

CALIFORNIA COASTAL COMMISSION

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STAFF REPORT: REGULAR CALENDAR

Application No.: 6-10-018

Applicants: John and Patricia Brown

Location: 836/838 Neptune Avenue, Encinitas, San Diego County (APN# 256-011-17-01-02).

Project Description: “After-the-fact” approval for the installation of an upper bluff deadman retaining system, placement of gravel on the mid and upper bluff, and construction of a seawall. New work includes placement of soil and installation of landscaping on the bluff, and aesthetic treatment of the seawall.

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

The applicants propose to construct a variety of bluff retention devices located on the bluff top, on the bluff face, and on the beach below an existing bluff top residence located in the City of Encinitas (Exhibit 1). The proposed bluff retention devices have already been constructed and are currently unpermitted, having been temporarily authorized under emergency permits which have expired without a follow-up permit following a large landslide in 1996, or placed without benefit of a permit. Because the development is unpermitted, all development is being reviewed as if it were not existing. In addition to retention of the existing seawall on the beach, gravel on the mid and upper bluff, and a deadman retaining system on the bluff top, the applicants are proposing to aesthetically treat the seawall and to place soil and landscaping on top of the gravel.

The bluff top residence at the site was approved and constructed in 1981. The bluff top residence is not an existing structure for purposes of Section 30235 of the Coastal Act because it was originally permitted and built after 1976, thereby postdating the enactment of California Coastal Act of 1976. Thus, the Commission is not required to approve shoreline armoring to protect the bluff top residence. Nevertheless, the Executive Director did authorize the construction of shoreline armoring at the site under emergency permits, with the understanding that the shoreline armoring was for the purpose of protecting the bluff top residence. Furthermore, the bluff top residence immediately adjacent to the north of the subject structure (858/860 Neptune Avenue) was constructed prior to the enactment of the Coastal Act and therefore does qualify as an existing structure for purposes of Section 30235. Thus, given that the Executive Director previously allowed the shoreline armoring to be constructed, and the shoreline armoring is needed to protect a pre-Coastal Act structure, it is consistent with the Coastal Act to allow the minimum amount of protection needed to support the current bluff top residences to remain at this time. However, there is no justification for increasing the amount of shoreline armoring (with its associated impacts) to protect the bluff top residence in the future or in perpetuity. Therefore, special conditions of this permit require that the applicants waive any rights to construct additional shoreline armoring and require that the applicants agree to remove the bluff top residence if it is threatened by further bluff erosion in the future.

Staff is also recommending that the proposed shoreline armoring only be approved for as long as the bluff top residences that the armoring is authorized to protect still exist; and requires the applicants to submit a complete coastal development permit application to remove or modify the terms of authorization of the armoring when the existing structure warranting armoring is redeveloped, no longer present, or no longer requires armoring.

Special conditions of this permit require reassessment of sand supply and public access mitigation for the impacts of the proposed shoreline armoring and reevaluation of the subject bluff top residence's safety 21 years following the seawall's completion (i.e. June 30, 2022).

As conditioned, the applicants are required to pay a sand supply mitigation fee of \$1,096 and a public access and recreation mitigation fee of \$154,662 for the initial 22 years that the shoreline armoring is in place (including the 15 years it has already adversely impacted shoreline sand supply and public access and recreation). The sand supply mitigation fee was calculated using a standard formula to determine the volume of sand that would otherwise have reached the beach were it not for the proposed shoreline armoring. The public access and recreation mitigation fee was calculated by applying the square foot value of vacant bluff top property in the vicinity of the subject site to the square foot impact of the proposed shoreline armoring on the beach. With Special Conditions that require mitigation for the adverse impacts to public access and recreation, impacts to the public will be minimized to the greatest extent feasible.

The properties located directly adjacent to the north (858/860 Neptune Avenue/Sonnie) and directly adjacent to the south (828 Neptune Avenue/Okun) of the subject site were also subject to the landslide and the three properties share a similar shoreline armoring pattern. The shoreline protection located on the southernmost Okun property was approved by the Commission in September 2005. The property immediately north of the subject site is being reviewed

concurrently with the subject project on the same hearing. The conditions recommended on each of these two current projects, in particular the conditions requiring monitoring of site conditions, the need for the protection, and reevaluation of the site and the required mitigation, have been designed to align with the time frame for the mitigation and monitoring required on the Okun site. This will allow the Commission to evaluate all three properties in a comprehensive, consistent manner 22 years after the shoreline protection on all three sites was originally installed.

Commission staff recommends **approval** of coastal development permit application 6-10-018, as conditioned.

Note:

Consent Cease and Desist Order CCC-09-CD-05 was issued by the Commission in 2009 to address the unpermitted development on the property. In the years since the Consent Order was approved, Commission Enforcement staff has expended a significant amount of time attempting to obtain compliance with the Consent Order, yet, only in October 2015, over 5 1/2 years after the deadline to submit a complete CDP application, did the applicant submit such an application. Throughout this time, the unpermitted development has remained on the property and continues to impact coastal resources. Commission Enforcement and Permit staff has undertaken significant efforts, including numerous meetings, phone calls, and letters (Exhibits –12-13) to get the applicants to comply with the Order and submit a complete CDP application, despite the fact that the applicants agreed to submit the required materials years ago by agreeing to the Consent Order, and have failed to comply with that agreement in the following years.

The applicants submitted a fee of \$6,000 with the subject coastal development permit application on March 19, 2014. Due to the fact that the majority of the proposed development is unpermitted, having been constructed pursuant to emergency permits that have since expired or placed without benefit of any permit, the Commission's regulations require that the permit fee shall be multiplied by five times, unless the fee is reduced by the Executive Director pursuant to Section 13055(d) of the California Code of Regulations. The five times permit fee is a total of \$30,000. Due to the fact that the applicants undertook the unpermitted development and the significant extra staff time expended by Commission staff to review the application, the Executive Director did not reduce the after-the-fact fee. The applicants have paid the entire permit fee of \$30,000 under protest and have requested that the Commission reduce the permit fee to a total of \$10,000 and to refund the remaining \$20,000. A detailed discussion of the after-the-fact permit fee can be found below under Section E. Unpermitted Development.

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I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit 6-10-018 subject to the conditions set forth in the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in conditional approval of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution:

The Commission hereby approves Coastal Development Permit 6-10-018 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittees 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 permittees to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Revised Final Plans.** PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall submit for review and written approval of the Executive Director, final plans for the proposed development that are in substantial conformance with the submitted plans dated March 30, 2015 by Construction Testing & Engineering, Inc., that have been approved by the City of Encinitas, and that have been revised to include the following details and requirements:
 - a. Sufficient detail regarding the construction method and technology utilized for texturing and coloring the seawall. Said plans shall conform to, and be of sufficient detail to verify, that the seawall closely matches the adjacent color and texture of the natural bluffs, including provision of a color board for the material.
 - b. Any existing permanent irrigation system located on the subject property shall be removed prior to construction. Evidence of removal of the irrigation system shall be submitted within 30 days of the removal.
 - c. All runoff from impervious surfaces on the top of the bluff shall be collected and directed away from the bluff edge towards the street and into the City's stormwater collection system.
 - d. Existing accessory improvements (i.e., decks, patios, walls, windscreens, etc.) located on the bluff top property shall be detailed and drawn to scale on the final approved site plan and shall include measurements of the distance between the accessory improvements and the reconstructed bluff edge taken at three or more locations. The locations for these measurements shall be identified through permanent markers, benchmarks, survey position, written description, or other method that enables accurate determination of the location of all structures on the site. The plans shall indicate that the existing accessory improvements are not entitled to protection from the proposed shoreline armoring. Any existing accessory structures located within five ft. of the reconstructed bluff edge shall be removed. Any new Plexiglas or other glass wall shall be detailed on the final plans and shall be non-clear, tinted, frosted or incorporate other elements to inhibit bird strikes.

The permittees shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the 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. **Final Landscape Plans.** PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall submit for review and written approval of the Executive Director, final landscape plans for the landscaping on the coastal bluff that are in substantial conformance with the submitted plans dated June 12, 2012 and July 15, 2012 by George Mercer Associates Landscape Architecture, that have been approved by the City of Encinitas and that have been revised to include the following details and requirements:
 - a. All existing non-native plant species on the bluff face shall be removed prior to planting of new vegetation.
 - b. Only drought tolerant native plant materials may be planted on the subject property. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as ‘noxious weed’ by the State of California or the U.S. Federal Government shall be planted within the property.
 - c. All irrigation on the bluff face shall be capped within 36 months of planting and the applicant shall agree not to undertake any additional irrigation 36 months after planting.
 - d. All approved landscaping shall be completed within 1 year of Commission action on this permit.
 - e. The applicant shall submit, five years from the date of Commission action on this coastal development permit (March 9, 2021), for review and written approval of the Executive Director, a landscape monitoring report, prepared by a licensed Landscape Architect or qualified Resource Specialist, that certifies the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage and shall document that the irrigation on the bluff face has been capped or removed. This requirement shall be incorporated in the Landscape Plan, pursuant to this Special Condition 2.

If the landscape monitoring report indicates that the landscaping has failed to successfully cover the entirety of the gravel on the bluff face, the permittees shall submit a revised or supplemental landscape plan for the review and written approval of the Executive Director. The revised landscaping plan must be prepared by a licensed Landscape Architect or Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan. The landscape monitoring report may be submitted separately or be included as a part of the shoreline armoring monitoring reports required pursuant to Special Condition 8 of this permit.

The permittees shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the 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.

3. No Future Shoreline Armoring.

- a. By acceptance of this permit, the applicants agree, on behalf of themselves and all successors and assigns, that no new shoreline armoring, including reconstruction of existing shoreline armoring, shall ever be constructed to protect the bluff top residence in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides or other natural hazards. By acceptance of this Permit, the applicants hereby waive, on behalf of themselves and all successors and assigns, any rights to shoreline armoring that may exist under Public Resources Code Section 30235 or under the certified LCP;
- b. By acceptance of this permit, the applicants agree, on behalf of themselves and all successors and assigns, that the bluff top residence will remain only as long as it is reasonably safe from failure and erosion without having to propose any shoreline armoring to protect the bluff top residence in the future.
- c. By acceptance of this Permit, the applicants further agree, on behalf of themselves and all successors and assigns, that the landowners shall remove the bluff top residence if any government agency has ordered that the structure is not to be occupied due to any of the hazards identified above. Such removal shall require a coastal development permit. In the event that portions of the development fall to the beach before they are removed, the permittees shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site;
- d. In the event the edge of the bluff recedes to within 10 feet of the bluff top residence, the permittee or successor in interest shall submit a geotechnical investigation prepared by a licensed geologist or civil engineer with coastal experience and retained by the permittee, that addresses whether any portions of the bluff top residence are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the bluff top residence without new shoreline armoring, including, but not limited to, removal or relocation of

portions of the bluff top residence. The report shall be submitted to the Executive Director and the appropriate local government official within 90 days of the bluff edge reaching 10 feet of the bluff top residence. If the Executive Director determines based on the geotechnical report that the bluff top residence or any portion of the bluff top residence is hazardous, the permittees shall, within 90 days of submitting the report, submit a complete application for a CDP or amendment to this CDP to remedy the hazard, which shall include removal of the entire bluff top residence or threatened portion of the bluff top residence.

4. **Site Stability Report.** Between January 1, 2022 and June 30, 2022 (21 years from the date that the seawall was substantially completed), the permittees shall submit a current geotechnical/engineering report assessing bluff stability and whether the bluff top residence remains in a safe location. Specifically, the permittees and/or successor(s) in interest shall submit to the Commission a site assessment evaluating the site conditions to determine whether or not alterations to the bluff top residence or removal of the bluff top residence is necessary to avoid risk to life or property. The study shall be based upon a site specific analysis of site stability, bluff alteration due to natural and manmade processes, and the hazard potential at the site. The required study shall be prepared by a licensed Certified Engineering Geologist or Geotechnical Engineer or Registered Civil Engineer with expertise in soils, in accordance with the procedures detailed in the Local Coastal Program (LCP) and the City Zoning Code; and shall include the following:
 - a. An analysis of site stability based on the best available science and updated standards, of beach erosion, wave run-up, sea level rise, inundation, and flood hazards;
 - b. An analysis of whether or not the shoreline armoring is still required to protect the subject bluff top residence it was approved to protect.
 - c. An analysis of the means to remove in whole or in part the bluff top residence if and when it becomes unsafe for occupancy.

The submitted analysis shall address all the structures existing on the subject property and, depending on the results of the bluff stability analysis, include proposals to remove or retain the bluff top residence and shoreline armoring. If the required study shows that the bluff top residence is no longer safely located, the permittees shall, within 90 days of submitting the report, apply for a coastal development permit or amendment to this CDP to undertake measures required to remove the bluff top residence or reduce the size of the bluff top residence to reduce the hazard potential.

5. **Duration of Shoreline Armoring Approval.**
 - a. **Authorization Expiration.** This CDP authorizes the shoreline armoring (seawall, mid and upper bluff gravel, and deadman retaining system) until the time when the bluff top residence is redeveloped as that term is defined in Special Condition 6, is no longer present, or no longer requires shoreline armoring, whichever occurs first. Prior to the anticipated expiration of the permit and/or in conjunction with redevelopment of the

property, the Permittees shall apply for a new CDP or amendment to this CDP, to remove the shoreline armoring or to modify the terms of its authorization.

- b. **Amendment.** If the Permittees intend to keep the shoreline armoring in place beyond the 22 year mitigation period (beginning from June 30, 2001 - the date that the seawall was substantially completed, and ending June 30, 2023), the Permittees shall submit a complete application for a CDP or amendment to this CDP to reassess mitigation for the on-going impacts of the armoring including potential ways in which those impacts could be reduced. The complete application shall be submitted no later than 21 years after construction of the seawall (i.e., no later than June 30, 2022). The application shall include analysis of feasible alternatives to modify the shoreline armoring or the bluff top residence to lessen the shoreline armoring's impacts on coastal resources, and shall propose mitigation for unavoidable coastal resource impacts associated with the retention of the shoreline armoring beyond 22 years.

6. **Reliance on Permitted Shoreline Armoring.** No future development that is not otherwise exempt from coastal development permit requirements, or redevelopment of the bluff top residence on the bluff top property, shall rely on the permitted shoreline armoring to establish geologic stability or protection from hazards. Such future development and redevelopment on the site shall be sited and designed to be safe without reliance on shoreline armoring. As used in these conditions, "redeveloped" or "redevelopment" consists of alterations including: (1) additions to the bluff top residence, (2) exterior and/or interior renovations, (3) and/or demolition of the bluff top residence, or portions thereof, which results in: alteration of 50 percent or more of major structural components including exterior walls, floor and roof structure, and foundation, or a 50 percent increase in floor area. Alterations shall not be additive between individual major structural components; however, changes to individual major structural components shall be cumulative over time from the date of approval of the CDP.

7. **Mitigation for Impacts to Public Access and Recreation and Sand Supply.**

- a. **PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP,** the applicants shall provide evidence, in a form and content acceptable to the Executive Director, that a payment of \$154,662 has been deposited in the Public Access and Recreation Fund, an interest-bearing account established at San Diego Association of Governments (SANDAG), or other account designated by the Executive Director, in lieu of replacing the beach area lost due to the significant adverse impacts that the proposed seawall will have on public access and recreation. The in-lieu fee will mitigate for those impacts for a 22 year period (beginning from June 30, 2001 - the date that the seawall was substantially completed; and ending June 30, 2023). All interest earned by the account shall be payable to the account for the purposes stated below.

The purpose of the mitigation payment is for provision, restoration or enhancement of public access and recreation opportunities within the City of Encinitas, including but not limited to, public access improvements, recreational amenities and/or acquisition of

privately-owned beach or beach-fronting property for such uses. The funds shall be used solely for the construction/creation of permanent long-term public access and recreation improvements along the Encinitas shoreline, and may not be used to fund operations, maintenance, or planning studies. Any portion of the fund that remains after ten years may be used for other permanent long-term public access and recreation improvements along the shoreline within the coastal zone of San Diego County.

- b. PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall provide evidence, in a form and content acceptable to the Executive Director, that a fee of \$1,090 has been deposited in an interest-bearing account designated by the Executive Director, in lieu of providing the total amount of sand to replace the sand that will be lost due to the impacts of the seawall for the 22 year mitigation period (beginning from June 30, 2001 - the date that the seawall was substantially completed; and ending June 30, 2023). All interest earned by the account shall be payable to the account for the purposes stated below.

The purpose of the account shall be to establish a beach sand replenishment fund to aid San Diego Association of Governments (SANDAG), or an alternate entity approved by the Executive Director, in the restoration of the beaches within San Diego County. The funds shall be used solely to pay for sand used to implement projects which provide sand to the region's beaches, not to fund operations, maintenance or planning studies. The funds shall be released only upon approval of an appropriate project by the Executive Director of the Coastal Commission. The funds shall be released as provided for in an MOA between SANDAG, or an alternate entity approved by the Executive Director, and the Commission, setting forth terms and conditions to assure that the in-lieu fee will be expended in the manner intended by the Commission. If the MOA is terminated, the Executive Director may appoint an alternate entity to administer the fund for the purpose of restoring beaches within San Diego County.

8. **Shoreline Armoring Monitoring and Reporting Program.** PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall submit to the Executive Director for review and written approval, a monitoring program prepared by a licensed civil engineer or geotechnical engineer to monitor the performance of the shoreline armoring which requires the following:
- a. An annual evaluation of the condition and performance of the shoreline armoring addressing whether any significant weathering or damage has occurred that would adversely impact the future performance of the structure. This evaluation shall also include an assessment of the color and texture of the structure compared to the surrounding native bluffs.
 - b. Annual measurements of any differential retreat of bluff material between the face of the natural bluff and the seawall face, at the north and south ends of the seawall and at 20-

foot intervals (maximum) along the top of the seawall face/bluff face intersection. The program shall describe the method by which such measurements shall be taken.

Provisions for submittal of a report to the Executive Director of the Coastal Commission by May 1 each third year, for so long as the seawall remains. In addition, reports shall be submitted by May 1 following either:

1. An “El Niño” storm event – comparable to or greater than a 20-year storm.
 2. An earthquake of magnitude 5.5 or greater with an epicenter in San Diego County.
- c. Annual surveys of the westernmost property line and mean high tide line (MHTL) by a licensed surveyor shall be undertaken in the Spring and Fall of each year and included in each monitoring report.
- d. Each report shall be prepared by a licensed civil engineer, geotechnical engineer or geologist. The report shall contain the measurements and evaluation required in subsections sections (a), (b) and (c) of Special Condition 8. The report shall also summarize all measurements and analyze trends such as erosion of the bluffs, changes in sea level, the stability of the overall bluff face, including the upper bluff area, and the impact of the structure on the bluffs to either side of the wall. In addition, each report shall contain recommendations, if any, for necessary maintenance, repair, changes or modifications to the shoreline armoring.
- e. An agreement that, if after inspection or in the event the report required in subsection (c) of Special Condition 8 recommends any necessary maintenance, repair, changes or modifications to the project including maintenance of the color of the structure to ensure a continued match with the surrounding native bluffs, the permittees shall contact the Executive Director to determine whether a coastal development permit or an amendment to this permit is legally required, and, if required, shall subsequently apply for a coastal development permit or permit amendment for the required maintenance within 90 days of the report or discovery of the problem.

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

9. **Storage and Staging Areas/Access Corridors.** PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall submit to the Executive Director for review and written approval, final plans indicating the location of access corridors to the construction site and staging areas. The final plans shall indicate that:

- a. No overnight storage of equipment or materials shall occur on sandy beach or public parking spaces. During the construction stages of the project, the permittees shall not store any construction materials or waste where it will be or could potentially be subject to wave erosion and dispersion. In addition, no machinery shall be placed, stored or otherwise located in the intertidal zone at any time, except for the minimum necessary to install the landscaping and aesthetically treat the seawall. Construction equipment shall not be washed on the beach or within public parking lots.
- b. Worker access corridors shall be located in a manner that has the least impact on public access to and along the shoreline.
- c. No work authorized by this CDP shall occur on the beach on weekends, holidays or from Memorial Day weekend through Labor Day of any year.
- d. The applicants shall submit evidence that the approved plans and plan notes have been incorporated into construction bid documents. The applicants shall remove all construction materials/equipment from the staging site and restore the staging site to its prior-to-construction condition within 24 hours following completion of the development.

The permittees 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.

10. **Water Quality--Best Management Practices.** PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall submit for review and written approval of the Executive Director, a Best Management Plan that effectively assures no construction byproduct will be allowed onto the sandy beach and/or allowed to enter into coastal waters. All construction byproduct shall be properly collected and disposed of off-site.

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

11. **Construction Site Documents & Construction Coordinator.** DURING ALL CONSTRUCTION:

- a. Copies of the signed coastal development permit and the approved Construction Plan shall be maintained in a conspicuous location at the construction job site at all times, and such copies shall be available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the coastal development

permit and the approved Construction Plan, and the public review requirements applicable to them, prior to commencement of construction.

- b. A construction coordinator shall be designated to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies). The coordinator shall be available 24 hours a day for the duration of construction. Contact information, including street address, phone number, and e-mail address shall be conspicuously posted at the job site where such contact information is readily visible from public viewing areas, along with an indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the name, phone number, and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 72 hours of receipt of the complaint or inquiry.
12. **As-Built Plans.** WITHIN 60 DAYS OF COMPLETION OF CONSTRUCTION, unless the Executive Director grants an extension for good cause, the Permittees shall submit two copies of As-Built Plans, approved by the City of Encinitas, showing all development completed pursuant to this coastal development permit; all property lines; and all residential development inland of the residence. The As-Built Plans shall be substantially consistent with the approved revised project plans described in Special Condition 1 above, including providing for all of the same requirements specified in those plans, and shall account for all of the parameters of Special Condition 8 (Monitoring and Reporting). The As-Built Plans shall include a graphic scale and all elevation(s) shall be described in relation to National Geodetic Vertical Datum (NGVD). The As-Built Plans shall include color photographs (in hard copy and jpg or other electronic format) that clearly show all components of the as-built project, and that are accompanied by a site plan that notes the location of each photographic viewpoint and the date and time of each photograph. At a minimum, the photographs shall be from representative viewpoints from the beaches located directly upcoast, downcoast, and seaward of the project site. The As-Built Plans shall be submitted with certification by a licensed civil engineer with experience in coastal structures and processes, acceptable to the Executive Director, verifying that the shoreline armoring has been constructed in conformance with the approved final plans.
 13. **Public Rights.** The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property. By acceptance of this permit, the applicants acknowledge, on behalf of themselves and their successors in interest and assigns, that issuance of the permit and construction of the permitted development shall not constitute a waiver of any public rights which may exist on the property.
 14. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the applicants acknowledge and agrees (i) that the site may be subject to hazards from erosion and coastal bluff collapse (ii) to assume the risks to the applicants and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such

hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

15. **Deed Restriction.** The applicants shall submit the deed restriction for review and approval of the Executive Director prior to recordation. PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall submit to the Executive Director, for review and approval, documentation demonstrating that the applicants have executed and recorded against its property (836/838 Neptune Avenue, Encinitas) 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 to benefit the applicants' 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 applicants' entire parcel and a corresponding graphic depiction. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the applicants' 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.

16. **State Lands Commission Approval.** PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND WITHIN 180 DAYS OF COMMISSION ACTION ON THIS CDP, the applicants shall submit to the Executive Director for review and written approval, a written determination from the State Lands Commission that:
 - a. No state lands are involved in the development; or
 - b. State lands are involved in the development, and all permits required by the State Lands Commission have been obtained; or
 - c. State lands may be involved in the development, but pending a final determination of state lands involvement, an agreement has been made by the applicants with the State Lands Commission for the project to proceed without prejudice to the determination.

16. **Future Development.** This permit is only for the development described in coastal development permit No. 6-10-018. Pursuant to Title 14 of the California Code of Regulations, Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) do not apply. Accordingly, any future improvements to the proposed single family residence, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Code section 30610(d) and Title 14 of the California Code of Regulations, Section 13252(a)-(b), shall require an amendment to permit No. 6-10-018 from the California Coastal Commission or shall require an additional

coastal development permit from the California Coastal Commission or from the applicable certified local government.

18. **Consent Order Compliance.** Pursuant to Consent Cease and Desist Order CCC-09-CD-05, the applicants are required to, among other things; remove the entirety of the unpermitted rip rap on the public beach and the portions of the unpermitted bluff top deck within 5 feet of the bluff edge (Exhibit 3). All terms and conditions of CCC-09-CD-05 remain in effect.

IV. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION/PERMIT HISTORY/JURISDICTION

Project Description (Exhibit 2)

The proposed development consists of a variety of bluff retention devices located on the bluff face and beach below an existing bluff top residence located in the City of Encinitas (Exhibit 1). The applicant owns the area landward of the mean high tide line (MHTL), which includes the bluff face. The proposed shoreline armoring currently exists on the site, without Coastal Act authorization, as it was placed without benefit of a permit or under emergency permits for which no follow-up Coastal Development Permit (CDP) has been approved to permanently authorize the development that was approved only on a temporary basis. Because the emergency permits have expired and the development has not been permanently authorized, all development is being reviewed as if it were not existing. The subject project consists of the following items:

- Construction of a deadman retaining system consisting of the installation of two 4 ft. x 10 ft. concrete “deadmen” to a depth of four 4 ft. located on each side of the bluff top residence approximately 30 feet east of the westernmost portion of the bluff top residence and one 3 ft. x 3 ft. concrete block seaward and adjacent to the westernmost portion of the bluff top residence. A ¾ inch cable is attached to the deadmen and to the existing foundation for the bluff top residence (and tension applied). The deadman retaining system was previously installed pursuant to an emergency Coastal Development Permit (CDP) (CDP 6-96-082-G) (Exhibit 5), but no follow-up coastal development permit was obtained within the deadlines established by the terms of that emergency permit, and therefore, the above-listed work is considered unpermitted development.
- Construction of a 50 ft. long, approximately 28 ft. high, 3 ft. thick seawall previously constructed pursuant to an emergency CDP (CDP 6-00-171-G) , but no follow-up coastal development permit was obtained within the deadlines established by the terms of that emergency permit, and therefore, the above-listed work is considered unpermitted development.
- Placement of gravel approximately 8 ft. in depth on the bluff face. The gravel was placed in 2001 without a CDP and was not authorized through any of the emergency permits summarized above.

- Under the proposed permit, the applicants would perform sculpting and coloring of the existing seawall to closely match the natural bluff face.
- Under the proposed permit, the applicants would place 8-12 inches of new topsoil on top of existing gravel, and place new hydroseed, container plantings, and irrigation on the mid and upper bluff.

The subject development is located on the bluff top at the base of and on the slope of an approximately 85 ft. high coastal bluff on the west side of Neptune Avenue fronting a single lot containing a 4,020 sq. ft. bluff top residence (residential duplex) with an attached 880 sq. ft. 4-car garage on a 11,724 sq. ft. lot. The duplex is located approximately 22.5 ft. from the edge of the bluff.

Permit History (Exhibit 4)

836/838 Neptune Avenue (Subject Site)

The subject property contains a bluff top residence (residential duplex) that was approved by the San Diego Coast Regional Commission in 1981 (CDP F9555). As approved by the Commission, the bluff top residence is 4,020 sq. ft. with an attached 880 sq. ft. 4-car garage. The bluff top residence was approved by the Commission to be located 40 feet from the natural bluff edge at that time, based on the professional opinion of the applicants' geotechnical consultants the setback would not result in a hazardous situation in the future. The Commission approval required that the applicants record an Offer to Dedicate (OTD) for the portion of the lot seaward of the toe of the bluff "...for pass and repass and passive recreation..." The OTD was accepted by the California State Coastal Conservancy in 2001. In addition, the applicants were required to record an open space easement on the bluff face that prohibits alteration of landforms, removal of existing vegetation, or erection of structures of any type, unless approved by the Commission.

In 1996, there was a major bluff landslide that affected the subject site and the adjacent properties to the north and south of the site. Various shoreline armoring emergency permits have been authorized to allow the minimum necessary amount of work needed in order to stabilize the site and allow sufficient time to apply for a regular Coastal Development Permit (CDP). In 1996, the three separate emergency permits were authorized to install a deadman retaining system, to remove debris on the bluff associated with a failed bluff top deck and to place riprap at the toe of the bluff, and to build an upper bluff soil anchor system and shotcrete retaining wall (Ref: Emergency CDPs: 6-96-082-G, 6-96-099-G, and 6-96-110-G). All of the development approved by the emergency permits was undertaken except for placement of riprap on the beach. Each of these emergency permits required that a regular CDP be applied for within 60 days and obtained within 150 days, which the applicants failed to obtain. The applicants were informed (in the context of each emergency permit authorization) and signed an acknowledgement that the work authorized by the permits was "temporary and subject to removal if a regular Coastal Permit was not obtained to permanently authorize the emergency work" and that any such permits may be subject to special conditions.

In 1997, staff confirmed that a new bluff top deck had been constructed on the site without benefit of a CDP. To resolve the unpermitted deck and lack of a follow up CDP application for any of the emergency work, in 1997 the Commission sent the applicants a Notice of Violation letter detailing the ongoing violations on the property and a letter providing notification of the Executive Director's intent to commence Cease and Desist Order proceedings. In an effort to work cooperatively with the applicants, and as a courtesy, in 1998, enforcement staff suspended enforcement action regarding violations on the property during litigation regarding the shoreline protection structures on the property initiated by the applicants against the City of Encinitas and the owner of the property to the south of the subject property.

In 1999, an additional bluff failure occurred on the site. Another emergency permit request to stabilize the upper bluff was submitted, but was denied for lack of supporting information (Ref: Emergency CDP 6-99-070-G). Nevertheless, construction activities commenced on the site without Commission approval and Commission staff hand-delivered a letter in order to halt the construction of the unpermitted upper bluff work. In December 1999, enforcement staff requested submittal of a complete CDP application and notified the applicants that they were resuming enforcement action regarding violations on the property.

In 2000, in another attempt to reach resolution of the violations, the Commission sent a second notice of intent to commence cease and desist proceedings. Subsequently, in 2000 and 2001, three additional emergency permits were authorized for the site to construct a lower bluff seawall, to place riprap on the beach, and to build an upper bluff caisson wall (Ref: Emergency CDPs 6-00-171-G, 6-01-012-G, and 6-01-042-G). All of the development authorized by the emergency permits was undertaken except for the construction of the upper bluff caisson wall. These emergency permits also required that a follow-up regular CDP be obtained to either retain or remove the approved development. In 2001, staff confirmed that a significant quantity of gravel had been placed on the bluff face at the site without benefit of a CDP. In 2002, enforcement staff sent the applicants another Notice of Violation letter explaining all the pending violations on the property and setting a deadline of May 2002 to submit a complete CDP application.

In June 2002, a CDP application was submitted as a follow-up permit for all of the past emergency permits, unpermitted work on the site, and landscaping on the bluff face (Ref: CDP Application 6-02-093). Staff subsequently notified the applicants that the application was incomplete and additional information was required to deem the application filed. In addition, in 2003, staff was copied on a letter to the applicants from the City of Encinitas, which notified the applicants that the CDP application with the City also was incomplete. Commission staff sent another Notice of Violation letter in 2005, which again requested submittal of a complete CDP application. In 2008, staff sent a Notice of Intent to Record a Notice of Violation and a third Notice of Intent to Commence Cease and Desist Order Proceedings letter.

The applicants subsequently agreed to the issuance of a consent cease and desist order, which was approved by the Commission in 2009 (Ref: Consent Cease and Desist Order CCC-09-CD-05) (the "Consent Order") (Exhibit 14). The Consent Order requires removal of the rip-rap from the beach, removal of all portions of the unpermitted rear deck within five feet of the bluff edge, removal of all other unpermitted development not proposed to be retained, and submittal of a

complete CDP application for retention of all unpermitted development (or development placed under temporary authorization) proposed to be retained (Exhibit 3). The applicants are currently out of compliance with the Consent Order, as has been explained to them in numerous letters over the past 6 years.

In 2010, the applicants applied for a new CDP with the Commission (Ref: CDP Application 6-10-018). Since that time, staff sent seven separate letters of incompleteness detailing the information required to review and make a recommendation on the request (Exhibit 13). During this time, Commission Enforcement staff has sent 15 letters to the applicants outlining their failure to comply with the Consent Order and the steps necessary to satisfy their obligations under that order (Exhibit 12). The application was deemed complete and filed as of October 27, 2015.

Site histories for the properties located directly adjacent to the subject site, which were also subject to the landslide that occurred in 1996, are included below. Due to the shared history of the three properties that were subject to the 1996 landslide and the interconnected nature of the existing shoreline armoring, it is important to evaluate all three of these properties in a comprehensive manner.

858/860 Neptune Avenue (Directly adjacent to the north of the subject site) (Brown)

The existing bluff top residence (residential duplex) to the north of the subject site was constructed prior to the enactment of the Coastal Act. In 1985, the Commission approved a remodel and addition to that existing bluff top residence to create a 2-story bluff top residence with an attached 4-car garage (CDP #6-85-362/Illman). The bluff fronting this bluff top residence was also impacted by the bluff landslide in 1996. Similar to the subject site, the property owners at 858/860 Neptune Avenue has also been granted numerous emergency permits over the past 19 years and also agreed to a consent cease and desist order with the Commission in 2008 (Ref: Consent Cease and Desist Order CCC-08-CD-08). The Consent Cease and Desist Order requires removal of any unpermitted development that the property owner does not propose to retain, submittal of a complete CDP application for retention of all unpermitted development proposed to be retained, and the removal of any unpermitted development for which authorization is denied. In 2014, the property owners submitted a CDP application to the Commission for removal of an existing failed upper bluff wall, construction of a rear yard concrete patio, retention of a deadman retaining system (ATF), construction of an upper bluff rear-yard caisson and retaining wall retention system, placement of gravel on the mid and upper bluff (ATF), placement of soil and installation of landscaping and two low profile mid-bluff retaining walls, and construction of a seawall (ATF). This application is also on the Commission's March 2016 agenda (Ref: CDP 6-14-0559/Sonnie).

828 Neptune (Directly adjacent to the south of the subject site) (Okun)

The bluff fronting the two bluff top residences (detached single family homes) to the south of the subject site, which are currently under construction, was also impacted by the bluff landslide in 1996. As a result of the landslide, the Executive Director approved various emergency permits to stabilize the approximately 1,200 sq. ft. bluff top residence that existed at that time. Emergency

permits authorized by the Executive Director and implemented by the property owners included underpinning of the bluff top residence (ref. Emergency Permit 6-96-96-G/Okun), construction of a 100 ft.-long, 20 to 27 ft. high seawall with tiebacks and backfill (ref. Emergency Permit #6-01-85-G/Okun), temporary placement of riprap seaward of the seawall (ref. Emergency Permit 6-01-011-G/Okun), and construction of an approximately 100 ft.-long upper bluff retaining wall (ref. Emergency Permits #6-01-40-G/Okun, 6-01-62-G/Okun and 6-02-074-G/Okun). Although soil was approved to backfill the area between the seawall and the upper bluff retaining wall, similar to the subject site, the property owners substituted gravel for the soil in violation of the emergency permit.

Commission enforcement staff contacted the property owner to request the submittal of the CDP applications required to authorize the work undertaken through emergency permits. In this case, the property owner complied and worked with City and Commission staff to submit coastal development permit applications and to submit all of the information necessary to process those applications. As a result, substantial delays and costs associated with prolonged processing of the CDP applications were avoided. The City approved the required follow-up regular coastal development permit for the residential underpinning, upper bluff wall and backfill material. To mitigate the visual impacts of the gravel material that was placed without authorization, the City required that a portion of the gravel be removed and be replaced by soil and landscaping. In the area where gravel could not be completely removed, the City required the gravel be covered by soil and landscaped. That action by the City was not appealed to the Coastal Commission. The Commission subsequently approved the required follow-up regular coastal development permit for the construction of the seawall at the base of the bluff (ref. CDP #6-05-30/Okun).

In 2009, the City of Encinitas approved an application to demolish the existing approximately 1,200 sq. ft. bluff top residence that the shoreline armoring had been approved to protect and to construct two detached approximately 5,000 sq. ft. bluff top residences on the bluff top lot. The project was appealed to the Coastal Commission. The Commission found Substantial Issue existed and approved two separate CDPs (A-6-ENC-09-040 and A-6-ENC-09-041) to demolish the existing bluff top residence and to construct the two new bluff top residences 40 ft. from the upper bluff wall. Conditions of the approvals require that the property owners agree to remove the new structures should they ever become threatened and also required a waiver of rights to any new shoreline armoring to protect the structures or reconstruction of the existing shoreline armoring. However, maintenance of the existing shoreline armoring is permitted.

Jurisdiction

The City of Encinitas has a certified Local Coastal Program (LCP) and has been issuing coastal development permits since May of 1995. The City's LCP jurisdiction is for development located above the mean high tide line (MHTL), while the Commission retains LCP jurisdiction for development located below the MHTL. Based on the information available to the Commission at this time, it appears the proposed seawall is located below the MHTL (see detailed discussion below, under Public Access and Recreation). In addition, the applicants have proposed to use mechanized equipment on the beach to complete the development proposed in this application. Thus, at least some portion of the development is within an area of the Commission's original jurisdiction because it is located seaward of the mean high tide line (MHTL). The proposed

shoreline armoring on the mid and upper bluff and the proposed deadman retaining system are located above the MHTL and lie within an area of the City of Encinitas' coastal permitting authority and within the Commission's appeals jurisdiction. However, the applicants and the City have requested that the Commission process a consolidated permit for development within the City jurisdiction and the development within the Commission jurisdiction. As such, the standard of review is the Chapter 3 policies of the Coastal Act with the certified LCP used as guidance.

B. GEOLOGIC CONDITIONS AND HAZARDS

Coastal Act Section 30235 addresses the use of shoreline armoring:

Section 30235 Construction altering natural shoreline

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

Coastal Act Section 30253 addresses the need to ensure long-term structural integrity, minimize future risk, and to avoid landform altering shoreline armoring. Section 30253 provides, in applicable part:

Section 30253 Minimization of adverse impacts

New development shall do all of the following:

- (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs...*
- (e) Where appropriate, protect special communities and neighborhoods that because of their unique characteristics, are popular visitor destination points for recreational uses.*

In addition, the following sections of the City's certified Local Coastal Plan also relate to the proposed development:

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

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

Public Safety Policy 1.7 of the City of Encinitas' certified LUP states, in part, that:

The City shall develop and adopt a comprehensive plan, based on the Beach Bluff Erosion Technical Report (prepared by Zeiser Kling Consultants Inc., dated January 24, 1994), to address the coastal bluff recession and shoreline erosion problems in the City. . . In addition, until such a comprehensive plan is approved by the City of Encinitas and the Coastal Commission as an amendment to the LCP, the City will not permit the construction of seawalls, revetments, breakwaters, cribbing, or similar structures for coastal erosion except under circumstances where an existing principal structure is imminently threatened and, based on a thorough alternatives analysis, an emergency coastal development permit is issued, and all emergency measures authorized by the emergency coastal development permit are designed to eliminate or mitigate adverse impacts on local shoreline sand supply.

Section 30.34.020(B)(2)(9) of the certified Implementation Plan (IP) includes similar language:

...In addition, until such a comprehensive plan is approved by the City of Encinitas and the Coastal Commission as an amendment to the LCP, the City shall not permit the construction of seawalls, revetments, breakwaters, cribbing, or similar structures for coastal erosion except under circumstances where an existing principle structure is imminently threatened and, based on a thorough alternative analysis, an emergency permit is issued and emergency measures authorized by the emergency coastal development permit are designed to eliminate or mitigate adverse impacts on local shoreline sand supply.

In addition, Section 30.34.020(C)(2)(b) states the following:

When a preemptive measure is proposed, the following findings shall be made if the authorized agency determines to grant approval:

(1) The proposed measure must be demonstrated in the soils and geotechnical report to be substantially effective for the intended purpose of bluff erosion/failure protection, within the specific setting of the development site's coastal bluffs. The report must analyze specific site proposed for development.

(2) The proposed measure must be necessary for the protection of a principal structure on the blufftop to which there is a demonstrated threat as substantiated by the site specific geotechnical report.

(3) The proposed measure will not directly or indirectly cause, promote or encourage bluff erosion failure, either on site or for an adjacent property, within the site-specific setting as demonstrated in the soils and geotechnical report. Protection devices at the bluff base shall be designed so that additional bluff erosion will not occur at the ends because of the device.

(4) The proposed measure must be demonstrated in the soils and geotechnical report to be substantially effective for the intended purpose of bluff erosion/failure protection, within the specific setting of the development site's coastal bluffs. The report must analyze specific site proposed for development.

[. . .]

In addition, Section 30.34.020 (D)(8) of the City's certified IP requires the submission of a geotechnical report for the project site that includes, among other things:

8. Alternatives to the project design. Project alternatives shall include, but not be limited to, no project, relocation/removal of threatened portions of or the entire home and beach nourishment.

The certified IP also requires that shoreline armoring 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 30.34.020B.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.

Section 30.34.020.C.2.b.(4) of the certified IP 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.

Erosion

Coastal Act Sections 30235 and 30253 acknowledge that seawalls, revetments, cliff retaining walls, groins and other such structural or "hard" methods designed to forestall erosion may also alter natural landforms and natural shoreline processes resulting in a variety of negative impacts on coastal resources, including adverse effects on sand supply, public access, coastal views, natural landforms, and overall shoreline beach dynamics on and off site, including ultimately resulting in the loss of beach. Thus, such devices are required to be approved only when necessary to protect existing structures or public beaches in danger from erosion, and only when designed to eliminate or mitigate adverse impacts on local sand supply.

Continual bluff retreat and the formation and collapse of sea caves have been documented in northern San Diego County, including the Cities of Solana Beach and Encinitas. Bluffs in this area are subject to a variety of erosive forces and conditions (e.g., wave action, reduction in beach sand, landslides). The subject site and properties immediately north and south of the subject site have experienced significant landslides that have threatened the structures at the top of the bluff and resulted in numerous Executive Director approved emergency permits for shoreline armoring.

The applicants have submitted a geotechnical report for the subject site relating to the proposed development that includes site-specific quantitative slope stability analyses. The slope stability analysis measures the likelihood of a landslide at the subject site. The factor of safety is an indicator of slope stability and a value of 1.5 is the industry standard value for new development. In theory, failure will occur when the factor of safety drops to 1.0, and no slope should have a factor of safety less than 1.0. The applicants' geotechnical report indicates that the bluff top residence at the subject site (836/838 Neptune Avenue) would be in immediate danger from bluff collapse without the existing shoreline armoring. The geotechnical report by Construction Testing & Engineering, Inc., dated May 31, 2011,¹ states that the Factor of Safety (FOS) of the bluff would be well below 1.0 without the existing shoreline armoring. In addition, the bluff top residence directly to the north of the subject site (858/860 Neptune Avenue) would be threatened without the proposed shoreline armoring on the subject site. A geotechnical report prepared for the adjacent property at 858/860 Neptune Avenue by GeoSoils, Inc., dated June 12, 2014, found that the Factor of Safety (FOS) of the bluff would also be well below 1.0 without the existing shoreline armoring. The Commission's engineer and the Commission's geologist have reviewed the submitted geotechnical reports, and agree with the conclusion that the subject bluff top residence without the existing shoreline armoring is in danger from erosion, as is the adjacent existing bluff top residence.

Existing Structures

Coastal Act Sections 30235 and 30253 together evince a broad legislative intent to allow shoreline armoring for development that was in existence when the Coastal Act was passed, but avoid such shoreline armoring for new development now subject to the Act. In this way, the Coastal Act's broad purpose to protect natural shoreline resources and public access and recreation would be implemented to the maximum extent when new, yet-to-be-entitled development was being considered, while applicants with shoreline development that was already entitled in 1976 would be "grandfathered" and allowed to be protected from shoreline hazards if it otherwise met Coastal Act tests, even if this resulted in adverse resource impacts.

The bluff top residence at the site was approved and constructed in 1981. The bluff top residence is not an existing structure for purposes of Section 30235 of the Coastal Act because it was originally permitted and built after 1976, thereby postdating the enactment of California Coastal

¹ The applicants' geotechnical engineers submitted a letter titled "Confirmation of Previous Geotechnical Observations", dated January 14, 2015, wherein the engineers verified that the conditions at the site had not significantly changed from those documented in the May 31, 2011 report.

Act of 1976. Thus, the Commission is not required to approve shoreline armoring to protect the bluff top residence. Nevertheless, the Executive Director did authorize the construction of shoreline armoring at the site in 1996, 2000, and 2001 under emergency permits, with the understanding that the shoreline armoring was for the purpose of protecting the bluff top residence. In addition, shoreline armoring has been constructed directly upcoast and downcoast of the subject site, and as such, represents the established pattern of development to protect structures on this stretch of the shoreline. Furthermore, the bluff top residence immediately adjacent to the north of the subject structure (858/860 Neptune Avenue) was constructed prior to the enactment of the Coastal Act and therefore does qualify as an existing structure for purposes of Section 30235. As noted, the armoring proposed by this application is necessary to protect the adjacent existing bluff top residence. Thus, given that the Executive Director previously allowed the shoreline armoring to be constructed, and the shoreline armoring is needed to protect a pre-Coastal Act structure, it is consistent with the Coastal Act to allow the minimum amount of shoreline armoring, which is also the least environmentally damaging feasible alternative, needed to support the current bluff top residences to remain at this time, even though the Commission is not required to approve any shoreline armoring to protect the bluff top residence on the subject site.

Alternatives

Alternatives to shoreline armoring can include the “no project” alternative; drainage and vegetation measures on the bluff top; planned retreat, including abandonment and demolition of threatened structures; relocation of the threatened structure; elimination of a portion of proposed shoreline armoring; foundation underpinning; or combinations of each.

The “no project” alternative in this case would be to not approve and require the removal of all of the existing shoreline armoring at the subject site, including the deadman retaining system, the gravel, and the seawall, and restoration of the bluff to a natural unaltered state. Gravel in particular is not a form of shoreline armoring typically preferred or approved by the Commission, as its effectiveness is not well established and it creates an extremely unnatural appearance. However, the Commission engineer and geologist have reviewed the options for removal of the existing shoreline armoring from the subject site and have concluded removal of the gravel would most likely be infeasible to accomplish, and would place the existing structure at risk. In addition, removal of the existing shoreline armoring at the subject site would raise issues of worker safety during the construction. Removing either the gravel or the seawall on the subject site would destabilize both the subject bluff top structure and the adjacent bluff top structures to the north and the south. Thus, removal is not a less environmentally-damaging feasible option.

A second alternative involves underpinning of the bluff top residence. However, underpinning would not stop the upper or lower bluff from continuing to erode and would result in significant adverse visual impacts when the piers are exposed.

A third alternative would be retention of the existing seawall, removal of the gravel on the bluff, and installation of a geogrid slope. However, the existing gravel cannot be safely removed

without threatening the adjacent bluff top residences and requiring substantial amounts of additional shoreline armoring.

Improved drainage and landscaping atop the bluffs is another option that is typically considered. Appropriate drainage measures coupled with planting long-rooted native bluff species can help to stabilize some bluffs and extend the useful life of setbacks. Thus, Special Condition 1 requires that all runoff from impervious surfaces on the bluff be collected and drain towards the street, thus drainage over the bluff face will not adversely impact bluff stability. The applicants are also proposing to install soil and landscaping on top of the existing gravel on the bluff face, which should further improve stability. However, these measures alone will not address the entire identified threat to the subject bluff top residence or the adjacent existing bluff top residence.

Relocation is another alternative that must be considered. The location on the subject site where a bluff top residence could safely be sited without reliance on any shoreline armoring was not provided in the applicants' geotechnical report. However, the geotechnical report for the adjacent property to the north, which shares the same seawall and gravel on the bluff as the subject site, found that a bluff top residence would need to be sited approximately 115 ft. landward of the bluff edge to be safe for a 75 year period without any shoreline armoring. The subject bluff top lot is approximately 115 ft. in depth and thus there is no safe location on the subject site where the bluff top residence could be relocated and shoreline armoring would not be required. Furthermore, relocating the subject bluff top residence would not eliminate the need for the shoreline armoring to protect the adjacent existing structure.

Thus, there do not appear to be feasible less environmentally damaging alternatives that could be applied in this case to protect the subject bluff top residence and the adjacent existing structure, which are both in danger from erosion.

Duration of Armoring Approval

As described earlier, the subject bluff top residence is not an "existing" structure, as defined by the Coastal Act, and thus, given that the proposed armoring is inconsistent with numerous Coastal Act policies, as discussed in this report, the Commission is not required by Section 30235 to approve shoreline armoring for the subject bluff top residence; however, the emergency CDPs for the shoreline armoring at the site were originally authorized with the understanding that the shoreline armoring was for the purpose of protecting the subject bluff top residence, and as discussed above, removal of the existing armoring could damage coastal resources. Nevertheless, the proposed shoreline armoring fronting the subject site impedes public access to and along the shoreline, destroys beaches and related habitats, and visually impairs coastal areas. Thus, it is important to limit the life of the shoreline armoring to that of the structure it is required to protect.

Sections 30235 and 30253 require new development on a bluff top lot to be sited and designed so that it does not require the construction of new shoreline armoring or reliance on existing shoreline armoring. However, when the approval of shoreline armoring is not expressly linked to a particular bluff top residence, shoreline armoring can remain long after the structure it was required to protect has been removed, and therefore may encourage the construction of new

structures in an unsafe location. An example of this can be seen on the site directly adjacent the south of the subject site at 828 Neptune Avenue (CDPs A-6-ENC-09-040 and 041/Okun). The homeowner on this site was granted approval to fully armor the coastal bluff with a seawall, gravel on the mid and upper bluff, and an upper bluff wall to protect a relatively small existing pre-Coastal Act structure; and then shortly thereafter applied for and was granted CDPs to demolish the existing bluff top residence and to construct two new and much larger bluff top residences. In that case, the original authorization of the shoreline armoring was not expressly limited to the existing structure that it was approved to protect; thus, removal of the seawall was not automatically triggered upon redevelopment of the property.

Therefore, Special Condition 5 limits the duration of the subject CDP approval to when the bluff top residence requiring protection is redeveloped (as defined in Special Condition 6), is no longer present (i.e. demolished), or no longer requires the shoreline armoring approved under this CDP, whichever occurs first. Special Condition 6 defines redevelopment as alterations, including additions, exterior or interior renovations, or demolition that results in a 50 percent or greater alteration of a major structural component (including exterior walls, foundation, floor and roof structures) or a 50 percent increase in floor area, cumulatively over time after approval of this CDP. Furthermore, changes to major structural elements are not additive between individual elements, while alterations to individual major structural elements are cumulative. Thus, if in the future, the applicants proposed to modify 40% of the exterior walls and 30% of the roof structure; this would not be considered redevelopment because it relates to two different major structural components. However, if the applicants were to come back for a subsequent CDP to modify an additional 10% of the exterior walls or an additional 20% of the roof structure, the project would be considered redevelopment because it would result in a cumulative alteration to 50% of a major structural component. Additions are also cumulative over time, such that an initial 25% addition would not be considered redevelopment; but a subsequent 25% addition would result in a cumulative 50% increase in floor area, and would thus constitute redevelopment. To assure that future improvements to the residence do not occur without review by the Commission, Special Condition 17 requires that all future modifications including those that otherwise may be exempt from the need of a coastal permit must be reviewed and approved by the Commission as an amendment to the subject permit or as a new coastal development permit.

As described previously, the Commission is not required to approve shoreline armoring to protect the bluff top residence on the subject site. The existing shoreline armoring is being approved at this time because at the time that the emergency CDPs were authorized, it was with the understanding that the structures would protect the subject bluff top residence, and the adjacent existing structure relies on it, however, there is no justification for increasing the amount of shoreline armoring (with its associated impacts) to protect the bluff top residence in the future or in perpetuity. Therefore, Special Condition 3 requires that the applicants waive any rights to shoreline armoring that may exist under 30235 of the Coastal Act or under the certified LCP. Only the amount and extent of shoreline alteration approved herein is permitted on this site. The applicants' geotechnical report states that the bluff top residence on the subject site, with retention of the existing seawall, gravel, and deadman retaining system, is expected to be reasonably safe from failure and erosion over its anticipated lifetime without further shoreline armoring.

The condition also allows the bluff top residence to remain only as long as it is reasonably safe from failure and erosion without having to propose any shoreline armoring to protect the bluff top residence in the future. Should the bluff top residence not be able to assure stability and structural integrity, without construction of new shoreline armoring, including reconstruction of the existing shoreline armoring, the applicants must agree to remove the subject structure, in part or entirely. Thus, retention of the existing bluff top residence at this time will not result in any new or additional shoreline armoring in the future.

The applicants' geotechnical report states that the design life of the shoreline armoring at the site is "...in excess of 75 years..." However, it has been the experience of the Commission that seawalls, and in particular seawalls that are exposed to continuous wave action, typically require substantial maintenance after approximately 20 years. Special Condition 4 requires submittal of a report evaluating the subject bluff top residence's safety by June 30, 2022, which is roughly 20 years after its construction. This reevaluation also coincides with the mitigation timeframe for the shoreline armoring on the site, the reevaluation condition imposed by the Commission on the adjacent property to the south, and the reevaluation timeframe being recommended for the adjacent property to the north. All of have similar geologic conditions and shoreline armoring, and to ensure consistency with Coastal Act policies are best evaluated comprehensively.

The site reassessment required under Special Condition 4 shall recognize the hazardous condition of this bluff and will consist of an evaluation of the geological conditions on the entire property, to determine whether the property can continue to safely support the subject bluff top residence. The required site reassessment shall include the following: (1) An analysis of site stability based on the best available science and updated standards for beach erosion, wave run-up, sea level rise, inundation and flood hazards, prepared by a licensed Certified Engineering Geologist and/or Geotechnical Engineer or Registered Civil Engineer with expertise in soils; (2) An analysis of the condition of the existing shoreline armoring and any impacts it may be having on public access and recreation, scenic views, sand supplies, and other coastal resources; and (3) An evaluation of the means to remove in whole or in part the subject bluff top residence if and when either becomes unsafe for occupancy. If the required study shows that the bluff top residence is no longer safely located, the permittees shall submit a permit amendment to undertake measures required to remove the bluff top residence or reduce the size of the bluff top residence to reduce the hazard potential. By syncing the timing of neighboring permits and requiring reevaluation of the stability of the subject site and the adjacent sites, the Commission will be able to evaluate the geological conditions as a whole, as well as to consider on a comprehensive basis all possible alternatives to reduce impacts to coastal resources that result from the proposed and approved shoreline armoring.

Eliminate or Mitigate Sand Supply Impacts

Section 30235 requires that shoreline structures be designed to eliminate or mitigate adverse impacts to local shoreline sand supply. As described in the Public Access/Recreation and Sand Supply Mitigation findings later in the staff report, the applicants have proposed to pay a sand supply mitigation fee for the volume of sand that will be prevented from reaching the public beach and littoral cell as a result of the proposed shoreline armoring. The applicants have

proposed to pay a sand mitigation fee for an initial 22 year mitigation period for the shoreline armoring. Typically, the Commission requires that sand mitigation be paid for a period of approximately 20 years from the date of approval, consistent with the Commission's experience that seawalls will need substantial maintenance approximately 20 years after construction. In this case, a 22 year mitigation period is being assessed, to be consistent with the 22 year mitigation period approved by the Commission for the adjacent seawall to the south of the subject site (828 Neptune Avenue), which was also constructed pursuant to an emergency permit in 2001, and was estimated to have an a 22 year design life without substantial maintenance. Twenty-two years is also the mitigation time under consideration for the property immediately to the north of the subject site being reviewed concurrently with the subject project (6-14-0559/Sonnie). Because the shoreline protection has already existed for 15 years, reassessment of all three of these sites and the required mitigation will occur in 6 years. Although this is a relatively short time frame, all of the shoreline protection at these three sites was constructed at the same time in response to the same geologic event, and are all reaching the time when significant maintenance is expected to be required. Standardizing the shoreline armoring mitigation time periods will allow the Commission to consider future impacts from the shoreline armoring comprehensively, if any of the seawalls are proposed to be retained after needing substantial repairs or even redevelopment.

Special Condition 7 requires that the applicants pay a total sand mitigation fee of \$1,090 (Exhibit 11). The sand mitigation fee is lower than the Commission typically requires because a significant quantity of sand already reached the beach during the past landslide event at the subject property. The Commission's sand mitigation fee calculations are based on the amount of sand contained in a typical bluff. However, as a result of the landslide, the current bluff profile at the subject site is concave, and is atypical of the bluff outside the limits of the slide area. As the bluff toe retreats, the full bluff face would be expected to again take on a profile similar to the bluffs that are not influenced by the landslide.

Thus, in this particular case, the calculation is for the total sand lost from a non-landslide influenced profile (765 cubic yards of beach quality sand) minus the sand lost from the bowl failure (estimated to be 690 cubic yards of sand), resulting in a mitigation sand loss volume of 75 cubic yards of beach quality sand. The Commission provided a similar "credit" for sand that had already reached the beach due to the landslide for the adjacent seawall (Ref: 6-05-030/Okun). The sand supply mitigation begins June 30, 2001 - the date that the seawall was substantially completed; and ends June 30, 2023. As conditioned, if the Permittees intend to keep the shoreline armoring in place beyond the 22 year mitigation period, the Permittees must submit a complete application for a CDP or amendment to this CDP no later than 21 years after construction of the seawall (i.e., no later than June 30, 2022). The application shall include analysis of feasible alternatives to modify the shoreline armoring or the bluff top residence to lessen the shoreline armoring's impacts on coastal resources, and shall propose mitigation for unavoidable coastal resource impacts associated with the retention of the shoreline armoring beyond 22 years. The sand supply fee serves as mitigation for the sand retention impacts in this case.

Thus, as conditioned, the project protects an existing structure and is designed to mitigate adverse impacts on the local shoreline sand supply, consistent with the requirements of Section 30235.

Long-Term Stability, Maintenance, and Risk

Coastal Act Section 30253 requires the project to assure long-term stability and structural integrity. Therefore, Special Condition 8 requires annual monitoring of the shoreline armoring and requires that monitoring reports be submitted to the Commission every three years following Commission approval of this application. More frequent monitoring reports are required following a large “El Niño” storm event or a large earthquake. The condition requires the evaluation of the condition and performance of the proposed project and overall bluff stability, including evaluating necessary maintenance, repair, changes or modifications. Such monitoring will ensure that the applicants and the Commission are aware of any damage to or weathering of the armoring and other project elements and can determine whether repairs or other actions are necessary to maintain the project in its approved state before such repairs or actions are undertaken. Special Condition 8 also requires annual surveys of the westernmost property line and mean high tide line (MHTL) by a licensed surveyor shall be undertaken in the Spring and Fall of each year and included in each monitoring report.

Future monitoring and maintenance activities must be understood in relation to clear as-built plans. Therefore, Special Conditions 1, 2, and 12 of this approval require the submittal of revised final plans, final landscaping plans, and as-built plans.

The applicants are required to maintain the project in its approved state, subject to the terms and conditions identified by the special conditions. Accordingly, this approval is conditioned for the applicants to assume all risks for developing at this location (Special Condition 14). The applicants’ geotechnical consultant has verified that the proposed structure is built to sufficiently withstand storms comparable to the winter storms of 1982-83 that took place in San Diego County. Special Condition 10 mandates that no construction byproduct will be allowed onto the beach or into the ocean. Special Condition 11 requires that this CDP be kept onsite at all times during construction activities and the contact information of a representative shall be posted.

To ensure that future property owners are properly informed regarding the terms and conditions of this approval, this approval is also conditioned for a deed restriction to be recorded against the applicants’ property (Special Condition 15). This deed restriction will record the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property.

Conclusion

The Commission is not required to approve the proposed shoreline armoring to protect the subject bluff top residence. Nevertheless, given that construction of the shoreline armoring was authorized through an emergency permit with the understanding that it was to protect the bluff top residence; the armoring is needed to protect the adjacent existing structure, and there are no feasible alternatives that would substantially lessen significant adverse effects on coastal resources, the project can be found consistent with Coastal Act Sections 30235 and 30253. Special Conditions have been imposed to eliminate or mitigate impacts on shoreline sand supply, including a sand supply in-lieu fee to help mitigate for the loss of sand to the littoral cell due to

retention in this case. As conditioned, the project can be found consistent with Coastal Act Sections 30235 and 30253.

C. PUBLIC ACCESS AND RECREATION

Coastal Act Section 30604(c) requires that every coastal development permit issued for any development between the nearest public road and the sea “shall include a specific finding that the development is in conformity with the public access and public recreation policies of [Coastal Act] Chapter 3.” The proposed project is located seaward of the first through public road (Neptune Avenue). Coastal Act Sections 30210 through 30214 and 30220 through 30224 specifically protect public access and recreation. In particular:

30210. 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.

30211. Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

30212. Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects

30213. Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. ...

30221. Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

30223. Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

Coastal Act Section 30240(b) also protects parks and recreation areas, such as the adjacent beach area. Section 30240(b) states:

30240(b). Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

These overlapping policies protect maximum public access and recreation to and along coastal waters, including lower cost recreational facilities, like public beaches.

Mean High Tide Line

As discussed above, shoreline structures can have a variety of adverse impacts on coastal resources, including adverse effects on beaches and sand supply, which ultimately result in the loss of public beach area with associated adverse impacts to public recreational access. The beaches in the vicinity of the project area are generally accessible during most tides, serving the dense residential development in the adjacent neighborhood, as well as visitors. The site is located approximately 200 ft. south of the public stairway leading to Beacons Beach, which, primarily due to the convenient access and parking, is one of the most popular beach areas in the City, and, thus, the beach in front of the subject site is frequented by beach goers.

The applicants assert that the proposed seawall is located on private property and therefore should not be subject to a mitigation fee for its adverse impacts to public access and recreation. The adjacent property owners at 858/860 Neptune Avenue have submitted a MHTL survey, dated July 11, 2014, for Commission review that purports to show that the MHTL is located approximately 75 ft. seaward of toe of the seawall (Exhibit 7). At the request of the adjacent property owners, the California State Lands Commission (SLC) staff reviewed the MHTL survey and found that at the point in time that the survey was done for the site, the seawall on the subject site did not intrude onto sovereign lands and that no lease, permit, or authorization was required from the State Lands Commission for the portion of the seawall fronting the adjacent property (Exhibit 8). However, the SLC staff also acknowledged that the MHTL is ambulatory and will continue to fluctuate over time in response to such natural phenomena as wave events, seasonal fluctuations, sediment supply, El Niño and La Niña condition, Pacific Decadal Oscillation, and long term sea level rise or fall.

The beach fronting the northern portion of the adjacent property differs from the beach fronting the applicants' property in that the landslide caused some of the bedrock material to rotate up at the base of the adjacent bluff. As a result, the MHTL intersects this wedge of material. The slide did not cause the same changes to the bedrock material at the subject site, and the MHTL can intersect the seawall during times when sand is absent from the beach. Commission staff has evaluated the July 11, 2014 MHTL survey and concluded that the survey does not reflect the typical or historic conditions of the beach. In addition to the persisting influence of the landslide, the MHTL survey was conducted in the summer when beach sand is at its highest levels. During the summer months, gentler waves typically bring sand landward, building up a significantly wider dry-sand beach. During late fall and winter, beaches tend to become narrower as more high energy waves carry sand away from the beach and deposit it in offshore bars.

In addition, the beaches in Encinitas and directly north in Carlsbad have been subject to significant beach replenishment projects over the past 22 years. In 1994, as part of the Batiquitos Lagoon restoration, approximately 2.5 million cubic yards (cu. yds.) of sand was placed at Ponto State Beach in Carlsbad (approximately four miles north of the subject site) (Ref: 6-90-219/Batiquitos Lagoon). Furthermore, in 2001, 141,000 cu. yds. of sand was placed on the beach approximately 800 ft. north of the subject site through the SANDAG Regional Beach Sand

Project 1, and in 2012, 117,000 cu. yds. of sand was placed on the beach in the same location through the SANDAG Regional Beach Sand Project 2. Littoral transport in this area of the coast travels north to south and thus these large replenishment projects and many other smaller replenishment projects have significantly increased the volume of sand at the subject site. The MHTL is generally an ambulatory line, except where there has been fill or artificial accretion. In areas where there has been fill or artificial accretion, which is most likely the case for the subject site, the MHTL is generally defined as the location of the MHTL just prior to the fill or artificial influence. A MHTL survey for the subject site prior to the large aforementioned replenishment projects is not available.

A survey of the MHTL shows where the elevation of Mean High Tide, often also called Mean High Water), intersects the beach. In that regard, the MHTL is typical of any topographic contour line in that it shows a surface elevation. It differs from other typical contour lines in that (1) the MHT elevation is based on the average of all high water heights observed over a 19-year National Tidal Datum Epoch and (2) the beach surface regularly rises and lowers with changes in the beach sand. The primary tidal station closest to Encinitas with a long-term record is at La Jolla and the La Jolla Tidal Benchmarks, for the current tidal epoch (1983 – 2001) the Mean High Tide Elevation as 1.87 feet Mean Sea Level.²

As shown on the as-built plans for the subject seawall, the intersection of the seawall and bedrock is located at approximately 1.0 ft. MSL, which is below the MHTL elevation of 1.87 ft. MSL (Exhibit 9). Had the various beach replenishment projects in the vicinity of the subject site not occurred and had the survey been conducted at the end of the winter storm season, it is likely that there would be little to no sand on this beach and the MHTL would be located at the toe of the bluff at the subject site.

Furthermore, over the past 20 years, the Commission has found that the MHTL is located at the toe of the coastal bluff for nearly every shoreline armoring structure application in the City of Encinitas approved since certification of the LCP (Ref: 6-95-066/Han; 6-98-039/Cantor & Denver; 6-99-009/Ash & Bourgault; 6-99-011/Mahoney & Baskin; 6-99-041/Bradley; 6-03-048/Gault & Sorich; 6-05-030/Okun; 6-07-133/Li; and 6-12-041/Lamp). The only exception was in the Commission's approval of 6-88-464-A2/Frick & Lynch. In that case, the seawall was constructed on a natural beach platform and determination of the MHTL was not necessary.

As seen in Exhibit 6, a photograph taken on December 29, 2015, during high tides and wave events, the tide clearly and regularly reaches the portion of the seawall that is not fronted by landslide deposits, and therefore limits beach access. Furthermore, the geotechnical report for the proposed development, by Construction Testing & Engineering, Inc., acknowledges that the bluff at the site is subject to continuous attack by wave action. Without the proposed seawall, the wave action would naturally erode the bluff landward, which would result in additional beach area for public use. As sea levels continue to rise, natural erosion of unarmored bluffs will only increase.

² The As-Built plans for the subject seawall use Mean Sea Level as the datum, so all other elevations will use MSL as a reference datum for comparison.

In any case, as stated previously, the Commission's 1981 approval of the bluff top structure at the subject site required that the applicants record an Offer to Dedicate (OTD) a lateral access easement to cover the portion of the lot seaward of the toe of the bluff "...for pass and repass and passive recreation..." (Exhibit 10). The proposed seawall was constructed at the toe of the bluff, within the OTD, and is now encroaching on beach area that would otherwise be available for public use subject to the recorded OTD. In addition, the seawall is preventing the toe of the bluff from eroding landward and creating additional beach area for public use that would also be subject to the OTD.

The proposed after-the-fact seawall will have direct and long-term impacts on public access and public recreation. The seawall has resulted in the degradation of public access to and along the beach, and may ultimately eliminate public beach access fronting the site as sea level continues to rise and the bluff is no longer able to retreat landward. Therefore, since the seawall is required to protect the existing adjacent bluff top structure and was approved by the previously authorized emergency CDP, the adverse impacts to public access and recreation cannot be avoided or further minimized, and the impacts must be mitigated.

Sandy Beach and Public Access Impacts

The Commission recognizes that in addition to the more qualitative social benefits of beaches (recreational, aesthetic, habitat values, etc.); beaches provide significant direct and indirect revenues to local economies, the state, and the nation. The ocean and the coastline of California contribute greatly to the California economy through activities such as tourism, fishing, recreation, and other commercial activities. There is also value in just spending a day at the beach and having wildlife and clean water at that beach, the aesthetics of an ocean view, and being able to walk along a stretch of beach. Over the past few decades, economists have developed tools and methods to value many of these "market" and "non-market" environmental resources, to quantify their values, and to include these values in cost-benefit equations. The results of a number of studies to quantify the economic value of beaches to the state have been published in recent years.³ These benefits are lost when shoreline armoring takes up beach area impacting public access and recreation. Thus, mitigation is necessary to offset impacts and in order for the development to be found consistent with the public access and recreation policies of the Coastal Act.

The most appropriate mitigation for the subject development would be the creation of additional public beach area in close proximity to the impacted beach area. However, there is no private beach area available for purchase, so that direct form of mitigation is unavailable. If a private beach area of comparable size were available for purchase, the Commission might use that value as a way of approximating the appropriate mitigation fee based on the purchase value of the beach area. In the absence of such private beach area, the market value of nearby private

³ Heberger, M., Cooley, H., Herrera, P., Gleick, P. H., & Moore, E. 2009. The Impacts of Sea-level rise on the California Coast. (C. C. C. Center, Ed.). Pacific Institute. King, P. G., A. R. McGregor, and J. D. Whittet. "The economic costs of sea-level rise to California beach communities." San Francisco State University (2011): 63-64. Pendleton, L., & Kildow, J. 2006. The Non-market Value of Beach Recreation in California. *Shore & Beach*, 74(2), 34-37. Pendleton, L., P. King., Mohn, C., Webster, D.G., Vaughn, R., & Adams, A. 2011. Estimating the potential economic impacts of climate change on Southern California beaches. *Climatic Change*, 109(S1), 277-298.

beachfront property that would provide public access and recreational beach land in time from constant erosive impacts from wave and weather forces can be used to approximate an appropriate mitigation.

The first assessment is to determine the amount of beach area that will be lost as a result of the proposed seawall over a set period of time. In this case, the public access and recreation mitigation fee has been calculated for an initial 22 year period, the same time period before the shoreline protective devices will be reevaluated, and the same period used to calculate the sand mitigation fee, discussed in detail above.

The expected near term erosion rate for the bluffs at the subject site, without shoreline armoring, is expected to be 0.27 ft./yr. The area of beach that would have otherwise been created between 2001 and 2023, if the existing seawall did not block natural erosion is 297 sq. ft. (50 ft. long seawall x 0.27 ft./yr. x 22 years). The physical encroachment of the proposed seawall is 150 sq. ft. (50 ft. long x 3 feet wide). Thus, the total sq. ft. area of beach that would otherwise have been available for public use if not for the seawall for a 22 year period is 447 sq. ft. (150 sq. ft. + 297 sq. ft.).

Commission staff reviewed relatively recent sales of coastal properties throughout the Encinitas area to get an estimate of the actual value of oceanfront bluff top parcels to determine comparable mitigation for the loss of shoreline area from the proposed development. This method of analysis seeks to determine the market value of the beach area lost using a sales comparison approach method. Staff's review was conducted by looking at the sales of unimproved bluff top property in this area between 2011 and present. Given that a majority of the Encinitas coastal parcels have been developed for some time, there is not a large pool of sample parcels that have been sold in the past five years that could be used as comparable properties to calculate the appropriate mitigation value for the project's impacts. This evaluation focused on three properties within the City of Encinitas for which sales information was available in the period between 2011 and present. The properties used in this analysis are all undeveloped bluff top oceanfront parcels. Thus, this method of analysis was previously used by the Commission in its 2013 approval of repair and maintenance to an existing unpermitted seawall at 660-678 Neptune Avenue in Encinitas (6-12-041/Lamp1), in which the Commission required a public access and mitigation fee of \$122,716 for the initial 20 years of impacts.

Commission staff evaluated the land value and acreage for the three unimproved properties that had been sold between 2011 and present in order to find an average value. The range of values per square foot starts at the top end for the properties at 708 and 713 4th Street, Encinitas, which are two adjacent 6,041 sq. ft. lots, which sold in May 2014 for \$2,400,000 each.⁴ Based on this sales price, the estimated value would be \$397 per square foot (\$2,400,000/6,041 sq. ft.). A third property at 132 Neptune Ave, Encinitas, which is a 6,970 square foot lot, sold in September 2012 for \$1,700,000.⁵ Based on this sales price, the estimated value would be \$244 per square

⁴ <https://www.redfin.com/CA/Encinitas/712-4th-St-92024/home/12160749>

⁵ San Diego County Recorder's Office- Document #2012-0535656, recorded on September 6, 2012; http://www.zillow.com/homedetails/132-Neptune-Ave-Encinitas-CA-92024/99495288_zpid/.

foot (\$1,700,000/6,970 sq. ft.). Thus, the average price per square foot of three bluff top properties sold over the past five years in Encinitas is \$346 per square foot ($(\$397 + \$397 + \$244)/3 = \346 sq. ft.).

These properties, taken together, serve to represent an approximate estimate of how much value the market places on these properties that could also potentially become shorefront recreational land. Furthermore, staff has researched the oceanfront properties in Encinitas from aerial images and found that very few of the hundred or so oceanfront parcels in Encinitas are vacant unimproved lots, which likely means those lots are in high demand when they are listed for sale, making the purchase of such a lot for mitigation a very expensive venture. Thus, the value of \$346 per square foot for an oceanfront lot in Encinitas is likely a conservative estimate of the market value of a vacant unimproved oceanfront lot in Encinitas.

Taking the beach area impacted by the proposed project (447 square feet) and multiplying it by the required mitigation fee results in a public access and recreation mitigation fee of \$154,662 ($\346×447 sq. ft.). Thus, Special Condition 7 requires a \$154,662 mitigation payment in lieu of providing actual square footage of beach, in order to mitigate for impacts to public access and recreational opportunities resulting from the shoreline armoring. The applicants are required to deposit the mitigation fee into an interest-bearing account to be established and managed by SANDAG, or another appropriate entity. The funds in the public access and recreation account may only be used for public beach recreational access acquisitions and/or improvements at beaches within Encinitas' city limits (including potentially acquiring beachfront property, providing bluff top access trails both up and downcoast of the site, public access improvements, etc.) or, at a minimum, within the San Diego County coastal zone. The 22 year public access and recreation mitigation begins June 30, 2001 - the date that the seawall was substantially completed; and ends June 30, 2023. As conditioned, if the Permittee intends to keep the shoreline armoring in place beyond the 22 year mitigation period, the Permittee must submit a complete application for a CDP or amendment to this CDP no later than 21 years after construction of the seawall (i.e., no later than June 30, 2022) to evaluate continued impacts and the need for additional mitigation. The application shall include analysis of feasible alternatives to modify the shoreline armoring or the bluff top residence to lessen the shoreline armoring's impacts on coastal resources, and shall propose mitigation for unavoidable coastal resource impacts associated with the retention of the shoreline armoring beyond 22 years.

As noted, the applicants have expressed objections to the application of a public access and recreation fee for the subject site. The Commission took a different approach to mitigation of the shoreline protection for the property adjacent to the south and did not require a separate public access and recreation fee (6-05-030/Okun). With that project, the Commission used the original version of the Commission's long-established mitigation fee, which evaluated sand within the bluff, sand located directly below the seawall, and sand that would otherwise have reached the beach through passive erosion were it not for the existence of the shoreline armoring; while acknowledging that recreational impacts were not fully captured by that approach. However, in the last decade, the Commission has attempted to address those impacts through the use of a recreational mitigation fee, which is now applied regularly to shoreline protection projects.

The Commission has required a public access and recreation mitigation fee for two of the three most recent seawalls approvals in Encinitas.

In January 2010, the Commission approved replacement of an existing unpermitted seawall with a new 57 ft. long seawall fronting a duplex in Encinitas. The Commission required the applicant to make a payment based on a current per sq. ft. real estate appraisal of the blufftop lot (without improvements) multiplied by the area of lost public beach. The property owner made a payment of \$136,606 to mitigate public access and recreation impacts of the seawall for a 20 year period (Ref. CDP 6-07-133/Li).

In August 2011, the Commission approved replacement of an existing seawall with a new 100 ft. long seawall fronting two duplexes in Encinitas. The Commission did not require that the applicants mitigate for public access and recreation because the seawall was constructed approximately eight ft. landward of the seawall that had previously existed, and the new seawall was sited on a beach platform located inland of the MHTL. However, in order to re-assess potential impacts after 20 years, the Commission conditioned the permit to require the applicant to submit an amendment application to the Commission 19 years after the seawall construction to re-evaluate the need for mitigation that will address direct impacts to public access and recreational use associated with the presence of the seawall (Ref. CDP 6-88-464/Frick/Lynch).

Most recently, in March 2013, the Commission approved repairs and maintenance to an existing unpermitted 67 ft. long seawall fronting a duplex in Encinitas. This approval used the same valuation method as recommended for the subject application. The Commission based the mitigation fee on the average sq. ft. value of undeveloped Encinitas bluff top lots which had recently sold. The property owner made a payment of \$122,716 to mitigate public access and recreation impacts of the seawall for a 20 year period (Ref. 6-12-041/Lampl).

Therefore, consistent with past Commission precedence, in order to address the project's impacts on sand supply and public access and recreation, the subject project includes a sand mitigation fee to address the area occupied by the seawall, and a public access and recreation mitigation fee based on the value of the land area that will be lost over the estimated life span of the of seawall. As conditioned, these mitigation fees cover a 22-year time period, and this time frame ensures that the public access context, including any potential changes and uncertainties associated with it over time, can be appropriately reassessed at that time. The entire site, including the seawall, the bluff, and the bluff top structure, will be comprehensively reevaluated at that time, along with the adjacent properties similarly affected by the landslide.

This stretch of beach has historically been used by the public for access and recreation purposes. Special Condition 13 acknowledges that the issuance of this permit does not waive the public rights that may exist on the property. The seawall may be located on tidelands, and as such, Special Condition 16 requires the applicants to obtain any necessary permits or permission from the State Lands Commission to perform the work.

In addition, the use of the beach or public parking areas for staging of construction materials and equipment can also adversely impact the public's ability to gain access to the beach. As noted, while the seawall currently exists, maintenance and improvement to the appearance of the wall is

proposed. As such, Special Condition 9 has been proposed to require that a staging area plan be submitted that indicates the beach will not be used for storage of materials and equipment and that construction be prohibited on the sandy beach on weekends and holidays during the summer months of Memorial Day weekend to Labor Day of any year.

In summary, the existing unpermitted seawall, which has been in place for approximately 15 years, currently occupies public beach area resulting in impacts to public access. Adverse impacts of the seawall on public access and recreation will be mitigated by Special Condition 7, which requires the applicants to pay an in-lieu mitigation fee for public access and recreation impacts. With Special Conditions that require mitigation for the adverse impacts to public access and recreation, impacts to the public will be minimized to the greatest extent feasible. Thus, as conditioned, the Commission finds the proposed shoreline armoring structures consistent with the public access and recreation policies of the Coastal Act.

D. VISUAL RESOURCES/ALTERATION OF NATURAL LANDFORMS

Section 30240 (b) of the Coastal Act is applicable and states:

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

In addition, Section 30251 of the Coastal Act states, in part:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

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

Resource Management (RM) 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...

In addition RM Policy 8.7 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 IP also requires that shoreline armoring 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.

The proposed shoreline armoring will occur on a coastal bluff and beach at the base of an approximately 85 foot-high coastal bluff fronting a bluff top residence. Neither the existing unpermitted seawall, nor the gravel on the mid-bluff has been designed in a manner that minimizes its visual impact to the beach going public. The applicants propose to color and texture the seawall, such that upon completion, the appearance will closely mimic the natural surface of the lower bluff face. The visual treatment proposed is similar to the visual treatment approved by the Commission in recent years for shoreline devices along the Encinitas shoreline. (ref. CDP 6-05-030/Okun – Directly adjacent to the south). Special Condition 1 has been attached which requires the applicants to submit final plans that include specific information on how this seawall will be colored and treated to help reduce its contrast with the natural bluff.

The applicants are also proposing to remove any existing invasive vegetation from the bluff face and to place soil on top of the existing gravel and to install hydroseeding and container plant landscaping on the bluff face. Special Condition 2 requires that the landscaping plans only include native, non-invasive, drought tolerant plant species, that any irrigation on the bluff face be capped within 36 months of planting, and that five years from the date of Commission action that the applicants provide a monitoring report certifying that the bluff landscaping has successfully covered the entirety of the gravel on the bluff face. If the landscape monitoring report indicates the landscaping has failed to successfully cover the entirety of the gravel on the bluff face, the permittees shall submit a revised or supplemental landscape plan for the review and written approval of the Executive Director. The revised landscaping plan must be prepared by a licensed Landscape Architect or Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

To address other potential adverse visual impacts, Special Condition 8 has been attached which requires the applicants to monitor and maintain the shoreline armoring in its existing state. In this way, the Commission can be assured that the proposed structure will be maintained so as to effectively mitigate its visual prominence.

Therefore, as conditioned, the Commission finds that potential visual impacts associated with the existing shoreline structures have been reduced to the maximum extent feasible and the proposed development will include measures to prevent impacts that would significantly degrade the adjacent park and recreation area (beach area). Thus, with the proposed conditions, the project is consistent with Sections 30240(b) and 30251 of the Coastal Act.

E. UNPERMITTED DEVELOPMENT

Unpermitted development has occurred at the project site subject to this coastal development permit application. The unpermitted development includes the placement of gravel on the bluff face, construction of an unpermitted rear yard deck overhanging the bluff edge, and development that was temporarily authorized on the beach, bluff face and bluff top pursuant to emergency coastal development permits but that currently lacks Coastal Act authorization, including a seawall, rip rap boulders, and a deadman retaining system. This development, which is not exempt, was conducted in the Coastal Zone without a valid coastal development permit, and therefore constitutes a violation of the Coastal Act. On September 9, 2009, the Commission found, through its approval of Consent Cease and Desist Order No. CCC-09-CD-05 (“Consent Order”), that all of this development described above, was conducted in the Coastal Zone without a valid coastal development permit, and in violation of the Coastal Act. In the years since the Consent Order was approved, Commission Enforcement staff has expended a significant amount of time attempting to obtain compliance with the Consent Order, including submission of a complete CDP application, yet, only in October 2015, over 5 1/2 years after the deadline to submit the CDP application set in the Consent Order, did the applicant submit a complete application. During this time, all of the unpermitted development has remained on the property and continues to impact coastal resources.

The applicants are proposing after-the-fact approval of some of the items of unpermitted development noted above and described in more detail in the project description. The remaining development, such as the rip rap and portions of the bluff top deck, will be removed pursuant to and as authorized by the Consent Order. Special Condition 18 has been included to reinforce the requirement of the consent order that the applicants remove the entirety of the unpermitted rip rap on the public beach and the portions of the unpermitted bluff top deck within 5 feet of the bluff edge. In addition, as required by the Consent Order, any development that is denied by the Commission in the subject CDP application is required to be removed from the site, pursuant to a removal plan submitted by the applicant and approved by the Executive Director.

In addition to the development that the applicants are applying for in this CDP, the applicants also have not complied with the requirements of the Consent Order. The Consent Order requires that the applicants provide the Executive Director within 60 days of issuance of the Consent Order, or by November 8, 2009, with a plan to remove the existing rip rap on the beach and the portions of the bluff top deck within 5 feet of the bluff edge; and that the development be removed within 15 days of approval of the removal plan. Instead, the applicants provided the Executive Director with an incomplete removal plan. Commission enforcement staff has done extensive work over the years to compel the applicants to submit the information necessary to approve the removal plan, and the other plans required pursuant to the Consent Order – however

the applicants have not yet submitted the information required to approve those plans. As recently as January 2016, the applicants told Commission staff that they will not remove the rip rap or portion of deck until a regular CDP is issued for the entirety of work proposed on the property. This is in direct violation of the clear requirements of the Consent Order.

Unpermitted Development has also occurred through elimination of a public parking space by eliminating a portion of the curb along the landward side of the residence. This occurred in violation of the plans which were approved for CDP F9555, which authorized the construction of the residence on the site. The applicant is not proposing to include resolution of the curb cut in this application and, thus, violations remain on the subject property that will not be resolved or addressed by the Commission's action on this application. The Commission's enforcement division will consider options to address said violations as a separate matter.

Although the development has taken place prior to submittal of this application, consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act.

After the Fact Permit Fee

The applicants have indicated that they disagree with the permit fee assessed for the subject project.

Section 30620 of the Coastal Act states, in relevant part:

The Commission may require a reasonable filing fee and the reimbursement of expenses for the processing by the Commission of any application for a coastal development permit...

Section 13055 of the California Code of Regulations sets the filing fees for coastal development permit applications, and states in relevant part:

(a)(5)(B)(1) Fees based upon development cost shall be as follows:
\$100,001 to \$500,000: \$6,000⁶

(d) Fees for an after-the-fact (ATF) permit application shall be five times the amount specified in section (a) unless such added increase is reduced by the Executive Director when it is determined that either:

(1) the ATF permit application can be processed by staff without significant additional review time (as compared to the time required for the processing of a regular permit,) or

⁶ Fee is based on the fee schedule in 2010. An application for the same development submitted today would have a fee of \$6,648.

(2) the owner did not undertake the development for which the owner is seeking the ATF permit, but in no case shall such reduced fees be less than double the amount specified in section (a) above. For applications that include both ATF development and development that has not yet occurred, the ATF fee shall apply only to the ATF development. In addition, payment of an ATF fee shall not relieve any persons from fully complying with the requirements of Division 20 of the Public Resources Code or of any permit granted thereunder or from any penalties imposed pursuant to Chapter 9 of Division 20 of the Public Resources Code.

The application includes an estimated cost of development of between \$100,001 to \$500,000. Based on the Filing Fee Schedule for the 2009/2010 fiscal year (Section 13055, subsection (a)(5)(B)(1) of Title 14 of the California Code of Regulations), the fee for development cost of \$100,001 to \$500,000 was \$6,000. The applicants submitted a fee of \$6,000 with their coastal development permit application on March 1, 2010. At the time that the applicants submitted the application, they were told by staff that staff would follow-up with a letter detailing the required ATF fee. The applicants were notified via a non-filing letter, dated March 30, 2010, that the required permit fee was, in fact, \$30,000 and that an additional \$24,000 was necessary to fulfill the ATF fee requirement. Thus, the applicants were aware of the requirement to pay an ATF fee from the time that the application was originally submitted in 2010.

Subsection (d) of regulations Section 13055 indicates that the fee for an after-the-fact permit application shall be five times the amount specified in section (a) unless such added increase is reduced by the Executive Director, when it is determined that either: the permit application can be processed by staff without significant additional review time or the owners did not undertake the development for which the owners are seeking the after-the-fact permit.

In this case, the owners did undertake the development for which they are seeking the after-the-fact permit. An additional fee is assessed for after-the-fact applications because they typically require significantly more staff time than similar applications that do not include after-the-fact development. In reviewing this application, due to the prior development undertaken without Coastal Act analysis or approval, staff had to spend an extensive, additional amount of time meeting with the applicants and the City, well beyond what would have been necessary if the development had not already occurred, in addition to spending additional time researching the long history of past unpermitted development on the site. Due to the fact that a large quantity of gravel was placed on the bluff face without a CDP, Commission staff has had to undertake the additional work analyzing alternatives involved with removal or retention of the gravel that would not have been otherwise required had the unpermitted development not occurred. Furthermore, conditions at the subject site have changed as a result of the substantial time period between issuance of the Emergency CDPs and now, over 19 years, a time period in which the applicants were given multiple opportunities to address this matter, but such actions were not taken, even after the issuance of the Consent Order. These changed conditions require additional analysis by Commission staff that would not have been required if permits had been obtained within the timeframes required by conditions of the Emergency CDPs and as required by the Consent Order and the Coastal Act itself. In this case, the Executive Director did not reduce the fee because staff has spent such a significant amount of additional time meeting with the

applicants, and the City, on multiple occasions over the past five years, as well as researching the previous 20 year history of unpermitted development on the site. Therefore, the required application fee is five times that required for the development, or \$30,000.

The applicants have paid the entire permit fee of \$30,000 under protest and have requested that the Commission reduce the permit fee to a total of \$10,000 and to refund the remaining \$20,000. The applicants have made the following arguments as to why the fee should be reduced from \$30,000 to \$10,000. The applicants' assertions are unrelated to the criteria for determining the amount of an after the fact permit fee, and thus, no material argument has been made to reduce the amount of the fee, but for informational purposes, staff is providing the following responses to the applicants' assertions.

First, the applicants contend that they believe the Consent Order resolved all the violations on the property and therefore they should not be "penalized." The Consent Order required the applicants to, among other things, not conduct any further unpermitted development, remove the rock revetment from the beach and portions of the deck that were within five ft. of the bluff edge, submit a CDP application to request retention of certain items of unpermitted development, and pay a monetary settlement of \$45,000 to resolve their civil liabilities for undertaking the unpermitted development in violation of the Coastal Act. The monetary settlement agreed to by the applicants and required pursuant to the Consent Order is completely separate from the filing fee for a CDP application. In fact, Section 13055(d)(2) of the Commission's regulations specifically states that payment of the after-the-fact permit fee is separate and distinct from payment to resolve civil liabilities pursuant to Chapter 9 of the Coastal Act: "payment of an ATF fee shall not relieve any persons from... any penalties imposed pursuant to Chapter 9 of Division 20 of the Public Resources Code." In addition, the Consent Order required the applicants to submit "all materials that are required to complete a Coastal Development Permit ("CDP") application." Those materials include the payment of the application filing fee. The applicants agreed to resolve the unpermitted development that occurred on the site through the Consent Order. By signing the Consent Order, the applicants acknowledged that they had reviewed and agreed with all of the terms of the Consent Order.

Furthermore, by entering into a consensual resolution, the applicants also avoided the issuance of unilateral orders against them, the potential for substantially greater penalties under Chapter 9 of the Coastal Act, and the substantial costs that could have occurred due to potential litigation. The Consent Order also requires, in Section 2.3.1.1, the submission of a complete CDP application. Although the deadline for the submittal of the completed CDP application was within 120 days of issuance of the Consent Order, or by January 7, 2010, submittal of a completed CDP application did not occur until October 27, 2015. The delay in "completing" the application was due to the applicants' repeated failures to submit the requested information that would allow staff to adequately analyze the proposed project.

Second, the applicants contend they should only be required to pay a total permit fee of \$10,000 due to a November 2010 letter by Commission enforcement staff. In a non-filing letter dated 3/30/2010, Commission staff stated that the required permit fee was \$30,000. In November 2010, months afterwards, the required permit fee, and other materials, had not yet been submitted, and Commission enforcement staff sent a letter dated 11/19/2010 which asked the applicants to

comply with the Consent Order. The letter stated that: 1) the required CDP application fee was 5 times the regular application fee, 2) a CDP application fee of two times⁷ might be appropriate to process the application if the application could be processed without additional staff time, 3) a payment of additional permit fees was requested by November 30, 2010, and 4) the final permit fee would be determined when all materials necessary for a complete application had been submitted (Exhibit 12). However, no additional permit fee was submitted by the November 30, 2010 date. This letter was sent more than five years ago, to request the applicants to comply with the requirements of the Consent Order. In the five years since this letter was sent, Commission staff have spent an intensive and lengthy amounts of time in making repeated requests, through 15 letters (Exhibit 12) and at least 48 phone calls with Commission enforcement staff, Commission permit staff has also expended a significant amount of time, requesting through seven non-filing letters (Exhibit 13) and numerous phone calls and emails, to submit the materials necessary to comply with the Consent Order and to submit a complete CDP application.

However, the applicants did not submit the information and the filing fee required to complete the CDP application, as repeatedly requested, until the filing fee and requested information was finally submitted in October, 2015, again, over 5 1/2 years after the deadline to do so. Therefore, it is not appropriate to reduce the application fee since significant extra staff time has been spent in the review of the after the fact permit application.

Commission staff has been making consistent good faith attempts over the last several years to work with the applicants to submit the materials necessary to process this application. However, as described above, the applicants' past Coastal Act violations and the applicants' unwillingness to promptly provide information needed to review this application given the presence of the "after the fact" development has resulted in the need for significantly more staff time to process this application. Therefore, the five times permit fee is appropriate and consistent with Section 13055 of the California Code of Regulations.

F. LOCAL COASTAL PLANNING

The subject site is located on the public beach and on a coastal bluff within the City of Encinitas. In November of 1994, the Commission approved, with suggested modifications, the City of Encinitas Local Coastal Program (LCP). Subsequently, on May 15, 1995, coastal development permit authority was transferred to the City. Although the site is within the jurisdiction of the original jurisdiction of the Coastal Commission and the City of Encinitas, the applicants and the City requested that the Commission issue a consolidated CDP. As such, the standard of review is Chapter 3 policies of the Coastal Act, with the City's LCP used as guidance.

As shoreline erosion along the coast rarely affects just one individual property, it is imperative that a region-wide solution to the shoreline erosion problem be addressed and solutions developed to protect the beaches. Combined with the decrease of sand supply from coastal rivers

⁷ The letter's statement that two-times the application fee would be \$10,000 was written in error, as a two times fee would have been \$12,000.

and creeks and armoring of the coast, beaches will continue to erode without being replenished. This will, in turn, decrease the public's ability to access and recreate on the shoreline.

Based on specific policy and ordinance language requirements placed in the LCP by the Commission, the City of Encinitas began the process of developing a comprehensive program addressing the shoreline erosion problem in the City. The intent of the plan was to look at the shoreline issues facing the City and to establish goals, policies, standards and strategies to comprehensively address the identified issues. To date, the City has conducted several public workshops and meetings on the comprehensive plan to identify issues and present draft plans for comment. However, at this time it is uncertain when the plan will come before the Commission as an LCP amendment or when it will be scheduled for local review by the Encinitas City Council.

In the case of the proposed project, site specific geotechnical evidence has been submitted indicating that the subject bluff top residence and the existing bluff top residence adjacent to the north of the project site are in danger if retention of the existing seawall and gravel are not approved. Based on the above findings, the proposed shoreline armoring has been found to be consistent with the Chapter 3 policies of the Coastal Act in that the need for the shoreline armoring has been documented and adverse impacts on public access, beach sand supply, and visual resources will each be mitigated. Therefore, the Commission finds that approval of the proposed shoreline armoring, as conditioned, will not prejudice the ability of the City of Encinitas to prepare a comprehensive plan addressing the City's coastline as required in the certified LCP and consistent with Chapter 3 policies of the Coastal Act.

G. CALIFORNIA ENVIRONMENTAL QUALITY ACT

Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, 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.

The proposed project has been conditioned in order to be found consistent with the Chapter 3 policies of the Coastal Act. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- Certified City of Encinitas Local Coastal Program (LCP)
- Consolidated CDP letter from the City of Encinitas dated December 14, 2015 and Consolidated CDP letter from the Applicants dated June 29, 2015
- “Landscape Improvement Plans for Bluff Repairs” by George Mercer Landscape Architecture, sheets 1-4 and 6-7, dated June 12, 2011
- “Erosion Control Planting Plan” by George Mercer Landscape Architecture, dated July 15, 2012 (1 Page)
- Untitled As-built Plans signed by Construction Testing & Engineering, Inc., dated March 30, 2015. In addition to the as-built aspects on the site, this plan set is also contains the proposed improvements.
- “As-Built Geotechnical Report for Bluff Restoration” by Construction Testing & Engineering, Inc., dated May 8, 2002
- “Response to Third Party Review” by Construction Testing & Engineering, Inc., dated August 9, 2004
- “Update Geotechnical Report for Bluff Restoration” by Construction Testing & Engineering, Inc., dated May 31, 2011
- “Response to City of Encinitas Review Comments for Case No. 10-025 MUP” by Construction Testing & Engineering, Inc., dated May 15, 2012
- “Confirmation of Previous Geotechnical Observations” by Construction Testing & Engineering, Inc., dated January 14, 2015
- CDP Nos. 6-85-362/Illman, 6-88-464/Frick/Lynch, 6-90-219/Batiquitos Lagoon, 6-95-066/Han, 6-96-082-G, 6-96-96-G/Okun, 6-96-099-G, 6-96-110-G, 6-98-039/Cantor & Denver, 6-99-009/Ash & Bourgault, 6-99-011/Mahoney & Baskin, 6-99-041/Bradley, 6-00-171-G, 6-01-012-G, 6-01-40-G/Okun, 6-01-042-G, 6-01-62-G/Okun, 6-01-85-G/Okun, 6-01-011-G/Okun, 6-02-074-G/Okun, 6-02-093, 6-03-048/Gault & Sorich, 6-05-30/Okun, 6-07-133/Li, A-6-ENC-09-040/Okun, A-6-ENC-09-041/Okun, 6-12-041/Lampl, 6-14-0559/Sonnie
- Consent Cease and Desist Order CCC-09-CD-05
- Heberger, M., Cooley, H., Herrera, P., Gleick, P. H., & Moore, E. 2009. The Impacts of Sea-level rise on the California Coast. (C. C. C. Center, Ed.). Pacific Institute. King, P. G., A. R. McGregor, and J. D. Whittet. "The economic costs of sea-level rise to California beach communities." San Francisco State University (2011): 63-64. Pendleton, L., & Kildow, J. 2006. The Non-market Value of Beach Recreation in California. Shore & Beach, 74(2), 34–37. Pendleton, L., P, King., Mohn, C., Webster, D.G., Vaughn, R., & Adams, A. 2011. Estimating the potential economic impacts of climate change on Southern California beaches. Climatic Change, 109(S1), 277-298.

PROJECT LOCATION

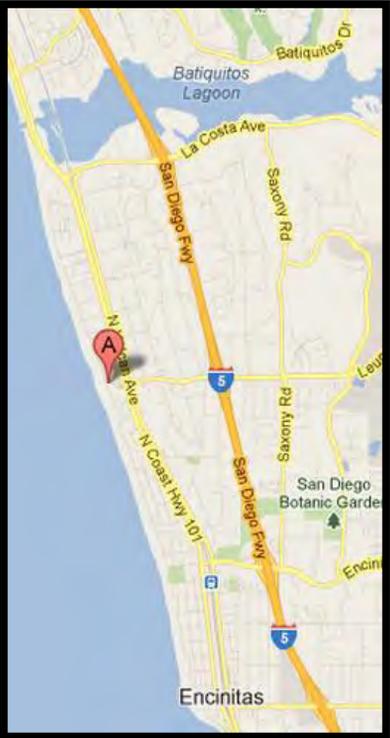


EXHIBIT NO. 1
APPLICATION NO. 6-10-018
Project Location
 California Coastal Commission

PROPOSED DEVELOPMENT

Sonnie

Brown

Retention of Deadman Retaining System

Retention of ~8 ft. in depth Gravel on bluff, placement of 8-12 in. of planting soil on top of gravel, hydroseed, container plantings, and temporary irrigation.

Retention of 50 ft. long, ~28 ft. high seawall and aesthetic shotcrete surface

EXHIBIT NO. 2

APPLICATION NO.

6-10-018

Proposed Development



California Coastal Commission

**CONSENT ORDER DEVELOPMENT REQUIRED TO BE REMOVED –
NOT A PART OF THIS CDP APPLICATION**

Sonnie

Brown

Remove portions of deck within 5 ft. of bluff edge.

Removal 2 to 6 lineal feet, 5-7 feet-high rip-rap

EXHIBIT NO. 3

APPLICATION NO.
6-10-018

Consent Order Removal



California Coastal Commission

SURROUNDING DEVELOPMENT

Sonnie
858/860 Neptune

Okun
828 Neptune
2 detached homes under construction

Sprangers/Blondin
864/866 Neptune

Brown
836/838 Neptune



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2013

EXHIBIT NO. 4

APPLICATION NO.
6-10-018

Surrounding Development



California Coastal Commission

DEADMAN RETAINING SYSTEM

BLUFF EDGE

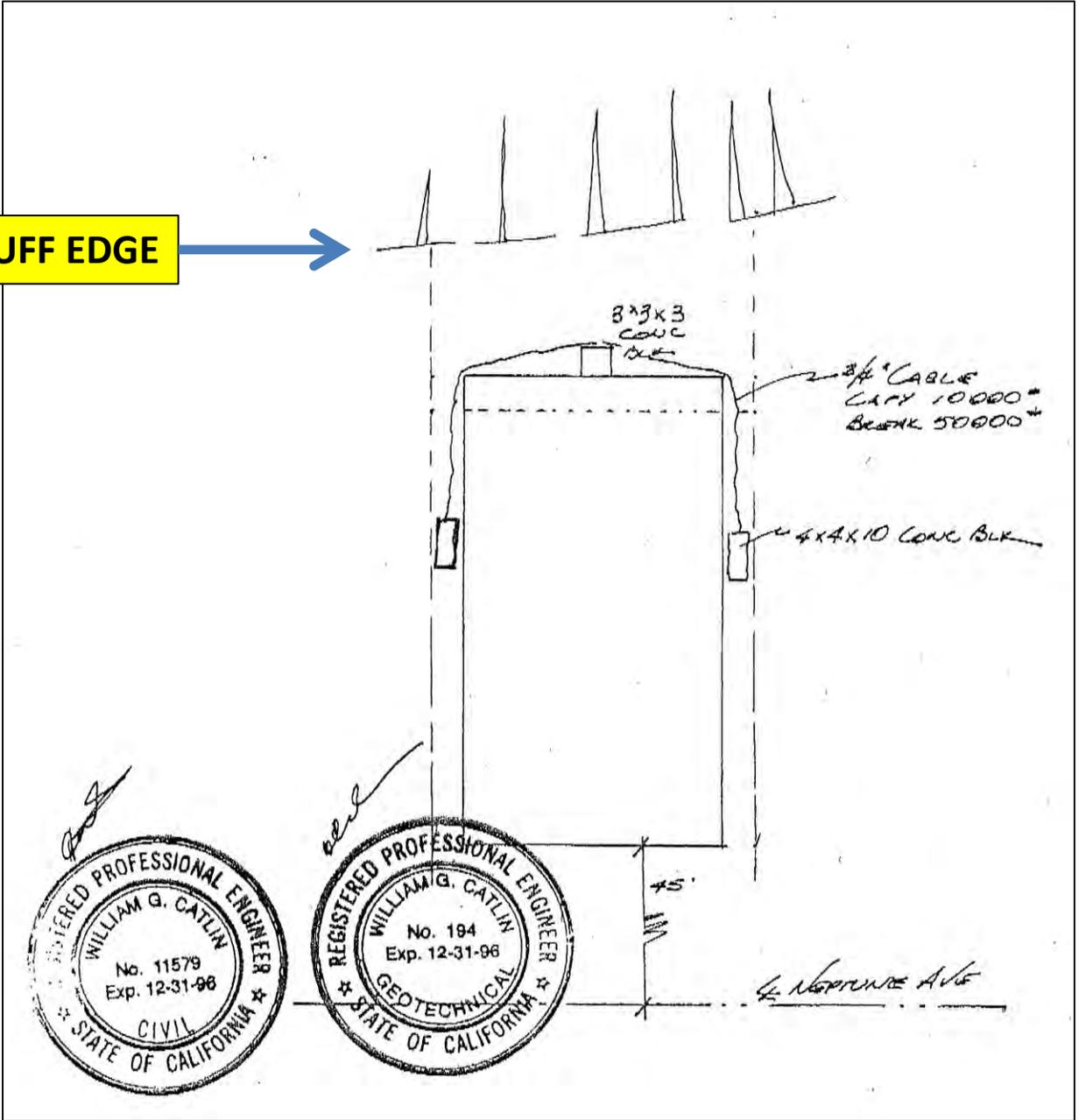


EXHIBIT NO. 5

APPLICATION NO.

6-10-018

Dead Man Retaining System



California Coastal Commission

WET SAND PHOTOGRAPH (12/29/2015)

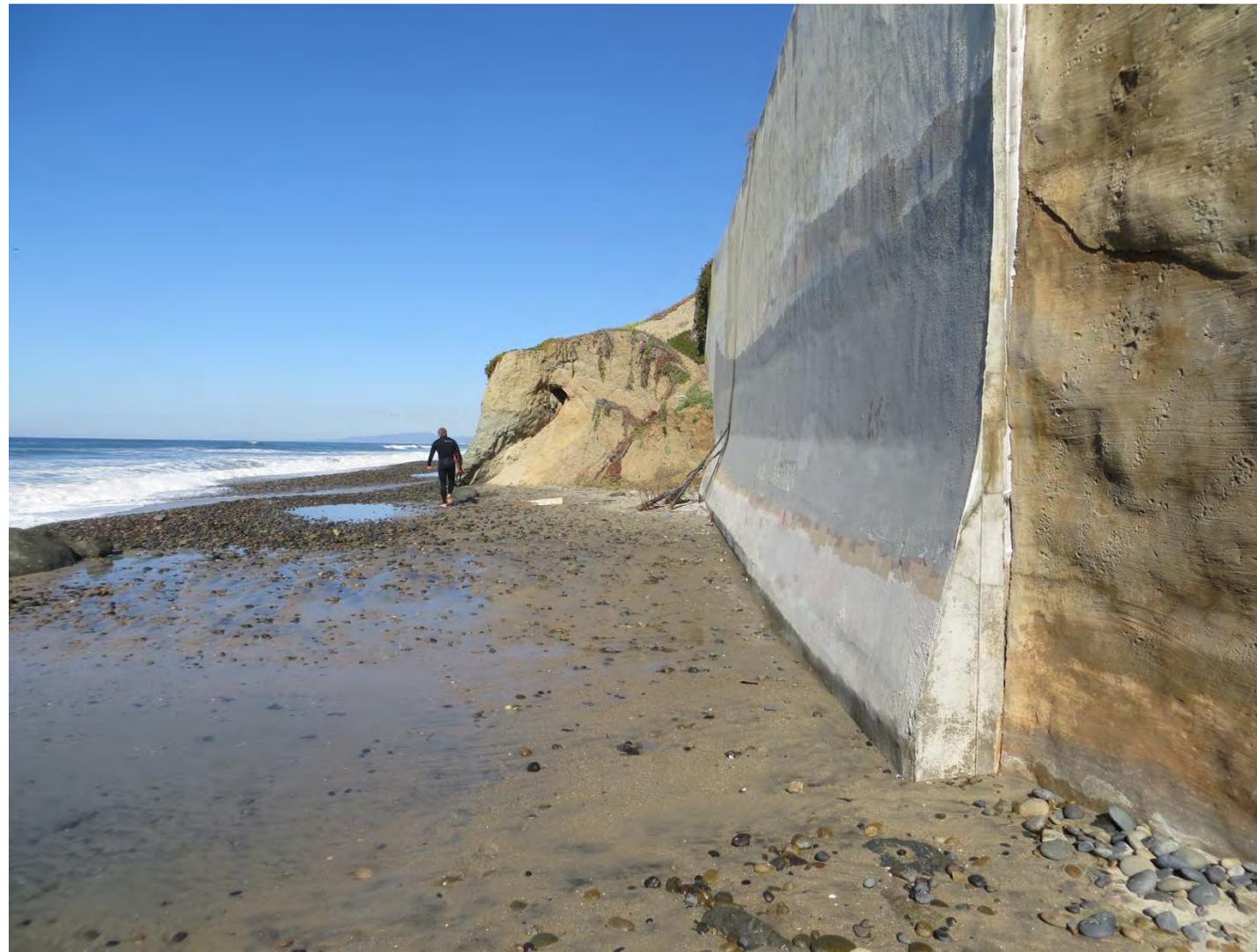


EXHIBIT NO. 6

APPLICATION NO.

6-10-018

Wet Sand Photo



California Coastal Commission

STATE LANDS COMMISSION LETTER 858/860 NEPTUNE AVE.

STATE OF CALIFORNIA

EDMUND G. BROWN JR., Governor

CALIFORNIA STATE LANDS COMMISSION
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202

JENNIFER LUCCHESI, Executive Officer
(916) 574-1800 FAX (916) 574-1810
California Relay Service From TDD Phone 1-800-735-2922
from Voice Phone 1-800-735-2929



February 17, 2015

Contact Phone: (916) 574-0900
Contact FAX: (916) 574-1835

RECEIVED
FEB 20 2015

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Bob Trettin
The Trettin Company
560 N. Pacific Highway, Suite 5
Encinitas, CA 92024

File: SD 2014-08-19.7

Subject: Jurisdiction Determination for Existing and Proposed Improvements
Located Adjacent to 858 & 860 Neptune Avenue, Encinitas, San
Diego County

Dear Mr. Trettin:

This letter is in response to your request on behalf of your clients, Richard Sonnie and Lupe Sonnie, for a determination by the California State Lands Commission (Commission) as to whether it asserts a sovereign title interest in the Pacific Ocean for an existing seawall initially constructed under an emergency coastal development permit adjacent to 858 & 860 Neptune Avenue (APN 254-311-05) in the City of Encinitas, San Diego County.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The State holds these lands for the benefit of all people of the State for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space.

On tidal waterways, the landward boundary of the State's sovereign land ownership is the ambulatory ordinary high water mark (OHWM). Generally, the OHWM is measured by the mean high tide line (MHTL), except where there has been fill or artificial accretions or the boundary has been fixed by agreement or court decision. Such boundaries may not be readily apparent from present day site inspections. MHTL surveys do not create a permanent boundary, but rather serve as evidence as to the MHTL location at that single point in time.

The proposed project, as Commission staff understands it, includes an existing seawall, the addition of two mid-bluff retaining walls, and a new upper-bluff retention structure. Commission staff has reviewed the documents submitted as well as other available information including historic mapping, site specific information and natural phenomena in the vicinity of the subject property.

EXHIBIT NO. 8

APPLICATION NO.

6-10-018

SLC Letter



California Coastal Commission

The Pacific Ocean at this location is ungranted sovereign land. The Commission has not made a determination as to the location of the OHWM (boundary) at this location. The uplands at this location are located within federal lands patented by the United States as Cash Entry Patent, Serial No. 1622, dated January 12, 1889 (Lot 1, Sec. 9, T13S, R4W, SBM). Since Commission staff found no evidence of artificial accretion or filling in the immediate vicinity of the subject property, the MHTL is ambulatory and can be expected to continue to fluctuate in response to such natural phenomena as wave events, seasonal fluctuations, sediment supply, El Nino and La Nina conditions, Pacific Decadal Oscillation, and long term sea level rise or fall.

We expect the MHTL to continue to fluctuate within full known historic range. At this time, Commission staff does not have sufficient information to conclude the extent to which the boundary may move landward at the project location. Additional research might reveal where the boundary is likely to move, but staff believes that the time, effort, and cost to develop such information is not warranted at this time and in this situation. In conclusion, based on the circumstances as set forth above, Commission staff does not presently claim that the proposed project intrudes onto sovereign lands. Therefore, no lease, permit, or authorization is required from the Commission at this time.

This determination is without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information come to the Commission's attention. In addition, this letter is not intended, nor should it be construed as, a waiver or limitation of any right, title, or interest of the State of California in any lands under its jurisdiction.

In addition, San Diego County Assessor's records show a parcel of land (APN 254-040-31) between the subject property and the Pacific Ocean as being assessed to the California Department of Parks and Recreation (CDPR) for Leucadia State Park. We recommend you contact CDPR to verify the seawall does not encroach onto their property.

If you have any questions regarding any of the above information, please contact Randy Collins, Public Land Management Specialist, Land Management Division, at (916) 574-0900.

Sincerely,



Brian Bugsch, Chief
Land Management Division

cc's: See next page.

cc: California Coastal Commission
San Diego Coast District
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421

California Department of Parks
and Recreation
P.O. Box 942896
Sacramento, CA 94296

Randy Collins, PLMS
Land Management Division
CSLC

AS-BUILT SEAWALL PROFILE

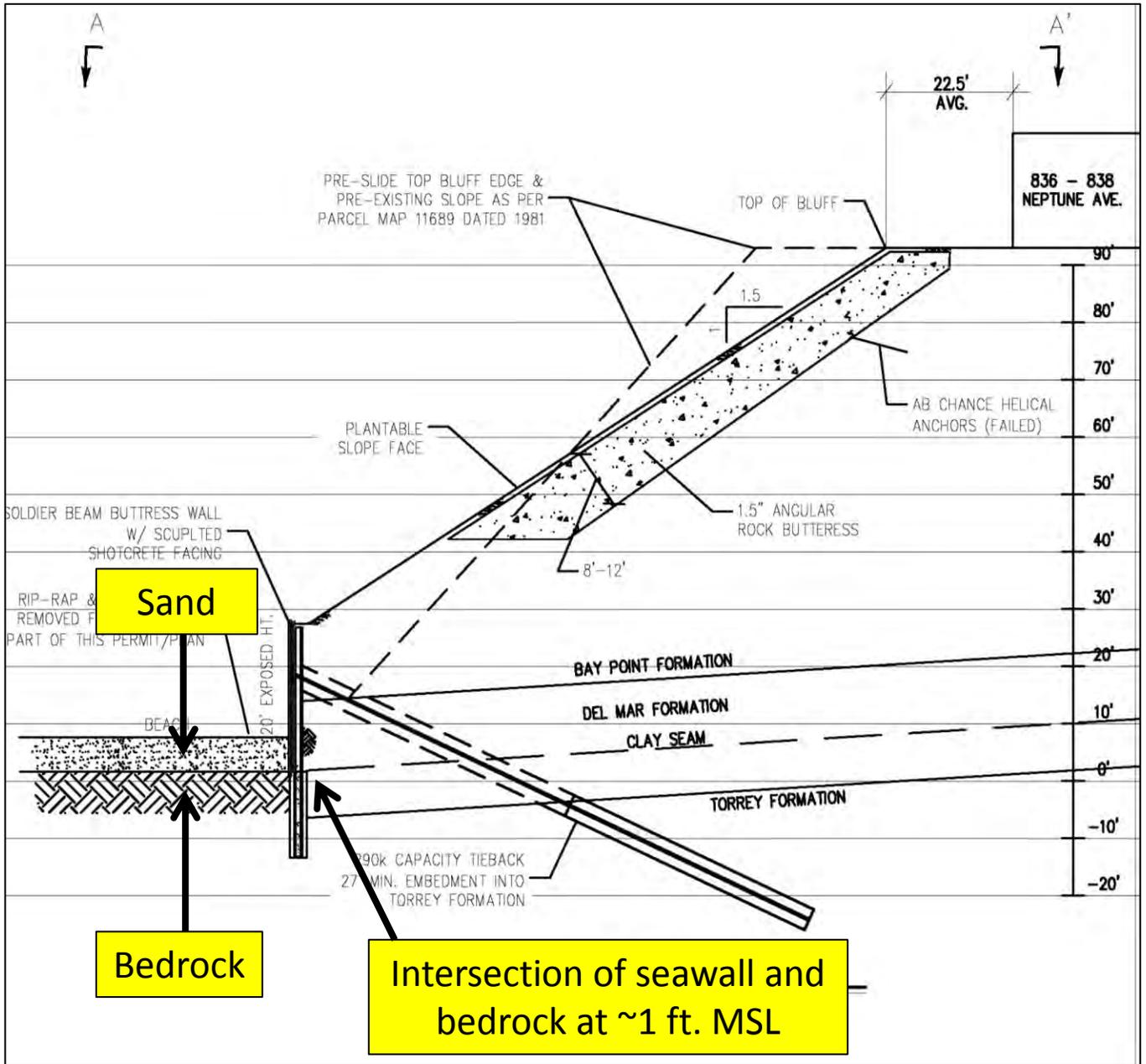


EXHIBIT NO. 9

APPLICATION NO.

6-10-018

As-Built Seawall Profile



California Coastal Commission

CDP F9555 SPECIAL CONDITIONS

Development Permit; F9555
Page 2 of 4

B. TERMS AND CONDITIONS:

1. That the applicant agrees to adhere strictly to the current plans for the project as approved by the Regional Commission.
2. That the applicant agrees to notify the Regional Commission (or State Commission if there is no Regional Commission) of any changes in the project.
3. That the applicant will meet all the local code requirements and ordinances and obtain all necessary permits from State and Federal Agencies.
4. That the applicant agrees to conform to the permit rules and regulations of the California Coastal Commission.
5. That the applicant agrees that the Commission staff may make site inspections of the project during construction and upon completion.

C. SPECIAL CONDITIONS:

1. Prior to a Coastal Development permit being issued for this project, the applicant shall submit for review and written approval by the Executive Director, a revised plot plan showing a 30 foot wide curb sited to maximize on-street parking.
2. Prior to transmittal of a development permit for this project, the applicant shall record a deed restriction in a form and content approved by the Executive Director. Said deed restriction shall be an irrevocable offer to dedicate to a public agency or private association approved by the Executive Director a public access easement for pass and repass and passive recreation on that portion of the permittee's property seaward of the toe of the bluff. This easement shall be free of prior liens and encumbrances except for tax liens. The irrevocable offer shall be binding on the permittee's successors in interest and any subsequent purchasers of any portion of the real property for a period of twenty-one (21) years from date of recordation of said offer. Evidence of recordation of this restriction shall be submitted to and acknowledged in writing by the Executive Director.
3. That prior to transmittal of the permit, the permittee shall record a restriction against the subject property, free of prior liens and encumbrances except for tax liens, and binding on the permittee's successors in interest and any subsequent purchasers of any portion of the real property. The restriction shall prohibit any alterations of landforms, placement or removal of vegetation, or erection of structures of any type, unless approved by the San Diego Coast Regional Commission or its successors in interest, on the bluff face between the toe of the bluff and top edge of the bluff: as shown on plans filed with the San Diego Coast Regional Commission and indicated on Exhibit "A" attached to these findings. Evidence of recordation of this restriction shall be submitted to and acknowledged in writing by the Executive Director prior to transmittal of the permit.

OTD

EXHIBIT NO. 10

APPLICATION NO.

6-10-018

CDP F9555 Special Cond.



California Coastal Commission

SPECIAL CONDITIONS (Continued)

4. Prior to the transmittal of a coastal development permit, the applicants shall submit to the Executive Director a recorded deed restriction that binds the applicants and any successors in interest. The deed restriction shall provide: (a) that the applicants understand that the site may be subject to extraordinary hazard from erosion and from landslides and the applicants assume the liability from those hazards; (b) the applicants unconditionally waive any claim of liability on the part of the Commission for any damage from such hazards; and (c) the applicants understand that construction in the face of these probable hazards may make them ineligible for public disaster funds or loans for repair or replacement of the property in the event of storms.

Terms and conditions are to run with the land. These terms and conditions shall be perpetual, and it is the intention of the parties to bind all future owners and possessors of the subject property to said terms and conditions.

SAND MITIGATION FEE CALCULATIONS

Sand Mitigation Calculation - Brown

Variable	Description	Value	Unit
S	Fraction of Beach Quality Sand in the bluff material, based on analysis of bluff material to be provided by the applicant.	0.74	NA
W	Width of the Bluff Retention Device in feet.	50	Feet
L	The duration in years of the Coastal Development Permit which shall be the period from completion of construction of the Bluff Retention Device through a period of 22 years.	22	Years
R	The retreat rate which must be based on historic erosion, erosion trends, aerial photographs, land surveys, or other acceptable techniques and documented by the applicant, limited by the seaward property line of the Bluff Property to be protected.	0.27	Feet/Year
hs	Height of Bluff Retention Device from base of bluff to the top, in feet.	28	Feet
hu	Height of unprotected upper bluff, from the top of the Bluff Retention Device to the crest of the bluff, in feet.	66	Feet
Rcu	Predicted rate of retreat of the crest of the bluff, during the 20-year duration of the Coastal Development Permit for the Bluff Retention Device, in feet per year, assuming no Bluff Retention Device has been installed. This value can be assumed to be the same as R unless the Bluff Property Owner provides site-specific geotechnical information supporting a different value.	0.27	Feet/Year
Rcs	Predicted rate of retreat of the crest of the bluff, in feet per year, during the duration of the Coastal Development Permit for the Bluff Retention Device, assuming the seawall has been installed. This value will be assumed to be zero unless the applicant Bluff Property Owner provides site-specific geotechnical information supporting a different value.	0	Feet/Year
$V_b = [(S \times W \times L) \times ((R \times h_s) + (1/2hu \times (R + (R_{cu} - R_{cs}))))]/27]$	V_b is the cubic yards of Beach Quality Sand, between the landward face of the Bluff Retention Device and the seaward property line of the Bluff Property to be protected, that would be supplied to the beach but for the qualifying Bluff Retention Device, based on the Erosion Rate, 22-year mitigation duration, and actual bluff geometry. Subject to the above, and unless site-specific information submitted by the Bluff Property Owner demonstrates otherwise.	765.16	Cubic Yards
VAC	Value of sand already contributed to the beach through the past landslide. The VAC is consistent with the VAC value approved by the Commission for CDP 6-05-030/Okun.	690	Cubic Yards
Vb-VAC	Cubic yards of beach quantity sand minus cubic yards of sand already contributed	75.16	\$
Cost/cy	Cost of sand delivered to the beach based on an average of three estimates	14.50	\$
Sand Fee = (Cost/cy * Vb-VAC)	Cubic yards of beach quantity sand minus cubic yards of sand already contributed multiplied by the cost per cubic yard of sand	1,089.82	\$

EXHIBIT NO. 11

APPLICATION NO.

6-10-018

Sand Calculation



California Coastal Commission

ENFORCEMENT LETTERS

EXHIBIT NO. 12

APPLICATION NO.

6-10-018

Enforcement Letters



California Coastal Commission

CALIFORNIA COASTAL COMMISSION

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



(Via Regular and Certified Mail)
Certified Mail No. 7006 2760 0005 5883 5743

September 14, 2009

John Mike and Patricia Brown
5201 Beach Drive SW
Seattle, WA 98136

Re: Consent Order CCC-09-CD-05

Dear Mr. and Mrs. Brown,

As I indicated in my previous letter dated September 10, 2009 the Commission approved the Consent Order at its September 9, 2009 public hearing. Therefore, the effective date of the Consent Order is September 9, 2009.

As discussed in our previous conversations, we are ready and willing to work with you in complying with the Consent Order. Commission staff would like to thank you once again for all your efforts and cooperation in resolving these issues. Please let us know if there is anything that we can do to ensure compliance with the Consent Order or if you need clarification or guidance in understanding the terms of the Consent Order. Also, even though I know you are committed to accomplishing the work under the Order, I want to remind you that November 8, 2009 is the first deadline established in the Order, by which time a removal plan needs to be submitted for the items delineated in Section 2.3 of the Order. You will need to send that submittal to:

California Coastal commission
Attn:
Aaron McLendon
200 Oceangate, 10th Floor
Long Beach, CA 90802

With a copy sent to:

California Coastal Commission
San Diego Coast district
Attn: Marsha Venegas
7575 Metropolitan Drive Ste. 103
San Diego, CA 92108-4402

Received

SEP 15 2009

California Coastal Commission
San Diego Coast District

We look forward to working with you to ensure a successful restoration in an efficient and timely manner. If you have any questions, please contact Aaron McLendon at (562) 590-5060.

Sincerely,



Heather Johnston
Enforcement Division

cc: Lisa Haage, Chief of Enforcement
Lee McEchern, District Regulatory Supervisor
Marsha Venegas, San Diego Coast District Enforcement Officer
Aaron McLendon, Statewide Enforcement Analyst

CALIFORNIA COASTAL COMMISSION

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



(Via Regular and Certified Mail)
Certified Mail No. Z 7001 1140 0002 4470 4513

FILE COPY

February 17, 2010

John Mike and Patricia Brown
5201 Beach Drive SW
Seattle, WA 98136

FILE COPY

RE: Consent Order CCC-09-CD-05 for 836-838 Neptune Avenue, City of Encinitas,
San Diego County (APN NO. 254-011-17)

Dear Mr. & Mrs. Brown:

Thank you for your cooperation and agreement to resolve the subject violations on your property through Consent Cease and Desist Order CCC-09-CD-05 (Consent Order). As you are aware, the effective date of the Consent Order is September 9, 2009 and, therefore, the deadlines established in the Consent Order commence from that date. As explained in a September 14, 2009 letter to you from Heather Johnston of our enforcement staff, the first of several deadlines to submit specific documents required by the Consent Order was November 8, 2009. In addition, the Consent Order established a separate deadline of November 1, 2009 to submit the first of five payments to resolve your civil liability under the Coastal Act. By signing the Consent Order you agreed to its terms and conditions. However, as of the date of this letter, we have not received the documents and/or payments required by the Consent Order.

The following is a list of items that you agreed to submit, and which were required pursuant to the Consent Order:

- 1) Submit a removal plan to the Executive Director by November 8, 2009 (pursuant to Section 2.3 and Section 2.5 of the Consent Order).
- 2) Submit a **complete** Major Use Permit and Coastal Development Permit application to the City of Encinitas by November 8, 2009 (pursuant to Section 2.4.2 of the Consent Order).
- 3) Submit a **complete** Coastal Development Permit application to the Commission's San Diego District office by January 7, 2010 (pursuant to Section 2.4.1 of the Consent Order).
- 4) Submit a Permanent Erosion Control Plan to the Executive Director by November 8, 2009 (pursuant to Section 2.9 of the Consent Order).

- 5) Submit an Interim Erosion Control Plan to the Executive Director by November 8, 2009 (pursuant to Section 2.10 of the Consent Order).
- 6) Additionally, pursuant to the Consent Order the first installment of the agreed upon penalty in the amount of \$9,000 was due on November 1, 2009. As of today, we have also **not** received the required settlement monies.

As detailed above, we have not received any of the items required by the Consent Order, and therefore you are in violation of the terms and conditions of the Consent Order. Therefore, you must immediately comply with the terms and conditions of the Consent Order, which includes submittal of the penalty payments, plans, and complete permit applications. In addition, pursuant to Section IX of the Consent Order, this letter is also a formal demand for stipulated penalties in the amount **\$458,000**. This payment is due no later than 15 days of receipt of this written demand.

Please be advised that, Section IX.B of the Consent Orders states:

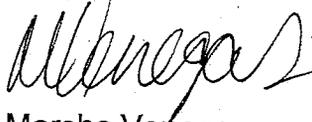
*Strict compliance with this Consent Order by all parties subject thereto is required. Failure to comply with any term or condition of this Consent Order, including any deadline contained in this Consent Order, unless the Executive Director grants an extension under Section X (in which case failure to comply with that deadline shall have the same effect), shall constitute a violation of this Consent Order and shall result in Respondents being liable for **stipulated penalties in the amount of \$750 per day per provision of the Order violated. Respondents shall pay stipulated penalties within 15 days of receipt of written demand by the Commission for such penalties regardless of whether Respondents have subsequently complied.** If Respondents violate this Consent Order, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, in addition to these stipulated penalties, including the imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30821.6, 30822 and 30820 as a result of the lack of compliance with the Consent Order and for the underlying Coastal Act violations as described herein. (Emphasis Added).*

Clearly, your failure to comply with the requirements of the Consent Order has caused stipulated penalties to accrue. By signing the Consent Order and agreeing to its terms, you have agreed to pay such stipulated penalties. Additionally, penalties continue to accrue daily \$4500 each day you are not in compliance with the order. However, Commission staff would like to continue working with you amicably to bring your order back into compliance.

Commission staff would like to continue to coordinate with you to resolve the violations that remains on your property and the ongoing violations of the Consent

Order. Thank you in advance for your cooperation. If you have any further questions regarding order compliance please contact me at (619) 767-2370 or send correspondence to the address on the letterhead.

Sincerely,



Marsha Venegas
San Diego District Enforcement

cc: Lisa Haage, Chief of Enforcement
Sherilyn Sarb, Deputy Director
Deborah Lee, San Diego District Manager
Lee McEachern, Supervisor, Planning and Regulation
N. Patrick Veasart, Enforcement Supervisor
Aaron McLendon, Statewide Enforcement
Roy Sapau, City of Encinitas

CALIFORNIA COASTAL COMMISSION

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



November 19, 2010

FILE COPY

Mike Brown
5201 Beach Drive SW
Seattle, Washington 98136

Dear Mr. Brown:

On October 7, 2010, Lee McEachern, the Coastal Commission's San Diego Coast District Regulatory Supervisor, and I discussed with you several issues that you have raised related to your compliance with Consent Cease and Desist Order No. CCC-09-CD-05 ("Consent Order"). The following is a list of these issues:

1. You claim that financial institutions that might provide you with a loan (that is needed to fund the project) have expressed concerns regarding the Commission's recorded Notice of Violation ("NOVA") on your property located at 836-838 Neptune Avenue in the City of Encinitas and its potential impacts to the lenders security interests.
2. You requested additional time to submit necessary information and undertake work required by the terms and conditions of the Consent Order to be able to address the issues raised by your lenders. More specifically, you claim that you need more time to obtain necessary permits required by the City of Encinitas to a) undertake the work required by the Consent Order and b) to seek after-the-fact authorization, as provided for in Section X of the Consent Order, for development that you installed on your property without a coastal development permit.
3. You do not feel that you should have to pay the applicable permit fees provided for in California Code of Regulations ("CCR") Section 13055(d) for after-the-fact development, as further detailed by the non-filing letter sent by Commission staff on March 30, 2010.

The intent of this letter is to memorialize our discussions on September 28th and October 7, 2010 related to the issues listed above and to provide further clarification to help address your concerns. Regarding the first matter listed above, as I expressed to you in telephone conversations a recorded NOVA **does** establish the following:

- Protects innocent purchasers of property where outstanding violations exist.
- Avoids creating additional complications associated with a potential sale to an uninformed party.
- Provides notice in the property's chain of title to prospective purchasers that a violation of the Coastal Act has occurred.

A recorded NOVA **does not** establish the following:

- A lien on the property in favor of the Commission, or any other financial interest in the subject property.
- Entitle the Commission to any source of income generated by the sale, lease, or any other act.
- Prohibit a sale of the property from occurring.

Once again, neither the recorded NOVA nor the Consent Order results in any financial interest or stake in the subject property; the Consent Order simply establishes deadlines and actions necessary to resolve outstanding Coastal Act violations and the NOVA only provides a notice provision for prospective purchasers of property.

However, failure to meet the agreed upon deadlines established in the Consent Order or the actions required by the Consent Order to resolve the violations could result in payment of stipulated penalties, as you agreed to and as provided for in Section X of the Consent Order.

On October 28, 2010, I received a letter from you via facsimile that requested an amendment to the Consent Order that would insert language that you believe would satisfy alleged concerns of your prospective lender(s). While we are not amenable to amending the Consent Order, as I have previously indicated, Commission staff has, on numerous occasions, discussed with financial institutions issues related to the factual implications of a recorded NOVA, and we are more than happy to talk with your prospective lender(s) and explain the effects of the NOVA and we remain willing and ready to work with you and your lender(s) to address any concerns you or they may have. Unfortunately, you have refused to provide us with the name or contact information for your prospective lender(s). However, while we have made every effort to address your concerns, we feel that the information in this letter addresses the concerns purportedly raised by your prospective lender(s). Please feel free to share this letter with your prospective lender(s) and let them know we are willing to discuss with them the NOVA recorded on your property and the requirements of the Consent Order.

Your second issue that you raised relates to a request to extend the deadlines in the Consent Order to address the issues raised by your lenders and to allow you more time to obtain a Major Use Permit ("MUP") and coastal development permit ("CDP") from the City of Encinitas to undertake work required by the Consent Order and for work that you wish to have approved "after-the-fact". As you know, the unpermitted development subject to the Consent Order on your property is subject to the jurisdiction of both the City of Encinitas (the City) and the Commission. As you also know, this development requires a MUP from the City and CDPs from both the City and the Commission. In an effort to facilitate and streamline the permit process necessary to resolve the violation, the City and the Commission have agreed that you may proceed with a consolidated permit process for the necessary CDP. This process requires you to finalize the MUP permit process with the City. Once completed, the Commission can then process the CDP for the whole project including, but not limited to, obtaining a regular CDP for the work undertaken under Emergency

Permits 6-96-82-G, 6-96-110-G, 6-01-012-G, 6-00-171-G, and 6-01-042-G and the removal of unpermitted development consisting of the unpermitted riprap revetment, gravel on the top of the bluff, and the patio deck. If you are in agreement, please submit a written statement acknowledging your agreement to the consolidated permit process by **November 30, 2010**. Additionally, please take all the necessary steps to finalize your MUP application with the City and your CDP application with the Commission to help expedite the process.

The last issue raised in your letter was your continued refusal to pay the necessary permit fees required by 14 CCR Section 13055 (d)). On March 1, 2010, Mr. McEachern and I both specifically informed you that we would accept the application with a check for \$5,000 as the minimum necessary to accept the application and would follow up with the total amount needed to deem the application "complete" within 30 days. The additional fees are noted in your non-filing letter dated on March 30, 2010. As we have discussed with you on numerous occasions, the Commission's regulations are very clear with respect to the permit fees for "after-the-fact" CDP applications. The regulations explicitly state that the permit fees for after-the-fact CDP applications are five times the amount of a regular CDP application, and, under very limited circumstances, can be lowered to, at a minimum, two times the amount of a regular CDP application. When you submitted a permit fee of \$5,000 with your CDP application, we informed you at that time that we would accept the application with that amount and would follow up with you to collect the total amount provided for in the Commission's regulations. In a March 30, 2010 non-filing letter, staff indicated, among other things, that an additional amount of \$24,000 is required to complete your CDP application. For your convenience, a copy of the March 30th letter is enclosed.

As I previously explained to you, the permit fees are separate and not associated with the settlement monies agreed upon pursuant to the Consent Order. In order to fully resolve the violations on your property by satisfying each of the Commission's claims for relief for violation of the Coastal Act (injunctive relief, monetary penalty) the

Consent Order required you to 1) remove unpermitted development, or obtain authorization for the development after-the-fact, 2) cease and desist from conducting further unpermitted development and from maintaining existing unpermitted development, and 3) settle the Commission's claims for monetary relief for the violations of the Coastal Act on your property. As described above, permit fees are necessary to process your application to remove unpermitted development and retain certain development after-the-fact, as required by the Consent Order. They are not penalties for violating the Coastal Act, which are provided for separately in Chapter 9 of the Coastal Act.

Pursuant to 14 CCR Section 13055(d), the reduction of ATF permit fees is allowable if 1) an ATF permit application can be processed without significant additional staff time or 2) the owner did not undertake the development for which the owner is seeking the ATF permit, but in no event shall the ATF CDP application fees be lower than two times the regular amount. In your case, you did undertake the unpermitted development and, up to this point, staff has expended additional time to process your application. However, as I stated in our October 7, 2010 telephone conversation, Commission staff may be willing to reduce the permit fees to **no less** than the statutory minimum of two times the regular permit fee (\$10,000) in order to facilitate the resolution of the violations on your property. Therefore, please submit a check in the amount of \$5,000 payable to the California Coastal Commission by **November 30, 2010** to meet the statutory minimum fee required to process your permit. Once you submit all the necessary information to process your application as detailed in the non-filing letter March 30, 2010, staff, in the spirit of good faith and cooperation, will determine at that time whether or not your application can be processed without additional staff time and may adjust the fee accordingly. However, if it is determined that significant staff time will be necessary to process your application; you will need to pay the total required fee amount at that time.

Staff has previously indicated to you that the geotechnical reports you have submitted are out of date and provide insufficient information necessary to adequately review your application. New and updated reports are required to complete your application. Failure to submit **all** of the items necessary to complete your application including an additional \$5,000 at this time to bring your application fees to the statutory minimum constitutes non-compliance with the Consent Order and may result in stipulated penalties as described in Section IX. B of the Order.

It is our hope that you will cooperate with staff to ensure compliance with the terms and conditions of the Consent Order. Therefore, please submit all of the remaining items detailed in your non-filing letter by **January 30, 2011**. Thank you in advance for your cooperation. If you have any further questions regarding the issues discussed, please feel free to send correspondence to the address on the letterhead.

Sincerely,



Marsha Venegas

San Diego District Enforcement

San Diego District Enforcement

cc: Lisa Haage, Chief of Enforcement
Sherilyn Sarb, Deputy Director
Deborah Lee, San Diego District Manager
Lee McEachern, Supervisor, Planning and Regulation
Andrew Willis, Enforcement Supervisor

Enclosure: Non-filing Letter for CDP No. 6-10-18 sent to Mike Brown on March 30, 2010.

CALIFORNIA COASTAL COMMISSION

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

**SENT VIA CERTIFIED AND REGULAR U.S. MAIL AND FACSIMILE**

July 28, 2011

Mike Brown
5201 Beach Drive SW
Seattle, Washington 98136
(Certified Mail Article No. 7001 2510 0009 4003 9843)

836-838 Neptune Ave.
Encinitas, CA 92024
(Certified Mail Article No. 7001 2510 0009 4003 9874)

Re: NOTICE OF NON-COMPLIANCE to Consent Order No. CCC-09-CD-05

Dear Mr. Brown:

The purpose of this letter is to again inform you that you are not in compliance with Consent Cease and Desist Order CCC-09-CD-05 ("the CO"), which you signed and agreed to and which was issued by the Commission on September 9, 2009.

After careful review of the materials submitted by you to the Executive Director ("ED") of the California Coastal Commission ("Commission"), we have determined that you still have not submitted any of the following items, each of which you were required (by the CO) to submit long ago:

- 1) a Permanent Erosion Control Plan (see CDO § 2.9.1);
- 2) an Interim Erosion Control Plan (see CDO § 2.10);
- 3) a complete Removal Plan (see CDO §§ 2.3 & 2.5.1) and;
- 4) a complete coastal development permit ("CDP") application to the Commission¹ (see CDO § 2.4.1.1).

As a result of your non-compliance with the Consent Order (which was intended to resolve the underlying violations), the unpermitted deck and rock revetment remains on (or seaward of) your property; and the seawall, retaining wall, and gravel located on the coastal bluff on your property is not authorized and therefore may not be consistent with the Coastal Act or the City's certified Local Coastal Program. As you know, you signed and agreed to the terms and conditions and the issuance of the CO, and that document constitutes both a governmental order and a binding contract meant to provide a path to resolution of the outstanding violations of the Coastal Act of which we are aware on your property. Commission staff has repeatedly attempted to work with you to bring you into compliance with the terms of the Consent Order and

¹ Failure to submit a complete CDP application to the Commission by January of 2010 also triggered yet another requirement for a removal plan. See CDO § 2.4.1.2.1.

the Coastal Act. We are still more than willing to do so and welcome your cooperation to this end.

You have claimed repeatedly, during numerous telephone conversations with Commission staff and in written correspondence to same, that you cannot comply with the CO because the City will not process your permit application. Setting aside the alleged issues you believe you have with the City's permitting process, some of the requirements of the CO are for actions that do not need additional action or CDP from the City or the Commission and should have been completed long ago. For example, Section 2.3 of the CO imposes the following requirement:

Within 60 days of the issuance of this Consent Order, submit a removal plan for the following unpermitted or temporarily permitted development:

2.3.1 All portions of the deck on the subject property that are within five-feet of the top edge of the bluff.

2.3.2 The rip-rap placed seaward of the existing seawall on the subject property.

Section 2.9.1 of the CO states (in relevant part):

Within 60 days of issuance of this Consent Order, Respondents agree to submit, [. . .] a Permanent Erosion Control Plan for the bluff face to: (a) to (sic) revegetate all portions of the bluff face on the Subject Property disturbed by the unpermitted development (or development placed under temporary authorization) or during the removal of the unpermitted development, with native vegetation.

Additionally, Section 2.10 of the CO states (in relevant part):

Within 60 days of issuance of the Consent Order, Respondents agree to submit, [. . .] an Interim Erosion Control Plan. The Interim Erosion Control Plan shall include measures to minimize erosion across the site (to be implemented during the removal process conducted pursuant to this Consent Order), which may enter into coastal waters.

The Consent Order was issued on September 9, 2009. Therefore, a Removal Plan to address the unpermitted deck and rock revetment, a Permanent Erosion Control Plan, and an Interim Erosion Control Plan were to be submitted to the ED by November 9, 2009, as required by the CO (and as you agreed to by your signature on the CO). However, to date, the only plan that we have received from you is an unacceptable Removal Plan. This plan is not compliant with the terms of the Consent Order, unfortunately, and only includes removal of the deck and not the rock revetment on the beach. Again, no alleged delays on the part of the City or the Commission in processing your CDP application should have prevented the timely submittal of the Removal Plan, Permanent Erosion Control Plan and Interim Erosion Control Plan. To date, the unpermitted deck and rock revetment continue to exist on your property as unpermitted development in violation of the Coastal Act and the terms of the CO.

As detailed above, you are also in non-compliance with the CO requirement to submit a complete CDP application to the Commission to request after-the-fact authorization

for the construction of a shoreline protective device and bluff face development. As you know, this provision was included at your request and reflected your desire to retain some shoreline protection here. However, any such measure requires legal authorization. Since you did not obtain such authorization in the first instance, the CO provided a means to address the situation.

As you know, the unpermitted development on your property subject to the CO is subject to the jurisdiction of both the City and the Commission. Section 2.4.1.1 of the CO requires that:

Within 120 days from the issuance date of this Consent Order, or within such additional time as the Executive Director may grant for good cause as per Section X, Respondents shall submit to the Commission's San Diego District Office all materials that are required to complete a Coastal Development Permit ("CDP") application. Necessary geotechnical and engineering documents shall be prepared by a professionally licensed engineer. The application shall address all alleged violations that are listed in Section III that are within the Commission's permitting jurisdiction except for development identified in and addressed in Sections 2.3 and 2.5, which is to be removed under this Consent Order.

Additionally, Section 2.4.2.1 of the CO requires:

Within 60 days from the issuance date of this consent Order, or within such additional time as the Executive Director may grant for good cause as per Section X, Respondents shall submit to the City of Encinitas ("City") all materials that are required to complete a CDP application, and a Major Use Permit application, which shall address all alleged violations identified in Section III, except for development identified in and addressed in Section 2.3 and 2.5, which is to be removed under this Consent Order, on the subject property that is located within the City's Coastal Act permitting jurisdiction. Necessary geotechnical and engineering documents shall be prepared by a professionally licensed engineer.

As indicated in the above-referenced sections of the CO, the deadline to submit to the City a complete Major Use Permit ("MUP") application was November 9, 2009; and, the deadline to submit to the Commission a complete CDP application was January 9, 2010. However, neither office received a completed application by the deadlines found in the CO - in violation of Sections 2.4.1.1 and 2.4.2.1 of the CO. Commission staff received an incomplete CDP application from you on March 1, 2010 and subsequently sent you a "non-filing" letter dated March 30, 2010, indicating that the application was so incomplete that Commission staff was unable to "file" the application. This letter identified all materials needed to complete your application. These additional materials were necessary to adequately review your application. Unfortunately, staff has yet to receive the requested materials.

Almost a year after the deadlines to submit the required MUP application, during a October 7, 2010 telephone conversation with Commission staff (Lee McEachern and Marsha Venegas), you requested an extension of time to submit a MUP application to the City. In our continued attempt to work with you and help facilitate the resolution of your violations, in a letter dated November 19, 2010, Commission staff offered to streamline the permitting process by utilizing the "consolidated CDP" option established in Section 30601.3 of the Coastal Act. This option would have allowed

you to finalize the MUP process with the City and, once the MUP was issued, the Commission would process the CDP for the whole project (instead of your having to obtain a separate CDP from both the City and the Commission). Commission staff requested that you submit, by November 30, 2010, a letter acknowledging your agreement to this process. Unfortunately, Commission staff never received even an acknowledgment of our proposal, and we can only assume that you have rejected the option of a consolidated permit process, which would have sped up the process and allowed you to move forward with resolving the violations and complying with the CO and the Coastal Act. This lack of response to our suggestions to aid you in your compliance with the CO and Coastal Act requirements is disappointing and results in further delays and noncompliance with the CO and Coastal Act.

Recently, City planning staff informed us that you submitted a complete MUP application to the City on June 2, 2011 after it had been deemed inactive for more than six months.

Over the last several years we expended considerable staff time working with you to resolve this matter. This has included: writing numerous letters; spending many hours in telephone conversations with you; working with you to finalize a Consent Order that established a mechanism for you to fully resolve the subject violations; preparing and recording a Notice of Violation on your property; and expending considerable effort to help you through both the Commission's CDP process and the City's process. Despite this effort, and after all this time, you have failed to satisfy the elements of the CO. We have made every effort to work with you to resolve your violations and comply with the CO. Unfortunately, these efforts have all been unsuccessful and it appears that we may be forced to refer this case to the State Attorney General's office to compel compliance with the terms and conditions of the Consent Order and Coastal Act.

In addition to the above, this letter also serves as a second demand for stipulated penalties as provided by the CO. The first formal demand was made to you by Commission staff in a letter dated February 17, 2010, but the agreed-upon stipulated penalties were never paid. As you know, Section IX B. of the CO states:

Strict compliance with this Consent Order by all parties subject thereto is required. Failure to comply with any term or condition of this Consent Order, including any deadline contained in this Consent Order, unless the Executive Director grants an extension under Section X (in which case failure to comply with that deadline shall have the same effect), shall constitute a violation of this Consent Order and shall result in Respondents being liable for stipulated penalties in the amount of \$750 per day per provision of the Order violated. Respondents shall pay stipulated penalties within 15 days of receipt of written demand by the Commission for such penalties regardless of whether Respondents have subsequently complied. If Respondents violate this Consent Order, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, in addition to these stipulated penalties, including the imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30821.6, 30822 and 30820 as a result of the lack of compliance with the Consent Order and for the underlying Coastal Act violations as described herein.

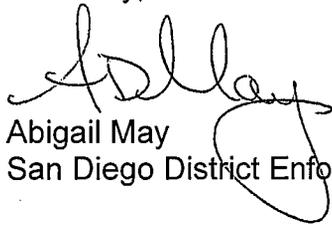
Your failure to submit complete Removal Plans, Permanent Erosion Control Plans and Interim Erosion Control Plans to Commission staff, and to implement those plans, and to submit a completed CDP application to the Commission subjects you to the agreed-upon stipulated penalty amount for each day in which you have been in violation of each provision, beginning from the first deadline of November 9, 2009. Please immediately remit your payment of stipulated penalties to the California Coastal Commission, attention Aaron McLendon, 200 Oceangate, 10th Floor, Long Beach, CA 90802.

As always, we remain willing to work with you to resolve what are now violations of the CO as well as the Coastal Act. If you are willing to take the steps required by the Consent Order, albeit belatedly, please contact us by August 5, 2011. Unless you contact us by the above date and thereafter comply with the terms and conditions of the CO immediately, Commission staff will be forced to refer your case to the State Attorney General's office to enforce compliance with the Coastal Act and the CO in a court of law.

This letter represents your last chance to work amicably with Commission staff to resolve the violations that remain on your property and the ongoing violations of the Consent Order without referral to the Attorney General. Please be advised that if you choose to continue to avoid your obligations, further legal action will be forthcoming.

If you have any further questions regarding order compliance, please contact Aaron McLendon at (562) 590-5071 or send correspondence to the address on the letterhead.

Sincerely,



Abigail May
San Diego District Enforcement

cc: **Lisa Haage, Chief of Enforcement**
Sherilyn Sarb, Deputy Director
Deborah Lee, District Manager
Lee McEachern, District Regulatory Supervisor
N. Patrick Veesart, Enforcement Supervisor
Alex Helperin, Staff Counsel
Aaron McLendon, Statewide Enforcement
Roy Sapau, City of Encinitas

CALIFORNIA COASTAL COMMISSION

San Diego Coast District Office
7575 Metropolitan Dr., Suite 103
San Diego, CA 92108-4402
(619) 767-2370

FILE COPY**SENT VIA CERTIFIED AND REGULAR U.S. MAIL**

September 30, 2011

Mike Brown
5201 Beach Drive SW
Seattle, Washington 98136
(Certified Mail Article No. 7002 0460 0003 8134 3241)

836-838 Neptune Ave.
Encinitas, CA 92024
(Certified Mail Article No. 7002 0460 0003 8134 3258)

Re: NON-COMPLIANCE to Consent Order No. CCC-09-CD-05

Dear Mr. Brown:

The purpose of this letter is to respond to your letter to me dated August 2, 2011. In your letter you assert that you are in compliance with the Consent Cease and Desist Order ("CO"), which you signed and agreed to, and which was issued by the California Coastal Commission ("Commission") on September 9, 2009. Despite your assertions to the contrary, Commission staff has reviewed the requirements of the Consent Order as well as current site status, and found that unfortunately, the record clearly supports the conclusion that you are and continue to be in violation of the CO. We have addressed this non-compliance and asked for your cooperation in coming into compliance with the CO in letters dated February 17, 2010; March 30, 2010; November 19, 2010; and July 28, 2011. The purpose of our letters, including this one, is to point out your legal obligations and work with you to achieve expeditious compliance with the Consent Order.

As discussed in numerous previous correspondence dated February 17, 2010; March 30, 2010; November 19, 2010; and July 28, 2011 and as is evident from the clear terms of the Consent Order itself, the CO requires the submittal of a Removal Plan (for the removal of unpermitted rock riprap placed on the beach and an unpermitted deck, among other things), a Permanent Erosion Control Plan, and an Interim Erosion Control plan, among other things. The CO required submittal of these plans and authorized the work that will be carried out by implementing these plans that were authorized by the Consent Order. As you know and as we have told you on numerous occasions, no coastal development permit ("CDP") is required to prepare, submit, or carry out these plans. Therefore, there is no reason for the continued failure to submit these plans, nor

is there validity to your repeated assertion that the permitting process between the City and the Commission has somehow contributed to your delay and failure to comply with the portion of the Consent Order pertaining to said plans.

In addition to your failure to submit the required plans and submit a complete coastal development permit ("CDP") application to the Commission as required by the agreement, you have also not responded to our offer of processing your CDP applications as a "consolidated permit", which would streamline the permitting process and could potentially save you both time and money. Currently, the CO requires you to apply for two CDPs, one from the Commission and one from the City of Encinitas ("City"). As background, in 1996, 2000, and 2001 you were granted five emergency permits from the Commission. These temporary emergency permit approvals were specifically conditioned on you, the applicant, returning to the Commission's San Diego District Office within 90 days to obtain regular CDPs to permanently authorize the temporary emergency development on your property. This was not done. Because you did not return to obtain regular CDPs, the temporary emergency permits given to you for grading the bluff slope, and building a seawall and a rock revetment expired 90 days after you originally received them and the temporarily authorized development became unpermitted. The CO required you to obtain regular CDPs from the Commission to permanently authorize the emergency development constructed on your property. The CO was our attempt to work with you to resolve these issues, and bring you into legal compliance with the requirements of the law.

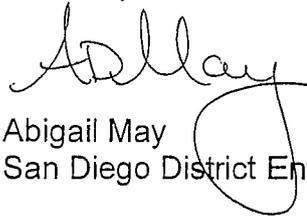
The CO separately required you to obtain a permit from the City to authorize unpermitted development not authorized by an emergency permit or any other permit, such as grading of the bluff slope and placement of gravel on the bluff face, since these actions would normally be in the City's permit jurisdiction. You failed to meet the deadlines of either of these requirements, putting you in non-compliance with the CO and subject to stipulated penalties. We do note that you finally submitted a complete permit application to the City on June 2, 2011, twenty months past the deadline, which is currently being processed. This does not, however, address the need for a CDP to authorize the development originally addressed by the expired Emergency Permits you received from the Commission, nor the legal requirements of the Coastal Act and Consent Order.

We have worked with the City to come up with a means—the consolidated permit—which would efficiently address all the outstanding permit obligations. A consolidated permit process would entail you receiving a Major Use Permit from the City of Encinitas, then applying for a Coastal Development Permit from the Coastal Commission for all of the unpermitted development, the temporarily authorized emergency work done and the unpermitted development that never received any type of permit. This would allow you less confusion by not having to apply for separate CDPs from the City and Commission for the different types of unpermitted development on your property. Yet, despite our attempts to help

you through this process you continue to assert that your non-compliance has been caused by the differences between the City and the Commission. This is not the case. In fact, the City and the Commission have worked together cooperatively in our mutual efforts to get you to resolve your violations. It was for this very reason that both the City and commission agreed to allow you to go through the consolidated permit process. In November of 2010 Commission staff requested your written acknowledgement of agreement to the consolidated permit process, as is required by the CO and California Code of Regulations. As of today we have not received a response. Please send us a written acknowledgement of agreement to the consolidated permit process by October 14, 2011 or we will assume that you intend to pursue two separate CDP applications from the City and the Commission to authorize the unpermitted development on your property.

Unfortunately, your letter did not reflect a willingness to comply with the CO, did not respond to our offer to proceed with the consolidated permit process, and instead simply repeated your arguments made in previous letters that we have previously addressed and explained in our responses. We have made every effort possible to get you to comply with the CO, sending numerous letters requesting that you comply, responding to your explanations of why you have yet to comply, and, yet have not obtained compliance. We are still willing to work with you to come into compliance with the requirements and deadlines contained in the Consent Order and hope that this letter reiterating the issues will assist us in such an agreement, but if you do not do so immediately, we will be forced to refer your violation case to the State Attorney General to initiate litigation to compel you to comply with the CO and resolve the outstanding violations on your property. Please contact me by October 14, 2011 to express how you intend to resolve the outstanding Coastal Act violations on your property. I can be reached at (619) 767-2370.

Sincerely,



Abigail May
San Diego District Enforcement

cc: Lisa Haage, Chief of Enforcement
Sherilyn Sarb, Deputy Director
Deborah Lee, District Manager
Lee McEachern, District Regulatory Supervisor
N. Patrick Veasart, Enforcement Supervisor
Alex Helperin, Staff Counsel
Aaron McLendon, Statewide Enforcement
Roy Sapau, City of Encinitas

CALIFORNIA COASTAL COMMISSION

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

**SENT VIA CERTIFIED AND REGULAR U.S. MAIL****FILE COPY**

October 14, 2011

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056
(Certified Mail Article No. 7002 0460 0003 8134 3272)

836-838 Neptune Ave.
Encinitas, CA 92024
(Certified Mail Article No. 7002 0460 0003 8134.3289)

Re: NOTICE OF NON-COMPLIANCE with Cease and Desist Order No. CCC-09-CD-05

Dear Mr. Brown:

Thank you for your letter dated October 10, 2011 and for speaking with me by telephone on the same day. I am writing in response to your letter and to memorialize and respond to issues discussed in our telephone conversation. In your letter and our telephone conversation we discussed your outstanding obligations and continuing non-compliance with Consent Cease and Desist Order CCC-09-CD-05 ("the CO") which you signed and agreed to and which was issued by the California Coastal Commission ("Commission") on September 9, 2009. Pursuant to the CO, your obligations continue to be the same obligations you agreed to and the Commission approved over two years ago, and as stated in our letters to you dated February 17, 2010, March 30, 2010, November 19, 2010, July 28, 2011, and September 30, 2011.

First, thank you for your written agreement to the consolidated permit process included in your October 10, 2011 letter. We will notify the City of Encinitas ("City") that they need only process a Major Use Permit ("MUP") for the development on your property, for which you are seeking after-the-fact approval, as required by the CO. Following the City's MUP process, you will need to submit your coastal development permit ("CDP") application materials to the Commission's San Diego District office. As required by the Consent Order, the CDP application submission to Commission staff must include materials to support a request for after-the-fact approval of all items temporarily authorized under Emergency Permits 6-96-82-G, 6-96-110-G, 6-01-012-G, 6-00-171-G, and 6-01-042-G that remain on the property, and all additional development on the property that was placed, constructed, and/or erected on the property without the benefit of a CDP described under Section III of the CO. Please submit these materials immediately so that Commission staff may begin processing your CDP application as soon as the City completes your MUP, but no later than 60 days after the MUP completion. If Commission staff has your materials prior to the City's completion of the MUP we can avoid any lapse in time between the permitting

processes and assist you in coming into compliance with the CO and Coastal Act as soon as possible.

Second, in our telephone conversation, you indicated that you will not submit the Removal Plan required by the CO for the removal of an unpermitted rock revetment on the sandy beach and a deck on the edge of the bluff because you believe you first need approval from the City and the Commission before you can use equipment on the beach to remove the unpermitted development. As we have explained to you on a number of occasions, this is incorrect. You do not need City or Commission staff approval prior to simply submitting a plan to remove unpermitted development pursuant to requirements of a cease and desist order, and in fact, the Consent Order requires submittal of this plan. Under § 2.6.1 of the CO, once you submit a Removal Plan it will be reviewed by the Executive Director of the Commission. If changes are necessary, you will be asked to revise and resubmit the plan. Once the Removal Plan is found acceptable by the Executive Director, you must implement the plan within 15 days. While you may possibly need permission from other local and/or State agencies to access the beach to remove the unpermitted rock revetment, no CDP is necessary to implement the Removal Plan once it is approved by the Executive Director, and no approvals are necessary prior to submittal of the Removal Plan. Moreover, any other agency approvals should have been sought and received by now. If you have not attempted to receive these other agency permission, which we again note should have been done over two years ago, please contact me and I can direct you to the appropriate agencies. Furthermore, as you know, there are no other requirements for the removal of the portions of the deck that are required to be removed under the CO. Therefore, please submit by no later than November 11, 2011 a Removal Plan to Commission enforcement staff as per the requirements of the CO §§ 2.3 & 2.5.1.

Third, in our October 10 telephone conversation, you stated that you will also not submit an Interim Erosion Control Plan or a Permanent Erosion Control Plan to the Commission because you believe that a landscaping plan that you submitted to the City is sufficient to meet the requirements of the Commission-issued Order. While this purported landscaping plan may address some erosion issues on the site, we have neither had the opportunity to review this plan, nor found it consistent with the requirements of the CO. Submission of a landscaping plan to the City does not fulfill your obligations under the CO. All plans required under the Commission's CO must be submitted to the Commission for review and approval. Therefore, please submit no later than November 11, 2011 an Interim Erosion Control Plan and a Permanent Erosion Control plan prepared by a professionally licensed engineer to Commission enforcement staff as per the requirements of the CO §§ 2.3 & 2.5.1.

To summarize these last two points, you agreed, through the signing of the Consent Order, to submit certain plans to address 1) the removal of unpermitted development (rock revetment at the toe of the bluff and on the sandy beach and deck) and 2) temporary and permanent erosion problems on and within the coastal bluff on your property. This requirement was written clearly and you have had every opportunity to review this requirement prior to signing the agreement. We have now been attempting for several months to get you to submit these plans, to allow us to review them and

determine if they are consistent with the goals and requirements of the CO. We obviously have been patient in the process of complying with these requirements, but the time has come for you to, once and for all, submit these plans, and once approved, carry out the removal of the unpermitted rock revetment and install the necessary erosion control measures. Please note that any new deadlines for material submissions to the Commission's San Diego District Office included in this letter do not constitute tolling of stipulated penalties for violations of the CO. You continue to be in violation of the CO and subject to stipulated penalties for each day that you have not submitted materials in violations of deadlines as provided in the CO.

Fourth, in your October 10 letter, you made a statement to the effect that you assume that Commission staff would rather you pay your scheduled "\$9,000 fine" than initiate litigation against you. This statement appears to confuse your obligations under the CO and your current non-compliance with the CO. Your \$9,000 installment due November 1, 2011 is not an additional fine assessed because of your current non-compliance with the CO. Under the terms of the CO, you agreed to pay \$45,000 to settle your financial liability for violations of the Coastal Act pursuant to Section 30820 A and B, and, as an accommodation to you, we agreed to have this payment made over time. The CO provided for a payment plan in which you would pay the Commission \$9,000 annually, with the first payment of \$9,000 due November 1, 2009, and four additional annual payments through November 1, 2013, totaling \$45,000. You have submitted two payments as of today's date, with the third of five payments due on November 1, 2011, as you agreed to by your signature on the CO.

As you know, you agreed to pay stipulated penalties in the amount of \$750 per day for per violation of the CO under CO Section IX B. The purpose of such a stipulated penalty provision is to ensure compliance with the terms of the agreement after it is reached. We have been trying to obtain such compliance, so that we can resolve the Coastal Act violations here, and to avoid additional harm to coastal resources. Aside from the failure to submit a complete CDP application, which we feel is a violation of the CO, you admit to not submitting the required Removal Plan (and removing the rock revetment and deck) and Interim and Permanent Erosion Control Plans (and implementing those plans), which is a clear violation of the CO. Stipulated penalties for violating the terms and conditions of the CO are separate and apart from resolving your financial liability for the initial Coastal Act violations. Therefore, this letter serves as the third demand for stipulated penalties as provided by the CO. The first demand for stipulated penalties was made by Commission staff in a February 17, 2010 letter to you and the second demand was made in our July 28, 2011 letter to you. The accrual of stipulated penalties has been running from the date of the failure to submit the plans discussed above (and to implement those plans), as a requirement of the CO. However, even if we assume that the violations of the CO began from the date of our first "non-compliance" letter and demand for stipulated penalties, which would be our February 17, 2010 letter, the number of days of non-compliance, and the associated daily stipulated penalty accrual, runs for over 1½ years. Our primary goal is to have you fully comply with the CO, and we would like to work with you to reach this goal. If you choose to work with us and comply with the CO and submit the requested information discussed in this letter, we can discuss how to best address the stipulated

penalty issues related to violations of the CO. Please contact me immediately so we can discuss how you plan to comply with the terms and conditions of the CO.

Fifth, in your October 10 letter and in our telephone call of the same date, you repeated previous remarks that Commission staff should contact the City planner, Roy Sapau so that he can explain the City's permitting process. Please be advised that Commission staff is quite familiar with the City's permitting process and has continuously worked with the City in a mutual effort to resolve the violations on your property through the tools provided for in the Coastal Act and the City's permitting requirements. In fact, we have been trying for several months now to receive a response from you on the City's and Commission's joint plan to utilize the "consolidated permit process", which both agencies felt would help speed up the permitting process, allow you to commence work more quickly, and likely save you money in processing the permit applications. We are happy that you have finally agreed to this process (something critical for us to legally use this cost and time-saving tool). We want to again assure you that there has been no disconnect between City staff and Commission staff.

Sixth, in our October 10 telephone call, you referred to letters you had written to Commission staff, particularly your letter to Commission staff dated March 1, 2010, as "agreements" between you and Commission staff. This is incorrect. The CO is the sole legally binding agreement between you and the Commission. Your letters to Commission staff do not constitute binding agreements.

Finally, Commission staff has contacted you primarily through certified, mailed letters in order to memorialize our positions regarding your non-compliance with the CO and to avoid lengthy discussions about previously resolved issues. As was evidenced in our October 10, 2011 telephone conversation, you apparently do not accept your legal obligations under the CO, and you assert that inconsistencies between City and Commission permitting jurisdictions are the cause of your non-compliance with the CO. As stated above, in our telephone conversation on October 10, 2011, and in previous Commission staff letters dated February 17, 2010, March 30, 2010, November 19, 2010, July 28, 2011, and September 30, 2011, your legal obligations under the CO are clear and the City and Commission staff are in agreement as to your obligations under the CO and are not disputing the other's jurisdiction.

Once again, Commission staff is appreciative of your agreement to the Consolidated Permit Process and hope that we can now move quickly towards compliance with these and other requirements of the Order. However, in order to become fully compliant with the CO you need to comply with the requirements of the CO, including the following:

1. Submit a Removal Plan for the unpermitted rock revetment and deck on your property to the San Diego District Office by November 11, 2011;
2. Submit an Interim Erosion Control Plan to the San Diego District Office by November 11, 2011;

3. Submit a Permanent Erosion Control Plan to the San Diego District Office by November 11, 2011;
4. Following approval by the Executive Director, implement the approved Removal Plan and Temporary and Permanent Erosion Control Plans within the timeframe established by the CO, specifically, within 15 days after Executive Director approval;
5. Timely complete the MUP process with the City;
6. Immediately upon receiving a City-approved MUP, complete a CDP application, and receive a CDP from the Commission authorizing, after the fact, the unpermitted development on your property, consistent with the terms and conditions of the CO, and;
7. Submit payment of stipulated penalties.

Commission staff remains hopeful that we can resolve this matter without resorting to further legal action and remains willing to do all we can to assist you in complying with the terms of the Consent Order. However, please be advised that if you choose to continue to avoid your obligations, we will be forced to resort to further legal action by the State Attorney General. Thank you for your time and immediate attention to this matter. If you have any further questions regarding order compliance, please contact Aaron McLendon at (562) 590-5071 or send correspondence to the address on the letterhead.

Sincerely,



Abigail May
San Diego District Enforcement

cc: Lisa Haage, Chief of Enforcement
Sherilyn Sarb, Deputy Director
Deborah Lee, District Manager
Lee McEachern, District Regulatory Supervisor
N. Patrick Veasart, Enforcement Supervisor
Alex Helperin, Staff Counsel
Aaron McLendon, Statewide Enforcement
Roy Sapau, City of Encinitas

CALIFORNIA COASTAL COMMISSION

45 FREMONT ST, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260
FAX (415) 904-5400
TDD (415) 597-5885



January 18, 2012

Mike and Pat Brown
3703 Lake Washington Blvd. North
Renton, WA 98056
(Certified Mail Article No. 7006 2760 0005 5883 5255)

836-838 Neptune Ave.
Encinitas, CA 92024
(Certified Mail Article No. 7006 2760 0005 5883 4456)

**Re: Cease and Desist Order No. CCC-09-CD-05 – Response to Mr. and Mrs. Brown
Correspondence, Dated October 20, 2011**

Dear Mr. and Ms. Brown:

I am newly-assigned to your case and look forward to working with you to assure full compliance with the terms and conditions of Consent Cease and Desist Order CCC-09-CD-05 (Consent Order). Thank you for your letter dated October 20, 2011 in response to the October 14, 2011 letter written to you by Ms. Abigail May of the Coastal Commission's San Diego Enforcement Unit. San Diego District staff received your letter on October 21, 2011, via facsimile.

You informed Ms. May, on October 10, 2011, that you believe you first need approval from the City of Encinitas and the Commission before you could use equipment on the beach to remove unpermitted development; therefore, you would not submit the Removal Plan required by the Consent Order for the removal of the unpermitted rock revetment on the sandy beach and the deck on the edge of the bluff. Please understand that you do not need approvals from City of Encinitas or Commission staff prior to submitting a Removal Plan for the unpermitted development.

We are in receipt of your document entitled: *Proposed Sequence for Removal Plan 836-838 Neptune Consent Order CCC-09-CD-05*, dated March 1, 2010. The document, in brief, proposes and presents a schedule of activities and sequence "associated with the necessary landslide repairs". While your October 20, 2011 letter states this document is the "Removal Plan", Commission staff's review of the plan finds that it does not comply with the requirements of §2.5.1 of the Consent Order. Ms. May, in her October 14, 2011 letter, requested that you submit a Removal Plan to Commission enforcement staff by November 11, 2011. I, again, request that you submit the required Removal Plan. Please submit a Removal Plan to Commission enforcement staff, as required by the Consent Order, by no later than **February 8, 2012**. Upon receipt of a Removal Plan, Commission staff will review said plan, provide you with any specific comments, and confirm whether or not the Executive Director has accepted/approved it.

In addition, Sections 2.9.1 and 2.10 of the Consent Order, as explained to you in our July 28, 2011 letter, require that you submit a Permanent Erosion Control Plan and an Interim Erosion Control Plan by November 9, 2009. However, as of the date of this letter, we have not received the required Erosion Control Plan. Please submit an Erosion Control Plan to Commission enforcement staff, as required by the Consent Order, by no later than **February 8, 2012**.

Commission staff agrees that it would be helpful for you and your professional consultants/engineers to meet with respective Commission and City staff regarding permit requirements. We understand that you will be meeting with City staff on January 31, 2012 regarding the MUP process. Mr. Lee McEachern, District Regulatory Supervisor of the Commission staff will be reviewing your Consolidated Coastal Development Permit (CDP) application. Please contact him at 619-767-2370 to arrange a meeting to further review with you the required documents needed in order to file your CDP application as complete.

In response to your inquiry about Commission staff or the Executive Director's understanding of the project activities stated in your Master Use Permit (MUP) application to the City of Encinitas, I provide the following: 1) the MUP is processed by the City of Encinitas for after-the-fact development on your property, not by the Commission; and 2) under consensus of all parties (you, as the property owner, the City of Encinitas, and the Coastal Commission) a consolidated permit in compliance with §30601.3 of the Coastal Act, will be processed by Commission staff as you agreed to in writing in August and October 2011. Again, the CDP will be for all the unpermitted development as more fully described in the Consent Order.

A courtesy copy of the Commission staff letter dated October 14, 2011 was sent to Mr. Roy Sapa'u, City of Encinitas Senior Planner. Mr. Sapa'u informed me on January 11, 2012 that he received and reviewed the letter. You may contact him directly should you have specific questions regarding his review of the Commission's October 14, 2011 staff letter.

Your letter includes a request of names and phone numbers of lenders with whom Commission staff (e.g., Ms. Venegas) may have worked with in the past. We do not have this type of information to provide you as it is beyond the scope of our duties as staff for a state regulatory resource agency. I can, however, assure you that the recorded Notice of Violation of the Coastal Act (NOVA) does not result in any financial interest or stake in the property at 836 - 838 Neptune Avenue in Encinitas. A NOVA:

- Protects innocent purchasers of the property where there are outstanding violations;
- Avoids creating additional complications associated with the potential sale of the property to an uninformed party; and
- Provides notice in the chain-of-title for the property to prospective purchasers that a violation of the Coastal Act has occurred on the property.

Your failure to meet the agreed-upon deadlines established in the Consent Order or the Coastal Commission's actions required by the Consent Order to resolve the violations triggers the requirement to pay stipulated penalties as specified in Section IX of the Consent Order, to which you agreed. Section IX stipulates penalty fees of \$750 per day per violation, which ensure compliance with the terms of the agreement after it is reached. Stipulated penalties have been accruing starting from the first deadline of November 9, 2009. Commission staff letters to you dated February 17, 2010, July 28, 2011, and October 14, 2011 served as formal demands for stipulated penalties, as provided by the Consent Order. The agreed-upon penalties were never paid in response to the requests. Therefore, this letter also serves as the fourth demand for

payment of the stipulated penalty fees. Stipulated penalty fees are not applied to the required CDP application fee; thus, the payment of a stipulated penalty fee cannot be credited towards your permit application fee.

Our primary goal is to have you fully comply with the Consent Order in order to restore damaged resources and reach final resolution of this matter. We would like to work with you to reach this goal. We can discuss how best to address the stipulated penalty issue, which is separate and apart from resolving the Coastal Act violation. Please contact me so we can discuss how you plan to comply with the terms and conditions of the Consent Order.

Commission staff is pleased that you have agreed to the Consolidated CDP application process and your time and efforts to comply are appreciated. I look forward to you achieving our mutual goal of full compliance with the Consent Order. Please feel free to contact me if you have further questions regarding the requirements necessary for you to comply with the Consent Order. You can send your correspondence to the address provided above in the header or contact me via phone at 415-904-5220.

Sincerely,

A handwritten signature in cursive script that reads "Renée T. Ananda".

Renée T. Ananda
Statewide Enforcement Analyst

Lisa Haage, Chief of Enforcement
Sherilyn Sarb, Deputy Director
Deborah Lee, District Manager
N. Patrick Veasart, Enforcement Supervisor, Southern Districts
Lee McEachern, District Regulatory Supervisor
Alex Helperin, Senior Staff Counsel
Aaron McLendon, Statewide Enforcement Supervisor
Roy Sapa'u, Senior Planner, City of Encinitas

Small Group

CALIFORNIA COASTAL COMMISSION

45 FREMONT ST, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260
FAX (415) 904-5400
TDD (415) 597-5885



March 2, 2012

Mike and Pat Brown
3703 Lake Washington Blvd. North
Renton, WA 98056
(Certified Mail Article No. 7006 2760 0005 5883 4562)

836-838 Neptune Ave.
Encinitas, CA 92024
(Certified Mail Article No. 7006 2760 0005 5883 4548)

Re: Cease and Desist Order No. CCC-09-CD-05 – Response to Mr. and Mrs. Brown Correspondence, Dated February 3, 2012 and February 8, 2012; and Staff Comments on “Landscape Improvement Plans” dated May 24, 2011.

Dear Mr. and Mrs. Brown:

Thank you for your installment payment of \$9,000 required by the Consent Order. We received your check on November 4, 2011; a copy of the signed receipt is enclosed for your records.

This letter is a follow-up to our phone discussion on February 7, 2012 as well as a response to your letters to me, dated February 3, and 8, 2012. You and I made several attempts on February 1, 2012 to discuss your recent meeting with the City of Encinitas; however technical difficulties with your mobile phone transmission prevented us from having an uninterrupted conversation. Thank you, again, for returning my calls and for your February 3 and 8 2012 letters, which I received via facsimile in my office on February 6, and 8, 2012, respectively. I also received two sets of plans, one set on February 9, 2012 and one on February 10, 2012. The plans, *Landscape Improvement Plans for Bluff Repairs, Brown Property 836-838 Neptune Avenue, Encinitas, California 92024*, respectively are dated May 24, 2011 and January 8, 2010 (with the exception of the Irrigation Plan sheet “2 of 7” and Site Plan sheet “S-1” being dated 1-27-10). Staff’s review comments are provided in detail later in this letter.

As you know, we are trying, still, to work with you to get you into compliance with the terms of the Consent Order effective upon Commission approval on September 9, 2009. You are still not in compliance with those requirements, as indicated by our prior letters to you. You informed me during our phone conversation on February 6, 2012, that you and your professional engineers met with the City of Encinitas staff on January 31, 2012. You’ve expressed your view that your primary purpose for meeting was to coordinate the “processing requirements” of the City and the Commission with both agencies in one place. The City is currently processing your Major Use Permit (MUP). The January 31, 2012 meeting provided you with an opportunity to review the City’s requirements. While Commission staff was not at that meeting, we are willing to meet with you as you move forward with the Consolidated CDP application process (to which you

agreed to in your letter dated October 10, 2011), to try and assist you in that process and to facilitate your coming into compliance with the Consent Order.

Your February 3, 2012 letter states that the City's "geotechnical consultant mentioned that some of the work might be done now". The "Plan of Removal/Erosion Control Plan" you submitted March 1, 2010, as I informed you in my January 18, 2012 letter and during our conversation, does not meet the requirements of the Consent Order and, therefore, can not be implemented without complying with the legal and technical requirements of the Consent Order and Coastal Act. In response to question as to whether you can assume that Commission staff agrees with the City staff and want this work done now with no further construction permits, I wish to reinforce with you, again, that, pursuant to Section 2.4 of the Consent Cease and Desist Order, you are required to submit a CDP application to allow analysis of the situation, and to obtain legal authorization under the Coastal Act. The CDP application is specifically intended to include the information and materials necessary to support a request for after-the-fact approval of all items temporarily authorized by Emergency Permit Nos. 6-96-82-G, 6-96-110-G, 6-01-012-G, 6-00-171-G, and 6-01-042-G that remain on the property; and all additional unpermitted development on the property that was placed, constructed, and or erected on the property as described in Section III of the Consent Order. The Consent Order specifically requires that you submit the following:

- A permanent Erosion Control Plan (Consent Order Section 2.9.1), within 60 days of issuance of the Consent Order;
- An interim Erosion Control Plan (Consent Order Section 2.10) within 60 days of issuance of the Consent Order;
- A complete Removal Plan (Consent Order Sections 2.3 and 2.5.1) within 60 days of issuance of the Consent Order;
- A complete Coastal Development Permit ("CDP") application to the Commission (Consent Order 2.4.1.1), within 120 days from the issuance date of the Consent Order; and
- A Major Use Permit application to the City of Encinitas, within 60 days from the issuance date of the Consent Order.

The Consent Order was issued on September 9, 2009; therefore, the permanent and interim Erosion Control Plans, and Removal Plan were to be submitted to the Executive Director by November 9, 2009. The Major Use Permit application was to be submitted to the City of Encinitas, also by November 9, 2009. The CDP application was to be submitted by January 9, 2010. You have failed to comply with these requirements of the Consent Order. Again, as I mentioned during our telephone conversations, and as has been reiterated in our prior letters to you, these requirements are still legally applicable and necessary to move towards resolution of the violations on your property.

I provide the following as a brief reminder regarding the permit processes applicable here: 1) the MUP is processed by the City of Encinitas for after-the-fact development on your property, not by the Commission; and 2) in light of the agreement of all parties (you, as the property owner,

the City of Encinitas, and the Coastal Commission) a consolidated permit in compliance with §30601.3 of the Coastal Act, will be processed by Commission staff as you agreed to in writing in August and October 2011.

You informed me that: no work has been conducted on the site over the past 11 years (since June 2001); you will not be going forward until it is clear what is required by the City and the Commission; and that you were unaware that the City had not forwarded to Commission staff a copy of the Landscape and Erosion Control Plan you apparently submitted to them. As we discussed, you are required to submit the Erosion Control Plan and the Removal Plan required by the Consent Order directly to Commission staff, as specified in the Consent Order. You agreed to send me these items in hard copy and pdf by the end of the week of February 6, 2012. Additionally you said that you would provide your engineering professionals with a copy of the Consent Order so that they are informed about the specific requirements for the Erosion Control Plan and the Removal Plan.

You informed me that the two sets of plans entitled "Landscape Improvement Plans for *Bluff Repairs, Brown Property 836-838 Neptune Avenue, Encinitas, California 92024*", one dated January 27, 2010 and the second one May 24, 2011 are the Erosion Control plans for your project. You stated that the May 2011 set is the most recent version that supposedly reflects requests for changes you may have received from the City of Encinitas staff. We really appreciate that you are now taking steps to comply with the Consent Order and although not in compliance with the time frames set out in the Consent Order, hope that we can continue forward to comply with the substantive requirements of the Consent Order. In furtherance of that, comments on the May 2011 plans are provided below.

The requirements under Section 2.9.1 and 2.10 of the Consent Order are set forth below for your convenience, as follows:

2.9 Erosion Control Plan

2.9.1 Within 60 days of issuance of this Consent Order, Respondents agree to submit, for the review and approval of the Executive Director, a Permanent Erosion Control Plan for the bluff face to: a) to revegetate all portions of the bluff face on the Subject Property disturbed by the unpermitted development (or development placed under temporary authorization) or during the removal of the unpermitted development, with native vegetation. The Permanent Erosion Control Plan shall include an exhibit that delineates an area for planting of the native plant species ("Bluff Planting Area). The Bluff Planting Area shall include all portions of the bluff face on the subject property disturbed or graded during the removal of the unpermitted development. The Permanent Erosion Control Plan shall also include and conform to the following requirements:

A. The Permanent Erosion Control Plan shall be prepared by a qualified, acceptable Licensed Landscape Architect or Resource Specialist ("Landscape Specialist") and include a map showing

the type, size, and location of all plant materials that will be planted in the Bluff Planting Area, all invasive and non-native plants to be removed from the Bluff Planting Area, the topography of the site, all other landscape features, and a schedule for installation of plants and removal of invasive and/or non-native plants. The Permanent Erosion Control Plan shall show all existing vegetation. The landscaping shall be planted using accepted planting procedures required by the professionally licensed landscape architect or resource specialist. Such planting procedures may suggest that planting would best occur during a certain time of the year. If so, and if this necessitates a change in the planting schedule, the 14 day deadline to implement the Landscaping Plan in Section 1.4(G), may be extended as provided for under the provisions of Section X herein.

- B. Identification of measures which shall be taken to prevent erosion and dispersion of sediments across the subject property via rain, surf, tide or wind. Such measures shall be provided at all times of the year, in conformance with Section 1.7 of this Consent Order, until the establishment of the revegetation required in the Permanent Erosion Control Plan.*
- C. To minimize the need for irrigation, the vegetation planted in the Bluff Planting Area shall consist only of native, non-invasive, drought-tolerant plants endemic to the North County San Diego coastal bluff area.*
- D. Respondents shall not employ invasive plant species within the Bluff Planting Area which could supplant native and drought tolerant plant species.*
- E. No permanent irrigation system shall be allowed in the Bluff Planting Area. Any existing in-ground irrigation systems shall be removed or permanently blocked. Temporary above-ground irrigation to provide for the establishment of the plantings is allowed for a maximum of three years or until the landscaping has become established, whichever occurs first. If, after the three-year time limit, the landscaping has not established itself, the Executive Director may allow for the continued use of the temporary irrigation system until such time as the landscaping becomes established.*
- F. Plantings shall be maintained in good growing condition throughout the life of the project and whenever necessary shall be*

replaced with new plant materials to ensure continued compliance with the approved Permanent Erosion Control Plan.

G. If temporary safety measures are deemed necessary by the Landscape Specialist for the completion of the Erosion Control Plan, such safety measures may be constructed for use during the duration of the landscaping operations but must be removed within 20 days of the completion of work approved under the Erosion Control Plan.

2.10 Within 60 days of issuance of the Consent Order, Respondents agree to submit, for the review and approval of the Executive Director, an Interim Erosion Control Plan. The Interim Erosion Control Plan shall include measures to minimize erosion across the site (to be implemented during the removal process conducted pursuant to this Consent Order), which may enter into coastal waters. The Interim Erosion Control Plan shall be prepared by a Qualified Restoration Professional or Resource Specialist. The Interim Erosion Control Plan shall be implemented prior to, and concurrently with the implementation of the Removal Plan and shall include the following:

A. Temporary erosion control measures, including but not limited to the following, shall be used: temporary hay bales, silt fences, drains, swales, sand bag barriers, wind barriers, or biodegradable erosion control material. Erosion on the site shall be controlled to avoid adverse impacts on adjacent properties and resources. In addition, all stockpiled material shall be covered with geofabric covers or other appropriate cover and all graded areas shall be covered with geotextiles or mats.

B. Interim Erosion Control measures shall include, at a minimum, the following components:

- 1) A narrative describing all temporary runoff and erosion control measures to be used.*
- 2) A detailed site plan showing the location of all temporary erosion control measures.*
- 3) A schedule for installation and removal of temporary erosion control measures, in coordination with the long-term revegetation and monitoring plan.*

Staff has reviewed the plans and found that the plans as drafted do not comply with the requirements of the Consent Order. The Erosion Control Plan you submit must be in conformity with Sections 2.9.1 and 2.10 of the Consent Order (noted above). The Erosion Control Plan must include:

1. Provisions for both the interim and permanent erosion control plans, as required by the Consent Order. The plan you submitted does not indicate whether it is permanent or for the interim.
2. A schedule for the installation of plants and the removal of invasive and or non-native plants.
3. A map of the existing vegetation, including an identification of items such as the Bermuda grass and weeds to be dug out/removed from the planting area pursuant to Section 2.9.1 A of the Consent Order.
4. A plan that uses only native, non-invasive, drought-tolerant plants endemic to the Northern County San Diego coastal bluff area as required by Section 2.9.1 C of the Consent Order. The plan you submitted includes the use of non-native plant species, (such as *acacia redons*, *leptospermum laevigatum*, and *myoporum parvifolium*) some of which are also invasive, which does not comply with the Consent Order.
5. Provisions specifying that the removal work and permanent erosion features construction will occur during the dry season, which in the San Diego Storm Water Permit is May 1st through September 30th and that the work should begin early enough in the season to ensure that the work is completed before the end of the season.
6. Specifications, due to the steepness of the site, for the construction described in the approved Removal Plan and the approved Permanent Erosion Control Plan, even if it is during the dry season. These specifications shall include:
 - a. Best Management Practices (BMPs) to prevent the movement of soils and other materials due to gravity that may affect the final site conditions or may be discharged from the site to other private or public property.
 - b. Contingencies for unexpected rain during the dry season.
 - c. Contingencies for leaks or other failures of the irrigation system or other water or wastewater pipes during construction.
 - d. BMPs to keep project materials on site in the event of high winds.
 - e. The plan shall delineate the areas to be disturbed by grading or construction activities and shall include any temporary access roads, staging areas and stockpile areas. The natural areas on the site shall be clearly delineated on the plan and on-site with fencing or survey flags.
 - f. Include a narrative report describing all temporary run-off and erosion control measures to be used during construction.

- g. The plan shall identify and delineate on a site or grading plan the locations of all temporary erosion control measures.
 - h. The plan shall specify that removal work and construction of the permanent erosion control features shall take place only during the dry season (May 1 – September 30). This period may be extended for a limited period of time if the situation warrants such a limited extension, if approved by the Executive Director.
 - i. The erosion control measures shall be required on the project site prior to or concurrent with the initial construction operations and maintained throughout the development process to minimize erosion and sediment from runoff waters during construction. All sediment should be retained on-site, unless removed to an appropriate, approved dumping location either outside of the coastal zone or within the coastal zone to a site permitted to receive fill.
 - j. The plan shall also include temporary erosion control measures should construction or site preparation cease for a period of more than 30 days, including but not limited to: stabilization of all stockpiled fill, access roads, disturbed soils and cut and fill slopes with geotextiles and/or mats, sand bag barriers, silt fencing; temporary drains and swales and sediment basins. The plans shall also specify that all disturbed areas shall be seeded with native grass species and include the technical specifications for seeding the disturbed areas. These temporary erosion control measures shall be monitored and maintained until grading or construction operations resume.
 - k. All temporary, construction related erosion control materials shall be comprised of bio-degradable materials and removed from the construction site once the permanent erosion control features are established.
7. BMPs which shall be taken to prevent erosion and dispersion of sediments across the property by rain, surf, tide, or wind. The Consent Order requires that measures shall be provided at all times of the year until plant establishment or the re-vegetation. Specific BMPs must include the following:
- a. Additional measures/BMPs, if for a reason acceptable to the Commission staff or the Executive Director, it is not possible to avoid working in the wet season, and more information on how the effectiveness of those BMPs will be monitored and contingencies for addressing failures of those BMPs.
 - b. No demolition or construction materials, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion.
 - c. No demolition or construction equipment, materials, or activity shall be placed in or occur in any location that would result in impacts to environmentally sensitive habitat areas, streams, wetlands or their buffers.
 - d. Any and all debris resulting from demolition or construction activities shall be removed from the project site within 24 hours of completion of the project.

- e. Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters.
- f. All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day.
- g. The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction.
- h. Debris shall be disposed of at a permitted disposal site or recycled at a certified recycling facility. If the disposal site is located in the coastal zone, a coastal development permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required.
- i. All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil.
- j. Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems.
- k. The discharge of any hazardous materials into any receiving waters shall be prohibited.
- l. Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible.
- m. BMPs and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or construction-related materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity
- n. All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

As you know, we still have not received a removal plan from you. The removal plan was due within 60 days of the effective date of the Consent Order, specifically due by November 9, 2009. It is now more than three years over-due. Once you've submitted the Removal Plan, Commission staff will review the plans for approval, as we discussed.

You raised the issue that you remain unsure of the costs of any future fines, fees, assessments, or other costs and your current financial ability to complete this work. You also stated that the "November/December, 2010 letters from CCC staffer Marsha Venegas implied she might be

helpful in securing a bank loan". I have reviewed these letters and confirmed that what she explained to you is consistent with what I relayed to you in my January 18, 2012 letter. The recorded Notice of Violation of the Coastal Act (NOVA) does not result in any financial interest or stake in the property at 836 - 838 Neptune Avenue in Encinitas. A NOVA:

- Protects innocent purchasers of the property where there are outstanding violations;
- Avoids creating additional complications associated with the potential sale of the property to an uninformed party; and
- Provides notice in the chain-of-title for the property to prospective purchasers that a violation of the Coastal Act has occurred on the property.

Commission staff cannot assist with any financing processes. However, staff has expressed a willingness to talk to your prospective lenders and explain what the NOVA is, and what the legal effect is and is not, of the recordation at your property, and remains more than willing to do so. You informed me that, for some reason, your potential lenders can't or won't talk to staff. Therefore if you desire, as staff has suggested to you, please feel free to share this letter and previous letters with your prospective lender(s) and tell them we are willing to discuss with them the NOVA that is recorded on your property as well as the requirements of the Consent Order.

Your failure to meet the agreed-upon deadlines established in the Consent Order or the Coastal Commission's actions required by the Consent Order to resolve the violations triggers the requirement to pay stipulated penalties as specified in Section IX of the Consent Order, to which you agreed. Section IX stipulates penalty fees of \$750 per day per violation, which are included to ensure compliance with the terms of the agreement after it is reached. Stipulated penalties have been accruing starting from the first deadline of November 9, 2009. Commission staff letters to you dated February 17, 2010, July 28, 2011, October 14, 2011, and January 18, 2012 served as formal demands for stipulated penalties, as provided by the Consent Order. The agreed-upon penalties were never paid in response to the requests. Therefore, this letter also serves as the fifth demand for payment of the stipulated penalty fees. Stipulated penalty fees are not applied to the required CDP application fee; thus, the payment of a stipulated penalty fee cannot be credited towards your permit application fee. We can discuss how best to address the stipulated penalty issue, which arises from your failure to timely fulfill the requirements of the Consent Order, and which is separate and apart from the continuing obligation to resolve the underlying Coastal Act violation. We are happy to talk to you about options for resolving both matters, and hope that we can now move towards compliance with the Consent Order.

In summary, I greatly appreciate you providing me with an update on the "highlights" of your January 31, 2012 meeting with City of Encinitas Planning staff. You informed me that you will coordinate with your consultants to send the Removal Plan this week. This Removal Plan, as you know, was due in November 2009 and remains an outstanding requirement of the Consent Order with which you yet have to comply. In order to move forward, **please submit a Removal Plan to Commission enforcement staff, as required by the Consent Order, by no later than March 19, 2012.** Commission staff will review said plan, provide you with any specific comments, and confirm whether or not the Executive Director has accepted/approved it.

In addition, Sections 2.9.1 and 2.10 of the Consent Order, as explained to you in our July 28, 2011 letter, require that you submit a Permanent Erosion Control Plan and an Interim Erosion Control Plan by November 9, 2009. However, as of the date of this letter, we have not received the required Erosion Control Plan. You informed me that you will coordinate with your consultants to send the Erosion Control Plan this week. **Please submit an Erosion Control Plan to Commission enforcement staff, as required by the Consent Order, by no later than March 19, 2012.** Commission staff will review said plan, provide you with any specific comments, and confirm whether or not the Executive Director has accepted/approved it.

Commission staff agrees that it would be helpful for you and your professional consultants/engineers to meet with Commission staff regarding permit requirements and would be willing to do so to facilitate your permit. Please contact Mr. Lee McEachern, District Regulatory Supervisor of the Commission staff at 619-767-2370 to arrange a meeting to further review with you what documents are required in order to file your CDP application as complete. He is familiar with this matter and with the contents of this letter.

I look forward to you achieving our mutual goal of full compliance with the Consent Order. Please feel free to contact me if you have further questions regarding the requirements necessary for you to comply with the Consent Order. You can send your correspondence to the address provided above in the header or contact me via phone at 415-904-5220.

Sincerely,



Renée T. Ananda
Statewide Enforcement Analyst

Encl.

Lisa Haage, Chief of Enforcement w/o Encl.
Sherilyn Sarb, Deputy Director w/o Encl.
Deborah Lee, District Manager w/o Encl.
N. Patrick Veasart, Enforcement Supervisor, Southern Districts w/o Encl.
Lee McEachern, District Regulatory Supervisor w/o Encl.
Alex Helperin, Senior Staff Counsel w/o Encl.
Aaron McLendon, Statewide Enforcement Supervisor w/o Encl.
Roy Sapa'u, Senior Planner, City of Encinitas w/o Encl.

RECEIVED

NOV 04 2011

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

October 31, 2011

RE:Consent Order dated September 9, 2009

RECEIPT for check payment of \$9,000. to the California Coastal Commission

This document shall be signed by the parties to the Consent Order(CO) dated September 9, 2009, between the California Coastal Commission(CCC) and John(Mike) and Patricia Brown. Signature by the parties above and cashing of this check by the appropriate parties representing the CCC shall be deemed full satisfaction of the current financial obligation of the Consent Order and all other obligations as of this date. The parties agree that 2 more payments of \$9,000.each in November, 2012 and November, 2013, are described in the CO and constitute the full and complete payment agreed to by the parties.

When this RECEIPT is properly executed by all of the parties, please return this RECEIPT to the Browns at:

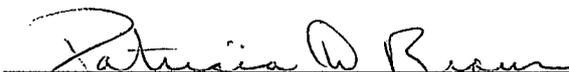
3703 Lake Washington Blvd. North
Renton, WA. 98056

In the event the appropriate party or parties of the CCC do not sign and return this RECEIPT, please return the uncashed check to the Brown family at the above address.

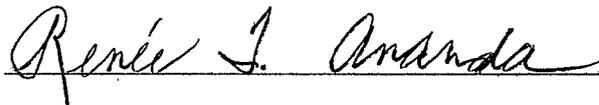
John Brown
alkibrown@aol.com
206-240-0133



John M. Brown



Patricia D. Brown



California Coastal Commission

CALIFORNIA COASTAL COMMISSION

45 FREMONT ST, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260
FAX (415) 904-5400
TDD (415) 597-5885



April 23, 2012

Mr. Mike and Patricia Brown
3703 Lake Washington Blvd. North
Renton, WA 98056
(Certified Mail Article No. 7006 2760 0005 5883 4531)

836-838 Neptune Ave.
Encinitas, CA 92024
(Certified Mail Article No. 7006 2760 0005 5883 4555)

Re: Cease and Desist Order No. CCC-09-CD-05 – Denial of Time Extension Request.

Dear Mr. Brown:

This is a response to your February 24, 2012 electronic-mail message (“Feb 24 email”) sent to me in which you make several assertions and requests. You have made many of these same assertions/requests before and we have responded to them in great detail; however, I am responding to your Feb 24 email to clarify the record and to provide further direction to facilitate compliance with Consent Cease and Desist Order No. CCC-09-CD-05 (“Consent Order”).

You claim (in your February 24 e-mail) that you met “last week” with your “professional engineers, some City of Encinitas (COE) staff members, and Lee McEachern...” I am aware, as we fully discussed in our February 1 and 6, 2012 telephone conversations, of a January 31, 2012 meeting between you, CTE (your engineering consultant), and the City of Encinitas (“City”). Mr. Roy Sapa’u City Senior Planner informed me on March 6, 2012 that he and his staff have not participated in a meeting with you and your consultants since that January 31, 2012 meeting. Further, as you know, Mr. Lee McEachern, Coastal Commission Staff, was not present at the January 31, 2012 meeting or at any alleged subsequent meetings.

Next, you describe the work to be done under the Consent Order as “4 construction activities”, and claim, “We have written to the CCC since 2009-2010 that we do not have the funds needed to complete all 4 of the activities at one time.” As you know and as we have discussed numerous times, the Consent Order, a legally binding contract between you and the Commission, is your agreement with the Commission to resolve Coastal Act violations on your property. In fact, you participated in developing the requirements of the Consent Order, having full knowledge of what would be required of you to resolve the violations, and you personally acknowledged and agreed to abide by its terms and conditions by your executing the final Consent Order on August 26, 2009. It does not specify or differentiate between four separate “construction activities”, as you stated in your Feb 24 email.

As you know, and as I summarized in my March 2, 2012 letter, and several prior letters to you, the Consent Order specifically requires that you submit the following:

- A permanent Erosion Control Plan (Consent Order Section 2.9.1), within 60 days of issuance of the Consent Order;
- An interim Erosion Control Plan (Consent Order Section 2.10) within 60 days of issuance of the Consent Order;
- A complete Removal Plan (Consent Order Sections 2.3 and 2.5.1) within 60 days of issuance of the Consent Order;
- A complete Coastal Development Permit (“CDP”) application to the Commission (Consent Order 2.4.1.1), within 120 days from the issuance date of the Consent Order; and
- A Major Use Permit (“MUP”) application to the City of Encinitas, within 60 days from the issuance date of the Consent Order.

The Consent Order was issued by the Commission on September 9, 2009; therefore, the permanent and interim Erosion Control Plans, and Removal Plan were to be submitted to the Executive Director by November 9, 2009. The MUP application was to be submitted to the City of Encinitas, also by November 9, 2009. The CDP application was to be submitted by January 9, 2010. Even assuming that the Executive Director would grant your request to extend the deadlines to phase the so-called “construction activities”, the deadlines provided in the Consent Order are for the submittal of plans for the Executive Director’s review and approval. You have failed to comply with these submittal requirements of the Consent Order, and therefore remain in violation of the terms and conditions of the Consent Order, which subjects you to ongoing stipulated penalties, as I will address below.

You state in your e-mail message that your engineers and City staff indicate it is “highly unlikely that their reviews of [your] most recent submittals would be completed and approved for a permit by May 15, 2012 by the [City]”. In a March 6, 2012 telephone conversation with City staff, the City stated that to complete your MUP application you must submit revised plans and additional information to complete the MUP application. This information belies your allegation of delays caused by the City’s processing of your application. In fact the City, since the January 31, 2012 meeting, has not received any submittals from you, and Mr. Sapa’u has informed me that he is still awaiting your revised plans. Therefore, the delay is not being caused by any review process; it is your failure to submit the revised plans so the City can move forward with their review.

It, additionally, is your contention that your “professional staff have submitted reports since 2002 trying to obtain this same landscaping/erosion control permit.” As you know the Consent Order was executed in 2009 and staff has been trying to get you to comply with the requirements of the Consent Order since that time. Not until February 9 and 10, 2012 did Commission staff receive a set of landscape/erosion control plans for our review and approval, well after the November 9, 2009 deadline required by the Consent Order. In a March 2, 2012 letter, I informed you that the landscape/erosion control plan was not consistent with the terms and conditions of the Consent

Order and provided you with clear guidance as to what additional information is necessary to render the plans consistent with the Consent Order. Furthermore, in this March 2nd letter, I also requested that you submit the required Removal Plan by March 19, 2012. As of this date, we have not received the requested Removal Plan, which was to have been submitted by November 9, 2009.

You state in your Feb 24 email that you have recently leased your property and told the tenants, "...because of obvious safety concerns... we would not do any landscaping and earth moving activities when the children are living there [for the next 2 years]." It is unfortunate that you made a promise to a tenant that, because of your legal obligations to conduct very specific work at very specific times and under clear deadlines, you cannot keep. You have known of these requirements since September 2009, over 2½ years ago, and now making assurances to a family renting your property, in no way, releases you from your legally binding contract with the Commission. Your Feb 24 email requested to "modify the Consent Order to remove the rip rap first..." You continue by requesting to modify language [of the Consent Order] to stage the construction dates for the other 3 projects to be March 1, 2014 onward". The time has come for you to fulfill your obligations under the Consent Order. In fact, you have been in violation of the terms and conditions of the Consent Order for well over 2 ½ years. The Executive Director is not extending the deadlines, nor has he ever extended the deadlines, for submitting the required plans and applications and then for undertaking the work approved under those plans.

We are encouraged that you now appear to be willing to remove the unpermitted rock riprap, as required by the Consent Order. You acknowledged in your Feb 24 email that you "still would need beach encroachment permits from the State Dept. of Parks and Recreation and the City of Encinitas and would have to be off the beach by Memorial Day, 2012." We hope that since the date of your Feb 24 email, 60 days ago you have applied for and received the necessary authorizations to access the beach for the removal of the unpermitted rock riprap. In a March 6, 2012 conversation, Mr. Sapa'u, confirmed with me that it is the City's position that you can move forward with implementing a removal plan in compliance with the provisions of the Consent Order and that no discretionary permit will be required by the City other than a temporary beach encroachment permit (necessary to access the beach for the removal of the riprap material). Please submit your Removal Plan, in addition to all other plans required by the Consent Order, consistent with the Consent Order immediately so we can review your plan(s) and determine if additional information or measures are necessary.

Our records show that you submitted Coastal Development Permit application No. 6-10-18 on March 1, 2010, which included \$6,000, for after-the-fact dead man anchoring system, bluff retention wall (sea wall), compacted gravel on the face of the bluff, and proposed landscaping with temporary irrigation on the bluff face, removal of rip rap sea ward of the sea wall, colorizing and texturizing the existing, unpermitted sea wall, and removal of 200 square feet of deck on the seaward side of the subject property. As a reminder the removal of the rip rap and deck are required by the Consent Orders therefore need not be addressed through the CDP application. In a March 30, 2010 letter, Commission staff notified you that Section 13005(d) of Title 14 of the California Code of Regulations require that the application fee be five (5) times the regular application fee (i.e., 5 times \$6,000 for a total of \$30, 000) because the development

involves a request for “after-the-fact” authorization. Section 13005(d) of the Commission’s Regulations states:

Fees for an after-the-fact (ATF) permit application shall be five times the amount specified in section (a) unless such added increase is reduced by the Executive Director when it is determined that either:

(1) the ATF permit application can be processed by staff without significant additional review time (as compared to the time required for the processing of a regular permit,) or

(2) the owner did not undertake the development for which the owner is seeking the ATF permit, but in no case shall such reduced fees be less than double the amount specified in section (a) above. For applications that include both ATF development and development that has not yet occurred, the ATF fee shall apply only to the ATF development. In addition, **payment of an ATF fee shall not relieve any persons from fully complying with the requirements of Division 20 of the Public Resources Code or of any permit granted thereunder or from any penalties imposed pursuant to Chapter 9 of Division 20 of the Public Resources Code.** (Emphasis added).

You submitted \$6,000 with your CDP application. Based on the requirements of the Commission’s Regulations, there is an outstanding balance of \$24,000 that you must submit, among other things, to “complete” your application.

Please submit the Interim Erosion Control Plan, Permanent Erosion Control Plan, Removal Plan, and all items requested by the City and commission staff to complete your MUP application and CDP application, respectively. Feel free to contact me if you have further questions regarding your obligations under the Consent Order. You can send correspondence to the address provided in the letterhead, above or contact me via telephone at 415-904-5220.

Sincerely,



Renée T. Ananda
Statewide Enforcement Analyst

CC: Lisa Haage, Chief of Enforcement
Deborah Lee, District Manager
Lee McEachern, District Regulatory Supervisor
Alex Helperin, Senior Staff Counsel
Aaron McLendon, Statewide Enforcement Supervisor
Roy Sapa’u, Senior Planner, City of Encinitas
Current Occupant of 836-838 Neptune Ave, Encinitas, CA 92024 (via Certified Mail)

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Via Regular U. S. Mail

December 7, 2012

Mike and Patricia Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

836-838 Neptune Ave.
Encinitas, CA 92024

Re: Consent Cease and Desist Order No. CCC-09-CD-05 – Compliance

Dear Mr. and Mrs. Brown:

Thank you for your submittal of *Response to City of Encinitas Review Comments for Case No. 10-025 MUP (836-838 Neptune Avenue)* prepared by Construction, Testing, & Engineering (CTE), dated May 15, 2012, that includes a "Grading Plan" dated May 9, 2012. Commission staff has reviewed your submittal and determined that some additional measures are necessary to ensure full compliance with the Consent Orders. This letter serves to provide you with Commission staff's comments to your submittal and additional measures that need to be taken to meet the requirements of Consent Cease and Desist Order No. CCC-09-CD-05 ("Consent Order"). This letter also provides responses to some of the issues that you have raised in previous letters to us and gives you an update on the City of Encinitas' recent decision to not process a Major Use Permit for this matter.

It appears that your submittal is an attempt to satisfy Section 2.5 of the Consent Order, which requires the submittal of a Removal Plan for the removal of unpermitted development on your property. After review of your submittal, we have determined that additional information is necessary to find the plan consistent with the Consent Order. We appreciate that you are now taking steps toward compliance with the Consent Order and, although you have not met the deadlines established by the Consent Order, we hope that the continuing violations can now be resolved quickly. For your convenience, I have included a copy of the Removal Plan requirements. Staff comments on your submittal follow the below-listed Removal Plan requirements.

Section 2.41 of the Consent Order states:

Submission of Removal Plans

- 2.4.1.1 *Within 20 days after the Commission acts on the CDP application submitted by Respondents, Respondents shall submit plans for removal of all development, as identified in this Consent Order, that has not been approved in that action. The plans shall include a schedule of all actions required to restore affected areas to pre-development condition, are subject to Executive Director approval, and should include Restoration and Removal activities, as detailed in Section 2.5 below. All procedural and implementation provisions listed in this Consent Order shall apply to this plan as well.*
- 2.4.1.2 *Within 20 days after the City of Encinitas acts on the CDP application submitted by Respondents, Respondents shall submit plans for removal of all development within the City of Encinitas' jurisdiction, as identified in this Consent Order, that has not been approved in that action. The plans shall include a schedule of all actions required to restore affected areas to pre-development condition, and should include Restoration and Removal activities, as detailed in Section 2.5 below. All procedural and implementation provisions listed in this Consent Order shall apply to this plan as well.*

The Consent Order states:

2.5 *Removal Plans*

- 2.5.1 *Within 60 days of issuance of this Order, Respondents will supply the Executive Director with a plan (the "Removal Plan") to: (a) remove all portions of the deck on the subject property that are seaward of a point five-feet landward of the top of the bluff, the rock revetment, and any other unpermitted development (or any development that was temporarily authorized under an emergency permit) for which Respondents have agreed that they have not and will not apply for after-the-fact permit authorization to retain, and (b) otherwise address any other violations on the subject property for which Respondents have not and will not seek after-the-fact authorization.*

The Removal Plan shall include a description of:

- A. *Removal of all portions of the deck on the subject property that are seaward of a point five-feet landward of the top of the bluff; [sic]*
- B. *Removal of the rock revetment;*
- C. *Appropriate operation of any mechanized equipment necessary to complete removal and restoration work, and follow other operational procedures to minimize impacts, including but not limited to the following:*

1. *Hours of operation of mechanized equipment shall be limited to weekdays between sunrise and sunset, excluding the Memorial Day, Fourth of July, and Labor Day Holidays;*
2. *Equipment shall be stored in an approved location inland from the beach when not in use;*
3. *A contingency plan shall be established addressing: 1) potential spills of fuel or other hazardous releases that may result from the use of mechanized equipment; 2) clean-up and disposal of hazardous materials; and 3) water quality concerns;*
4. *Disposal of removed materials and structures which are to be disposed of must occur at a licensed disposal facility located outside of the Coastal Zone. Any hazardous materials must be transported to a licensed hazardous waste disposal facility;*
5. *Liners and other imported materials shall be disposed of at a Commission-approved location outside of the Coastal Zone. If a disposal location within the Coastal Zone is selected, a coastal development permit will be required. Any hazardous materials shall be disposed of according to the contingency plan required under 3.4.1.D.3 above;*
6. *Removal of revetment materials and any fill materials consisting of soil, sand, or other similar materials shall be accomplished using means that provide the least impact possible on the subject property and surroundings;*
 - a. *All requisite permits shall be obtained from the Department of Parks and Recreation prior to the use of any mechanized equipment on Leucadia State Beach.*
7. *The number of trips to and from the site shall be minimized; and*
8. *Measures to protect against impacts to water quality from removal and restorative grading shall be described and followed.*

2.5.2 *If the Executive Director determines that any modifications or additions to the proposed Removal Plan are necessary, he shall notify Respondents. Respondents shall complete requested modifications and resubmit the Removal Plan for approval within 10 days of the notification.*

2.5.3 *The Plan shall provide for access to the site per Section XIV below for the purpose of monitoring compliance with this Consent Order.*

Please amend the Removal Plan to address the below-enumerated concerns and re-submit the Plans to my attention by no later than December 28, 2012.

1. Specify in the "Waste Management" section of your submittal that materials and structures that are removed pursuant to the Consent Order shall be disposed of at a facility located outside of the Coastal Zone.
2. Please provide a detailed description of the quantities of rock rip-rap material and the extent of the deck within the required setback that will be removed. In addition, please describe the method by which you will remove the rip-rap and deck.
3. Specify in the "Construction Vehicles" and "On-site Construction Material Storage" section that equipment and material shall be stored in an approved location, and in no case shall storage of such equipment and materials be located on the beach.
4. While the plan makes a reference to "erosion control devices" and BMPs, these measures are not shown on the plan sheet. Please submit detailed specifications for the erosion control measures and BMPs to be used, as required by the Consent Order and as staff requested in our March 21, 2012 letter to you.
5. Please include the schedule for the installation and the removal of temporary erosion control measures.

Mr. Roy Sapa'u, Planner with the City of Encinitas Planner, has been working with you on the Major Use Permit (MUP) application for the City that is required under the provisions of the Consent Order. Mr. Patrick Murphy, Director of Planning and Building for the City of Encinitas informed Commission staff by way of his November 28, 2012 letter to Ms. Deborah Lee, Commission San Diego District Manager, that the City recently determined that a MUP is not required for the construction of coastal bluff protective measures. Therefore, you may proceed with processing your CDP application with the Commission.

In previous correspondence, you requested to be placed on the Commission meeting agenda to discuss with the Commission your case. Commission meetings are devoted to specific items that require the Commission's action (such as when there is a proposed CDP application or when there is a recommendation to issue enforcement orders). As you know, the Commission held a public hearing on the Consent Order that was issued to you. Each day of each Commission meeting, however, has time allotted at the beginning of the meeting (and at times, following the lunch break) to provide the general public with the opportunity to make comments on any matter (typically the time for each public comment is 3 minutes). This public comment period is open to all. Please inform me of which meeting you plan to attend so we can ensure there is adequate time provided for your comments.

You have also made requests in recent correspondence for Commission staff to help you with your financial situations. As we have explained to you, Commission staff cannot provide you with guidance on the financial issues that may be associated with your compliance with the Consent Orders. As you know, our directive is to ensure that violations of the Coastal Act are resolved. Consideration was given to your suggestions and appropriate modifications were

made during the negotiation of the Consent Order language. You reviewed the Consent Order and, by signing the agreement, you accepted the terms and ongoing obligations of the Consent Order.

We still have not received the interim Erosion Control Plan, the permanent Erosion Control Plan, the complete Removal Plan, or a complete Coastal Development Permit application as required by the Consent Order. Your engineer, Mr. Math of CTE, informed me in an e-mail message he sent on May 16, 2012 that he was going to submit the revised erosion control/landscape plan some time during the week of May 21, 2012. As of the date of this letter, we have not received the plan.

Please contact me if you have more questions regarding your obligations under the Consent Order. You can send correspondence to the address provided in the letterhead or contact me via telephone at 415-904-5220.

Sincerely,



Renée T. Ananda
Statewide Enforcement Analyst

CC: Lisa Haage, Chief of Enforcement
Lee McEachern, District Regulatory Supervisor
Aaron McLendon, Statewide Enforcement Supervisor
Roy Sapa'u, Senior Planner, City of Encinitas

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Via Regular U. S. Mail

March 20, 2013

Mike and Patricia Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

836-838 Neptune Ave.
Encinitas, CA 92024

Re: Consent Cease and Desist Order No. CCC-09-CD-05 – Compliance

Dear Mr. and Mrs. Brown:

Thank you for your submittal of the “Erosion Control Planting Plan” prepared by George Mercer, Landscape Architect, dated July 15, 2012 and received on February 4, 2013. It appears that your submittal is an effort to satisfy provisions of Section 2.9 and/or 2.10 of Consent Cease and Desist Order No. CCC-09-CD-05 (“Consent Order”), which requires the submittal of a Permanent Erosion Control Plan and an Interim Erosion Control Plan, respectively, to address erosion and runoff across the bluff face on your property. Commission staff has reviewed this submittal and has determined that additional information is needed before the Executive Director can approve the plan consistent with the Consent Order. The following provides Commission staff’s specific requests and comments:

- Please indicate whether the submittal is intended to be the interim or permanent erosion control for the site. Please clarify which elements are intended to comply with the interim measures (Section 2.10) and which elements are intended to comply with the permanent erosion control plan.
- The required Removal Plan remains incomplete (see my letters dated March 2, 2012 and December 7, 2012) and has not been approved; however, please note that the Consent Order requires that the schedule for the installation and removal of the temporary erosion control measures must be coordinated with the Removal Plan. How will the implementation of the Temporary and Permanent Erosion Control Plan be coordinated with the implementation of the Removal Plan and its related timeline?
- The planting schedule states that a “grow-and-kill” program will be implemented to control invasive species. Please provide a narrative description of this process, including what materials and methods you propose to use to kill invasive species.

- What is the schedule for the installation and removal of temporary erosion control measures in coordination with the long-term revegetation and monitoring plan?
- Section 2.10 requires the submittal of a narrative report describing all temporary runoff and erosion control measures to be used. Please include this narrative in your re-submittal.

This letter also serves to follow-up on my December 7, 2012 letter, in which I requested that you amend the Removal Plan to address a number of deficiencies that were listed in the letter and resubmit the Removal Plan for the Executive Director's review and approval. Because I did not hear from you or your representatives, I called your engineer, Mr. Dan Math (CTE), on January 29, 2013, and left a message with him requesting a response to my December 7th letter. As of the date of this letter, we have not received a response to the December 7th letter or a revised Removal Plan. As a reminder, the Removal Plan must be amended to account for the following:

1. Specify in the "Waste Management" section of your submittal that materials and structures that are removed pursuant to the Consent Order shall be disposed of at a facility located outside of the Coastal Zone.
2. Please provide a detailed description of the quantities of rock rip-rap material and the extent of the deck that will be removed. In addition, please describe the method by which you will remove the rip-rap and deck.
3. Specify in the "Construction Vehicles" and "On-site Construction Material Storage" section that equipment and material shall be stored in an approved location, and in no case shall storage of such equipment and materials be located on the beach.
4. Please include the schedule for the installation and the removal of temporary erosion control measures.

Finally, we have yet to receive a "complete" coastal development permit application pursuant to Section 2.4 of the Consent Order. We remain will and ready to discuss with you the items that are needed to "complete" your application.

Please revise the Interim Erosion Control Plan, the Permanent Erosion Control Plan, and the Removal Plan, and submit all information necessary to "complete" your Coastal Development Permit application as required by the Consent Order, by April 4, 2013. This deadline date does not re-establish (i.e. re-set) any of the deadlines required under the Consent Order; therefore the number of days for which violations have occurred are calculated based on those deadlines as provided in the Consent Order.

We look forward to continuing to work with you to resolve this matter amicably. Please contact me if you have any questions regarding your obligations under the Consent Order.

Mike and Patricia Brown
CCC-09-CD-05
3/20/13
Page 3 of 3

You can send correspondence to the address provided in the letterhead or contact me via telephone at 415-904-5220.

Sincerely,

A handwritten signature in cursive script that reads "Renée T. Ananda".

Renée T. Ananda
Statewide Enforcement Analyst

CC: Mr. Colm Kenny, Project Engineer, CTE
Lisa Haage, Chief of Enforcement
Lee McEachern, District Regulatory Supervisor
Aaron McLendon, Statewide Enforcement Supervisor

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Via Regular U. S. Mail

July 30, 2013

Mike and Patricia Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

836-838 Neptune Ave.
Encinitas, CA 92024

Re: Consent Cease and Desist Order No. CCC-09-CD-05 – Compliance

Dear Mr. and Mrs. Brown:

Staff received your March 26, 2013 and your April 18, 2013 letters by facsimile on March 27, 2013 and April 23, 2013 respectively. This letter serves to also follow-up my brief telephone discussions with you on March 27 and April 10, 2013. Staff has received, reviewed, and, in letters dated January 18, 2012, March 2, 2012, December 7, 2012, and March 20, 2013, provided you with detailed comments on the following items:

- Proposed Sequence for Removal Plan 836-838 Neptune Consent Order CCC-09-CD-05, dated March 1, 2010.
- Landscape Improvement Plans for Bluff Repairs, Brown Property 836-838 Neptune Avenue, Encinitas, California 92024 dated May 24, 2011 and January 8, 2010.
- Response to City of Encinitas Review Comments for Case No. 10-025 MUP (836-838 Neptune Avenue), prepared by Construction, Testing & Engineering (CTE), dated May 15, 2012, that includes a "Grading Plan", dated May 9, 2013.
- Erosion Control Planting Plan prepared by George Mercer, Landscape Architect, dated July 15, 2012, received on 2/4/13.

During our April 10th telephone conversation, you agreed that your engineering consultant will review my December 7, 2012 letter (requesting that you address a number of deficiencies in your submittal) and my March 20, 2013 letter (requesting that you address the deficiencies identified in staff's December 7th letter and amend your plan submittal, dated July 15, 2012, accordingly). You requested that staff's future correspondence and questions regarding the Erosion Control and Removal Plans required pursuant to Consent Cease and Desist Order No.

CCC-09-CD-05 ("Consent Order") be sent directly to Mr. George Mercer, Landscape Architect. You also agreed to submit the Removal Plan for the Executive Director's review and approval.

The following responds to your April 18th letter:

- While the Landscape Plans, dated July 15, 2012, show the portion of the deck to be removed, this should also be described and included in the required Removal Plan.
- You requested that a narrative report that contains the detailed descriptions be included as a supplement to the Removal Plan. Staff will review whatever you submit to determine if any modifications or additions to the proposed Removal Plan are necessary. You are required under the Consent Order to complete the requested changes and resubmit the Removal Plan within 10 days of the notification for approval by Executive Director.
- Please provide further description in the July 15, 2012 Landscape Plan to identify in narrative form and/or label the interim erosion control measures and specify when those interim measures will be removed. Please also identify in narrative form and/or label the permanent erosion control measures, and the schedule for the installation of such measures.
- Please include in the "Waste Management" section of your "Bluff Repairs" plan that materials and structures that are removed pursuant to the Consent Order shall be disposed of at a facility located outside of the Coastal Zone, as required by Section 2.5.1, C. 4.
- As you know, you submitted Coastal Development Permit (CDP) application No. 6-10-018 with only a partial application fee of \$6,000 for after-the-fact authorization to retain the "dead man" anchoring system, sea wall (bluff retention wall), gravel, and landscaping with temporary irrigation; to remove of rip-rap and 200 square feet of deck seaward of the residence; and to color and texturize the existing sea wall. Staff sent you a letter informing you that your CDP application is incomplete and requested that you submit several required documents. I have attached a copy of staff's March 30th letter listing all of the items that you must submit before the application can be "completed". Please note that your CDP application must be amended to be in conformity with the requirements under Section 2.4 and 3 of the Consent Orders. Since you, the City of Encinitas, and Commission staff have agreed, pursuant to Section 30601.3 of the Coastal Act, to process a consolidated CDP for the unpermitted development for which you wish to retain your CDP application must be amended to also include the unpermitted development located within the City's jurisdiction that is not specified for removal in the Consent Order.

- The development for which you are seeking after-the-fact authorization to retain was constructed in violation of the Coastal Act. Commission regulations require that the application fee for development involved in violation matters be five (5) times the regular application fee. Therefore the applicable fee for your CDP application is \$30,000 (5 times \$6,000). We received \$6,000 with your CDP application submittal. Please contact the Commission's San Diego office to discuss this matter further.

We look forward to receiving the revised Interim Erosion Control Plan, the Permanent Erosion Control Plan, and the Removal Plan, and all information necessary to "complete" your CDP application, as required by the Consent Order, by August 20, 2013. As you know, this new deadline does not re-establish (i.e. re-set) any of the deadlines required under the Consent Order.

We also look forward to continuing to work with you to resolve this matter amicably. Please contact me if you have any questions regarding your obligations under the Consent Order. Please contact Mr. Lee McEachern at (619) 767-2370 regarding your CDP application. You can send correspondence to the address provided in the letterhead or contact me via telephone at 415-904-5220.

Sincerely,



Renée T. Ananda
Statewide Enforcement Analyst

CC: Mr. Colm Kenny, Project Engineer, CTE
Mr. George Mercer, Landscape Architect
Lisa Haage, Chief of Enforcement
Lee McEachern, District Regulatory Supervisor
Aaron McLendon, Statewide Enforcement Supervisor

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Via Regular U. S. Mail

October 11, 2013

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

836-838 Neptune Ave.
Encinitas, CA 92024

Re: Consent Cease and Desist Order No. CCC-09-CD-05 – Compliance

Dear Mr. Brown:

This letter serves to follow-up our September 12 and 13, 2013 telephone conversation regarding your compliance with Consent Cease and Desist Order No. CCC-09-CD-05 (“Consent Order”). Thank you for your submittal entitled “Removal and Restoration Plan Supplement” (“Plan Supplement”), dated September 13, 2013 and received by facsimile on September 16, 2013. The Plan Supplement must include the provisions necessary to complete the Removal Plan, Permanent Erosion Control Plan, Temporary Erosion Control Measures, and Interim Erosion Control Plan required by the Consent Order. The Commission staff comments are provided below; please amend and re-submit the Plans and Plan Supplement, in accordance with the revisions below, for review and approval by October 21, 2013.

Deck Removal – The Plan Supplement should include a narrative a description of the method of removal, including what equipment you propose to be used for demolition of the deck, and the time duration for this work. Additionally, please include provisions to specify that 1) the deck removal activities will be conducted between May 1st and September 30th (i.e., during the dry season), 2) mechanized equipment shall be limited to weekdays between sunrise and sunset, excluding the Memorial Day, 4th of July, and Labor Day holidays, and 3) that the number of trips to and from the site shall be minimized.

Rock Revetment Removal – The Plan Supplement should additionally include the specification that rock removal activities will be conducted between May 1st and September 30th.

The “Erosion Control Planting Plans” (“Erosion Control Plan”), dated July 15, 2012, indicate a staging area located at the top of the bluff; please clarify if this is intended to be the staging area for the rock removal equipment. If not, please also show on the Erosion Control Plan and describe in detail in the Plan Supplement where the equipment to be used for the rock removal will be staged during the removal activities. Additionally, please identify on the July 15, 2012

Erosion Control Plan the intended access route for the front end loader and the haul truck(s) and include the provision that the number of trips to and from the site shall be minimized.

Erosion Control Measures – The Plan Supplement should provide that 1) construction of the permanent erosion control features will be conducted between May 1st and September 30th; 2) the permanent erosion control measures will be installed no later than 14 days after implementation of the Removal Plan; and 3) if temporary safety measures are deemed necessary by the Landscape Specialist for the completion of the Erosion Control Plan, such safety measures are to be used during landscaping operations and must be removed within 20 days of completion of the work approved under the Erosion Control Plan.

Staff has determined that the plant species listed on Sheet 5 of 7 of the Erosion Control Plan, dated July 15, 2012, are acceptable for erosion control purposes.

Staff proposes no changes to the hydroseeding and planting specifications as shown on the Bluff Repair Plans Sheets 6 of 7 and 7 of 7, dated January 8, 2010.

Contingency Plan – You state in your September 13th submittal (the Plan Supplement) that in “the event of a spill of hazardous materials, The City of Encinitas will issue with the Beach Encroachment Permit listing any required components of a Spill Contingency Plan which are to be followed”. The “Spill Contingency Plan” (Contingency Plan) you propose to prepare as part of the City’s encroachment permitting process must be reviewed and approved by the Commission in advance of the commencement of work. The Contingency Plan must be approved and in place prior to initiating the required work; as such, please submit the proposed Contingency Plan for review and approval by the Executive Director with the revised Supplemental Plan.

BMPs – The Plan Supplement must augment the “BMP Project Status” plans, dated May 9, 2012. The Plan Supplement must provide that 1) all demolition and construction debris shall be removed from the site within 24 hours of completion of the project; 2) no demolition or construction materials, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion; 3) no demolition or construction equipment, materials, or activity shall be placed in or occur in any location that would result in impacts to environmentally sensitive habitat areas, streams, wetlands or their buffers; 4) any and all debris resulting from demolition or construction activities shall be removed from the project site within 24 hours of completion of the project; 5) demolition or construction debris and sediment shall be removed from work areas each day to that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters; all trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day; and 6) the discharge of any hazardous materials into any receiving waters shall be prohibited.

Please complete the above-enumerated modifications and re-submit the revised Plans and Plan Supplement within 10 days, by **October 21, 2013**, in conformance with the requirements of

Section 2.5.2 of the Consent Order. This new deadline does not waive or otherwise amend any deadlines established in the Consent Order. Please contact Mr. Lee McEachern at (619) 767-2370 regarding your required Coastal Development Permit ("CDP") application for after-the-fact approval of the unauthorized development within the Commission's and the City's jurisdictions. A copy of Commission staff's filing status letter, dated March 30, 2010, is attached for your convenience; it lists what you must do in order to complete your CDP application required by the Consent Order. Furthermore, any development subject to Coastal Act permitting requirements that is not specifically authorized under this Consent Order requires a CDP.

Please feel free to contact me at 415-904-5220 if you have any questions regarding this letter or your obligations under the Consent Order; correspondence, including the revised Plan Supplement, should be directed to the address provided in the letterhead. Thank you for your continued consideration; we look forward to working with you to ultimately resolve this matter.

Sincerely,



Renée T. Ananda
Statewide Enforcement Analyst

Encl.

CC: Mr. Colm Kenny, Project Engineer, CTE
Mr. George Mercer, Landscape Architect
Lee McEachern, District Regulatory Supervisor
Aaron McLendon, Statewide Enforcement Supervisor

CALIFORNIA COASTAL COMMISSION

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



Via Regular and Certified Mail
(7002 0460 0003 8134 3227)

March 30, 2010

John and Patricia Brown
5201 Beach Drive SW
Seattle, WA 98136

Re: Coastal Development Permit Application #6-10-18/Brown

Dear Mr. and Mrs. Brown:

Commission staff has reviewed the above-cited permit application for after-the-fact deadman anchoring system, bluff retention wall (seawall), compacted gravel on the face of the bluff and proposed landscaping with temporary irrigation of the bluff face, removal of riprap seaward of the seawall, color and texturing of the seawall and removal of 200 sq. ft. of deck on seaward side of residence at 836/838 Neptune Avenue, Encinitas, and determined that additional information is necessary in order to properly review this application and schedule it for public hearing.

You must submit copies all requested documents in order to complete your application. We will not accept documents cited from other files. The required documents are as follows.

- Three (3) copies of scaled, as-built plans prepared by a licensed professional that accurately show all existing conditions with details and dimensions for the seawall, gravel placement, deadman system, soil nails, and deck including cross-sections, elevations, foundations and other typical details. The plans submitted with the application are insufficient since they include no details or dimensions for any of the existing developments.
- Three (3) copies of revised landscape plans that accurately show all existing conditions and all proposed work. Your application identifies "geogrid" as an element of the landscaping and your initial landscaping plan shows something that appears to be consistent with "geogrid". However, you have verbally informed us that geogrid is not proposed. Please clarify with detailed plans and a written description all proposed landscaping elements.
- The landscape palate must only include native, non-invasive, drought-tolerant species. Your submitted landscape palate includes at least one (1) invasive species (*Myoporum parvifolium*). Please have a certified landscape architect or biologist confirm that all plants are native, non-invasive and drought-tolerant species.
- Three (3) copies of structural calculations for the seawall
- Two (2) additional copies of slope stability analysis documenting slope stability before and after construction of the seawall and installation of gravel. (Only 1 copy was submitted)
- Three (3) copies of all geotechnical reports prepared for all aspects of the various development requests (seawall, deadman system, soil nails, gravel, etc.) including three (3) copies of third-party reviews and responses to them.

March 29, 2010

Page 2

- Three (3) copies of a current/updated geotechnical report documenting existing conditions.
- Three (3) copies of all Major Use Permits and signed Resolutions of Approval for all elements of the development. ✓
- One (1) copy of Appendix B (attached) that has been signed by the City of Encinitas
- Additional application fee of \$24,000.00. Because the proposed development involves a violation of the Coastal Act, the Commission regulations require that the application fee be five (5) times the regular application fee (i.e., 5 times \$6,000.00). Since you have already submitted \$6,000.00, you are required to submit an additional \$24,000.00.
- Because the proposed seawall will prevent sand material from the bluff from entering onto the beach over the lifetime of the seawall, the Commission will require mitigation for the loss sand to the beach resulting from the construction of the seawall. To address this adverse impact, the Commission historically has required the payment of an in-lieu fee for sand replenishment. The fee is based on the attached sand fee calculation worksheet. Please complete the attached worksheet and submit three (3) copies of proposed sand fee mitigation worksheet.
- In addition to mitigation for the adverse impacts on sand supply, the Commission will likely require that the applicant address the adverse impacts that the seawall structure has had and will have on public access and recreational opportunities. Please address how the applicant proposes to mitigate for these adverse impacts.

When all required information is received, reviewed by staff and found to be adequate to analyze the project, your application will be filed and scheduled on the next available Commission agenda. If you have any questions, please feel free to call me.

Sincerely,



Gary Cannon
Coastal Planner

cc: Marsha Venegas, Enforcement
Roy Sapau, City of Encinitas

Beach Sand Replenishment
In-lieu Fee Worksheet

$V_e =$ Volume of sand to rebuild the area of beach lost due to encroachment by the seawall; based on the seawall design and beach and nearshore profiles (cubic yards)

$$V_e = A_e \times v$$

$A_e =$ The encroachment area which is equal to the width of the properties which are being protected (W) times the seaward encroachment of the protection (E)

$$A_e = W \times E$$

W = Width of property to be armored (ft.)

E = Encroachment by seawall, measured from the toe of the bluff or back beach to the seaward limit of the protection (ft.)

v = Volume of material required, per unit width of beach, to replace or reestablish one foot of beach seaward of the seawall; based on the vertical distance from the top of the beach berm to the seaward limit of reversible sediment movement (cubic yards/ft. of width and ft. of retreat). The value of v is often taken to be 1 cubic yard per square ft. of beach. If a vertical distance of 40 feet is used for the range of reversible sediment movement, v would have a value of 1.5 cubic yards/square ft. (40 feet x 1 foot x 1 foot/27 cubic feet per cubic yard). If the vertical distance for a reversible sand movement is less than 40 feet, the value of v would be less than 1.5 cubic yards per square foot. The value of v would be less than 1.5 cubic yards per square foot. The value of v will vary from one coastal region to another. A value of 0.9 cubic yards per square foot has been suggested for the Oceanside Littoral Cell (Oceanside Littoral Cell Preliminary Sediment Budget Report, December 1997, prepared as part of the Coast of California Storm and Tide Wave Study)

$V_w =$ Volume of sand to rebuild the area of beach lost due to long-term erosion (V_w) of the beach and near-shore, resulting from stabilization of the bluff face and prevention of landward migration of the beach profile; based on the long-term regional bluff retreat rate, and beach and nearshore profiles (cubic yards)

$$V_w = A_w \times v$$

A_w = The area of beach lost due to long-term erosion is equal to the long-term average annual erosion rate (R) times the number of years that the back beach or bluff will be fixed (L) times the width of the property that will be protected (W) (ft./yr.)

$$A_w = R \times L \times W$$

R = The retreat rate which must be based on historic erosion, erosion trends, aerial photographs, land surveys, or other acceptable techniques and documented by the applicant. The retreat rate should be the same as the predicted retreat rate used to estimate the need for shoreline armoring

L = The length of time the back beach or bluff will be fixed or the design life of the armoring without maintenance (yr.). For repair and maintenance projects, the design life should be an estimate of the additional length of time the proposed maintenance will allow the seawall to remain without further repair or replacement

V_b = Amount of beach material that would have been supplied to the beach if natural erosion continued, or the long-term reduction in the supply of bluff material to the beach, over the life of the structure; based on the long-term average retreat rate, design life of the structure, percent of beach quality material in the bluff, and bluff geometry (cubic yards)

$$V_b = (S \times W \times L) \times [(R \times h_s) + (1/2h_u \times (R + (R_{cu} - R_{cs})))]/27$$

S = Fraction of beach quality material in the bluff material, based on analysis of bluff material to be provided by the applicant

h_s = Height of the seawall from the base of the bluff to the top (ft.)

h_u = Height of the unprotected upper bluff, from the top of the seawall to the crest of the bluff (ft.)

R_{cu} = Predicted rate of retreat of the crest of the bluff, during the period that the seawall would be in place, assuming no seawall were installed (ft./yr.). This value can be assumed to be the same as R unless the applicant provides site specific geotechnical information supporting a different value

R_{cs} = Predicted rate of retreat of the crest of the bluff, during the period that the seawall would be in place, assuming the seawall has been installed (ft./yr.). This value will be assumed to be zero unless the applicant provides site specific geotechnical information supporting a different value

V_t = Total volume of sand required to replace losses due to the structure, through reduction in material from the bluff, reduction in nearshore area and loss of available beach area (cubic yards). Derived from calculations provided above

$$V_t = V_b + V_w + V_e$$

$$M = V_t \times C$$

C = Cost, per cubic yard of sand, of purchasing and transporting beach quality material to the project vicinity (\$ per cubic yard). Derived from the average of three written estimates from sand supply companies within the project vicinity that would be capable of transporting beach quality material to the subject beach, and placing it on the beach or in the near shore area

CDP #6-10-18
Mike and Patricia Brown

W =
E =
v =
R =
L =
S =
h_s =
h_u =
R_{cu} =
R_{cs} =
C =

$$V_e = A_e \times v$$

$$V_e =$$

$$V_w = A_w \times v$$

$$V_w =$$

$$V_b = (S \times W \times L) \times [(R \times h_s) + (1/2 h_u \times (R + (R_{cu} - R_{cs})))]/27$$

$$V_b =$$

$$V_t = V_b + V_w + V_e$$

$$V_t =$$

$$M = V_t \times C$$

$$M =$$

6-10-18

APPLICATION FOR COASTAL DEVELOPMENT PERMIT

APPENDIX B

LOCAL AGENCY REVIEW FORM

SECTION A (TO BE COMPLETED BY APPLICANT)

Applicant _____

Project Description _____

Location _____

Assessor's Parcel Number _____

SECTION B (TO BE COMPLETED BY LOCAL PLANNING OR BUILDING INSPECTION DEPARTMENT)

Zoning Designation _____ du/ac

General or Community Plan Designation _____ du/ac

Local Discretionary Approvals

- Proposed development meets all zoning requirements and needs no local permits other than building permits.
- Proposed development needs local discretionary approvals noted below.

Needed Received

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Design/Architectural review |
| <input type="checkbox"/> | <input type="checkbox"/> | Variance for _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Rezone from _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Tentative Subdivision/Parcel Map No. _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Grading/Land Development Permit No. _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Planned Residential/Commercial Development Approval |
| <input type="checkbox"/> | <input type="checkbox"/> | Site Plan Review |
| <input type="checkbox"/> | <input type="checkbox"/> | Condominium Conversion Permit |
| <input type="checkbox"/> | <input type="checkbox"/> | Conditional, Special, or Major Use Permit No. _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Other _____ |

CEQA Status

- Categorically Exempt Class _____ Item _____
- Negative Declaration Granted (Date) _____
- Environmental Impact Report Required, Final Report Certified (Date) _____
- Other _____

Prepared for the City/County of _____ by _____

Date _____ Title _____

CALIFORNIA COASTAL COMMISSION

45 FREMONT ST, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260
FAX (415) 904-5400
TDD (415) 597-5885



Via Regular U. S. Mail

January 28, 2014

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

836-838 Neptune Ave.
Encinitas, CA 92024

Re: Consent Cease and Desist Order No. CCC-09-CD-05 – Compliance

Dear Mr. Brown:

First, I would like to take this opportunity to introduce myself as the Coastal Commission staff member assigned to Consent Cease and Desist Order No. CCC-09-CD-05 (“Consent Order”). As you may know, Renee Ananda, the staffer that was previously assigned to this case, is now working in a different department of the Commission, handling cases in the north central coast district. I look forward to working together with you to reach full compliance with the Consent Order.

Staff appreciates the time you took to discuss compliance with the Consent Order and the status of Coastal Development Permit (CDP) application No. 6-10-18 with Mr. Lee McEachern and Ms. Renée Ananda by telephone on December 5, 2013.

You indicated in an April 18, 2013 letter to Ms. Ananda and during telephone conversations with Ms. Ananda on April 10, September 9, and November 14, 2013, a commitment to submit a project narrative, which you stated would include additional information on the activities to be carried out through the proposed Removal Plan, to address the deficiencies identified in Commission staff’s October 11, 2013, July 30, 2013, March 20, 2013, and other earlier letters to you.

On September 16, 2013, we received a report, titled “Removal And Restoration Plan Supplement To Be Attached To Submitted Landscape Plans” (which will be referenced below as: “Landscape Narrative”) and on November 15, 2013 we received a narrative report, titled “Attached Plan Supplement” (referenced below as “Supplemental Narrative”).

The following provides comments to the Landscape Narrative and Supplemental Narrative. Additionally, please also find below requests for revisions to the Landscape Improvement Plans for Bluff Repairs prepared by George Mercer Landscape Architecture, which is dated July 15, 2012 and was received by Commission staff on February 4, 2013. Specifically, revisions are requested to sheets S-1 and S-2 dated 1-8-2010 (referenced below as Sheet S-1

or S-2 of the Full Size Plans) and sheet 5 of 7, dated 7-15-2012 (referenced below as Sheet 5 of the Full Size Plans).

Language requested to be added is marked as **bold text**, and language requested to be deleted is marked as ~~strikeout text~~

Item 1, Deck Removal - As you know, the Consent Order requires that: a) all portions of the deck on the subject property that are seaward of a point five-foot landward of the top of the bluff are required to be removed and b) such removal shall occur within 15 days of approval of the Removal Plan.

1) Therefore, please revise the first sentence of Item 1 of the Supplemental Narrative to state:
“The Deck Removal will consist of removing the portions of the deck at 836 Neptune Avenue in Encinitas, CA **that are seaward of a point five-foot landward of the top of the bluff.**”

2) In addition, please revise the third and fourth sentences of Item 1 of the Supplemental Narrative as follows:

“It is anticipated that **the portions of the deck will be removed no later than 15 days after the Executive Director approves the removal plan.** ~~this work will be completed from May 1 to September 30.~~ **Within this period,** the deck may be used as part of the landscape/planting installation and related erosion control measures **required by the Consent Order.**”

- Additionally, it appears that some portions of the existing deck near the southern property line are located within 5 feet of the bluff edge, but are not indicated for removal.

3) Therefore, please revise Sheet 5 of the Full Size Plans consistent with the terms of the Consent Order, demonstrating that no portion of the existing deck remains within 5 feet of the top of bluff.

Item 2, Rock Removal – Item 2 of the Supplemental Narrative states that the removal of the rock “will take place between September 30 and May 1, in accordance with the City of Encinitas permit requirements.” Please note that the Consent Order requires the removal of development on the site to occur within 15 days of the Executive Director’s approval of the Removal Plan.

1) Therefore, please replace the first sentence of Item 2 of the Supplemental Narrative with the following:

“**Within 15 days after the Executive Director’s approval of the Removal Plan, and in compliance with all plan terms including schedule for activities, Respondents shall commence removal in compliance with the terms of the Consent Order.** ~~The Rock Revetment Removal on the Beach below the site will take place between September 30 to May 1 in accordance with the City of Encinitas permit requirements.~~”

- 2) Please revise Sheet 5 of the Full Size Plans to identify the intended access route for the front end loader and the haul truck(s).
- 3) Please also modify Item 2 of the Supplemental Narrative to include a provision that the number of trips to and from the site shall be minimized.

Item 3, Erosion Control Measures

- Item 3 of the Supplemental Narrative states: "The Erosion Control Measures will be conducted between May 1 and September 30." The Consent Order requires that a) the Interim Erosion Control measures be installed prior to, and concurrent with the removal plan, and b) that the planting be carried out no more than 14 days after the implementation of the Removal Plan.

1) Therefore, please replace the first sentence of Item 3 of the Supplemental Narrative, consistent with the Consent Order, with the following:

" The Erosion Control Notes/BMPs will be carried out prior to, and concurrently with the removal plan. ~~The Erosion Control Measures will be conducted between May 1 and September 30.~~"

2) Please amend the Erosion Control Notes/BMPs section of Sheet 5 of the Full Size Plans to include the following note: "7. Erosion control measures shall be provided at all times of the year until the establishment of vegetation on the site."

- Sheet 5 of the Full Size Plans includes a section labeled "Planting Schedule & Notes." This section states that removal of non-native plants will occur 1 month prior to planting, and will involve a grow-kill method.

3) Please revise Item 3 of the Supplemental Narrative to include a description of how the "grow-kill" method will be carried out, consistent with the terms and conditions of the Consent Order.

4) Please include in Sheet 5 of the Full Size Plans a timeline for planting in the Planting Schedule that addresses the length of time needed for the installation of container plants and the timing for hydroseeding of the property.

- The Consent Order requires the restoration of areas disturbed by unpermitted development. However, Sheet 5 of the Full Size Plans does not indicate that the area currently occupied by the bluff top deck, including the area below the cantilevered portion of the deck, will be revegetated, and Sheet S-1 of the Full Size Plans states that the project limits (marked on the plans as 'limit of work') would be smaller than is required to carry out the requirements of the Consent Order. Further, Sheet S-2 of the Full Size Plans is lacking irrigation plans for the entire bluff area.

5) Please amend Sheet 5 of the Full Size Plans to include native landscaping in the area currently occupied by the blufftop deck.

6) Please indicate on Sheet 5 of the Full Size Plans the access route for removal of the blufftop deck and installation of landscaping.

7) Please amend Sheet S-1 of the Full Size Plans to indicate the correct boundaries of the project site (marked as 'limit of work' on the plans). That is, the 'limit of work' line should

be amended to include the full area of the bluff to be planted, the rock on the beach to be removed, and the portions of the blufftop deck to be removed.

8) Please delineate on Sheet S-2 of the Full Size Plans the exact location of all temporary, above-ground irrigation that is being proposed for the planting proposed for the entire bluff area in your Permanent Erosion Control Plan, consistent with Section 2.9.1 of the Consent Order.

- You have proposed in Sheet 5 of the Full Size Plans the installation of texture and color work on the sea wall surface. This proposal, while encouraging, is not within the scope of the Consent Order.

9) Therefore, please amend your CDP application No. 6-10-008 to incorporate this proposal and delete from sheet 5 of 7, the Planting Plan, dated July 15, 2012, the note: "Existing seawall textured and colored to match neighboring wall to the south" and replace it with: "texturizing and coloring of sea wall to be included in Coastal Development Permit application 6-10-008".

- Sheet 5 of the Full Size Plans indicates that you wish to retain the gravel located on the upper portion of the bluff, and place soil and landscaping on top of the gravel. A request for authorization of this gravel is outside the scope of the Consent Order. Instead, authorization for retention of this development should be requested through CDP application 6-10-008.

10) Therefore, please delete reference to the retention of the unpermitted gravel and the placement of fill on top of the gravel on Sheet 5 of the Full Size Plans and include a note on the plans that addresses how landscaping will be established if: a) the Commission authorizes the retention of the unpermitted gravel on the site after the fact or b) the Commission denies the request to retain the unpermitted gravel and the gravel is removed from the property.

11) By **February 7, 2014¹**, please submit a written request to Mr. Lee McEachern of the San Diego District Office to incorporate into the CDP application the request to texturize and colorize the seawall and retain any gravel you wish to seek after-the-fact authorization for, along with any materials necessary to substantiate that request.

Item 4. Spill Contingency Plan ("Contingency Plan") – The Supplemental Narrative states that forms and materials from the City of Encinitas that address procedures for handling discharge of waste from construction equipment and activities on the beach will be attached to a future submittal. Section 2.5.1.C of the Consent Order requires a contingency plan that addresses potential spills or hazardous releases from mechanized equipment, clean up and disposal of hazardous materials, and water quality concerns raised by such releases. No contingency plan has been submitted.

1) Please submit, for the review and approval of the Executive Director, a contingency plan that meets the requirements of the Consent Order.

Item 5, BMP – Section 2.5.1 of the Consent Order requires a description of appropriate operation of mechanized equipment. The Supplemental Narrative states “...construction equipment and materials shall not be stored where they will not enter sensitive environmental habitat...” As written, this would have the opposite effect of what is required by the Consent Order.

1) For clarification, please amend the provision so that it states “...construction equipment and materials shall not be stored where they **could potentially impact** ~~will not enter~~ sensitive environmental habitat...”

Landscape Narrative

1) The Landscape Narrative includes references to plans dated July 15, 2012. The revisions to these plans, which are requested above, will require submittal of a new, revised plan, and the the revised plans will have a new date shown within the plan set. Therefore, please revise the Landscape Narrative to show the date of the revised plans which will be submitted.

2) Please amend the second to last sentence of item number 2 of the Landscape Narrative as follows: “... 1 hauling truck to remove the boulders in a proposed 1-2 ~~week~~ day operation...”

As you know, Section 2.4 of the Consent Order requires the completion of a CDP application requesting after-the-fact authorization of certain items of development listed in Section III of the Consent Order, within 120 days of the issuance of the Consent Order. The Consent Order also requires you to proceed with the application through the Commission permitting process and not withdraw it, to provide timely responses, and work to move the process along as quickly as possible, and to fully comply with the terms and conditions of the coastal development permit.

Please note that there are significant issues which must be resolved before your CDP application can be completed. These issues were previously outlined in a March 30, 2010 CDP filing status letter, and subsequent letters from Commission Enforcement staff.

In response to your previous request, Ms. Ananda forwarded a copy of Commission permit staff's March 30, 2010 CDP non-filing status letter to Mr. Jim Knowlton, FLM Structural Engineers (via fax on December 13, 2013), and Mr. Dan Math, CTE Engineering (via e-mail on December 13, 2013).

Please continue to coordinate with Mr. Lee McEachern regarding the completion of the required CDP application, including the payment of filing fees and the submittal of documents requested in this and previous letters. Please submit the materials required to complete your application to Mr. Lee McEachern by **February 7, 2014**¹.

You may contact me at 415-904-5220 if you have any questions regarding this letter or your obligations under the Consent Order. Please submit, by **February 7, 2014**¹, the revisions requested above.

Please send all correspondence, including the revised Removal Plan and Written Narratives, to my attention at the address provided in the letterhead. Thank you once again for your continued efforts and anticipated cooperation and we look forward to hearing from you soon.

Sincerely,



John Del Arroz

Statewide Enforcement Analyst

CC: Lee McEachern, District Regulatory Supervisor
Aaron McLendon, Statewide Enforcement Supervisor
Mr. Colm Kenny, Project Engineer, CTE
Mr. George Mercer, Landscape Architect

¹ Please note that this deadline date, or the other deadline dates included in the letter, does not re-establish (i.e. re-set) any of the deadlines required under the Consent Order; therefore the number of days for which violations have occurred are calculated based on those deadlines as provided in the Consent Order.

CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



Via Regular U.S. Mail

April 24, 2014

Mr. Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

Mr. George Mercer, Landscape Architect
4730 Palm Ave, Ste #210
La Mesa, CA 91941

Re: Consent Cease and Desist Order No. CCC-09-CD-05 – Compliance

Dear Mr. Brown and Mr. Mercer:

Thank you very much for the time you spent on the phone with me and Lee McEachern today. From our conversation, I believe you are now taking the necessary steps towards resolving the issues that remain on your property. As you've requested, please find attached the letter I sent to you on January 28th, 2014, which was also sent to you on April 24th, 2014 via email. I look forward to receiving the revised documents requested in the January 28 letter. As we discussed, the revised documents should be submitted by May 8th, 2014.

Please feel free to call me at 415-904-5220, or for matters regarding the Coastal Development Permit, to call Eric Stevens, at 619-767-2370.

Thank you again for your time and I look forward to talking to you soon.

Sincerely,

A handwritten signature in black ink, appearing to read "John Del Arroz".

John Del Arroz
Statewide Enforcement Analyst

Attachment: January 28, 2014 letter to Mr. Mike Brown

NON-FILING LETTERS

EXHIBIT NO. 13

APPLICATION NO.

6-10-018

Non-Filing Letters



California Coastal Commission

CALIFORNIA COASTAL COMMISSION

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



Via Regular and Certified Mail
(7002 0460 0003 8134 3227)

March 30, 2010

John and Patricia Brown
5201 Beach Drive SW
Seattle, WA 98136

Re: Coastal Development Permit Application #6-10-18/Brown

Dear Mr. and Mrs. Brown:

Commission staff has reviewed the above-cited permit application for after-the-fact deadman anchoring system, bluff retention wall (seawall), compacted gravel on the face of the bluff and proposed landscaping with temporary irrigation of the bluff face, removal of riprap seaward of the seawall, color and texturing of the seawall and removal of 200 sq. ft. of deck on seaward side of residence at 836/838 Neptune Avenue, Encinitas, and determined that additional information is necessary in order to properly review this application and schedule it for public hearing.

You must submit copies all requested documents in order to complete your application. We will not accept documents cited from other files. The required documents are as follows.

- Three (3) copies of scaled, as-built plans prepared by a licensed professional that accurately show all existing conditions with details and dimensions for the seawall, gravel placement, deadman system, soil nails, and deck including cross-sections, elevations, foundations and other typical details. The plans submitted with the application are insufficient since they include no details or dimensions for any of the existing developments.
- Three (3) copies of revised landscape plans that accurately show all existing conditions and all proposed work. Your application identifies "geogrid" as an element of the landscaping and your initial landscaping plan shows something that appears to be consistent with "geogrid". However, you have verbally informed us that geogrid is not proposed. Please clarify with detailed plans and a written description all proposed landscaping elements.
- The landscape palate must only include native, non-invasive, drought-tolerant species. Your submitted landscape palate includes at least one (1) invasive species (*Myoporum parvifolium*). Please have a certified landscape architect or biologist confirm that all plants are native, non-invasive and drought-tolerant species.
- Three (3) copies of structural calculations for the seawall
- Two (2) additional copies of slope stability analysis documenting slope stability before and after construction of the seawall and installation of gravel. (Only 1 copy was submitted)
- Three (3) copies of all geotechnical reports prepared for all aspects of the various development requests (seawall, deadman system, soil nails, gravel, etc.) including three (3) copies of third-party reviews and responses to them.

March 29, 2010

Page 2

- Three (3) copies of a current/updated geotechnical report documenting existing conditions.
- Three (3) copies of all Major Use Permits and signed Resolutions of Approval for all elements of the development. ✓
- One (1) copy of Appendix B (attached) that has been signed by the City of Encinitas
- Additional application fee of \$24,000.00. Because the proposed development involves a violation of the Coastal Act, the Commission regulations require that the application fee be five (5) times the regular application fee (i.e., 5 times \$6,000.00). Since you have already submitted \$6,000.00, you are required to submit an additional \$24,000.00.
- Because the proposed seawall will prevent sand material from the bluff from entering onto the beach over the lifetime of the seawall, the Commission will require mitigation for the loss sand to the beach resulting from the construction of the seawall. To address this adverse impact, the Commission historically has required the payment of an in-lieu fee for sand replenishment. The fee is based on the attached sand fee calculation worksheet. Please complete the attached worksheet and submit three (3) copies of proposed sand fee mitigation worksheet.
- In addition to mitigation for the adverse impacts on sand supply, the Commission will likely require that the applicant address the adverse impacts that the seawall structure has had and will have on public access and recreational opportunities. Please address how the applicant proposes to mitigate for these adverse impacts.

When all required information is received, reviewed by staff and found to be adequate to analyze the project, your application will be filed and scheduled on the next available Commission agenda. If you have any questions, please feel free to call me.

Sincerely,



Gary Cannon
Coastal Planner

cc: Marsha Venegas, Enforcement
Roy Sapau, City of Encinitas

Beach Sand Replenishment
In-lieu Fee Worksheet

$V_e =$ Volume of sand to rebuild the area of beach lost due to encroachment by the seawall; based on the seawall design and beach and nearshore profiles (cubic yards)

$$V_e = A_e \times v$$

$A_e =$ The encroachment area which is equal to the width of the properties which are being protected (W) times the seaward encroachment of the protection (E)

$$A_e = W \times E$$

$W =$ Width of property to be armored (ft.)

$E =$ Encroachment by seawall, measured from the toe of the bluff or back beach to the seaward limit of the protection (ft.)

$v =$ Volume of material required, per unit width of beach, to replace or reestablish one foot of beach seaward of the seawall; based on the vertical distance from the top of the beach berm to the seaward limit of reversible sediment movement (cubic yards/ft. of width and ft. of retreat). The value of v is often taken to be 1 cubic yard per square ft. of beach. If a vertical distance of 40 feet is used for the range of reversible sediment movement, v would have a value of 1.5 cubic yards/square ft. (40 feet x 1 foot x 1 foot/27 cubic feet per cubic yard). If the vertical distance for a reversible sand movement is less than 40 feet, the value of v would be less than 1.5 cubic yards per square foot. The value of v would be less than 1.5 cubic yards per square foot. The value of v will vary from one coastal region to another. A value of 0.9 cubic yards per square foot has been suggested for the Oceanside Littoral Cell (Oceanside Littoral Cell Preliminary Sediment Budget Report, December 1997, prepared as part of the Coast of California Storm and Tide Wave Study)

$V_w =$ Volume of sand to rebuild the area of beach lost due to long-term erosion (V_w) of the beach and near-shore, resulting from stabilization of the bluff face and prevention of landward migration of the beach profile; based on the long-term regional bluff retreat rate, and beach and nearshore profiles (cubic yards)

$$V_w = A_w \times v$$

A_w = The area of beach lost due to long-term erosion is equal to the long-term average annual erosion rate (R) times the number of years that the back beach or bluff will be fixed (L) times the width of the property that will be protected (W) (ft./yr.)

$$A_w = R \times L \times W$$

R = The retreat rate which must be based on historic erosion, erosion trends, aerial photographs, land surveys, or other acceptable techniques and documented by the applicant. The retreat rate should be the same as the predicted retreat rate used to estimate the need for shoreline armoring

L = The length of time the back beach or bluff will be fixed or the design life of the armoring without maintenance (yr.). For repair and maintenance projects, the design life should be an estimate of the additional length of time the proposed maintenance will allow the seawall to remain without further repair or replacement

V_b = Amount of beach material that would have been supplied to the beach if natural erosion continued, or the long-term reduction in the supply of bluff material to the beach, over the life of the structure; based on the long-term average retreat rate, design life of the structure, percent of beach quality material in the bluff, and bluff geometry (cubic yards)

$$V_b = (S \times W \times L) \times [(R \times h_s) + (1/2h_u \times (R + (R_{cu} - R_{cs})))]/27$$

S = Fraction of beach quality material in the bluff material, based on analysis of bluff material to be provided by the applicant

h_s = Height of the seawall from the base of the bluff to the top (ft.)

h_u = Height of the unprotected upper bluff, from the top of the seawall to the crest of the bluff (ft.)

R_{cu} = Predicted rate of retreat of the crest of the bluff, during the period that the seawall would be in place, assuming no seawall were installed (ft./yr.). This value can be assumed to be the same as R unless the applicant provides site specific geotechnical information supporting a different value

R_{cs} = Predicted rate of retreat of the crest of the bluff, during the period that the seawall would be in place, assuming the seawall has been installed (ft./yr.). This value will be assumed to be zero unless the applicant provides site specific geotechnical information supporting a different value

V_t = Total volume of sand required to replace losses due to the structure, through reduction in material from the bluff, reduction in nearshore area and loss of available beach area (cubic yards). Derived from calculations provided above

$$V_t = V_b + V_w + V_e$$

$$M = V_t \times C$$

C = Cost, per cubic yard of sand, of purchasing and transporting beach quality material to the project vicinity (\$ per cubic yard). Derived from the average of three written estimates from sand supply companies within the project vicinity that would be capable of transporting beach quality material to the subject beach, and placing it on the beach or in the near shore area

CDP #6-10-18
Mike and Patricia Brown

W =
E =
v =
R =
L =
S =
h_s =
h_u =
R_{cu} =
R_{cs} =
C =

$$V_e = A_e \times v$$

$$V_e =$$

$$V_w = A_w \times v$$

$$V_w =$$

$$V_b = (S \times W \times L) \times [(R \times h_s) + (1/2 h_u \times (R + (R_{cu} - R_{cs})))] / 27$$

$$V_b =$$

$$V_t = V_b + V_w + V_e$$

$$V_t =$$

$$M = V_t \times C$$

$$M =$$

6-10-18

APPLICATION FOR COASTAL DEVELOPMENT PERMIT

APPENDIX B

LOCAL AGENCY REVIEW FORM

SECTION A (TO BE COMPLETED BY APPLICANT)

Applicant _____

Project Description _____

Location _____

Assessor's Parcel Number _____

SECTION B (TO BE COMPLETED BY LOCAL PLANNING OR BUILDING INSPECTION DEPARTMENT)

Zoning Designation _____ du/ac

General or Community Plan Designation _____ du/ac

Local Discretionary Approvals

- Proposed development meets all zoning requirements and needs no local permits other than building permits.
- Proposed development needs local discretionary approvals noted below.

Needed Received

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Design/Architectural review |
| <input type="checkbox"/> | <input type="checkbox"/> | Variance for _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Rezone from _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Tentative Subdivision/Parcel Map No. _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Grading/Land Development Permit No. _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Planned Residential/Commercial Development Approval |
| <input type="checkbox"/> | <input type="checkbox"/> | Site Plan Review |
| <input type="checkbox"/> | <input type="checkbox"/> | Condominium Conversion Permit |
| <input type="checkbox"/> | <input type="checkbox"/> | Conditional, Special, or Major Use Permit No. _____ |
| <input type="checkbox"/> | <input type="checkbox"/> | Other _____ |

CEQA Status

- Categorically Exempt Class _____ Item _____
- Negative Declaration Granted (Date) _____
- Environmental Impact Report Required, Final Report Certified (Date) _____
- Other _____

Prepared for the City/County of _____ by _____

Date _____ Title _____

CALIFORNIA COASTAL COMMISSION

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



March 20, 2014

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

FILE COPY

Re: Coastal Development Permit Application #6-10-18/Brown – 836/838 Neptune Avenue,
Encinitas

Dear Mr. Brown:

As you know, on March 1, 2010, you submitted a coastal development permit application to our office to authorize, after-the-fact, a deadman anchoring system, a seawall on the beach and compacted gravel on the bluff face. In addition, your application included a request to color and texture the seawall and landscape the face of the bluff. On March 30, 2010, we sent to you a letter acknowledging receipt of your application, but notifying you the application was incomplete pending submittal of additional information and therefore your application was non-filed. Recently, on February 28, 2014, we met with you and your engineering consultant, Mr. Colm Kenny to discuss the status of your application. At that meeting you submitted a number of documents/reports to respond to our March 30, 2010 non-filing letter (see attached listing of materials submitted). However, Commission staff has reviewed the information you submitted and determined that it does not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing. As such, your application remains unfiled at this time. Specifically, the information still needed to file you application includes the following:

- Three (3) copies of scaled, as-built plans prepared by a licensed professional that accurately depicts all existing conditions with details and dimensions for the seawall gravel placement, deadman system, soil nails, and deck including cross sections, elevations, foundation and other typical details.
- Three (3) copies of the revised landscape plans that accurately shows all existing conditions and all proposed work.
- Three (3) copies of a current/updated geotechnical report documenting existing conditions. The documents you recently submitted may be sufficient, but we are awaiting review of our geologist to assure they are recent enough.
- Additional application fee of \$24,000.00
- Because the proposed seawall will prevent sand material from the bluff from entering onto the beach over the lifetime of the seawall, the Commission will require mitigation for the loss sand to the beach resulting from the construction of the seawall. To address this adverse impact, the Commission historically has required the payment of an in-lieu fee for sand replenishment. The fee is based on the sand

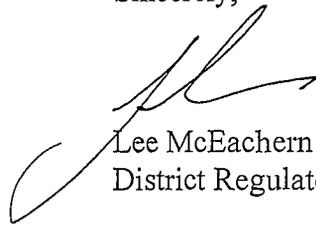
Mike Brown
March 20, 2014
Page 2

fee calculation worksheet that was previously sent to you. Please complete and submit three (3) copies of sand fee mitigation worksheet.

- In addition to mitigation for the adverse impacts on sand supply, the Commission will likely require that the applicant address the adverse impacts that the seawall structure has had and will have on public access and recreational opportunities. Please address how the applicant proposes to mitigate for these adverse impacts.

When all required information is received, reviewed by staff and found to be adequate to analyze the project, your application will be filed and scheduled on the next available Commission agenda. If you have any questions, please feel free to call me.

Sincerely,



Lee McEachern
District Regulatory Supervisor

cc: Eric Stevens
John Del Arroz

Materials Submitted by Mike Brown and Colm Kenny on February 28, 2014 Regarding CDP Application #6-10-18

- As-Built Geotechnical Report for Bluff Restoration – May 8, 2002
- Bluff and Seawall Landscape Plan – May 22, 2002
- Response to Third Party Review – August 9, 2004
- Update Geotechnical Report for Bluff Restoration – May 31, 2011
- Response to City of Encinitas Review Comments – May 15, 2012
- Response to California Coastal Commission Review Comments for Cease and Desist Order – June 15, 2012
- Engineering Calculations
- Slope Stability analysis - undated
- Haul Route Permit – May 29, 2001
- Temporary Encroachment Permit – December 13, 2000

CALIFORNIA COASTAL COMMISSION

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



May 29, 2014

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

Re: Coastal Development Permit Application #6-10-18/Brown - 836/838 Neptune Avenue,
Encinitas

Dear Mr. Brown:

We would first like to thank you for meeting with us on February 28, 2014 for a discussion on the CDP application and for the efforts you have taken recently to answer questions and provide additional information to Commission Staff. Although, as detailed below, there is still some information that we are requesting, we are very willing to work with you to ensure that Commission Staff has the information that we need to analyze the Coastal Development Permit application, and that we can move forward and bring this application to the Commission for the resolution of the issues on the property.

As you know, on March 1, 2010, you submitted a coastal development permit application to our office to authorize, after-the-fact, a deadman anchoring system, a seawall on the beach and compacted gravel on the bluff face. In addition, your application included a request to color and to texture the seawall and landscape the face of the bluff. On March 30, 2010, we sent to you a letter acknowledging receipt of your application, but notifying you the application was incomplete pending submittal of additional information and therefore your application was non-filed. Recently, on February 28, 2014, we met with you and your engineering consultant, Mr. Colm Kenny to discuss the status of your application. At that meeting you submitted a number of documents/reports to respond to our March 30, 2010 non-filing letter. In addition, on March 1, 2014 and March 3, 2014, you submitted various other documents. A list of the documents that you recently submitted is attached to this letter.

On March 20, 2014, we sent you a letter notifying you that Commission staff had reviewed the information you submitted and determined that it did not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing. On April 30, 2014, you faxed a letter to Commission staff. The letter appears to be in response to both the March 20, 2014 non-filing letter from Commission permit staff and a separate letter dated January 28, 2014 from Commission enforcement staff. The following responds to only the items in your letter regarding the Coastal Development Permit application; Commission enforcement staff will address the items regarding compliance with Consent Cease and Desist Order CCC-09-CD-05 in a separate letter.

Y900 3117
LITE COPY

Commission staff has reviewed the information you submitted and determined that it still does not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing.

As such, your application remains unfiled at this time. Specifically, the information still needed to file your application includes the following:

- Three (3) copies of scaled, as-built plans prepared by a licensed professional that accurately depicts all existing conditions with details and dimensions for the seawall gravel placement, deadman system, soil nails, and deck including cross sections, elevations, foundation and other typical details.

Although your response letter, dated April 30, 2014, appears to indicate that you have previously submitted the requested plans, that is not the case (Ref: Plan Submittal Inventory). None of the plans submitted to date have been marked as-built. In addition to the fact that as-built plans have not been submitted, the existing site plans submitted with the application include no details or dimensions for any of the existing development.

- Three (3) copies of the revised landscape plans that accurately shows all existing conditions and all proposed work.

It is unclear what landscaping and irrigation is proposed for the site. Your most recent landscaping plan submittal dated July 15, 2012 only included plan page 5 of 7. Please confirm that this plan represents the latest landscaping proposal and provide the other 6 plan pages.

- Your response letter, dated April 30, 2014, states: "We continue to request a formal acknowledgement/document from CCC staff that the \$45,000. fee charged to us in 2009 was fully paid in November, 2013. A copy of that document needs to be sent to us and enclosed in our CCC project file."

As you know, you agreed to resolve the unpermitted development which occurred on the site through Consent Cease and Desist Order CCC-09-CD-05 (referred to below as "the Order"). The "\$45,000 fee" which you refer to is the monetary settlement required pursuant to Section IX.A of the Order. Along with the other requirements in the Order, the monetary settlement was required in order to resolve the civil liability for the unpermitted development which occurred on the site. Please accept this letter as acknowledgement and confirmation from Commission Staff that you have fully satisfied the requirements of section IX.A of the Order and submitted the full \$45,000 settlement payment. A copy of this letter will be included in the Commission's permit application file.

However, please note that the monetary settlement is different from the filing fee for a CDP application. The Order also requires, in Section 2.4.1, that you submit a complete CDP application, which has not yet occurred. The filing of a complete

CDP application requires the payment of a filing fee for the costs of processing the application. As detailed further below, the filing fee for the Coastal Development Permit application has **not** been paid in full.

On March 1, 2010, you paid a filing fee of \$6,000 when you submitted this application. Due to the fact that this application is, in part, a follow up to Coastal Act violations, the Commission is required to increase the filing fee to five times the regular filing fee¹. Therefore, the filing fee for the subject CDP application is \$30,000. You have paid a total of \$6,000. Therefore, the remainder of the required filing fee is \$24,000, which must be paid at this time.

- Because the proposed seawall will prevent sand material from the bluff from entering onto the beach over the lifetime of the seawall, the Commission will require mitigation for the loss of sand to the beach resulting from the construction of the seawall. To address this adverse impact, the Commission historically has required the payment of an in-lieu fee for sand replenishment. The fee is based on the sand fee calculation worksheet that was previously sent to you. Please complete and submit three (3) copies of sand fee mitigation worksheet.
- In addition to mitigation for the adverse impacts on sand supply, the Commission will likely require that the applicant address the adverse impacts that the seawall structure has had and will have on public access and recreational opportunities. Please address how you propose to mitigate for these adverse impacts. On the Commission website you can find examples of past Commission actions for shoreline armoring in Encinitas that included mitigation for public access and recreation impacts. Commission actions that included mitigation for public access and recreation impacts in Encinitas include CDP No. 6-07-133/Li and CDP No. 6-12-041/Lampl & Baskin.

When all required information is received, reviewed by staff and found to be adequate to analyze the project, your application will be filed and scheduled on the next available Commission agenda.

In addition to the items listed above that are needed to file this application, our geologist reviewed the geotechnical documents that you submitted and has requested that you respond to the following two items.

- The original slope failure was generally agreed at the time to have occurred along a thin clay seam present in the Eocene bedrock, which was visible in the outcrop (similar clay seams are visible in the bedrock lower bluff north and south of the site). The slope stability analyses provided do not take such a clay seam into consideration. Please rectify these observations with the slope stability models presented.

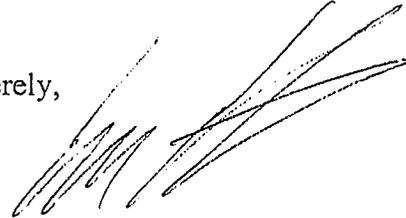
¹ See: Page 14 of the CDP application form, and/or Section 13055 of the California Code of Administrative Regulations

Mike Brown
May 29, 2014
Page 4

- Please provide an updated geotechnical report confirming that geologic conditions have not changed subsequent to prior submitted reports.

We are looking forward to working with you. If you have any questions, please feel free to call me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric Stevens', written over a light blue horizontal line.

Eric Stevens
Coastal Program Analyst

cc: Diana Lilly, Supervisor, Permits and Enforcement
John Del Arroz, Statewide Enforcement Analyst

Mike Brown
May 29, 2014
Page 6

Materials submitted by Mike Brown and Colm Kenny on February 28, 2014 in regards to CDP application #6-10-018:

1. As-Built Geotechnical Report for Bluff Restoration – May 8, 2002
2. Bluff and Seawall landscape Plan – May 22, 2002
3. Response to Third Party Review – August 9, 2004
4. Response to City of Encinitas Review Comments – May 15, 2012
5. Response to California Coastal Commission Review Comments for Cease and Desist Order – June 15, 2012
6. Engineering Calculations – Various Dates
7. Haul Route Permit – May 29, 2001
8. Temporary Encroachment Permit – December 13, 2000

Materials submitted by Mike Brown on March 1, 2014 in regards to CDP application #6-10-018:

9. 1 page Memorandum from Monica Sonie to Mike McNeff which referenced a Soils Report from Construction Testing Engineers, which was not a part of the March 1, 2014 submittal – August 26, 2004
10. 1 page Transmittal from Construction Testing & Engineering, Inc. to Flores Lund Consultants which references Wet Signed and stamped As-Built Geotechnical Report, which was not a part of the March 1, 2014 submittal – May 10, 2002

Materials submitted by Mike Brown on March 3, 2014 in regards to CDP application #6-10-018:

11. Update Geotechnical Report for Bluff Restoration and Slope Stability Analysis – May 31, 2011

Plan Submittal Inventory:

You have submitted 4 separate plan sets to San Diego Commission staff since this application was originally submitted in March 2010. An inventory of plan sets submitted to San Diego Commission staff is included for your reference and to aid you in clearly responding to the information requests in this letter. A description of these plans sets is below:

1. Plan set received March 1, 2010
 - “Site Plan for Bluff Repairs” by Ray Spencer undated (1 Page)
 - “Site Plan for Bluff Repairs” by George Mercer Landscape Architecture dated January 27, 2010 (1 Page)
 - “Landscape Improvement Plans for Bluff Repairs” by George Mercer Landscape Architecture dated January 8, 2010 (7 Pages)
 - “Shoring Plans for Bluff Repairs” by McNeff Engineering and Consulting dated February 22, 2010 (1 Page)
2. Plan set received May 24, 2011
 - “Landscape Improvement Plans for Bluff Repairs” by George Mercer Landscape Architecture dated May 24, 2011 (7 Pages)
3. Plan set received May 17, 2012
 - “Grading Plan for 836-838 Neptune Avenue” by Construction Testing & Engineering dated May 9, 2012 (2 Pages)
4. Plan set received February 4, 2013
 - “Erosion Control Planting Plan” by George Mercer Landscape Architecture dated July 15, 2012 (1 Page)

CALIFORNIA COASTAL COMMISSION

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



December 18, 2014

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

Re: Coastal Development Permit Application #6-10-18/Brown – 836/838 Neptune Avenue,
Encinitas

Dear Mr. Brown:

As you know, on March 1, 2010, you submitted a coastal development permit application to our office to authorize, after-the-fact, a deadman anchoring system, a seawall on the beach and compacted gravel on the bluff face. In addition, your application included a request to color and to texture the seawall and landscape the face of the bluff. On March 30, 2010, we sent to you a letter acknowledging receipt of your application, but notifying you the application was incomplete pending submittal of additional information and therefore your application was non-filed. On February 28, 2014, we met with you and your engineering consultant, Mr. Colm Kenny to discuss the status of your application. At that meeting you submitted a number of documents/reports to respond to our March 30, 2010 non-filing letter. In addition, on March 1, 2014 and March 3, 2014, you submitted various other documents.

On March 20, 2014, we sent you a letter notifying you that Commission staff had reviewed the information you submitted and determined that it did not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing. On April 30, 2014, you faxed a letter to Commission staff. The letter was in response to both the March 20, 2014 non-filing letter from Commission permit staff and a separate letter dated January 28, 2014 from Commission enforcement staff. On May 29, 2014, Commission staff responded to the April 30, 2014 fax and detailed the items that still needed to be submitted in file the application as complete.

On November 24, 2014, you faxed an additional letter to Commission staff and on November 25, 2014, you sent three sets of plans to Commission staff. On December 1, 2014, we met with you to discuss the status of your application. A list of the documents that you recently submitted is attached to this letter. Commission staff has reviewed the information you submitted and determined that it still does not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing. As such, your application remains unfiled at this time. Specifically, the information still needed to file your application includes the following:

- Three (3) copies of scaled, as-built plans prepared by a licensed professional that accurately depicts all existing conditions with details and dimensions for the seawall,

gravel placement, deadman system, soil nails, and deck including cross sections, elevations, foundation and other typical details.

As discussed at the December 1, 2014 meeting, the purpose of as-built plans is to show **all** development that has been constructed on the site. As-built plans must be marked with the words “**As-built.**” You have not submitted any as-built plans to date. As stated above, as-built plans should include details and dimensions for the seawall, gravel placement, deadman system, soil nails, and deck including cross sections, elevations, foundation and other typical details. As discussed, the plan section showing the gravel placement should include an estimate of the amount of gravel placed and the thickness of the gravel. In addition, the plans should also show the soil that has already been placed on the lower portion of the bluff. At the December 1, 2014 meeting, you stated that the soil nails have failed; this should be included as a note on the plans.

Separate plans from the As-built plans should be submitted that clearly show any work that is proposed at this time, but is not already constructed.

- At the December 1, 2014 meeting, you stated that the landscape plans dated June 12, 2011 and July 15, 2012 are the most recent landscaping plans and reflect your current landscaping proposal. If this is correct, you do not need to submit additional landscaping plans. However, if site conditions have changed in the 3+ years since these plans were developed, the plans should be updated to reflect current conditions.
- At the December 1, 2014 meeting and within your fax, dated November 24, 2014, you expressed your disagreement with the filing fee for this application. Staff notes that you do not agree with the filing fee. However, the filing of a complete CDP application requires the payment of a filing fee for the costs of processing the application. As detailed further below, the filing fee for the Coastal Development Permit application has **not** been paid in full.

On March 1, 2010, you paid a filing fee of \$6,000 when you submitted this application. Due to the fact that this application is, in part, a follow up to Coastal Act violations, the Commission is required to increase the filing fee to five times the regular filing fee¹. Therefore, the filing fee for the subject CDP application is \$30,000. You have paid a total of \$6,000. Therefore, the remainder of the required filing fee is \$24,000, which must be paid at this time.

When all required information is received, reviewed by staff and found to be adequate to analyze the project, your application will be filed and scheduled on the next available Commission agenda.

¹ See: Page 14 of the CDP application form, and/or Section 13055 of the California Code of Administrative Regulations

Mike Brown
December 18, 2014
Page 3

In addition to the items listed above that are needed to file this application, please provide an updated geotechnical report or a letter from a certified geologist confirming that geologic conditions have not changed subsequent to prior submitted reports. The updated geotechnical report or a letter should clearly reference the title, date, and author of any reports that were reviewed.

We are looking forward to working with you. If you have any questions, please feel free to call me.

Sincerely,



Eric Stevens
Coastal Program Analyst

cc: Diana Lilly, Supervisor, Permits and Enforcement
John Del Arroz, Statewide Enforcement Analyst

Plan Submittal Inventory:

You have submitted 5 separate plan sets to San Diego Commission staff since this application was originally submitted in March 2010. An inventory of plan sets submitted to San Diego Commission staff is included for your reference and to aid you in clearly responding to the information requests in this letter. A description of these plans sets is below:

1. Plan set received March 1, 2010
 - “Site Plan for Bluff Repairs” by Ray Spencer undated (1 Page)
 - “Site Plan for Bluff Repairs” by George Mercer Landscape Architecture dated January 27, 2010 (1 Page)
 - “Landscape Improvement Plans for Bluff Repairs” by George Mercer Landscape Architecture dated January 8, 2010 (7 Pages)
 - “Shoring Plans for Bluff Repairs” by McNeff Engineering and Consulting dated February 22, 2010 (1 Page)
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4. Plan set received February 4, 2013
 - “Erosion Control Planting Plan” by George Mercer Landscape Architecture dated July 15, 2012 (1 Page)
4. Plan set received November 25, 2014
 - “Landscape Improvement Plans for Bluff Repairs” by George Mercer Landscape Architecture, pages 1-4 and 6-7 are dated June 12, 2011 and page 5 is dated July 15, 2012.

Materials submitted by Mike Brown and Colm Kenny on February 28, 2014 in regards to CDP application #6-10-018:

1. As-Built Geotechnical Report for Bluff Restoration – May 8, 2002
2. Bluff and Seawall landscape Plan – May 22, 2002
3. Response to Third Party Review – August 9, 2004
4. Response to City of Encinitas Review Comments – May 15, 2012
5. Response to California Coastal Commission Review Comments for Cease and Desist Order – June 15, 2012
6. Engineering Calculations – Various Dates
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9. 1 page Memorandum from Monica Sonie to Mike McNeff which referenced a Soils Report from Construction Testing Engineers, which was not a part of the March 1, 2014 submittal – August 26, 2004
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Materials submitted by Mike Brown on March 3, 2014 in regards to CDP application #6-10-018:

11. Update Geotechnical Report for Bluff Restoration and Slope Stability Analysis – May 31, 2011

CALIFORNIA COASTAL COMMISSION

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



March 19, 2015

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

Re: Coastal Development Permit Application #6-10-18/Brown – 836/838 Neptune Avenue,
Encinitas

Dear Mr. Brown:

As you know, on March 1, 2010, you submitted a coastal development permit application to our office to authorize, after-the-fact, a deadman anchoring system, a seawall on the beach and compacted gravel on the bluff face. In addition, your application included a request to color and to texture the seawall and landscape the face of the bluff. On March 30, 2010, we sent you a letter acknowledging receipt of your application, but notifying you the application was incomplete pending submittal of additional information and therefore your application was non-filed. On February 28, 2014, we met with you and your engineering consultant, Mr. Colm Kenny to discuss the status of your application. At that meeting you submitted a number of documents/reports to respond to our March 30, 2010 non-filing letter. In addition, on March 1, 2014 and March 3, 2014, you submitted various other documents.

On March 20, 2014, we sent you a letter notifying you that Commission staff had reviewed the information you submitted and determined that it did not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing. On April 30, 2014, you faxed a letter to Commission staff. The letter was in response to both the March 20, 2014 non-filing letter from Commission permit staff and a separate letter dated January 28, 2014 from Commission enforcement staff.

On May 29, 2014, Commission staff sent you a letter in response to the April 30, 2014 fax and detailed the items that still needed to be submitted in order to file the application as complete. On November 24, 2014, you faxed an additional letter to Commission staff and on November 25, 2014, you sent three sets of plans to Commission staff. On December 1, 2014, we met with you to discuss the status of your application.

On December 18, 2014, Commission staff sent you a letter in response to the November 24, 2014 fax and in response to the plans submitted on November 25, 2014, which detailed the items that still needed to be submitted in order to file the application as complete. On February 20, 2015, you submitted two copies of a one-page response letter and three copies of unsigned and undated "As-Built" plans. Each copy of the plans was a total of two pages.

A list of the documents that you recently submitted is attached to this letter.

Mike Brown
March 19, 2015
Page 2

Commission staff cannot review the plans marked "As-Built" that you recently submitted because they are neither signed nor dated. Thus, it is not possible to verify that the information contained within the plans is accurate. You must submit "As-Built" plans that are both signed and dated by a registered professional engineer.

Furthermore, you have still not submitted the remaining required permit fee of \$24,000.

Commission staff has reviewed the information you submitted and determined that it still does not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing. As such, your application remains unfiled at this time. When all required information is received, reviewed by staff and found to be adequate to analyze the project, your application will be filed and scheduled on the next available Commission agenda.

In addition to the items listed above that are needed to file this application, please provide an updated geotechnical report or a letter from a certified geologist confirming that geologic conditions have not changed subsequent to prior submitted reports. The updated geotechnical report or a letter should clearly reference the title, date, and author of any reports that were reviewed.

If you have any questions, please feel free to call me.

Sincerely,



Eric Stevens
Coastal Program Analyst

cc: Diana Lilly, Supervisor, Permits and Enforcement
John Del Arroz, Statewide Enforcement Analyst

Plan Submittal Inventory:

You have submitted 6 separate plan sets to San Diego Commission staff since this application was originally submitted in March 2010. An inventory of plan sets submitted to San Diego Commission staff is included for your reference and to aid you in clearly responding to the information requests in this letter. A description of these plans sets is below:

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CALIFORNIA COASTAL COMMISSION

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



April 30, 2015

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

Re: Coastal Development Permit Application #6-10-18/Brown – 836/838 Neptune Avenue,
Encinitas

Dear Mr. Brown:

As you know, on March 1, 2010, you submitted a coastal development permit application to our office to authorize, after-the-fact, a deadman anchoring system, a seawall on the beach and compacted gravel on the bluff face. In addition, your application included a request to color and to texture the seawall and landscape the face of the bluff. On March 30, 2010, we sent you a letter acknowledging receipt of your application, but notifying you the application was incomplete pending submittal of additional information and therefore your application was non-filed. On February 28, 2014, we met with you and your engineering consultant, Mr. Colm Kenny to discuss the status of your application. At that meeting you submitted a number of documents/reports to respond to our March 30, 2010 non-filing letter. In addition, on March 1, 2014 and March 3, 2014, you submitted various other documents.

On March 20, 2014, we sent you a letter notifying you that Commission staff had reviewed the information you submitted and determined that it did not include all the previously requested information necessary in order to properly review this application and schedule it for public hearing. On April 30, 2014, you faxed a letter to Commission staff. The letter was in response to both the March 20, 2014 non-filing letter from Commission permit staff and a separate letter dated January 28, 2014 from Commission enforcement staff.

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On February 20, 2015, you submitted two copies of a one-page response letter and three copies of unsigned and undated "As-Built" plans. Each copy of the plans was a total of two pages.

Mike Brown
April 30, 2015
Page 2

On March 19, 2015, Commission staff sent you a letter in response to your February 20, 2015 plan submittal notifying you that your application would not be filed until signed and dated "As-Built" plans are submitted and until the full permit fee is submitted. In addition, the letter requested that you submit an updated geotechnical report or a letter confirming that conditions at the subject site have not changed subsequent to prior submitted geotechnical reports.

On April 1, 2015, your representative submitted memo of "Confirmation of Previous Geotechnical Observation," dated January 14, 2015. In addition, on April 3, 2015, Commission Staff Received 3 copies of signed and dated "As-Built" plans. Each copy of the plans was a total of two pages.

A list of the documents that you recently submitted is attached to this letter.

The final item that must be submitted before this application will be filed is the remaining required permit fee of \$24,000. As such, your application remains unfiled at this time. When the required permit fee is received, your application will be filed and scheduled on the next available Commission agenda.

If you have any questions, please feel free to call me.

Sincerely,



Eric Stevens
Coastal Program Analyst

cc: Diana Lilly, Supervisor, Permits and Enforcement
John Del Arroz, Statewide Enforcement Analyst

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11. Update Geotechnical Report for Bluff Restoration and Slope Stability Analysis – May 31, 2011

Materials submitted by Mike Brown on February 20, 2015 in regards to CDP application #6-10-018:

12. Two copies of a one page letter to Commission staff, dated February 20, 2015

Materials submitted by Colm Kenny on April 1, 2015 in regards to CDP application #6-10-018:

13. 2 page memorandum titled “Confirmation of Previous Geotechnical Observations Brown Residence 836-838 Neptune Avenue Encinitas, California” dated January 14, 2015

CALIFORNIA COASTAL COMMISSION

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



June 1, 2015

Mike Brown
3703 Lake Washington Blvd. North
Renton, WA 98056

Re: Coastal Development Permit Application #6-10-18/Brown – 836/838 Neptune Avenue,
Encinitas

Dear Mr. Brown:

This letter is in response to your recent emails to Commission staff, dated 5/1/2015, 5/20/2015 (multiple), and 5/21/2015.

In your email dated 5/1/2015, you note that in November 2014 you submitted a fax to Commission staff and you would like that fax to be a part of the list of submitted documents included in the Commission staff letter to you, dated 4/30/2015. The fax was previously referenced in Commission staff letters to you, dated 12/18/2014 and 3/19/2015, and is referenced on page 1 of the 4/30/2015 letter from Commission Staff:

“...On November 24, 2014, you faxed an additional letter to Commission staff...”

Commission staff has also included the fax in the list of recently submitted documents at the end of this letter.

In your email dated 5/1/2015, you also note that you have already paid \$45,000 and that you have previously offered to pay a total permit fee of \$10,000. In the letter to you from Commission enforcement staff, dated 11/19/2010, staff stated that a CDP fee of two times may be appropriate to process your application, if your application could be processed without additional staff time. This letter was sent more than four years ago and significant staff time has since been expended since. Therefore, a CDP fee of two times is not appropriate and you must submit the required five-time fee. The filing fee for the subject CDP application is \$30,000. You have paid a total of \$6,000. The remainder of the required filing fee is \$24,000, which must be paid at this time.

In your emails dated 5/20/2015 and 5/21/2015, you included a copy of a Preliminary Title Report for your property, dated 5/11/2015, and an Assessor's Parcel Map. You also requested that the Commission remove the Notice of Violation from your property.

As Commission Enforcement staff have explained to you in previous communications, and as you can see in the Coastal Act, which is quoted below as a courtesy to you, the Notice of Violation (NOVA) recorded on the property is only an informational notice. Section 30812 of the Coastal Act states, “This notice is for informational purposes only and is not a defect, lien, or encumbrance on the property.” Contrary to your message, Commission staff did not

offer to “talk directly to your lender to help accomplish [y]our loan.” However, if you are referring to explaining the NOVA, Commission Enforcement staff has previously offered (in previous phone calls and in our 11/19/2010 and 3/2/2012 letters) to do so, and is still willing to explain the meaning of the NOVA to anyone, including your lender. If you would like to have Commission Enforcement staff discuss the NOVA with someone, please have that person call John Del Arroz at 415-904-5220.

Coastal Act Section 30812 states:

(e)(2) The notice of violation, when properly recorded and indexed, shall be considered notice of the violation to all successors in interest in that property. This notice is for informational purposes only and is not a defect, lien, or encumbrance on the property.

(f) Within 30 days after the final resolution of a violation that is the subject of a recorded notice of violation, the executive director shall mail a clearance letter to the owner of the real property and shall record a notice of rescission in the office of each county recorder in which the notice of violation was filed, indicating that the notice of violation is no longer valid. The notice of rescission shall have the same effect of a withdrawal or expungement under Section 405.61 of the Code of Civil Procedure.

The Notice of Violation will be removed when the Commission’s Consent Orders have been fully complied with. That is, the NOVA will be removed when either the unpermitted development has been removed or a Coastal Development Permit has been issued by the Commission to authorize the unpermitted development after the fact. No CDP has been issued to authorize the development and the unpermitted development remains on the property. Therefore, the NOVA will not be rescinded.

As explained in the Commission’s letter to you dated 4/30/2015 and by telephone on 5/27/2015, the final item that must be submitted before this application will be filed is the remaining required permit fee of \$24,000. As such, your application remains unfiled at this time. When the required permit fee is received, your application will be filed and scheduled on the next available Commission agenda.

In addition, as we also discussed on the 5/27/2015 phone call, please confirm via email to me that you would like the Commission to process a consolidated CDP for your project. I have included the section of the Coastal Act that provides for consolidated permit review below for your reference.

Section 30601.3 Coastal development permit application; processing criteria; standard of review; application fee; adoption of guidelines

(a) Notwithstanding Section 30519, the commission may process and act upon a consolidated coastal development permit application if both of the following criteria are satisfied:

(1) A proposed project requires a coastal development permit from both a local government with a certified local coastal program and the commission.

Mike Brown
June 1, 2015
Page 3

(2) The applicant, the appropriate local government, and the commission, which may agree through its executive director, consent to consolidate the permit action, provided that public participation is not substantially impaired by that review consolidation.

(b) The standard of review for a consolidated coastal development permit application submitted pursuant to subdivision (a) shall follow Chapter 3 (commencing with Section 30200), with the appropriate local coastal program used as guidance.

(c) The application fee for a consolidated coastal development permit shall be determined by reference to the commission's permit fee schedule.

(d) To implement this section, the commission may adopt guidelines, in the same manner as interpretive guidelines adopted pursuant to paragraph (3) of subdivision (a) of Section 30620. (Added by Ch. 294, Stats. 2006.)

If you have any questions, please feel free to call or email me.

A list of the documents that you recently submitted is attached to this letter.

Sincerely,



Eric Stevens
Coastal Program Analyst

cc: Diana Lilly, Supervisor, Permits and Enforcement
John Del Arroz, Statewide Enforcement Analyst

Plan Submittal Inventory:

You have submitted 7 separate plan sets to San Diego Commission staff since this application was originally submitted in March 2010. An inventory of plan sets submitted to San Diego Commission staff is included for your reference. A description of these plans sets is below:

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11. Update Geotechnical Report for Bluff Restoration and Slope Stability Analysis – May 31, 2011

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Mike Brown
June 1, 2015
Page 6

14. 2 page memorandum titled "Confirmation of Previous Geotechnical Observations Brown Residence 836-838 Neptune Avenue Encinitas, California" dated January 14, 2015

CONSENT ORDER

EXHIBIT NO. 14

APPLICATION NO.

6-10-018

Consent Order



California Coastal Commission

CONSENT CEASE AND DESIST ORDER CCC-09-CD-05

1.0 CEASE AND DESIST ORDER CCC-09-CD-05

Pursuant to its authority under California Public Resource Code (hereinafter, "PRC") section 30810, the California Coastal Commission (hereinafter, "Commission") hereby authorizes and orders John "Mike" and Patricia Brown, all their employees, agents, and contractors, and any persons acting in concert with any of the foregoing (hereinafter, "Respondents") to: 1) cease and desist from engaging in any further development, as that term is defined in PRC section 30106, on the property located at 836-838 Neptune Avenue, City of Encinitas, San Diego County (APN 254-011-17) or the area immediately seaward thereof (hereinafter, "subject property"), unless authorized or exempt pursuant to the Coastal Act (PRC §§ 30000-30900), which includes authorization pursuant to the terms and conditions of any permit or order issued by the Commission or by a certified local government¹ in administering the Coastal Act, including Consent Cease and Desist Order No. CCC-09-CD-05 ("Consent Order"), and 2) comply with the requirements of Section 2.0, as set forth below, including any requirement therein to comply with other sections of this Consent Order, and with all other terms of this Consent Order. Through the execution of this Consent Order, the Respondents agree to comply with the terms of this paragraph and with the following terms and conditions.

2.0 TERMS AND CONDITIONS

2.1. Cease and desist from engaging in any further unpermitted "development," as that term is defined in PRC section 30106, on the subject property or the areas immediately up or downcoast thereof.

2.2. Cease and desist from maintaining unpermitted "development," as that term is defined in PRC section 30106, on the subject property or the areas immediately up or downcoast thereof.

2.3. Within 60 days of the issuance of this Consent Order, submit a removal plan for the following unpermitted or temporarily permitted development:

2.3.1. All portions of the deck on the subject property that are within five-feet of the top edge of the bluff.

¹ A "certified local government" is a City or County that has a local coastal program that has been effectively certified by the Commission pursuant to Chapter 6 of the Coastal Act (PRC §§ 30500-30534).

2.3.2. The rip-rap placed seaward of the existing seawall on the subject property.

2.4. Completion of Permit Applications

2.4.1 Commission CDP

2.4.1.1 Within 120 days from the issuance date of this Consent Order, or within such additional time as the Executive Director may grant for good cause as per Section X, Respondents shall submit to the Commission's San Diego District Office all materials that are required to complete a Coastal Development Permit ("CDP") application. Necessary geotechnical and engineering documents shall be prepared by a professionally licensed engineer. The application shall address all alleged violations that are listed in Section III that are within the Commission's permitting jurisdiction except for development identified in and addressed in Sections 2.3 and 2.5, which is to be removed under this Consent Order.

2.4.1.2 Respondents shall not withdraw the application submitted under Section 2.4.1 and shall allow the application to proceed through the Commission's permitting process according to applicable laws and regulations and the standard permitting procedures.

2.4.1.2.1 If Respondents fail to submit a complete CDP application within the timeframes established herein, Respondents agree to submit a plan to remove all unpermitted development or development temporarily authorized within 30 days of their failure to submit the complete CDP application. This removal plan shall be consistent with the terms of Section 2.5 of this Order.

2.4.1.3 If, after receiving Respondents' submittal, the Executive Director determines that additional information is required to complete the Commission CDP application, the Executive Director shall send a written request to the Respondents for the information, which request will set forth the additional materials required and provide a reasonable deadline for submittal. Respondents shall submit the required materials by the deadline specified in the request letter.

2.4.1.4 Respondents shall fully participate and cooperate in the Commission permitting process, provide timely responses, and work to move the process along as quickly as possible, including responding to requests for information.

2.4.2 City of Encinitas CDP and Major Use Permit

2.4.2.1 Within 60 days from the issuance date of this Consent Order, or within such additional time as the Executive Director may grant for good cause as per Section X, Respondents shall submit to the City of Encinitas ("City") all materials that are required to complete a CDP application, and a Major Use Permit application, which shall address all alleged violations identified in Section III, except for development identified in and addressed in Section 2.3 and 2.5, which is to be removed under this Consent Order, on the subject property that is located within the City's Coastal Act permitting jurisdiction. Necessary geotechnical and engineering documents shall be prepared by a professionally licensed engineer.

2.4.3 Respondents shall comply with requests from the City and/or Commission permit staff, which are made in order to complete the permit applications, within the timeframe provided in the requests.

2.4.4 Respondents shall comply fully with the terms and conditions of any permit that the Commission and/or the City may grant in response to the applications referenced in Sections 2.4.1 and 2.4.2 above.

2.4.5 Submission of Removal Plans

2.4.5.1 Within 20 days after the Commission acts on the CDP application submitted by Respondents, Respondents shall submit plans for removal of all development, as identified in this Consent Order, that has not been approved in that action. The plans shall include a schedule of all actions required to restore affected areas to pre-development condition, are subject to Executive Director approval, and should include Restoration and Removal activities, as detailed in Section 2.5 below. All procedural and

implementation provisions listed in this Consent Order shall apply to this plan as well.

2.4.5.2 Within 20 days after the City of Encinitas acts on the CDP application submitted by Respondents, Respondents shall submit plans for removal of all development within the City of Encinitas' jurisdiction, as identified in this Consent Order, that has not been approved in that action. The plans shall include a schedule of all actions required to restore affected areas to pre-development condition, and should include Restoration and Removal activities, as detailed in Section 2.5 below. All procedural and implementation provisions listed in this Consent Order shall apply to this plan as well.

2.5 Removal Plans

2.5.1 Within 60 days of issuance of this Order, Respondents will supply the Executive Director with a plan (the "Removal Plan") to: (a) remove all portions of the deck on the subject property that are within five-feet of the top edge of the bluff, the rock revetment, and any other unpermitted development (or any development that was temporarily authorized under an emergency permit) for which Respondents have agreed that they have not and will not apply for after-the-fact permit authorization to retain, and (b) otherwise address any other violations on the subject property for which Respondents have not and will not seek after-the-fact authorization.

The Removal Plan shall include a description of:

- A. Removal of all portions of the deck on the subject property that are within five-feet of the top edge of the bluff;
- B. Removal of the rock revetment;
- C. Appropriate operation of any mechanized equipment necessary to complete removal and restoration work, and follow other operational procedures to minimize impacts, including but not limited to the following:
 - 1. Hours of operation of mechanized equipment shall be limited to weekdays between sunrise and sunset, excluding the Memorial Day, Fourth of July, and Labor Day Holidays;

2. Equipment shall be stored in an approved location inland from the beach when not in use;

3. A contingency plan shall be established addressing: 1) potential spills of fuel or other hazardous releases that may result from the use of mechanized equipment; 2) clean-up and disposal of hazardous materials; and 3) water quality concerns;

4. Disposal of removed materials and structures which are to be disposed of must occur at a licensed disposal facility located outside of the Coastal Zone. Any hazardous materials must be transported to a licensed hazardous waste disposal facility;

5. Liners and other imported materials shall be disposed of at a Commission-approved location outside of the Coastal Zone. If a disposal location within the Coastal Zone is selected, a coastal development permit will be required. Any hazardous materials shall be disposed of according to the contingency plan required under 3.4.1.D.3 above;

6. Removal of revetment materials and any fill materials consisting of soil, sand, or other similar materials shall be accomplished using means that provide the least impact possible on the subject property and surroundings;

a. All requisite permits shall be obtained from the Department of Parks and Recreation prior to the use of any mechanized equipment on Leucadia State Beach.

7. The number of trips to and from the site shall be minimized; and

8. Measures to protect against impacts to water quality from removal and restorative grading shall be described and followed.

2.5.2 If the Executive Director determines that any modifications or additions to the proposed Removal Plan are necessary, he shall notify Respondents. Respondents shall complete requested modifications and resubmit the Removal Plan for approval within 10 days of the notification.

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2.5.3 The Plan shall provide for access to the site per Section XIV below for the purpose of monitoring compliance with this Consent Order.

2.6 Plan Implementation

2.6.1 Within 15 days after the Executive Director's approval of the Removal Plan, and in compliance with all plan terms including schedule for activities, Respondents shall commence removal in compliance with the terms of the Consent Order, including the following:

- 2.6.1.1 Remove all development listed in the approved Removal Plan, including removal of the all portions of the bluff-top deck within five-feet of the top edge of the bluff and rip-rap from the beach seaward of the existing seawall on the subject property.
- 2.6.1.2 Cease maintaining or conducting new unpermitted development except that for which authorization is still being sought through the permit process listed above.
- 2.6.1.3 Restore the area to pre-development condition.
- 2.6.1.4 Revegetate in accordance with any approved Revegetation Plan.

2.7 Other than those areas subject to removal activities, the areas of the subject property and surrounding areas currently undisturbed shall not be disturbed by activities required by this Consent Order.

2.8 Within 15 days of the completion of work outlined in the Removal Plan, Respondents shall submit, for the review and approval of the Executive Director, a report indicating that the removal has taken place in accord with the approved Removal Plan, along with photos documenting all work done. All documents submitted by Respondents shall be submitted according to Section V of this Order.

2.9 Erosion Control Plan

2.9.1 Within 60 days of issuance of this Consent Order, Respondents agree to submit, for the review and approval of the Executive Director, a Permanent Erosion Control Plan for the bluff face to: a) to revegetate all portions of the bluff face on the Subject Property disturbed by the unpermitted development (or development placed under temporary authorization) or during the removal of the unpermitted development, with native vegetation. The Permanent Erosion Control Plan shall include an exhibit that

delineates an area for planting of the native plant species ("Bluff Planting Area). The Bluff Planting Area shall include all portions of the bluff face on the subject property disturbed or graded during the removal of the unpermitted development. The Permanent Erosion Control Plan shall also include and conform to the following requirements:

- A. The Permanent Erosion Control Plan shall be prepared by a qualified, acceptable Licensed Landscape Architect or Resource Specialist ("Landscape Specialist") and include a map showing the type, size, and location of all plant materials that will be planted in the Bluff Planting Area, all invasive and non-native plants to be removed from the Bluff Planting Area, the topography of the site, all other landscape features, and a schedule for installation of plants and removal of invasive and/or non-native plants. The Permanent Erosion Control Plan shall show all existing vegetation. The landscaping shall be planted using accepted planting procedures required by the professionally licensed landscape architect or resource specialist. Such planting procedures may suggest that planting would best occur during a certain time of the year. If so, and if this necessitates a change in the planting schedule, the 14 day deadline to implement the Landscaping Plan in Section 1.4(G), may be extended as provided for under the provisions of Section X herein.
- B. Identification of measures which shall be taken to prevent erosion and dispersion of sediments across the subject property via rain, surf, tide or wind. Such measures shall be provided at all times of the year, in conformance with Section 1.7 of this Consent Order, until the establishment of the revegetation required in the Permanent Erosion Control Plan.
- C. To minimize the need for irrigation, the vegetation planted in the Bluff Planting Area shall consist only of native, non-invasive, drought-tolerant plants endemic to the North County San Diego coastal bluff area.
- D. Respondents shall not employ invasive plant species within the Bluff Planting Area which could supplant native and drought tolerant plant species.
- E. No permanent irrigation system shall be allowed in the Bluff Planting Area. Any existing in-ground irrigation systems shall be removed or permanently blocked. Temporary above-

ground irrigation to provide for the establishment of the plantings is allowed for a maximum of three years or until the landscaping has become established, whichever occurs first. If, after the three-year time limit, the landscaping has not established itself, the Executive Director may allow for the continued use of the temporary irrigation system until such time as the landscaping becomes established.

- F. Plantings shall be maintained in good growing condition throughout the life of the project and whenever necessary shall be replaced with new plant materials to ensure continued compliance with the approved Permanent Erosion Control Plan.
- G. If temporary safety measures are deemed necessary by the Landscape Specialist for the completion of the Erosion Control Plan, such safety measures may be constructed for use during the duration of the landscaping operations but must be removed within 20 days of the completion of work approved under the Erosion Control Plan.

2.9.2 All planting in the approved Permanent Erosion Control Plan shall be installed in accordance with the schedule and requirements of the approved Permanent Erosion Control Plan and no later than 14 days after the implementation of the Removal Plan.

2.10 Within 60 days of issuance of the Consent Order, Respondents agree to submit, for the review and approval of the Executive Director, an Interim Erosion Control Plan. The Interim Erosion Control Plan shall include measures to minimize erosion across the site (to be implemented during the removal process conducted pursuant to this Consent Order), which may enter into coastal waters. The Interim Erosion Control Plan shall be prepared by a Qualified Restoration Professional or Resource Specialist. The Interim Erosion Control Plan shall be implemented prior to, and concurrently with the implementation of the Removal Plan and shall include the following:

- A. Temporary erosion control measures, including but not limited to the following, shall be used: temporary hay bales, silt fences, drains, swales, sand bag barriers, wind barriers, or biodegradable erosion control material. Erosion on the site shall be controlled to avoid adverse impacts on adjacent properties and resources. In addition, all stockpiled material shall be covered with geofabric covers or other appropriate cover and all graded areas shall be covered with geotextiles or mats.

B. Interim Erosion Control measures shall include, at a minimum, the following components:

- 1) A narrative describing all temporary runoff and erosion control measures to be used.
- 2) A detailed site plan showing the location of all temporary erosion control measures.
- 3) A schedule for installation and removal of temporary erosion control measures, in coordination with the long-term revegetation and monitoring plan.

3 COASTAL DEVELOPMENT PERMIT REQUIREMENTS

To resolve Coastal Act violations related to the failure to obtain follow-up regular CDPs to authorize temporary emergency work (including grading, a rock revetment, and a seawall) as permanent development, as required by Emergency Permits 6-96-82-G, 6-96-110-G, 6-01-012-G, 6-00-171-G, and 6-01-042-G, on the subject property, and to address additional unpermitted development on the subject property, Respondents must submit all relevant permit applications as detailed in Section 2.4 above. Any development subject to Coastal Act permitting requirements that is not specifically authorized under the Consent Order requires a CDP.

I. Persons Subject to the Consent Order

Persons subject to this Consent Cease and Desist Order are Respondents, as defined above to include John "Mike" and Patricia Brown, their agents, contractors and employees, and any persons acting in concert with any of the foregoing.

II. Identification of the Property

The property that is subject to this Consent Order is identified as 836-838 Neptune Avenue, City of Encinitas, San Diego County (APN 254-011-17), the area immediately seaward thereof, and/or the areas immediately up or downcoast thereof.

III. Description of Alleged Coastal Act Violations

The development that is the subject of this Consent Order includes (but may not be limited to): 1) unpermitted development including, but not limited to, grading of bluff slope, placement of gravel on bluff face, and unpermitted construction of blufftop deck, and 2) failure to obtain follow-up regular coastal development permits to authorize temporary emergency work (including grading, a rock revetment, placement of riprap, tie back anchors, and construction of a seawall) as

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permanent development, as required by Emergency Permits 6-96-82-G, 6-96-110-G, 6-01-012-G, 6-00-171-G, and 6-01-042-G.

IV. Commission Jurisdiction and Authority to Act

The Commission has jurisdiction over resolution of the alleged Coastal Act violations pursuant to Public Resources Code Sections 30810. Respondents agree to not contest the Commission's jurisdiction to issue or enforce this Consent Order.

V. Submittal of Documents

All documents and payments submitted pursuant to this Consent Order must be sent to:

California Coastal Commission

Attn:

Aaron McLendon
200 Oceangate, 10th Floor
Long Beach, CA 90802

With a copy sent to:

California Coastal Commission
San Diego Coast District
Attn: Marsha Venegas
7575 Metropolitan Drive Ste. 103
San Diego, CA 92108-4402

VI. Settlement of Matter Prior to Hearing

In light of the intent and preference of the parties to resolve these matters in settlement and avoid litigation and costs, Respondents have agreed to settle this matter and not to contest the legal and factual bases of, or the terms or issuance of, this Order including the allegations of Coastal Act violations contained in the Notice of Intent to Commence Cease and Desist Order Proceedings (NOI) dated July 15, 2008. Specifically, Respondents agree to this settlement and therefore not to contest the issuance of the Consent Order or to object to the recordation of a Notice of Violation pursuant to PRC Section 30812.

VII. Effective Date and Terms of the Consent Order

The effective date of the Consent Order is the date of approval by the Commission. The Consent Order shall remain in effect permanently unless and until modified or rescinded by the Commission.

VIII. Findings

This Consent Order is issued on the basis of the findings adopted by the Commission at its public hearing, as set forth in the attached document entitled "Staff Report and Findings for Consent Cease and Desist Order".

IX. Settlement/Compliance Obligation

- A. In light of the intent of the parties to resolve these matters in settlement, Respondents have agreed to pay a monetary settlement in the amount of \$45,000. Penalty payments will be made in installments, one of which will be made annually beginning with the first payment of \$9,000 due November 1, 2009, the second payment of \$9,000 due November 1, 2010, the third payment of \$9,000 due November 1, 2011, the fourth payment of \$9,000 due November 1, 2012, and the final payment of \$9,000 due November 1, 2013. The settlement monies shall be deposited in the Violation Remediation Account of the California Coastal Conservancy Fund (See Public Resources Code Section 30823) or into such other public account as authorized by applicable California law at the time of the payment and as designated by the Executive Director. Respondents shall submit the settlement payment amounts to the attention of the Enforcement Unit of the Commission, payable to the California Coastal Commission/Coastal Conservancy Violation Remediation Account or other account designated per this paragraph.
- B. Strict compliance with this Consent Order by all parties subject thereto is required. Failure to comply with any term or condition of this Consent Order, including any deadline contained in this Consent Order, unless the Executive Director grants an extension under Section X (in which case failure to comply with that deadline shall have the same effect), shall constitute a violation of this Consent Order and shall result in Respondents being liable for stipulated penalties in the amount of \$750 per day per provision of the Order violated. Respondents shall pay stipulated penalties within 15 days of receipt of written demand by the

Commission for such penalties regardless of whether Respondents have subsequently complied. If Respondents violate this Consent Order, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, in addition to these stipulated penalties, including the imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30821.6, 30822 and 30820 as a result of the lack of compliance with the Consent Order and for the underlying Coastal Act violations as described herein.

X. Extension of Deadlines

The Executive Director may extend the deadlines set forth in this Consent Order for good cause. Any extension request must be made in writing to the Executive Director and received by Commission staff at least ten days prior to expiration of the subject deadline.

XI. Settlement Resolving Issuance of Order

Persons against whom the Commission issues a Cease and Desist Order have the right pursuant to PRC Section 30803(b) to seek a stay of the order. However, in light of the desire of the parties to instead settle this matter and avoid litigation, pursuant to the agreement of the parties as set forth in this Consent Order, Respondents hereby agree not to seek a stay or to challenge the issuance and enforceability of this Consent Order in a court of law.

XII. Modifications and Amendments to this Consent Order

Except as provided in Section X, or for minor, immaterial changes agreed to by the parties, this Consent Order may be amended or modified only in accordance with the standards and procedures set forth in Section 13188(b) or 13197 of Title 14 of the California Code of Regulations.

XIII. Government Liability

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Neither the State of California, the Commission, nor its employees shall be liable for injuries or damages to persons or property resulting from acts or omissions by Respondents in carrying out activities pursuant to this Consent Order, nor shall the State of California, the Commission or its employees be held as a party to any contract entered into by Respondents or their agents in carrying out activities pursuant to this Consent Order.

XIV. Site Access

Respondents shall provide access to the subject property at all reasonable times to Commission staff and any agency working in cooperation with the Commission or having jurisdiction over the work being performed under this Consent Order. Nothing in this Consent Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission staff may enter and move freely about the following areas: (1) the portions of the subject property on which the violations are located, (2) any areas where work is to be performed pursuant to this Consent Order or pursuant to any plans adopted pursuant to this Consent Order, (3) adjacent areas of the property, and (4) any other area where evidence of compliance with this Order may lie, as necessary or convenient to view the areas where work is being performed pursuant to the requirements of this Consent Order, for purposes including but not limited to overseeing, inspecting, documenting, and reviewing the progress of Respondents in carrying out the terms of this Consent Order.

XV. Settlement of Claims

The Commission and Respondents agree that this Consent Order settles the Commission's monetary claims for relief for those violations of the Coastal Act alleged in the NOI occurring prior to the date of this Consent Order, (specifically including claims for civil penalties, fines, or damages under the Coastal Act, including PRC Sections 30805, 30820, and 30822), with the exception that, if Respondents fail to comply with any term or condition of this Consent Order, the Commission may seek monetary or other claims for both the underlying violations of the Coastal Act and for the violation of this Consent Order. In addition, this Consent Order does not limit the Commission from taking enforcement action due to Coastal Act violations at the property other than those that are the subject of this Consent Order.

XVI. Successors and Assigns

This Consent Order shall run with the land, binding all successors in interest, future owners of the property, heirs and assigns of Respondents. Respondents shall provide notice to all successors, heirs and assigns of any remaining obligations under this Consent Order.

XVII. Governmental Jurisdiction

This Consent Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California.

XVIII. No Limitation on Authority

A. Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with these Order.

B. Correspondingly, Respondents have entered into this Consent Order and agreed not to contest the factual and legal bases for issuance of this Consent Order, and the enforcement thereof according to its terms. Respondents have agreed not to contest the Commission's jurisdiction to issue and enforce this Consent Order.

XIX. Integration

This Consent Order constitutes the entire agreement between the parties and may not be amended, supplemented, or modified except as provided in this Consent Order.

XX. Severability

If a court finds any provision of this agreement invalid or unenforceable under any applicable law, such provision shall, to that extent, be deemed omitted, and the balance of this agreement will be enforceable in accordance with its own terms.

XXI. Non-Waiver

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The failure of either party to exercise any of its rights under this agreement for a breach thereof shall not be deemed a waiver of such rights or waiver of any subsequent breach.

XXII. Stipulation

Respondents and their representatives attest that they have reviewed the terms of this Consent Order and understand that their consent is final and stipulate to their issuance by the Commission.

XXIII. Recordation of Notice of Violation

Respondents do not object to recordation by the Executive Director of a notice of violation, pursuant to Public Resources Code Section 30812(b). Accordingly, a notice of violation will be recorded after issuance of this Consent Order. No later than thirty days after the Commission determines that Respondents have fully complied with this Consent Order, and has received from Respondents the rescission fee required by the County Recorder's Office, the Executive Director shall record a notice of rescission of the notice of violation, pursuant to Section 30812(f). The notice of rescission shall have the same effect of a withdrawal or expungement under Section 405.61 of the Code of Civil Procedure.

IT IS SO STIPULATED AND AGREED:

On behalf of Respondents:

John Mike Brown
John Mike Brown

8-26-09
Date

Patricia Brown
Patricia Brown

8-26-09
Date

Peter Douglas
PETER DOUGLAS, Executive Director

9/9/09
Date