

CALIFORNIA COASTAL COMMISSION

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



W23a

Staff: EStevens-SD
Staff Report: 2/19/14
Hearing Date: 3/12/14

REVISED CONDITIONS AND FINDINGS

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: Partial Approval with Conditions and Partial Denial on De Novo

Commissioners on Prevailing Side: Bochco, Brennan, Cox, Garcia, Mitchell, Vargas, Zimmer, Shallenberger, and Chair Kinsey

STAFF NOTES

Staff recommends the Commission adopt the following revised findings in support of the Commission's action on October 10, 2013. In its action, the Commission partially approved and partially denied the permit with modifications to the language in Special Condition No. 1 to allow retention of existing railroad ties on the bluff face and to require removal of the existing railroad ties on California State Parks property subject to approval of California State Parks. The amended motion begins on Page 6. The amended Special Conditions begin on Page 9. Findings to support these modifications can be found starting on Page 10.

~~This appeal was originally scheduled for the November 2012 Commission meeting. However, in order to respond to the staff recommendation, the applicant requested a postponement.~~

~~This item was then brought forward to the Commission at its February 6, 2013 hearing. At the hearing, the Commission found that the subject appeal raised a substantial issue with regards to the consistency of the project with the certified LCP. At the same hearing, staff was recommending denial of the project on de novo due to numerous inconsistencies of the project with the certified LCP. However, during testimony, the applicant requested that the Commission again postpone the hearing. In his request, the applicant indicated to the Commission that he had a number of elderly witnesses that could not travel and that if the hearing were held locally in San Diego; they would be able to testify as to the historic presence of the stairway. In addition, the applicant told the Commission that he also had "new definitive evidence", in the form of aerial photographs that could be presented that would be important to the Commission's decision making, but he needed more time to get that evidence. As such, the Commission voted to continue this matter in order to allow time for the applicant to provide additional evidence to support that the stairway existed prior to February 1, 1973 and to allow the item to be heard locally in San Diego. Since that time and after repeated requests by Commission staff, the applicant has not provided any additional evidence or information.~~

SUMMARY OF STAFF RECOMMENDATION SUMMARY OF COMMISSION ACTION

~~Staff recommends that, on de novo, t~~The Commission take took one vote adopting a two-part resolution, which ~~would~~ approved portions of the development and ~~denied~~ other portions of the development. The project, as proposed, includes the removal, retention, and replacement of portions of a private stairway on a coastal bluff ~~installed after the passage of the California Coastal Zone Conservation Act (Prop 20), that to date does not have any coastal development permit history. 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. Due to the low resolution of the photographs, it is not possible to determine if the existing railroad ties were installed prior to passage of Prop 20. In addition, multiple members of the public testified before the Commission that the railroad ties existed prior to the passage of Prop 20. Furthermore, numerous railroad tie stairways did exist in the vicinity of the subject site prior to passage of Prop 20. However, it is clear from available photographs that substantial improvements in the form of a new raised wooden stairway with numerous retaining walls was constructed subsequent to the passage of Prop 20. Therefore, the entire private stairway~~

(excluding any existing railroad ties) is an unpermitted structure and the proposed development must be reviewed as a proposal for new development and requires the Commission to consider the project site as though none of the existing development exists on site (excluding any existing railroad ties).

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, 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 unpermitted construction in 2004 also appears to have included the construction of three upper bluff retaining walls to support the new raised stairway.

The applicant and the City of Encinitas assert that a railroad tie stairway was constructed on the subject bluff face prior to the passage of the Prop 20. ~~However, due to the fact that the applicant has not submitted substantial evidence (no prior permit approvals, records of construction, etc.) to support his claim that a stairway existed in this location prior to November 8, 1972 (former Public Resources Code, section 27404), 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. Due to the low resolution of the older photographs, it is not possible to determine from them whether the existing railroad ties were installed prior to passage of Prop 20.~~

~~Furthermore, e~~Even if the property owner at the subject property had received a permit and diligently commenced construction and performed substantial work in good faith reliance on the permit for a private railroad tie stairway prior to November 8, 1972, the policies of the City's certified LCP do not allow for replacement or additions to private stairways on the bluff face. Due to the fact that the applicant has constructed substantial improvements to the railroad tie staircase, it is unclear how much of the railroad tie staircase is even still on the bluff face and what condition those railroad ties are in.

The City of Encinitas' certified Local Coastal Program prohibits construction of new private stairways on coastal bluffs and requires that 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~~ The Commission **approved** 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, within 90 days, 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 (existing railroad ties may be retained, but not replaced). Special Condition 2 requires that, within 90 days, the applicant record a deed restriction to ensure that the Special Conditions of this permit run with the subject property. Special Condition 3 has 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 **denied** the applicant's request for retention of the three unpermitted upper bluff wooden retaining walls, replacement of the unpermitted at-grade railroad ties, and construction of an upper bluff retractable stair access in sections 1-8, and retention of unpermitted wooden treads, risers, and stringers in sections 9-15, ~~and retention of unpermitted 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. Here, the new development consists of the retention or replacement of any portion of the private access stairway (excluding the existing railroad ties), which is inconsistent with the City of Encinitas certified Local Coastal Program. Removal of the remaining unpermitted development (not proposed to be removed by the applicant in this CDP application) will be addressed through a separate enforcement action or through voluntary removal by the applicant of all unpermitted development within 90 days (or within such additional time as the Executive Director may grant for good cause) of Commission action on this coastal development permit. Prior to removal of the remaining unpermitted development, the applicant shall submit removal and bluff restoration plans for review and written approval of the Executive Director of the Commission (Special Condition 4).

~~Therefore, staff recommends that~~ The Commission, on de novo, **partially approved as conditioned and partially denied** 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

STAFF RECOMMENDATION ON THE COASTAL PERMIT

I. MOTION AND RESOLUTION ON DE NOVO

I move that the Commission adopt the revised findings in support of the Commission's action on October 10, 2013 concerning approval of Coastal Development Permit No. A-6-ENC-11-073.

STAFF RECOMMENDATION OF APPROVAL:

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

Commissioners Bochco, Brennan, Cox, Garcia, Mitchell, Vargas, Zimmer, Shallenberger, and Chair Kinsey

RESOLUTION TO ADOPT REVISED FINDINGS:

The Commission hereby adopts the revised findings set forth below for *Coastal Development Permit No. A-6-ENC-11-073* on the ground that the findings support the Commission's decision made on October 10, 2013 and accurately reflect the reasons for it.

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 removal of all other unpermitted development on the bluff face 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.~~

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent 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.

III. SPECIAL CONDITIONS

The permit is subject to the following conditions:

1. **Final Revised Plans.** WITHIN 90 DAYS OF APPROVAL OF THIS COASTAL DEVELOPMENT PERMIT, or within such additional time as the Executive Director may grant for good cause, 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. However, any existing railroad ties may remain, but they cannot be replaced. The existing railroad ties on California State Parks property shall be removed subject to approval of California State Parks.

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.** WITHIN 90 DAYS OF APPROVAL OF THIS COASTAL DEVELOPMENT PERMIT or within such additional time as the Executive Director may grant for good cause, 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. **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, which the applicant proposes to remove per this CDP application, 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.

4. Removal of Unpermitted Development. WITHIN 90 DAYS OF APPROVAL OF THIS CDP, or within such additional time as the Executive Director may grant for good cause, the applicant may remove all remaining unpermitted development on the bluff face. Prior to removal, the applicant shall submit to the Executive Director for review and written approval, final project plans for hand removal of all other unpermitted development on the bluff face and restoration of the resulting disturbed area on the bluff face with native, drought-tolerant, and non-invasive plants and minimal temporary irrigation.

IV. 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 residence¹. 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 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 and shall be removed subject to the approval of State Parks.

~~Based on~~ A review of oblique aerial photographs compiled by the California Coastal Records Project between 1972 and 2010, did not definitively establish whether 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 Prop 20. (See Former Pub. Res. Code, § 27404.). Due to the low resolution of the older photographs, it is not possible to determine if the existing railroad ties were installed prior to the passage of Prop 20. However, it is clear from available photographs that substantial improvements in the form of a new raised wooden stairway with numerous retaining walls was constructed subsequent to the passage of Prop 20.

¹ 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.

The applicant has submitted a letter from a prior owner of the subject 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. In addition, multiple members of the public testified before the Commission that the railroad ties existed prior to the passage of Prop 20. Furthermore, numerous railroad tie stairways did exist in the vicinity of the subject site prior to passage of Prop 20. ~~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. Further, the applicant did not supply any substantial evidence in the form of regulatory approvals for any pathway built prior to 1970 or, if no regulatory approvals were necessary, substantial evidence supporting a finding that this type of development did not require regulatory approval.~~

The applicant previously submitted a photograph, allegedly taken in 1971, that clearly shows the existence of ~~subject~~ a railroad tie private pathway on the subject property. 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 2nd 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~~ may have been constructed pre-Prop 20.

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.

California voters passed the Coastal Zone Conservation Act (Prop 20) on November 8, 1972, with the effective date being February 1, 1973. Prop 20 regulated development along the coast if the development took place between the mean high tide line and 1,000 yards inland from the mean high tide line. (Former Pub. Res. Code, §§ 27001, 27104, 27400.) The subject site is within 1,000 yards of the mean high tide line and, thus, was subject to Prop 20 jurisdiction. Prop 20 provided that property owners could obtain a vested right for development and not be required to obtain a CDP under Prop 20 “if any city or county has issued a building permit [prior to passage of Prop 20 (November 8, 1972)]..... [and the owner] has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor.” (Former Public Resources Code, section 27404.) 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.4th 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.

Neither the railroad ties nor the additional bluff improvements were permitted prior to passage of Proposition 20. Further, neither the applicant, nor any prior owners, ever submitted a vested rights claim to the Commission under section 30608 of the Coastal Act and section 13202 of the Commission’s regulations for these bluff improvements. Thus, the Commission has never determined that a vested right exists for the unpermitted bluff development. Therefore, the proposal is treated as new development on the bluff face. At some point ~~prior to 1990, but well after the~~ in the past, which may have been prior to the passage of Prop 20, a private railroad tie accessway was installed on the bluff face of the subject site. 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 (current property owner) 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, 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. The unpermitted construction in 2004 also appears to include the construction of three upper bluff retaining walls to support the new raised stairway. However, the applicant asserts that the stairway improvements and the three upper bluff walls are independent of each other and were constructed at different times. The applicant further claims that the three walls were covered by vegetation in previous photographs.

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). The proposed development includes the following:

- 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-Prop 20 structure. While the date of construction of the residence predates Prop, 20, there is not a presumption that it is a legally permitted structure because it too doesn't have the benefit of a formal vested rights determination by the Commission. It, however, is not the subject of the proposed development, so the Commission need not address the permit history of the residence at this time. 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.

Oblique Aerial Photographs

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->

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

Given that the unpermitted development including, but not limited to, the construction of a private stairway/accessway down a coastal bluff is within the City's permitting jurisdiction and has occurred without the benefit of a coastal development permit, and the Commission has never determined that the applicant or any prior owner has a vested right for the subject bluff development, the Commission's review of the proposed development, on appeal, is based solely upon applicable policies of the certified City of Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act. 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. Special Condition 3 has 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 20th 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 the following regarding 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, and 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, within 90 days, the applicant submit revised final plans that consist solely of removal of portions of the unpermitted private stairway and do not include any additions to or retention (aside from retention of the existing railroad ties) of the unpermitted private stairway. Special Condition 2 requires that, within 90 days, the applicant record a deed restriction to ensure that the Special Conditions of this permit run with the subject property.

As stated previously, although neither the railroad ties ~~nor~~ the additional bluff improvements were not permitted prior to Prop 20 and the Commission has not issued a vested rights determination for this development. Therefore, the proposal constitutes unpermitted development and 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 (excluding the existing railroad ties) 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. Therefore, the proposed removal of the unpermitted development is consistent with the LCP.

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~~ None of the bluff improvements, with the possible exception of some railroad ties, existed ~~were permitted~~ prior to passage of Prop 20. Therefore, the Commission is required to review the proposal and project site conditions as though the unpermitted development had not occurred and, thus, constitutes an application for new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4th 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” 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 certified 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. However, the existing railroad ties may be retained, but not replaced, as they may have existed prior to the passage of Prop 20. After all the nonconforming/unpermitted elements of the stairway are removed and the existing railroad ties are

exposed, if in the future the property owner felt that repair and maintenance of the railroad ties were necessary he or she would need to contact the City of Encinitas. The City of Encinitas would then determine, based on the City's certified LCP, if a CDP is required. Existing private stairways on the coastal bluff in Encinitas are non-conforming uses and the intention of the LCP policies are to phase out these existing non-conforming uses, which is why repair, but not replacement, may be permitted.

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, and 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 plans condition that requires the removal of all plan notes that allow retention or replacement of any portion of the private stairway (except for the existing railroad ties), 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

Given that the unpermitted development including, but not limited to, the construction of a private stairway/accessway down a coastal bluff is within the City’s permitting jurisdiction and has occurred without the benefit of a coastal development permit, and the Commission has never determined that the applicant or any prior owner has a vested right for the subject bluff development, the Commission’s review of the proposed development, on appeal, is based solely upon applicable policies of the certified City of Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act. 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 or through voluntary removal by the applicant of all unpermitted development within 90 days (or within such additional time as the Executive Director may grant for good cause) of Commission action on this Coastal Development Permit. Prior to removal of the remaining unpermitted development, the applicant shall submit removal and bluff restoration plans for review and written approval of the Executive Director of the Commission (Special Condition 4).

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 existing railroad ties may have been constructed prior to the passage of Prop 20 and can therefore be retained, but cannot be replaced.

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 reviewed as though the unpermitted development had not occurred, which means it constitutes a proposal for new development. (LT-WR v. CCC (2007) 152 Cal.App.4th 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 that took place after 1972 including the railroad ties is unpermitted and retention of any part of the staircase (except for the railroad ties that may have existed prior to the passage of Proposition 20) 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 the Commission has never issued a vested rights determination for the bluff development (Section 30608 of the Coastal Act; former Pub. Res. Code, § 27404.). As such, it is considered unpermitted development. The oblique aerial photographs taken in 1972 of the subject

site 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 contentions~~ that the resolution of these oblique aerial photographs is too low to depict sufficient detail of the bluff face appears to be without merit to show the railroad ties on the bluff face that may have existed pre-Prop 20. 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, other than the railroad ties that may have existed prior to the passage of Proposition 20 is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4th 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 (except for the existing railroad ties) 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,~~ with the possible exception of the existing railroad ties, were not permitted prior to Prop20. Therefore, the proposal is treated as a proposal for new development on the bluff face since the Commission is required to review the project as though the unpermitted development had not occurred. (LT-WR v. CCC (2007) 152 Cal.App.4th 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 and provide that the visual quality of bluffs should be restored and enhanced. The existing railroad tie stairway may have been constructed pre-Prop 20 and can be retained; however replacement of the existing railroad ties or retention of any of the improvements that occurred after the passage of Prop 20 is not consistent with the certified LCP. 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 (except for the existing railroad ties) 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, and risers or the replacement of the existing, and railroad ties is not consistent with the visual or geologic protection policies of the certified Local Coastal Program.

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, and 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, and risers or allowing replacement of the existing, 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, in part:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby....

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 cases, 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~~ retention of portions of an unpermitted private stairway down the coastal bluff. The continued approval of development (other than retention of the existing railroad ties) 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 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 (excluding the existing railroad ties) 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 of portions of the private stairway (excluding the existing railroad ties) 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 of the existing railroad ties or maintenance retention of any other 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

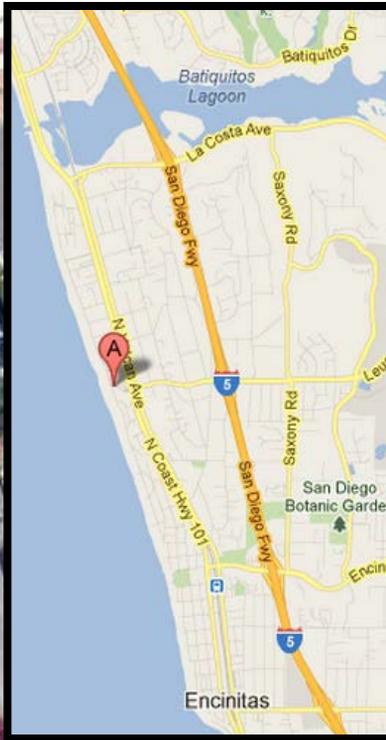


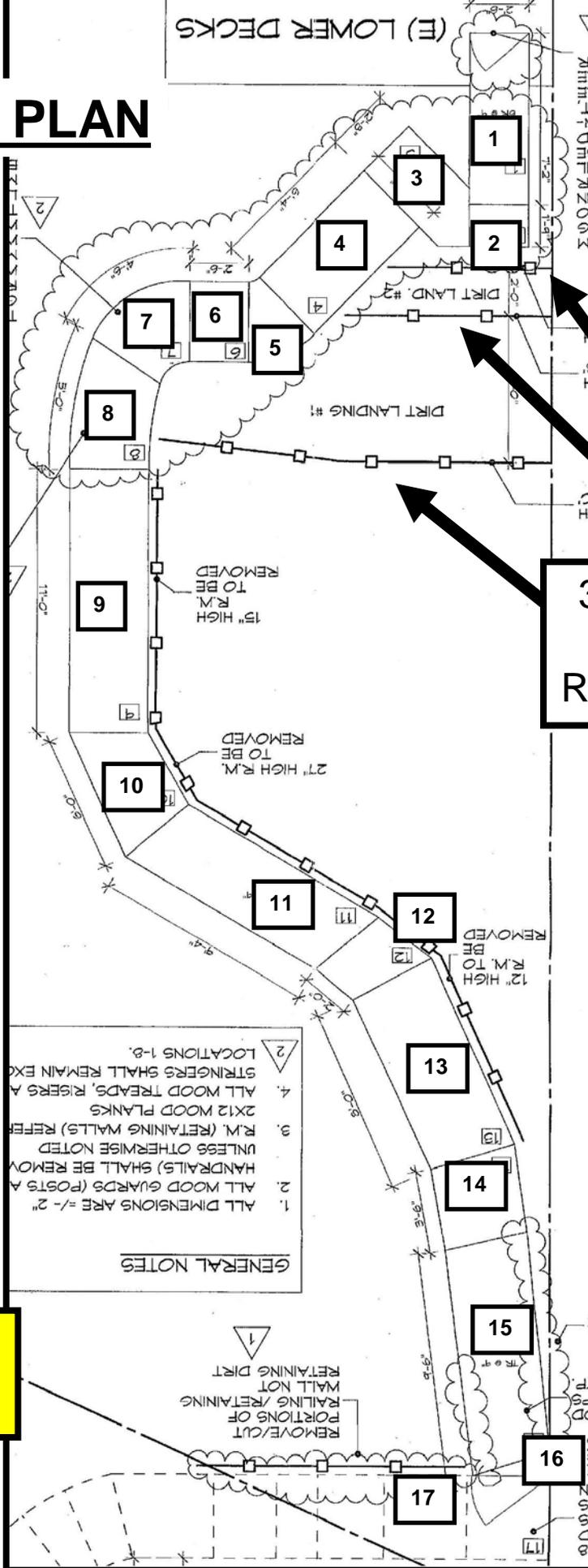
EXHIBIT NO. 1
APPLICATION NO.
A-6-ENC-11-073
Project Location

SITE PLAN

TOP OF BLUFF

**3 Upper Bluff
Wooden
Retaining Walls**

BASE OF BLUFF



GENERAL NOTES

1. ALL DIMENSIONS ARE +/- 2"
2. ALL WOOD GUARDS (POSTS & HANDRAILS) SHALL BE REMOVED UNLESS OTHERWISE NOTED
3. R.M. (RETAINING WALLS) REFER TO 2X12 WOOD PLANKS
4. ALL WOOD TREADS, RISERS & STRINGERS SHALL REMAIN EXCEPT LOCATIONS 1-8.

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| EXHIBIT NO. 3 |
| APPLICATION NO. |
| A-6-ENC-11-073 |
| Site Plan |
| California Coastal Commission |