnical evaluation prepared by Leslie D. Reed of Geotechnical Exploration, Inc included as part of attached **Exhibit PC-3** was submitted as part of the application. The evaluation was prepared to determine, based on a visual evaluation and probing of soils behind the stairway plank retaining walls, how much

retaining wall heights could safely be reduced (only removing portions of walls not retaining any earth) without causing any sloughing and surficial failures up the slope face. The evaluation presented recommendations in lowering of existing wall heights to the degree appropriate without adversely impacting bluff face stability. The evaluation concluded that implementing the proposed removal methodology of existing retaining walls, vertical supports, hand rails, stringers, and treads and risers as noted and described on the attached project drawing (**Exhibit PC-6**) prepared by Mr. Steve Shackelton, dated December 14, 2011, will not adversely impact the stability of the bluff face and will not compromise the existing levels of erosion protection. The geotechnical evaluation, as required by the City, was subject to a Third Party Geotechnical Review by the City's Geotechnical Consultant, Geopacifica. The Third Party Review concurred with the proposed recommendations and concluded that the geotechnical evaluation adequately addressed the site conditions and provided information to adequately meet the standards of the City of Encinitas Municipal Code Section 30.34.020B, C and D.

The proposed project requires approval of a Coastal Development Permit in accordance with Chapter 30.80 (Coastal Development Permit) of the Encinitas Municipal Code. The required findings to approve a Coastal Development Permit application can be found in Section 30.80.090 of the Municipal Code. The findings contained in Attachment "A" of the attached draft Resolution of Approval (**Exhibit PC-1**) reflect that the project complies with the General Plan and Encinitas Municipal Code.

**Citizen's Participation Plan (CPP):** The applicant prepared a Citizen's Participation Plan (CPP) newsletter in accordance with Chapter 23.06 of the Municipal Code. The newsletter was mailed out on April 8, 2011 to property owners and occupants within 500 feet of the subject property. The newsletter allowed for a two week comment period. The applicant states in the CPP final report (**Exhibit PC-2**) that one email correspondence was received during the comment period. The email is included with the CPP final report. As stated in the CPP final report, all concerns were addressed at the CPP meeting.

**ENVIRONMENTAL REVIEW:** The project has been determined to be exempt from environmental review as per California Environmental Quality Act (CEQA) Guidelines Sections 15301(1)(4), which categorically exempts demolition and removal of accessory structures.

**ALTERNATIVE ACTIONS:** Alternative actions available to the Commission include: (1) Make the required findings and adopt the attached Resolution approving the Coastal Development Permit; (2) Continue the hearing for further information and review; or (3) Close the public hearing, discuss the findings, vote to deny the application and direct staff to return on a date certain with a resolution of denial reflecting the findings of the Commission.

**RECOMMENDATION:** Before public comment is received, disclose all information and contacts received outside the hearing of this matter upon which the decision will be based, receive public testimony and consider the facts and findings necessary to make a decision on the application. Staff recommends that the Planning Commission approve Case No. 10-069 CDP based upon the findings and conditions contained in the draft resolution of approval (**Exhibit PC-1**) for the project provided to the Commission.

LIST OF ATTACHMENTS:

- Exhibit PC-1 Draft Resolution of Approval with Attachments "A", "B" and "C"
- Exhibit PC-2 Citizen's Participation Plan Final Report
- Exhibit PC-3 Geotechnical Letter Reports prepared by Leslie D. Reed of Geotechnical Exploration, Inc dated July 8, 2011, June 23, 2010 and April 23, 2010; and Letter correspondence from Stephen Shackelton dated June 22, 2011
- Exhibit PC-4 Application and Related Materials
- Exhibit PC-5 Color photos of project site
- Exhibit PC-6 Project drawings

\*\*\* The entire Administrative Record for this Coastal Development Permit application including the June 2, 2011 Agenda Report and Geotechnical Evaluation are available for review in the Planning and Building Department.

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SEP 01 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

RESOLUTION NO. PC 2011-21

**A RESOLUTION OF THE CITY OF ENCINITAS PLANNING COMMISSION  
APPROVING A COASTAL DEVELOPMENT PERMIT FOR REMOVAL OF  
EXISTING WOODEN STAIRS, TREADS, RISERS, RAILINGS AND RETAINING  
WALLS ON THE BLUFF FACE FOR THE PROPERTY LOCATED AT 876 & 878  
NEPTUNE AVENUE.**

(CASE NO. 10-069 CDP; APN: 258-311-07)

**WHEREAS**, a request for consideration of a Coastal Development Permit was filed by Steve Shackelton on behalf of the property owner to allow the removal of existing wooden stairs, treads, risers, railings and retaining walls, in accordance with Chapters 30.34 (Special Purpose Overlay Zones) and 30.80 (Coastal Development Permit) of the Encinitas Municipal Code, for the property located within the R-11 (Residential 11) zone, the Ecological Resource/Open Space/Parks (ER/OS/P) Zone, the Coastal Bluff Overlay Zone and the California Coastal Commission Appeal Jurisdiction of the Coastal Zone, legally described as:

(SEE ATTACHMENT "A")

**WHEREAS**, the Planning Commission conducted noticed public hearings on the application on June 2, 2011 and August 4, 2011, at which time all those desiring to be heard were heard; and

**WHEREAS**, the Planning Commission considered, without limitation:

1. The June 2, 2011 and August 4, 2011 agenda reports to the Planning Commission with attachments;
2. The General Plan, Local Coastal Program, Municipal Code and associated Land Use Maps;
3. Oral evidence submitted at the hearings;
4. Written evidence submitted at the hearings;
5. Project drawing consisting of 1 sheet Site Plan stamped received by the City of Encinitas on December 15, 2010; and

**WHEREAS**, the Planning Commission made the following findings pursuant to Chapter 30.80 (Coastal Development Permit) of the Encinitas Municipal Code:

(SEE ATTACHMENT "B")

**NOW, THEREFORE, BE IT RESOLVED** that the Planning Commission of the City of Encinitas hereby approves application No. 10-069 CDP subject to the following conditions:

EXHIBIT NO. 17
APPLICATION NO. <b>A-6-ENC-11-073</b>
Resolution
 California Coastal Commission

(SEE ATTACHMENT "C")

**BE IT FURTHER RESOLVED** that the Planning Commission, in its independent judgment, finds that this project is categorically exempt from environmental review pursuant to Section 15301(1)(4), which categorically exempts demolition and removal of accessory structures.

**PASSED AND ADOPTED** this 4<sup>th</sup> day of August, 2011, by the following vote, to wit:

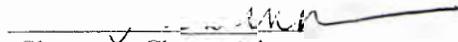
AYES: Brandenburg, Felker, O'Grady, Shannon

NAYS: None

ABSENT: Grosclose

ABSTAIN: None

*Signature on File*

  
Jo Ann Shannon, Chair of the  
Encinitas Planning Commission

ATTEST:

*Signature on File*

  
Patrick Murphy  
Secretary

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

**ATTACHMENT "A"**  
**Resolution No. PC 2011-21**  
**Case No. 10-069 CDP**

LEGAL DESCRIPTION

THOSE PORTIONS OF BLOCKS "B" AND "D" OF SOUTH COAST PARK NO.2, IN THE CITY OF ENCINITAS, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 1859, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, SEPTEMBER 21. 1925, DESCRIBED AS FOLLOWS;

COMMENCING AT A CONCRETE MONUMENT MARKING THE INTERSECTION OF THE CENTER LINE OF FULVIA STREET AND NEPTUNE AVENUE AS SHOWN ON SAID MAP NO. 1859; THENCE SOUTH 69 DEGREES 51'30" WEST A DISTANCE OF 20.04 FEET TO AN ANGLE POINT IN THE WESTERLY LINE OF SAID NEPTUNE AVENUE; THENCE ALONG THE SAID WESTERLY LINE OF NEPTUNE AVENUE, SOUTH 23 DEGREES 34'45" EAST (RECORD SOUTH 23 DEGREES 35'33" EAST) A DISTANCE OF 15 FEET TO THE TRUE POINT OF BEGINNING, SAID POINT BEING A CORNER TO THAT PORTION OF SAID BLOCKS "B" AND "D" AS CONVEYED BY THE SOUTH COAST LAND COMPANY, TO THE COUNTY OF SAN DIEGO BY DEED DATED JANUARY 10, 1930, AND RECORDED IN BOOK 1731 PAGE 258 OF DEEDS; THENCE CONTINUING ALONG THE SAID WESTERLY LINE OF NEPTUNE AVENUE, SOUTH 23 DEGREES 34'45" EAST A DISTANCE OF 278.89 FEET (RECORD SOUTH 23 DEGREES 35'33" EAST A DISTANCE OF 278.28 FEET) TO THE SOUTHEASTERLY CORNER OF SAID BLOCK "B"; THENCE ALONG THE SOUTHERLY LINE OF SAID BLOCK "B" AND ITS WESTERLY PROLONGATION SOUTH 74 DEGREES 16'30" WEST A DISTANT OF 236.41 FEET TO A POINT ON THE EASTERLY LINE OF SAID SAN DIEGO COUNTY LAND; THENCE ALONG THE EASTERLY AND SOUTHEASTERLY LINE OF SAID COUNTY LAND THE FOLLOWING COURSES AND DISTANCES; NORTH 23 DEGREES 09'50" WEST A DISTANCE OF 68.7 FEET TO AN ANGLE POINT THEREIN; THENCE NORTH 7 DEGREES 14' EAST A DISTANCE OF 218.88 FEET TO AN ANGLE POINT THEREIN; THENCE NORTH 71 DEGREES 10'15" EAST A DISTANCE OF 122 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION LYING SOUTHERLY OF A LINE THAT IS PARALLEL WITH AND 50.00 FEET SOUTHERLY OF THE NORTHERLY LIMIT OF THE ABOVE DESCRIBED PROPERTY. SAID 50.00 FEET BEING MEASURED ALONG THE WESTERLY LINE OF SAID NEPTUNE STREET.

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

APN: 258-311-07-00

**ATTACHMENT "B"**  
**Resolution No. PC 2011-21**  
**Case No. 10-069 CDP**

**FINDINGS FOR A COASTAL DEVELOPMENT PERMIT**

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

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

**Facts:** The project proposes to remove existing wooden stairs, treads, risers, railings and retaining walls installed on the bluff face by the property owner without proper permits. The structures are being removed as recommended by the project Geotechnical Consultant Geotechnical Exploration Inc. in their evaluation report dated July 8, 2011 and April 23, 2010 and as delineated on the project drawings stamped received by the City on December 15, 2010. The site is located within the Ecological Resource/Open Space/Parks (ER/OS/P) Zone, Coast Bluff Overlay Zone, Coastal Appeal Zone and the R-11 zoning district of the City of Encinitas. The Coastal Development Permit for the proposed improvements is subject to review by the City and the action of the City can be appealed to the Coastal Commission.

**Discussion:** As to the findings above, the proposed project is to bring the project site in to conformance with the development standards and findings set forth in Chapter 30.34 (Coastal Bluff Overlay Zone) of the Municipal Code, the General Plan and the Local Coastal Program. The project, with the implementation of the recommended removal methodology of the wooden structures on the bluff face by Geotechnical Exploration Inc. and implementation of conditions of approval required as part of this resolution will not cause significant negative impacts to the coastal bluff and surrounding area. Additionally, the project will not adversely impact public coastal access. Public access or public recreational facilities are not feasible given the project site's condition as a blufftop residential property. Therefore, no condition requiring public access is imposed with this approval. Public access to the shore is available immediately adjacent to the north at Beacon's State Beach access. Since there was no public access through the property prior to this application, the ability of the public to access the shore is not adversely impacted with this application.

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

**ATTACHMENT "C"**  
**Resolution No. PC 2011-21**  
**Case No. 10-069 CDP**

Applicant: Steve Shackelton

Location: 876 & 878 Neptune Avenue (APN: 258-311-07).

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**SPECIFIC CONDITIONS:**

SC2 At any time after two years from the date of this approval, on August 4, 2013 at 5:00 pm, or the expiration date of any extension granted in accordance with the Municipal Code, the City may require a noticed public hearing to be scheduled before the authorized agency to determine if there has been demonstrated a good faith intent to proceed in reliance on this approval. If the authorized agency finds that a good faith intent to proceed has not been demonstrated, the application shall be deemed expired as of the above date (or the expiration date of any extension). The determination of the authorized agency may be appealed to the City Council within 15 days of the date of the determination.

SC5 This project is conditionally approved as set forth on the application dated received by the City on May 4, 2010 and project drawing stamped received by the City on December 15, 2010, consisting of a 1 sheet Site Plan, all designated as approved by the Planning Commission on August 4, 2011, and shall not be altered without express authorization by the Planning and Building Department.

SCA Prior to the performance of any work on the bluff face, the applicant shall obtain a Temporary Beach Encroachment Permit from the Engineering Department.

SCB An open space easement shall be executed and recorded to the satisfaction of the Planning and Building Department to conserve the coastal bluff face between the coastal bluff edge and the most westerly property line. Said coastal bluff conservation action shall prohibit the alteration of land forms, removal of vegetation, or the removal/erection of structures of any type except as permitted herein and/or by written authorization by the City of Encinitas Planning and Building Department. This does not preclude the exercise of emergency measures as directed and authorized by the City of Encinitas Planning and Building Department in accordance with Section 30.34.020B2 of the Encinitas Municipal Code. Said open space easement shall be clearly depicted on the plans submitted for temporary beach encroachment permit issuance in reliance on this approval to the satisfaction of the Planning and Building Department and Engineering Services Department and shall be recorded prior to issuance of said temporary beach encroachment permit.

SCC Stairway removal and alteration methodology shall be implemented and performed as recommended by the Geotechnical Exploration Inc. in their evaluation dated July 8, 2011 and as depicted on the project drawings dated received by the City on December 15,

2010. All wooden posts, railings, treads and risers depicted as Section 1 thru 8 on the project drawing shall be removed as recommended by Geotechnical Exploration Inc. to the satisfaction of the Planning and Building Department and Engineering Services Department. All wooden posts shall be cut at grade above tread elevations.

**STANDARD CONDITIONS:**

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

- G2 This approval may be appealed to the City Council within 15 calendar days from the date of this approval in accordance with Chapter 1.12 of the Municipal Code.
- G3 This project is located within the Coastal Appeal Zone and may be appealed to the California Coastal Commission pursuant to Coastal Act Section 30603 and Chapter 30.04 of the City of Encinitas Municipal Code. An appeal of the Planning Commission's decision must be filed with the Coastal Commission within 10 days following the Coastal Commission's receipt of the Notice of Final Action. Applicants will be notified by the Coastal Commission as to the date the Commission's appeal period will conclude. Appeals must be in writing to the Coastal Commission, San Diego Coast District office.
- G4 Prior to **issuance of temporary beach encroachment permit**, the owner shall cause a covenant regarding real property to be recorded. Said covenant shall set forth the terms and conditions of this grant of approval and shall be of a form and content satisfactory to the Planning and Building Director. The Owner(s) agree, in acceptance of the conditions of this approval, to waive any claims of liability against the City and agrees to indemnify, hold harmless and defend the City and City's employees relative to the action to approve the project.
- G5 Approval of this request shall not waive compliance with any sections of the Municipal Code and all other applicable City regulations in effect at the time of Building Permit issuance unless specifically waived herein.
- G12 Prior to any use of the project site pursuant to this permit, all conditions of approval contained herein shall be completed or secured to the satisfaction of the Planning and Building Department.
- BL1 Owner(s) shall enter into and record a covenant satisfactory to the City Attorney waiving any claims of liability against the City and agreeing to indemnify and hold harmless the City and City's employees relative to the approved project. This covenant is applicable to any bluff failure and erosion resulting from the development project.

**ENGINEERING CONDITIONS:**

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

- E2 All City Codes, regulations, and policies in effect at the time of building/grading permit issuance shall apply.
- E3 All drawings submitted for Engineering permits are required to reference the NAVD 88 datum; the NGVD 29 datum will not be accepted.

Matthew Gordon  
Applicant  
878 Neptune Avenue,  
Encinitas, CA 92024

Per request of Staff please Append as Exhibit to the Staffs Report;

**“APPLICANT’S RESPONSE TO STAFF REPORT RECOMMENDATIONS”**

**Local Permit no# 10-069**

Appeal Number: A-6-ENC-11-073

**Total Pages: 67** including cover

**Response to Staff Report: Page 1-15**

**Attached 19 Exhibits A-O: Page 16-66**

Hearing Date: **FEBRUARY 6-8, 2013**

Redondo Beach Civic Center  
415 Diamond Street  
Redondo Beach, CA 90277

JAN 15 2013

S. J. ...

EXHIBIT NO. 18
APPLICATION NO. <b>A-6-ENC-11-073</b>
Applicant's Response
 California Coastal Commission

## **APPLICANT'S RESPONSE TO THE STAFF REPORT**

### APPLICANT'S RAILROAD TIE STAIRS ARE PRE-COASTAL

The Staff Report on pg. 2 states:

“The applicant and the City of Encinitas assert that a railroad tie stairway was constructed on the subject bluff face prior to the implementation of the Coastal Act. However, due to the fact that convincing evidence has not been submitted to support the contention that the existing stairway is pre-coastal, it must be reviewed as a proposal to construct a new private stairway on the coastal bluff” Staff Report, pg 2.

The Staff Report simply ignores the substantial evidence Applicant introduced before the Planning Commission that the railroad tie stairs were installed in 1962 before the implementation of the Coastal Act. Staff simply states Applicant's evidence the stairs are pre-coastal was not “convincing.” No further reason is given.

The only issue before the Commission is whether Staff has presented evidence sufficient to overcome Applicant's proof presented to the Planning Commission that the stairs are pre-coastal. Appellants' attempt has failed. Staff relies solely on false computer manipulated images, Exhibits 4, 5, 6, and 7. Staff's appeal offers no probative evidence rebutting Applicant's proof the stairs are pre-coastal.

The Staff Report itself refers to Applicant's evidence adduced before the Planning Commission proving the stairs pre-coastal. (Staff Report, p10):

“However, a prior owner of the property submitted a letter to the City stating that the railroad tie stairway had been installed in 1962 and various members of the public stated to the City that the railroad ties existed prior to 1972.” The letter is attached hereto as Exhibit A.

Applicant presented further evidence the stairs were pre-coastal:

The report of Stephen Kwik dated October 31, 2011 (Applicant's Exhibit B) submitted to the Planning Commission proves the stairs are pre-coastal. Mr. Kwik an experienced geologist states "The railroad tie stairs in question have been in place since at least 1969 when I began frequenting the area."

To the same effect are the letters from Hildegard Stubbs & Margaret and Susan Edwards, Exhibit A-2, Rodney McCoubrey, Exhibit A-A and John Wigmore, Exhibit A-B.

The City of Encinitas concluded the stairway was pre-coastal. Staff Report, pg 2 states the City of Encinitas "assert[s] that a railroad tie stairway was constructed on subject bluff face prior to the implementation of the Coastal Act."

Applicant's "Introduction" annexed as Exhibit C states in summary: In 2011, in the course of submitting a Coastal Development Project application, Applicant met at the stairway site with various long time employees of the City of Encinitas including: Peter Cota Robles, head of the City's Engineering Department, Phil Cotton, City Manager and others, in connection with the railroad tie stairs. They were long time area residents and in the course of their professional life knew well the bluff properties including the stairs at 878 Neptune Avenue. Phil Cotton acknowledged to Applicant that the railroad tie stairs were there as long as he had been in Encinitas. Applicant's "Introduction" to that effect is attached as Exhibit C.

It is axiomatic the Planning Commission was in a better position than Staff to evaluate and judge the veracity and truth of the live witnesses who testified before the Planning Commission to the existence of the stairway prior to 1972.

The Staff Report cites nothing to cast doubt on the reliability and truth of Applicant's evidence presented to the Planning Commission proving the stairs pre-coastal.

### STAFF'S RELIANCE ON FALSE IMAGES, EXHIBITS 4, 5, 6 AND 7 IS MISPLACED.

Staff rests its appeal entirely on computer manipulated images, Exhibits 4, 5, 6, and 7 to prove there were no stairs on the bluff until after 1989 and therefore the stairs are not pre-coastal. Staff misleadingly identifies these exhibits as "historic aerial photographs." Staff Report, pg 12. They are presented as original photographs accurately depicting the bluff in the years 1972, 1979, 1987 and 1989. However, these exhibits are not photographs. Staff fails to disclose these images are computer manipulated fragments taken from high altitude photographs of the Encinitas coastal region, far from Applicant's bluff. Those regional photographs were not taken to depict details on Applicant's bluff. Nonetheless, Staff characterizes Exhibits 4, 5, 6 and 7 as "historic aerial photographs." Staff Report, pg 12. Perhaps you could characterize the original regional photograph as historic. But not a fragment of the regional photo manipulated to convey the false sense the camera was directed exclusively at the Gordon's bluff. Exhibits 4, 5, 6 and 7 are blurred, unfocused and lack resolution. These manipulated images are not, as represented "historic aerial photographs," that is, original photos taken by a camera aimed at Applicant's bluff. They are merely computer manipulated fragments manufactured to support staffs argument there was no pre-coastal stairway.

Staff rests its entire appeal on the physically altered images identified as Staff Exhibits 4, 5, 6 and 7. Staff offers no provenance to establish their authenticity. Staff did not authenticate the images represented as “historic aerial photographs” because they could not. These images are patently false and should be disregarded.

The California Coastal Records Web Site states images prior to 2002 are from deteriorated 35mm slides found and partially restored. They lack color, resolution and are not original photos. These are the Photos used by the appellate for the manipulated images they present as proof the stairs are not pre-coastal. **“ Although the resolution of these older photographs isn't as good as the 2002 and later sets, and the colors have deteriorated, they need to be viewed in the context that they may be some of the only surviving photographs that document the entire California coast from that era.”**

The original, regional photos Exhibits D, E, F and G were taken at altitude and distance above the Encinitas coastal region. The camera was aimed somewhere in the middle of the region, not at the face of Appellant’s bluff as Staff Exhibits 4, 5, 6 and 7 might suggest. One could not expect the regional photographs to depict particular details on Applicant’s bluff situated far below and peripheral to the principal direction of the camera. Those regional photographs had a different purpose. Staff’s images manufactured from the regional photos are manipulated by a 200 percent enlargement. The result is the images, Exhibit 4, 5, 6, and 7, are blurred and unfocused and lacking resolution.

None of Staff’s Exhibits 4, 5, 6 and 7 depict the railroad tie stairway on Applicant’s bluff. Why? The camera that took those regional photos was aimed somewhere beyond the bluffs to take the big picture of the coastal area. The camera was never aimed at Appellant’s bluff. See the regional photographs, Applicant’s exhibits D, E, F, and G. The wide-angle regional photographs taken from altitude and a great distance from the bluff were never intended to photograph Appellant’s bluff.

If Exhibits 4, 5, 6 and 7 are merely computer manipulated images represented as “historic aerial photos,” **how would a legitimate photograph of Applicant’s bluff look?** See Staff Exhibit 8. Compare the quality of those manipulated 1970s and 1980s images, Exhibits 4, 5, 6, and 7, with the clarity of Staff’s 2002 Exhibit 8, an aerial photo taken with the camera aimed and focused on Appellant’s bluff. The Exhibit 8 photo is clear and strong with good resolution.

It is not a computer manipulated image. It clearly depicts Appellant’s stairway. Comparison with Exhibits 4, 5, 6 and 7 demonstrates the dramatic difference between a legitimate photo, Exhibit 8, the real thing, and a computer manipulated fragment of a regional photograph ginned up and altered by enlargement to support Staff’s argument. Did Staff use the Exhibits 4, 5, 6 and 7 images because Staff knew those manufactured images would not reveal the stairway to support Staff’s false argument there was no pre-coastal stairway? Exhibits 4, 5, 6 and 7 portray an entirely different bluff than the true photo of Applicant’s bluff portrayed in Exhibit 8 focused on the bluff and intended to photograph Applicant’s bluff details. Had Staff aimed and focused an aerial camera at Applicant’s bluff in the 1970 and 1980s, the camera would have taken the same picture of Applicant’s bluff and railroad tie stairway portrayed in Exhibit 8.

Exhibits 4, 5, 6 and 7 have no probative value. They are false images and not qualified to prove anything.

In contrast, Applicant’s eye witness testimony proving the stairs pre-coastal and that the stairs have existed for the intervening 50 years is compelling. Applicant’s evidence was accepted by the Planning Commission and the City of Encinitas. Applicant’s evidence is consistent with the City of Encinitas’s officials’ personal recollections of the pre-coastal existence of the stairs. Exhibit C. The appeal should be

dismissed out of hand based as it is on indisputably false images unworthy of consideration.

#### A CLOSER EXAMINATION OF THE REGIONAL PHOTOS AND STAFF EXHIBITS 4, 5, 6, 7.

In sum, Exhibits 4, 5, 6 and 7 are ginned up photos computer altered by enlargement of a section taken from a regional photo.

#### Staff Report Exhibit 4.

Applicant's Exhibit D hereto is a copy of a 1972 regional aerial photograph of the Encinitas coastal area. The Gordon's house is depicted immediately to the right of the Beacons Beach parking lot. The distance and altitude at which the aerial photo was taken reveals the camera was aimed far behind the bluffs. It was not focused on Appellant's bluff. It captures no detail of Applicant's bluff.

Staff's Exhibit 4 is a manipulated image taken from the 1972 regional photo and falsely represented as accurately depicting Appellant's bluff to prove the absence of the stairway. However, Staff Exhibit 4 is only a manipulated fragment of the original aerial photo Exhibit D. It is no surprise it reveals no details of Applicant's bluff or the pre-coastal stairway. It was never intended that the 1972 regional photograph of the Encinitas coastal region would focus on Appellant's bluff

#### Staff Report Exhibit 5

Applicant's exhibit E is a 1979 aerial photo of the Encinitas coastal region taken at altitude and distance. The Gordon's home appears immediately to the right of Beacons. The camera is aimed a far distance behind Applicant's bluff. No bluff detail is visible in the regional photo.

The 1979 image, Exhibit 5, misleadingly purports to be an “historic aerial photograph” accurately depicting Appellant’s bluff and the absence of the stairway in 1979. Staff Report, pg 12 Again, Exhibit 5 is only a computer manipulated image of a fragment of Exhibit E altered by a 200 percent enlargement. The 1979 regional photo was not aimed at appellant’s bluff nor intended to depict Applicant’s bluff detail. The manipulated fragment of the aerial photo further blurs any bluff details had they been in the regional photo.

#### Staff Report Exhibit 6

Exhibit F is a 1987 regional photo of the Encinitas coastal area taken at altitude and distance over the area. The camera was not aimed or focused on Applicant’s bluff, obviously not intended to photograph details of Applicant’s bluff. I also note it does not depict the railroad tie stairs on Beacons bluff neighboring Applicant’s bluff. However, Applicant’s Exhibit K-A, a URS 1987 photo taken from Applicant’s bluff surface, does depict railroad tie stairs on the adjoining Beacons bluff in 1987. Since the 1987 regional photograph, Exhibit F, did not depict those railroad tie stairs on the Beacons bluff, neither would the 1987 regional aerial photo depict the railroad tie stairs on Applicant’s bluff. The regional photograph was never intended to photograph Applicant’s bluff detail including the railroad tie stairs. Those photos were taken too high and too far to photograph detail on the bluffs. Exhibit 6 is simply a computer manipulated fragment of the regional photo manufactured from Exhibit F to support Staff’s argument.

#### Staff Report Exhibit 7

Applicant’s Exhibit G is a 1989 regional photograph of the Encinitas coastal area. The camera is aimed north and east of Applicant’s bluff, it is not focused on Applicant’s bluff. There is no bluff detail.

Staff's Exhibit 7 is represented as an accurate depiction of Applicant's bluff in 1989 and, according, to Staff, "the earliest photograph showing a private access path from the applicant's home to the beach" adding "and it is not clear if railroad ties are present." Staff Report, pg 12.

However, Exhibit 7 is not a photograph much less a photograph of Applicant's bluff. It is simply a computer manipulated image of a fragment of the aerial photo of the greater Encinitas coastal region. An image manufactured to support Staff's argument. It suffers from the same defects as Staff Exhibits 4, 5, and 6. It is axiomatic the distance and altitude of the original aerial photo could not include any detail of Applicant's bluff, a circumstance exacerbated by enlargement of the fragment.

Staff Report, Exhibit 8.

This is the only legitimate bluff photo submitted by Staff. In this photo, the camera is aimed and focused at the bluff revealing bluff detail and Applicant's stairway for the first time in Staff's Report. For example, in addition to the stairway, the resolution of the photo shows the shingles on the roof of Applicant's home. Compare this photo with Staff Exhibits 4, 5, 6 and 7. Had Staff taken earlier photos of this quality, they would have revealed the pre-coastal stairway and we would have avoided this proceeding.

Staff Report, Exhibit 11.

Exhibit 11 is a 2012 photo taken on the ground on Applicant's bluff clearly depicting vegetation obscuring the railroad tie stairway. Note the quality of Exhibit 11. It is sharp and clear, a dramatic contrast to Staff photos Exhibits 4, 5, 6, and 7. However, still the lower bluff railway tie stairway is only faintly revealed. The photo notes: "**Overgrown**

**Stairway.**” Had the Exhibit 11 photo been an aerial photo taken at altitude, one could safely surmise the photo would not have revealed the lower bluff stairway through the vegetation. To the same point, see Applicant’s Exhibit N, a 1990’s photo where vegetation covers most of the upper stairway exposing only two railroad ties.

Why did Staff provide fabricated images of regional photos taken at altitude and distance from Applicant’s bluff and represent them as “historic aerial photos”? The answer must be Staff has no reliable evidence to rebut Applicant’s evidence demonstrating the stairs are pre-coastal.

Bureaucratic zeal has its place but not when it divests a property owner of his valuable property based on false evidence. A public entity should be held to the highest standard.

*ARE THOSE WHO SAW THE STAIRS IN PLACE BEFORE 1990 ALL LIARS?*

We attach hereto the affidavit of John G. Wigmore Exhibit A-B. He resides at 870 Neptune, two houses south of the Gordon’s. Mr. Wigmore has walked his path down the bluff below the Gordon’s continuously since 1977. Mr. Wigmore states in his affidavit: “...I know from my own observation walking my path down to the beach, the Gordon’s railroad tie stairway was in place in 1977 and thereafter.”

See the following exhibits to the same effect: Exhibit B Steve Kwik; Exhibit A-A, Rodney McCoubrey; Exhibit A-2, Hildegard Stubbs & Margaret and Susan Edwards; and Exhibit A, Jack Gazdik.

Instead, Staff (without a blush) in reliance solely on those manipulated images asserts there were “no convincing evidence” of a pre-coastal stairway and no evidence of the stairway until after 1989. Staff has offered no probative evidence to support its conclusions.

Further, in effect, Staff implies every witness to the installation of the stairs in 1962 and/or witness to their existence on the bluff before 1990 is a liar.

Are John Wigmore, Rodney McCoubrey, Hildegard Stubbs, Jack Gazdik and Steve Kwik liars? The answer is no they are not liars. The proper answer is that Staff's Exhibits 4, 5, 6 and 7 simply are not what Staff represents them to be, namely--- "historic aerial photographs" accurately depicting Applicant's bluff face. Those photos are the liars.

THE EVIDENCE ESTABLISHES THE GORDONS STAIRS ARE  
"GRANDFATHERED."

The pre-Coastal evidence of the installation of the Gordon's' stairs in 1962 and their existence thereafter is uncontested by any proper evidence. The Commission need not consider whether the Gordon's' stairway meet the requirements to install new stairs. The Gordon's stairs are "grandfathered".

Further, the Planning Commission explicitly concluded the railroad tie stairway is neither inconsistent with the character of the surrounding development nor the Local Coastal Program. See the Planning Commission's Findings attached as Applicant's exhibit I.

I refer you to the Planning Commission's findings annexed as **Exhibit I, parts 1, 2 and 3:**

**"The project is consistent with the certified Local Coast Program of the City of Encinitas; and-----approval shall include a specific finding that such development is in conformity with the public access and public recreation policies of Section 30200 et. Seq. of the Coast Act."**  
APPLICANT'S RAILROAD TIE STAIRWAY IS CONSISTENT WITH

## THE LOCAL COASTAL PROGRAM AND IS UNOBTRUSIVE

Two views of the Gordon's' stairway are depicted in Staff Report Exhibits 10 and 11. These photos likely explain why there has never been a complaint.

That is, because Applicant's railroad tie pathway down the bluff is unobtrusive and compatible with its surroundings; a finding made explicitly by the Encinitas Planning Commission, See Exhibit I. In proof of the propriety of that finding, compare the Gordon's railroad tie stairway with other stairways obtrusively populating the Encinitas bluffs.

## THE COASTAL COMMISSION ACTING BY THE CITY OF ENCINITAS EXAMINED AND APPROVED THE STAIRWAY IN 1990

This is not the first time the Coastal Commission has reviewed the Gordon's stairs. In 1990, the Coastal Commission represented by the City of Encinitas examined the stairs following a complaint the stairs were an illegal non-conforming use. The stairs were inspected and the Commission concluded the stairs were a legal, non-conforming use necessarily finding the stairs pre-coastal. The complaint was dismissed. Refer to Exhibit J. Nothing has changed. The Coastal Commission's earlier finding the stairs legal should be honored.

## THE RAILROAD STAIRWAY PROTECTS AND SUPPORTS THE BLUFF

Do railroad tie stairways harm the bluff? Are they incompatible with the surrounding environment?

The answer is no. The strength of the railroad ties when embedded in the bluff soil supports the fragile bluff. They protect the bluff soils from crumbling away particularly during the rains. They prevent water erosion

channeling into the soft bluff sands. Moreover, water may run down the ties as the path of least resistance. When the ties channel the surface water to the bottom of the bluff, there is no channeling of the bluff face itself. Or, the hard surface ties can deflect rain water runoff away from the pathway into the surrounding vegetation where the water is absorbed by the vegetation preserving the bluff from water erosion channeling. Without the railroad ties, water runoff on the fragile bluff sand can erode a channel and seriously endanger the bluff. See exhibit K-B.

Attached as Applicant's Exhibit L is a photograph of a large sink hole in front of Applicant's home at 878 Neptune Avenue. By unintended circumstance, the sink hole just happens to line up with the railroad tie stairway down Applicant's bluff. During the rains, the sink hole fills with water. The water flows over Applicant's driveway due west under the gate (just to the rear of the automobile) and onto the railroad tie steps and down the bluff to the beach. But for the hard surface provided by the railroad tie steps, the waters would run down the soft, exposed bluff digging an erosion channel carrying away bluff soil and vegetation. The railroad ties are essential to carry off the sinkhole water. They protect the bluff from serious damage caused by channeling water erosion. Exhibits L and K-B

I refer to Applicant's Exhibit B, Geologist Stephen Kwik's report submitted to the Planning Commission. He says:

"...the California Coastal Commission (CCC) proposes to remove the subject stairway. In my opinion as a geologist who has observed changes in the unstable bluffs throughout the years, this is not a wise decision because the railroad ties and surrounding vegetation are stabilizing the toe of the slope by slowing/preventing erosion, therefore keeping the bluff's angle of repose in check. The railroad ties in question have been in place since at least 1969 when I began frequenting the area."

Further, Mr. Kwik refers to Geotechnical Exploration, Inc.'s report dated

May 10, 2011 entitled “Upper Bluff Stairway Alterations, Adverse Erosion Impact.” “That report highlights the impact to the bluff face soils, stating removal of stairs will significantly increase erosion potential due to the low cohesion nature of the bluff face soils. As the report and pictures indicate, the bluff is well-vegetated. Stair removal activities will greatly impact and reduce the vegetation by increasing soil erosion and sloughing.”

Geotechnical Exploration, Inc. visited the stairway site and in its letter to Applicant of 10 May, 2011 (Applicant’s Exhibit M) stated:

“On April 25, 2011, we re-visited the upper bluff and determined that complete removal of the upper stairway sections will significantly increase erosion potential beyond what currently exists.”

Applicant declares in his “Introduction,” Exhibit C, that various high level City of Encinitas employees including Peter Cota Robles and Phil Cotton acknowledged to Applicant the railroad tie stairway had been there as long as they had been in Encinitas. Further, they agreed once the railing and posts were removed the railroad tie stairway would be invisible.

To further exemplify the impact of the power of water erosion on the bluff, Applicant attaches two photos as Exhibits KA and KB. Exhibit KA is a drain pipe laid down against the bluff face surface. Only a few years later (Exhibit K-B), water erosion had scoured a significant amount of bluff soil from under and around the pipe. See: Exhibit K-C- URS source exhibit. The photos are stark testimony to the power and damage caused by water erosion. The sand bags stacked under the pipe provided no protection. Secondly, it is evident the stairway a few feet south of the pipeline was instrumental in protecting the bluff from further layback. The railroad tie stairway serves salutary purposes. The stairway does

more than simply ease a person's way down the bluff. The embedded railroad ties protect and preserve the bluff from devastating water erosion and provide a drainage channel for storm waters accumulating on Neptune Avenue.

## CONCLUSION

The Commission should consider that Staff recommends the complete removal of the Gordon's invaluable stairway and drainage channel without compensation (a taking prohibited by the 5<sup>th</sup> Amendment of the Constitution) in reliance solely upon manipulated images taken from regional photos never intended to photograph Applicant's bluff detail. Staff's recommendation is made in the face of compelling and uncontroverted evidence the railroad tie stairway is pre-coastal and that its removal would result in erosion and sloughing of the bluff soils as well as the removal of a drainage channel for waters collecting on Neptune Avenue.

Stephen Kwik an experienced geologist in his report asks: "What purpose is to be achieved by removal of the stairs? If the purpose is simply to remove the stairs, then one must consider the obvious harm that will be caused."

The stairs have been in existence since they were installed in 1962, why is this an issue now? It would have been a different matter if the unpermitted stairs had been identified as illegal when built or within a reasonable period after the Coastal Act.

Why now fifty years after the stairs were installed should the property owner be forced to accept the risk posed by additional erosion and sloughing. Will the CCC accept that risk? A rhetorical question to which I am certain the answer would be no. Then why should the Commission impose it on Applicant? For the sake of the protection of the bluff, however, the Commission can choose a number of alternatives to ordering the removal of the stairs. However, I urge the Commission to affirm the Planning Commission's findings.

As Stephen Kwik notes regarding the stairs; **"If it isn't broken, don't mess with it."** Exhibit B.

No purpose would be served by reversing the Encinitas Planning Commission to deny the Gordon's their fifty year old stairway. The stairway has never elicited a complaint and, indeed, has preserved and protected the bluff from water erosion and consequent weakening and perhaps ultimately the bluff's collapse from water erosion. The stairway harms no one and as the Planning Commission found, it conforms to the environment.

The Encinitas Planning Commission (and the Coastal Commission itself acting through the City of Encinitas in 1990) found the stairway pre-coastal and compatible and consistent with surrounding uses and local policies.

I respectfully urge the Commission to dismiss the appeal and confirm the Planning Commission's findings.

Respectfully,



Matthew Gordon  
Applicant



**Exhibit A**

**Jack Gazdik Letter**

Jack Gazdik

March 20, 2009

602 Neptune Avenue  
Encinitas Ca. 92024

To whom it may concern;

My name is Jack Gazdik ,

My wife Bonnie and I live on Neptune Avenue in Encinitas.

I was born and grew up in Leucadia, California.

My father, John Gazdik, built our family home at 878-876 Neptune Avenue in 1954 that is now the Gordon residence. My three siblings and I lived in and grew up in this home.

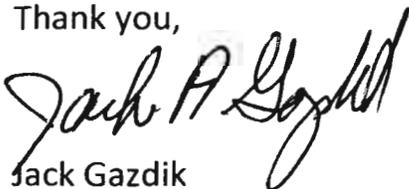
In 1962 my father built a lower level to the house because we needed the additional room for our family. At that time he also built a patio deck and steps from the patio to the beach. The existing configuration of the steps looks as it did when my father installed them in 1962.

I would be glad to appear at the city or any other venue to answer questions about our family home and its history. As a lifetime resident and coastal property owner on Neptune I purchased land and built our family home just like my father.

I am aware that sometimes questions do come up as to what is vested or pre-existing when it comes to bluff improvements.

Please feel free to contact me if you need any further information.

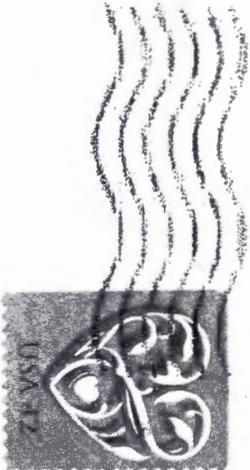
Thank you,

  
Jack Gazdik

Jack Gazdik  
5552 Madena Pl.  
Fogaria Hills CA  
91391  
Good friend

Matthew Gordon  
878 Neptune Ave.  
Encinitas CA  
92024.

POSTAGE WILL BE PAID BY ADDRESSEE  
NO POSTAGE NEEDED IF MAILED IN THE UNITED STATES



52024+2082



**Exhibit A-A**

**Letter**

**Rodney McCoubrey**

**matthew gordon**

---

**From:** Rodney McCoubrey [brorodro@sbcglobal.net]  
**Sent:** Thursday, November 08, 2012 10:01 AM  
**To:** Matthew&robin Gordon  
**Subject:** 878 neptune stairway

To whom it may concern;

I have been an avid surfer/beach goer since the late 60's. My local beach has been Beacons for most of those years. In my time here i can vouch for the stairway at 878 Neptune ave that it has been here as long as i have surfed here. And a few times i have actually used it to reach the top of Neptune Ave. If you need my personal testimony all my contact info is attached.

Rodney McCoubrey  
844 Del Rio ave.  
encinitas,ca 92024  
760 9426332

**Exhibit A-B**

**AFFADAVIT OF JOHN G. WIGMORE**

## AFFADAVIT OF JOHN G. WIGMORE

I live at 870 Neptune, Encinitas, two houses south of Matthew and Robin Gordon residing at 876 Neptune Avenue, Leucadia. Thus, I am a neighbor of the Gordons separated by only one house. I have taken an interest in this case simply because I don't want to see an injustice imposed on a good neighbor and friend.

I bought my house in April 1977. At that time, the Gordon's stairway and the lower bluff path to the beach were precisely where you see it depicted in Exhibit 1. I have walked the pathway down my bluff to the path in front of the Gordons' house then down to Beacon's beach continuously since April 1977, almost 35 years. When you walk a path for that long it becomes a part of your life. And so it has with our lives, mine and my families. The bluff pathway is an integral part of our walk down to Beacons beach. It was one of the reasons I bought my house. I can't say from my own observation how long the Gordon's railroad tie stairway had been there before I arrived in April 1977 but I can say from my own personal observation that it was there when I bought my house in 1977 and from the looks of it, it had been there sometime before that. The stairs have been there ever since.

December 11, 2012

*I hereby certify the foregoing is true and correct  
under penalty of perjury.*

John G. Wigmore

*John G. Wigmore*

**Exhibit A-2**

**Letters**

**Hildegard Stubbs & Margaret and Susan Edwards**

Hildegard Stubbs  
919 Neptune Avenue  
Encinitas, CA 92024

January 2 2013

To whom it may concern:

My name is Hildegard Stubbs,

Since 1970 I have lived at 919 Neptune Avenue Encinitas (Leucadia) California 92024 that is located across the street (directly east) from the Beacons Beach (Leucadia State Park) access.

My five children, late husband and I spent much of our earlier years in the 1970's through mid 80's enjoying Beacon's Beach.

This is a friendly neighborhood and we are well acquainted with all the people who owned property close by through the years.

My children and I are familiar with the railroad tie stairs that begin at the lower deck of 878 Neptune Avenue leading to the Beacons Beach.

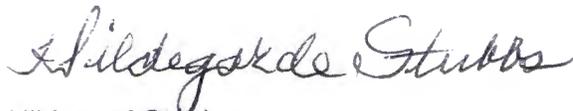
This is currently the home of Matthew Gordon and it is located on the South Side of Beacons Beach.

The home two doors south of the Gordon's is 870 Neptune Avenue and it has been owned by John Wigmore for over 30 years. His property has also always had a pathway that intersected with the pathway at 878 Neptune the Gordon residents.

From 1970 to this day the stair way has been used by all the previous residents to come down to the Beacon's Beach from 878 Neptune Avenue and 870 Neptune to get to the beach and surfing.

My family and I would sit on these neighbors stairs to the Beacon's beach access on many occasions at high tide to enjoy watching the waves come in.

If I can be of any further assistance in this matter please let me know.



Hildegard Stubbs

Matthew Gordon  
378 Neptune Avenue  
Encinitas, CA 92024

January 3, 2013

Dear Mr. Gordon:

Pursuant to our conversation before Christmas we wanted to write to let you know that we are familiar with your house built in 1956 by Jack Gazdick. Our home, at 1423 Neptune Ave., was built in 1947 and we have occupied it since 1953. We have used the beach stairs both at Beacon's Beach and also the railroad tie stairs going down the cliff from your house since the 60's.

There are other stairs on the cliff side of Neptune but we do remember using yours for beach access since we have lived here.

Sincerely yours,



Margaret Edwards



Susan Edwards

Ms. Anne Grauzlis  
PO Box 234282  
Encinitas, CA 92023-4282

CHICAGO, IL 60601

04 JAN 2013 PMS IL



Matthew Gondara  
878 Neptune Ave.  
Encinitas, CA 92024

92024206278



**Exhibit B**

**Steve Quick - Geologist**

**Subject: Bluff Stairway at 878 Neptune Ave., Encinitas, CA 92024**

To Whom It May Concern:

My name is Stephen Kwik, my educational and professional background is in geology. I've worked with various private geotechnical and environmental consulting firms within the San Diego region for approximately 17 years. I'm also an avid surfer, and started surfing North County San Diego in 1969, specifically the Beacons area.

My understanding is, the California Coastal Commission (CCC) proposes to remove the subject stairway. In my opinion as a geologist who has observed changes in the unstable bluffs throughout the years, this is not a wise decision because the railroad tie stairway and surrounding vegetation are stabilizing the toe of the slope by slowing/preventing erosion, therefore keeping the bluff's angle of repose in check. The railroad tie stairway in question has been in place since at least 1969 when I began frequenting the area.

Based on the Geotechnical Exploration, Inc. report, dated 5/10/2011, titled "**Upper Bluff Stairway Alterations, Adverse Erosion Impact**" highlights the impact to the bluff face soils, stating removal of stairs will significantly increase erosion potential due to the low cohesion nature of the bluff face soils. As the report and pictures indicate, the bluff is well-vegetated. Stair removal activities will greatly impact and reduce the vegetation by increasing soil erosion and sloughing. The report mentions plank retaining walls and if those are removed, this will also create significant impact to soil erosion and sloughing.

My first question is what purpose is to be achieved by removal and/or replacement? Are the stairs unsightly; are they unsafe; are they rotting; what is the problem with the existing conditions? If it is simply to remove the unpermitted stairs, as the City Legal Notice states, then one should look at the obvious harm that will be caused. The stairs have been in place for 40+ years, then why is this an issue now? Certainly this would have been a whole different issue if the unpermitted stairs were identified at the time of construction.

What is the potential affect to the residence on the bluff if the stairs are removed? Coastal bluffs are all actively receding as a part of nature. If, in this particular instance, conditions exist that decrease the rate of bluff erosion (i.e., stairs, walls and well developed vegetation), who will accept the risk associated with removal of this condition? After 40+ years, should the private property owner now be forced to accept the risk? Will the City of Encinitas or CCC accept the risk of its decision?

Based on my observations throughout the years and from what I see in the photos, the stairs don't get much use. Regardless, the well established vegetation has created a natural barrier to surface erosion and wave-cut undermining. From a cosmetic appearance, painting the railing to blend in with the vegetation should help. If some of the railroad tie stairs are rotted, maybe simple wooden overlays with edge-support spikes driven into the subgrade would do the trick. One could even look at using the new non-rotting deck materials that lumberyards sell as an overlay. You could even look at injecting some type of "plastic epoxy" into the rotted railroad tie stairs for stabilization prior to the overlays. If the CCC wants simply to remove the unpermitted stairs, then remove only the free standing wooden structures (non-soil retaining) to just above the ground surface.

Should the CCC mandate the railroad tie stairway be removed from the bluff, I fear a scenario will develop similar to that where the bottom is pulled out from a house of cards. Once the work starts, there is no going back. One may make the argument that the risk associated with altering existing conditions that obviously decrease bluff erosion – and protect the residence, regardless of whether permits exist or not, is less than the risk associated with removal and increasing bluff erosion. The risk of future property loss is real, "If it isn't broken, don't mess with it."

Regards,



Stephen Kwik

Exhibit C- 3 pages

**Matthew Gordon Affidavit**

AFFADAVIT OF MATTHEW GORDON

Attached hereto is "Introduction to Appeal Number A-6\_ENC\_11\_073.

I hereby certify that I wrote the foregoing document and to the best of my knowledge and belief it is true and correct under the penalty of perjury dated this 19<sup>th</sup> day of December 2012.

Matthew Gordon

A handwritten signature in black ink, appearing to read "Matthew Gordon", written over a circular stamp or mark.

## **Introduction to Appeal Number A-6\_ENC\_11\_073**

My name is Matthew Gordon and I have resided for 12 years at my home 878 Neptune Avenue in Encinitas CA 92024 with my wife.

I purchased this home in February of 2000 and at that time there was a beach stair access in place that was grown over from lack of routine maintenance.

In 2010 I met with Peter Cota-Robles head of engineering for the City of Encinitas at the foot of my bluff beach access directly below my home.

We mutually agreed that the railings and posts that were installed on the stairs at the behest of the City of Encinitas should be removed and then to close any future issues I should apply for a Coastal Development Permit for my beach access stairs. This CDP was passed by the Encinitas Planning Commission in September in 2011.

### **History of Improvements:**

In May 2004 Phil Cotton then Director of Encinitas Community Services suggested that my wife and I the owners of 878 Neptune Ave should install a gate and guard railings that would be painted to differentiate our stairs from the Beacons Beach State Park access pathways. The City of Encinitas Parks and Rec even recommended the workers to implement the job. This plan was enacted due to a new switchback that was graded diagonally across the Beacons Beach Bluff Face by workers for Dr Len Okun on 828 Neptune Ave. who were putting in emergency sea wall measures. This new path intersected beside our homes seaward bluff stair entrance and after sunset numerous beach goers would mistake our 878 homes access stairs for the Beacons Beach (Leucadia State Park) exit. According to City officials we were "Entitled to the quality of life that we bought into when we purchased our home." The installation of the gate, guard rails and paint was recommended as a mitigation solution.

Fascia placed on existing treads or removed in favor of wood boards attaching posts and railings to the top. No posts were allowed in the soil by the City of Encinitas so fascia was used to support the posts and guard rails.

I applied for the CDP in May of 2010 and processed the CDP for the removal of Posts and railings. After this agreement an engineering dept employee intervened and requested the above grade removal of stairs to at grade railroad ties on the upper bluff face that existed under the treads. The head of the City of Encinitas Engineering Department and the City Manager Phil Cotton agreed and said "Those stairs have been here as long as we have." So it was mutually agreed that we proceed to process the CDP.

The parties involved in this CDP process from the consulting Geologist to the City of Encinitas Staff have been working in Encinitas for most of their careers and are very familiar with the Beacons Beach bluff access as well as the neighboring homes.

Our stairs to the beach at 878 Neptune were determined to have predated the 1972 California Coastal Act, added stability, provided drainage from Neptune Avenue and are consistent with the surrounding area.

Implementing the agreed removal of the railings and posts our stairs would be virtually invisible.

Since 1962 there has been no public objection to the 878 Neptune Avenue home's beach access except in a 1990 complaint filed by a citizen that went to the CCC who brought it to the attention of our City for investigation.

Our beach access was investigated in 1990 for the CCC by the City of Encinitas with some parties that were involved in the current CDP. They were found to be consistent with pre 1972 legal non conforming use and replacement railroad tie stairs were permitted to be installed.

In 2011 our homes Coastal Development Permit was processed by the City of Encinitas and approved by the Planning Commission under the agreement to manage the Coastline in our community of Encinitas on behalf of the CCC. This decision was made in the best interest of the homeowner, beach goers and the surrounding community.

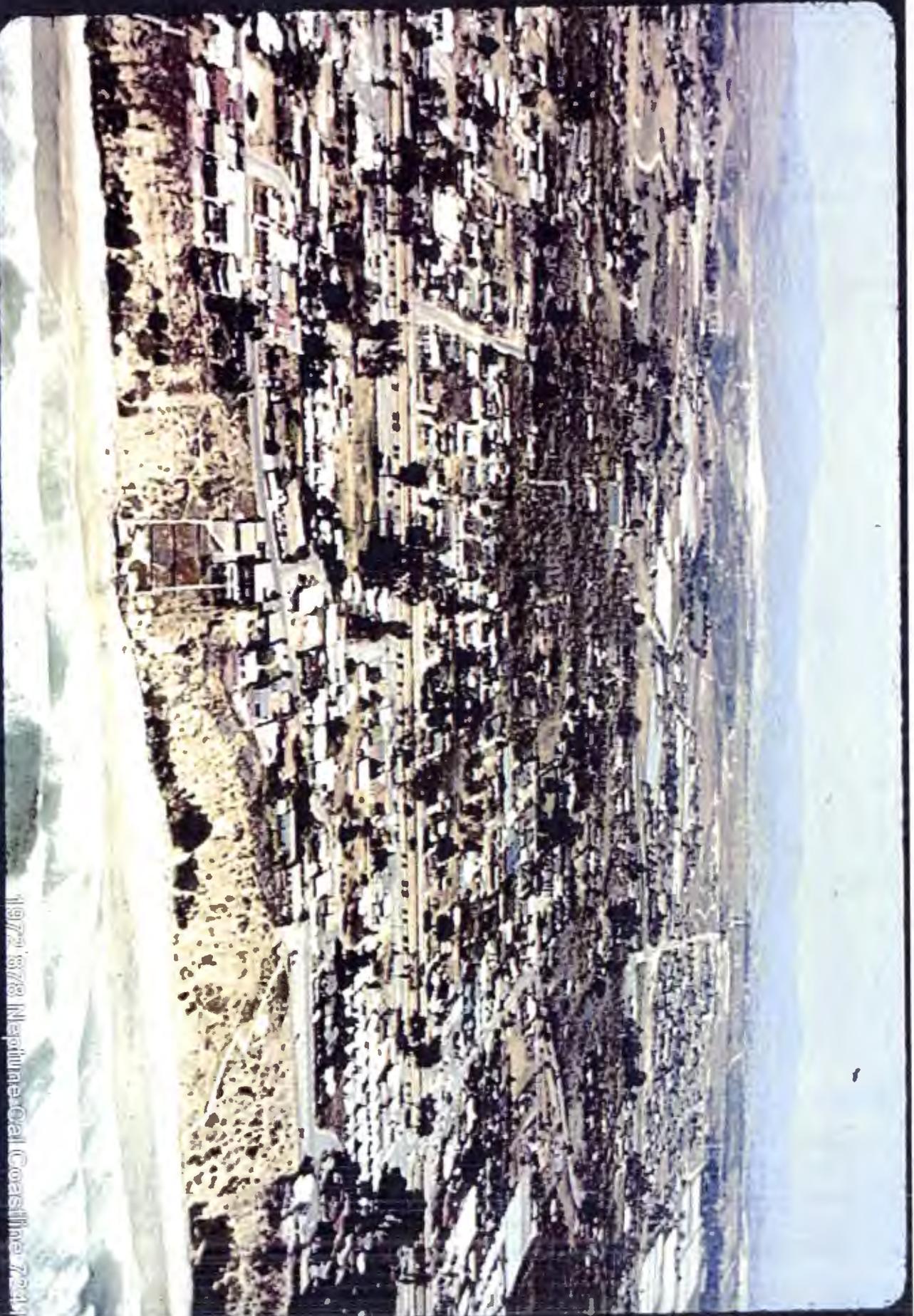
(Please see the "Applicants Response to Staff Report Recommendations" pages 1-15 and Exhibits 1-19)

**Exhibit D**

**Picture**

**1972 California Coastal Records Project**

**#724103**



1973 8/78 Mapiluna Oal Coastline 724103

**Exhibit E**

**Picture**

**1979 California Coastal Records Project**

**#724103**

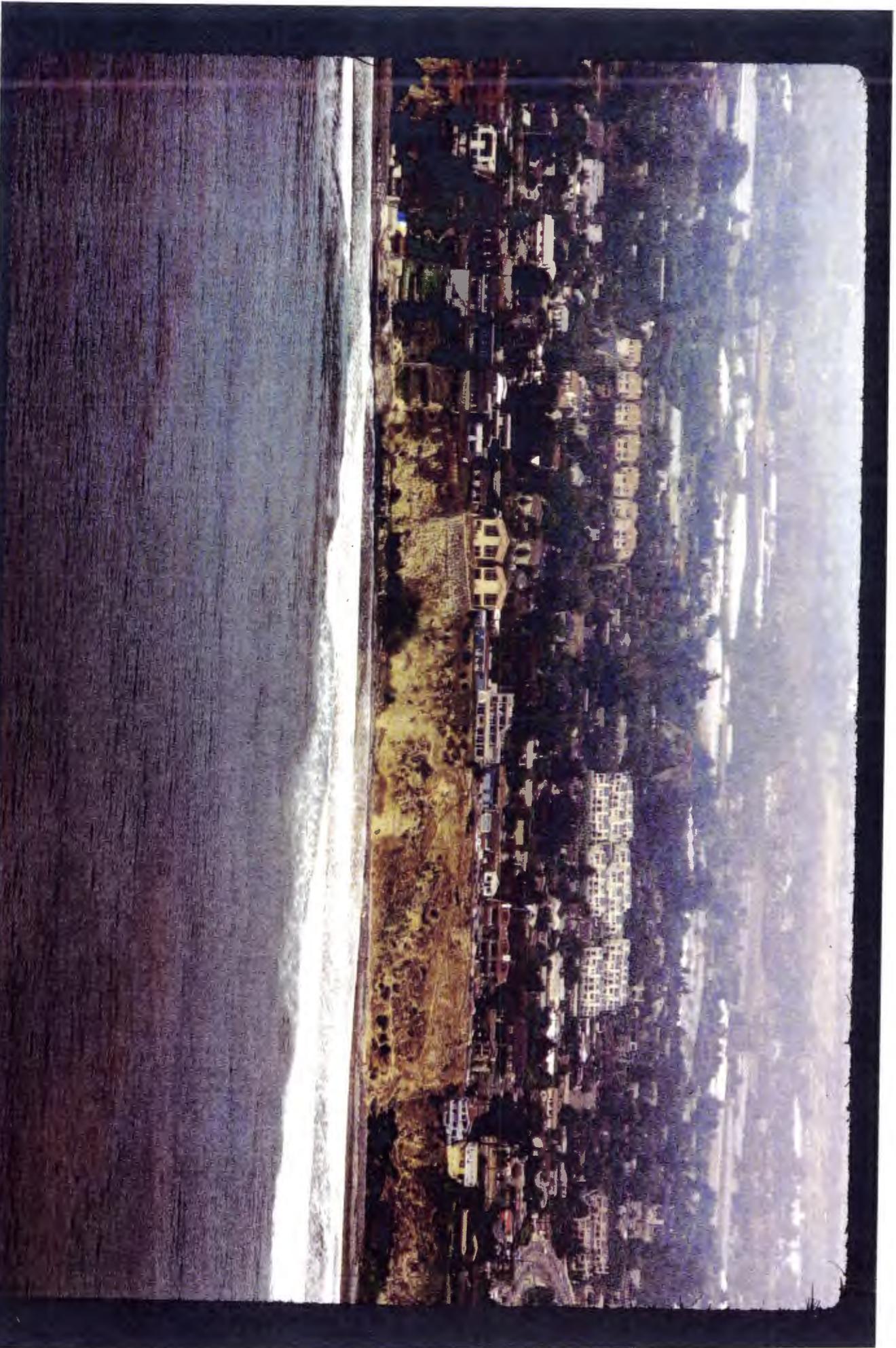


**Exhibit F**

**Picture**

**1987 California Coastal Records Project**

**#870212208**



**Exhibit G**

**Picture**

**1989 California Coastal Records Project**



**Exhibit I**

**Encinitas Planning Commission Findings**

**Resolution No. PC 2011**

**Case No. 10-069 CDP**

**“Project consistent with the certified Coastal program of the City of Encinitas.”**

**ATTACHMENT "B"**  
**Resolution No. PC 2011-**  
**Case No. 10-069 CDP**

**FINDINGS FOR A COASTAL DEVELOPMENT PERMIT**

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

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

**Facts:** The project proposes to remove existing wooden stairs, treads, risers, railings and retaining walls installed on the bluff face installed by the property owner without proper permits. The structures are being removed as recommended by the project Geotechnical Consultant Geotechnical Exploration Inc. in their evaluation report dated May 10, 2011 and as delineated on the project drawings stamped received by the City on December 15, 2010. The site is located within the Ecological Resource/Open Space/Parks (ER/OS/P) Zone, Coast Bluff Overlay Zone, Coastal Appeal Zone and the R-11 zoning district of the City of Encinitas. The Coastal Development Permit for the proposed improvements is subject to review by the City and the action of the City can be appealed to the Coastal Commission.

**Discussion:** As to the findings above, the proposed project is to bring the project site in to conformance with the development standards and findings set forth in Chapter 30.34 (Coastal Bluff Overlay Zone) of the Municipal Code, the General Plan and the Local Coastal Program. The project, with the implementation of the recommended removal methodology of the wooden structures on the bluff face by Geotechnical Exploration Inc. and implementation of conditions of approval required as part of this resolution will not cause significant negative impacts to the coastal bluff and surrounding area. Additionally, the project will not adversely impact public coastal access. Public access or public recreational facilities are not feasible given the project site's condition as a blufftop residential property. Therefore, no condition requiring public access is imposed with this approval. Public access to the shore is available immediately adjacent to the north at Beacon's State Beach access. Since there was no public access through the property prior to this application, the ability of the public to access the shore is not adversely impacted with this application.

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

**Exhibit J**

**1990 City of Encinitas and CCC**

**Legal non conforming use**

CALIFORNIA COASTAL COMMISSION  
1535 CAMINO DEL RIO SOUTH, SUITE 138  
SAN DIEGO, CA 92108-3830

*Cindy Adams, Code Enforcement  
City of Encinitas  
535 Encinitas Blvd #100  
Encinitas, CA 92024*

*San Diego  
California  
92108-3830  
12*



# City of Encinitas

Building Division  
527 Encinitas Blvd., Suite 100  
Encinitas, CA 92024  
(619) 944-5030

## NOTICE OF VIOLATION

SITE:

Address:

876-78 VENTURE AVE  
Robert F. JEAN HOLMES

Owner/Occupant:

P.L.C.

### FIELD INSPECTOR'S COMMENTS

THIS SPACE FOR OFFICE USE ONLY

Reported By: P.C.C.

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Alleged Violation: \_\_\_\_\_

Site Location: \_\_\_\_\_

A.P.N.: \_\_\_\_\_

Prepared by: \_\_\_\_\_

Date: \_\_\_\_\_

T.B. Map: \_\_\_\_\_

Complainer notified by: \_\_\_\_\_

Date: \_\_\_\_\_

Use of Building: Duplex

Needs building permit for: stairway to beach

Needs electrical permit for: \_\_\_\_\_

Needs plumbing permit for: \_\_\_\_\_

Needs mechanical permit for: \_\_\_\_\_

List building, electric plumbing, and mechanical violations observed and any potential problems.

SECTION 301(A) of the  
Uniform Building Code -  
building w/out a permit

STOP WORK IMMEDIATELY  
obtain all required permit/  
and planning approvals

11/2/90 C. Adams  
Date Inspector's Signature

Allegations: True  False

Owner's Mailing Address: 7625 Postico DR  
CARLSBAD 92008

Owner's home phone: \_\_\_\_\_  
Owner's work phone: \_\_\_\_\_

Contractor's Name: DANIEL MILLARD (?)  
Contractor's phone: \_\_\_\_\_

Inspector's recommendations and violator's comments:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

OFFICE

THIS SPACE FOR OFFICE USE ONLY

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OFFICE MEMO  
NO. 10-1000-1000  
10-1000

DATE  
Nov 1, 1990

TO  
CINDY ADAMS

FLOOR NUMBER

FROM  
RICH CREPEAU / Coastal Commission

PHONE NUMBER

SUBJECT  
876 Neptune

Enclosed please find a copy of the report of violation.

Mr. Leab has consented to have us release his name only to the City of Encinitas for purposes of the investigation of the alleged violation and will in no way be ~~not~~ released to Mr. Daniel Millward.

Date Received: 11.1.90 Investigator: \_\_\_\_\_

Address of Complaint: 876 Neptune Ave 876-878

Assessors Parcel No. 254-311-07 Zone: \_\_\_\_\_

Owner's Name: Daniel Millard & Kimberly

Owner's Address: 878 Neptune Ave

Owner's Phone: WK # \_\_\_\_\_ Home # \_\_\_\_\_ Map Page # \_\_\_\_\_

Tenant's Name: \_\_\_\_\_

Tenant's Phone: \_\_\_\_\_

Complainant's Name: PA Coastal Comm.

Complainant's Address: \_\_\_\_\_

Complainant's Phone: \_\_\_\_\_

Nature of Complaint: Constructing illegal stair way - no permit

Zoning/Code Violation (Code Section): \_\_\_\_\_

Action Taken	Check	Date	Comments
Initial Investigation			
Inspector Robert & Jenn Holmes			
7625 Ruston Dr. Corickland 92008			
NEW OWNER Millard - NOV AM 151			
OUT 11.29.90			
replacement - low floor. 12/11 - P.I. w/			

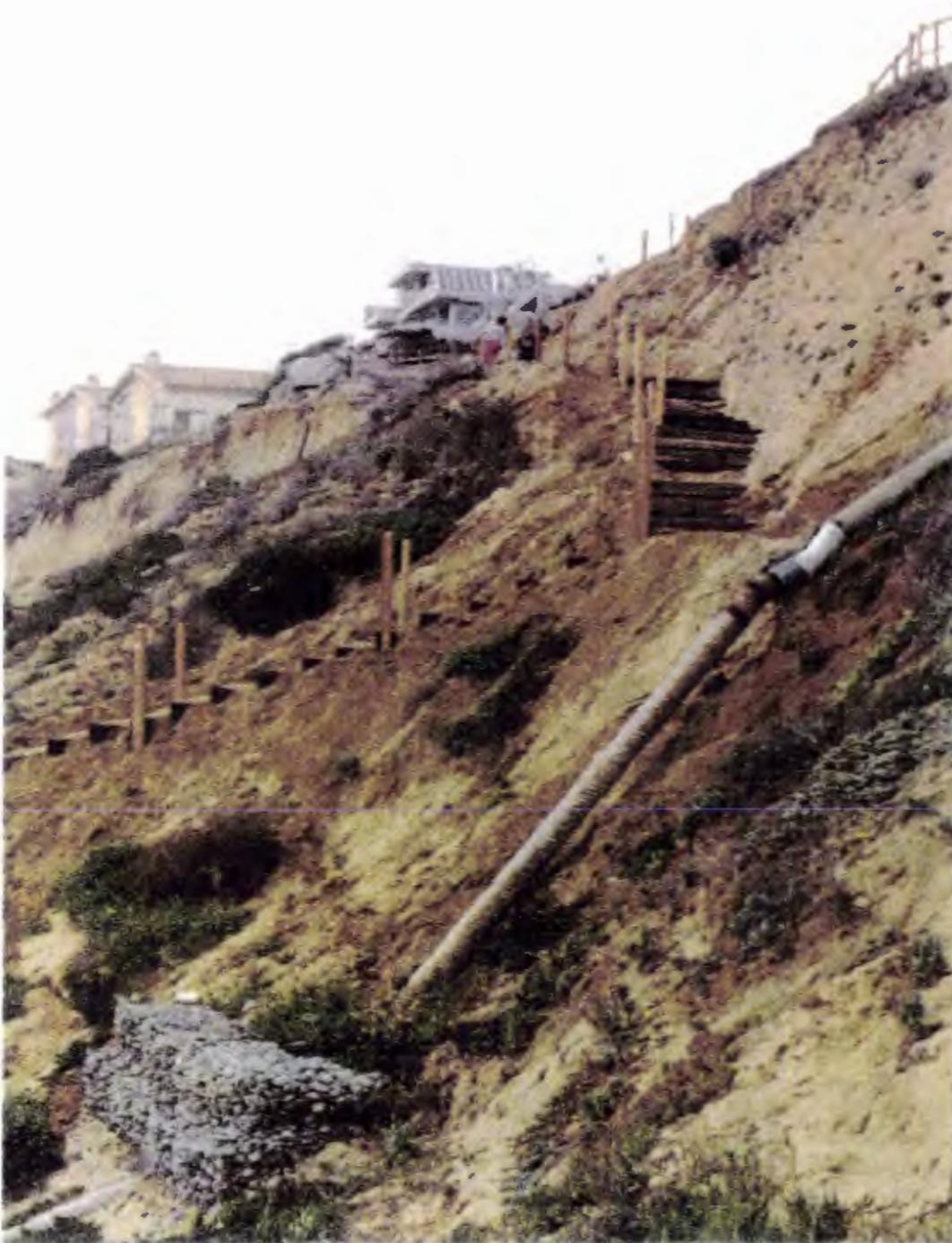
DATE \_\_\_\_\_  
See page, Big. Shaded. Representation of steps  
only - no vid. close

**Exhibit K-A**

**Photo**

**URS Study no. 27644559.00001**

**Photo showing Beacon Beach March 1987 with stairs not visible in the California Coastal Record photos taken showing surface drainage pipe.**



URS Study Beacons Beach Access way March of 1987

**Exhibit K-B**

**Pipe on bluff face**



Frontier Canyon Leaching Point, 100 ft. of old and high cut from south side of the canyon beach onto 672 North Canyon. burred, sandstone, shale, and/or mudstone. In place.

**Exhibit K-C**

**URS Study Project No. 27644559.00001**

**April 17, 2003**

**Beacons Beach access way March of 1987 with stairs that are not visible in the California Coastal record Photos from 878 property showing erosion from the 1987 photo to the 2003 URS study photo.**



JULY 1998  
VIEW OF BLUFF EDGE ALONG PARKING LOT



MARCH 2003  
NOTE HYDROSEEDED SLOPE



MARCH 1993



MARCH 2003  
NOTE STEEPENED UPPER BLUFF

**COMPARISON OF BLUFF CONDITIONS  
BEACON'S BEACH ACCESS**

**URS**

CHECKED BY:

DATE: 4-18-03

FIG. NO:

PM DLS

PROJ. NO: 27844568.00001

10

**Exhibit F**

**Picture**

**1987 California Coastal Records Project**

**#870212208**



**Exhibit I**

**Encinitas Planning Commission Findings**

**Resolution No. PC 2011**

**Case No. 10-069 CDP**

**“Project consistent with the certified Coastal program of the City of Encinitas.”**

**ATTACHMENT "B"**  
**Resolution No. PC 2011-**  
**Case No. 10-069 CDP**

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**1990 City of Encinitas and CCC**

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1535 CAMINO DEL RIO SOUTH SUITE 100  
SAN DIEGO, CA 92108-3550

*Andy Adams, Code Enforcement  
City of Encinitas  
535 Encinitas Blvd #100  
Encinitas, CA 92024*





STATE OF CALIFORNIA  
OFFICE MEMO  
DATE: Nov 1, 1990

DATE: Nov 1, 1990

TO: CINDY ADAMS

PHONE NUMBER

FROM: RICH CREPEAU / Coastal Commission

PHONE NUMBER

SUBJECT: 876 Neptune

Enclosed please find a copy of the report of violation.

Mr. Leach has consented to have up release his name only to the City of Encinitas for purposes of the investigation of the alleged violation and will in no way be ~~not~~ released to Mr. Daniel Millward.

Put your thoughts to work. Submit a MERIT AWARD SUGGESTION.

1.  
page 3

Date Received: 11-1-90 Investigator: \_\_\_\_\_

Address of Complaint: 876 Neptune Ave 876-878

Assessors Parcel No. 854-311-07 Zone: \_\_\_\_\_

Owner's Name: Daniel Millard & Kimberly

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Owner's Phone: WK # \_\_\_\_\_ Home # \_\_\_\_\_ Map Page # \_\_\_\_\_

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Complainant's Name: CA Coastal Comm.

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Complainant's Phone: \_\_\_\_\_

Nature of Complaint: Constructing illegal stair  
way - no permit

Zoning/Code Violation (Code Section): \_\_\_\_\_

Action Taken	Check	Date	Comments
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owner Robert & Jean Hayes			
7625 Ruston Dr. Berkeley 94705			
new owner Millard - NOV 1989			
out 11-29-90			
replacement - see photo 12/11- P.I. w/			

Initial Investigation \_\_\_\_\_

owner Robert & Jean Hayes

7625 Ruston Dr. Berkeley 94705

new owner Millard - NOV 1989

out 11-29-90

replacement - see photo 12/11- P.I. w/

DATE

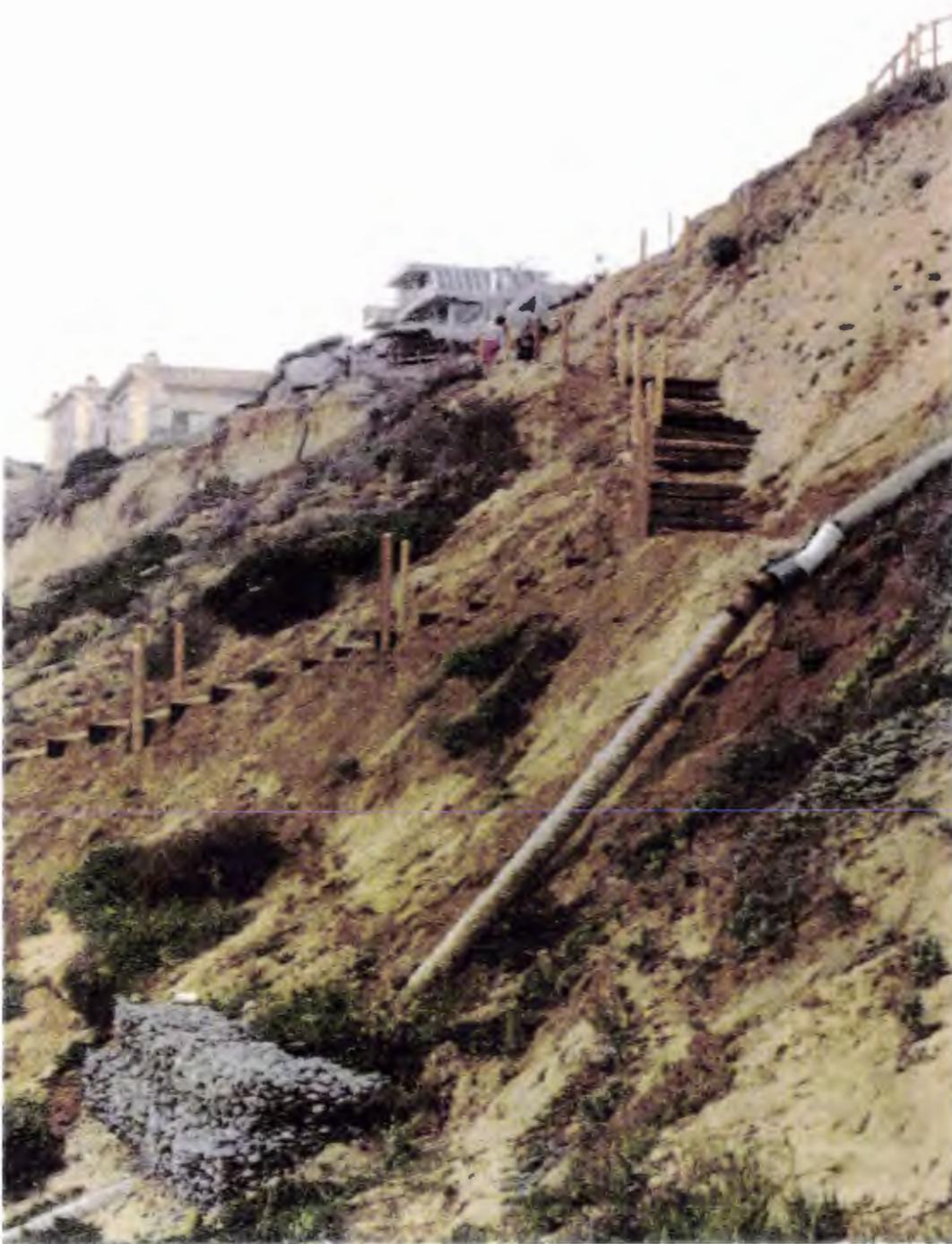
Two page, 6th grade. Repetition of steps  
only - no vid. class

**Exhibit K-A**

**Photo**

**URS Study no. 27644559.00001**

**Photo showing Beacon Beach March 1987 with stairs not visible in the California Coastal Record photos taken showing surface drainage pipe.**



URS Study Beacons Beach Access way March of 1987

**Exhibit K-B**

**Pipe on bluff face**



erosion from leaking pipe has caused the eroded layback from South Side  
of Mascoma Beach onto 678 Nephrolepis bluffs, causing the pipe to migrate  
layback.

**Exhibit K-C**

**URS Study Project No. 27644559.00001**

**April 17, 2003**

**Beacons Beach access way March of 1987 with stairs that are not visible in the California Coastal record Photos from 878 property showing erosion from the 1987 photo to the 2003 URS study photo.**



JULY 1998  
VIEW OF BLUFF EDGE ALONG PARKING LOT



MARCH 2003  
NOTE HYDROSEEDED SLOPE



MARCH 1993



MARCH 2003  
NOTE STEEPENED UPPER BLUFF

COMPARISON OF BLUFF CONDITIONS  
BEACON'S BEACH ACCESS

**URS**

CHECKED BY:

DATE: 4-16-03

FIG. NO:

PK# 013

PROJ. NO: 27844568.00001

10

**Exhibit O**

**Photo**

**2002 California Coastal Records Project**

878 Neptune high resolution photo "Detail in Shingle" Other CCC Photos No Shingle

