

CALIFORNIA COASTAL COMMISSION

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**Wed 16a**

Filed: March 10, 2000
Staff: GDC-SD
Staff Report: April 20, 2000
Hearing Date: May 9-12, 2000

STAFF REPORT: REQUEST FOR RECONSIDERATION

Application No.: A-6-ENC-99-115-R

Applicant: Jack Lampl

Agents: Matthew Peterson

Description: After-the-fact approval for construction of mid and upper bluff retaining walls, and private stairway on the bluff face; repairs and improvements to the retaining walls; and construction of 338 sq. ft. addition to existing 4,426 sq. ft. duplex.

Project Location: 676-678 Neptune Avenue, Encinitas, San Diego County.
APN 256-051-07

Commission Action and Date: On February 15, 2000, the Commission denied the request for after-the-fact construction of mid and upper bluff retaining walls, private stairway on the bluff face and construction of 338 sq. ft. addition to existing 4,426 sq. ft. duplex and approved the request for repairs and improvements to the existing unpermitted mid and upper bluff retaining walls.

Summary of Staff's Preliminary Recommendation:

The staff recommends that the Commission deny the request for reconsideration because no new relevant information has been presented that could not have been reasonably presented at the hearing and no errors in fact or law have been identified that have the potential of altering the Commission's decision.

Staff Notes: On February 15, 2000, the Commission denied the applicant's request for after-the-fact construction of mid and upper walls and a private beach access stairway, because applicant had failed to demonstrate that the structures were necessary at the time of construction to protect the existing duplex and had not examined less environmentally damaging alternatives. The Commission also denied the proposed addition to the existing duplex at the top of the bluff because the applicant had not demonstrated that it would be safe from threat due to the documented instability of the existing unpermitted bluff protection structures. However, the Commission approved repairs to the unpermitted mid and upper retaining walls because the applicant demonstrated they could not be removed and if not repaired could threaten the existing principle structure at the top of the bluff. The Commission's action on February 15, 2000 is reflected in the revised findings dated April 20, 2000 and scheduled for adoption at the Commission's

May 2000 meeting. The applicant has requested reconsideration of the Commission's decision.

Substantive File Documents: Certified City of Encinitas Local Coastal Program (LCP); "Proposed Sea Wall 678 Neptune Ave." by Converse Consultants, April 19, 1985; "Geologic Reconnaissance" by Michael W. Hart, February 6, 1995; Appeal Applications dated August 23, 1999; Limited Geotechnical Assessment Update by Soil Engineering Construction, December 14, 1998; "Letter from Soil Engineering Construction to Coastal Commission dated August 5, 1999; City of Encinitas Planning Commission Resolution No. PC-99-34; MUP/CDPDR 95-106; Letter from Skelly Engineering to Matt Peterson dated November 1, 1999; CDP Nos. 6-92-167-G/Mallen, et al., 6-99-8/Lampl and A-6-ENC-99-115/Lampl.; Request for Reconsideration from Jack Lampl dated March 10, 2000.

PROCEDURAL NOTE:

The Commission's regulations provide that at any time within thirty (30) days following a final vote to deny a coastal development permit, the applicant of record may request that the Commission reconsider the denial. (14 CA. Admin. Code 13109.2)

The grounds for reconsideration of a permit denial are provided in Coastal Act Section 30627, which states, in part:

The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the initial decision. (Section 30627(b)(3).)

If the Commission grants reconsideration, the de novo hearing would be scheduled for a subsequent Commission hearing.

APPLICANT'S CONTENTIONS:

In the attached letter dated 3/10/00, the applicant contends that errors of fact and law occurred and that these errors have the potential of altering the Commission's decision. The applicant asserts the following in support of his contention: 1) The appeal applications were not properly prepared, signed or filed; 2) Chapter 3 policies of the Coastal Act were used as the standard of review and, as such, the Commission's action resulted in a "de facto" amendment to the certified LCP; 3) The applicant was prevented from asserting these errors at the Commission hearing; 4) Errors of fact and law were contained in the Commission's staff report; 5) The Commission asserted jurisdiction over a bluff face stairway that was not properly before them; 6) The Commission

violated "certain constitutionally mandated protections"; 7) The Commission failed to provide evidence of adverse effects of or feasible alternatives to the proposed development as part of its CEQA finding; 8) Staff's failure to comment on the project during the environmental review period was a violation of CEQA; 9) The Commission's action constituted "a 'taking' of private property for a public purpose".

- I. **MOTION:** *I move that the Commission grant reconsideration of Coastal Development Permit No. A-6-ENC-99-115-R*

STAFF RECOMMENDATION TO DENY RECONSIDERATION:

Staff recommends a **NO** vote on the motion. Failure to adopt the motion will result in denial of the request for reconsideration and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of Commissioners present.

RESOLUTION TO DENY RECONSIDERATION:

The Commission hereby denies the request for reconsideration of the Commission's decision on coastal development permit no. *A-6-ENC-99-115-R* on the grounds that there is no relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing, nor has an error of fact or law occurred which has the potential of altering the initial decision.

II. **FINDINGS AND DECLARATIONS.**

A. **Project Description.** The proposed development involves the construction of mid and upper bluff retaining walls, construction of a private stairway on the face of the bluff leading to the beach, repair and improvements to the mid and upper bluff walls, and an approximately 338 sq. ft. addition to the existing approximately 4,426 sq. ft. duplex. The mid and upper bluff retaining walls and the stairway have already been constructed without a coastal development permit in apparent violation of the Coastal Act. On February 15, 1999, the Commission denied the proposed after-the-fact mid and upper walls, private access stairway and proposed addition to the existing duplex. However, the Commission approved repairs and improvements to the mid and upper bluff walls with a special condition requiring updated repair plans.

The proposed development is located on the face of and above an approximately 95 ft. high coastal bluff on the west side of Neptune Avenue in Encinitas fronting a single lot containing a 4,426 sq. ft. duplex. The duplex is sited approximately 17 feet from the bluff which was reconstructed when the upper bluff walls were installed. Thus, the bluff edge and upper bluff wall are coterminous. According to the applicant, the existing duplex was constructed in 1972, prior to the enactment of the Coastal Act and included a

private access stairway to the beach and a tram. Based on review of plans submitted by the applicant, it appears the duplex was constructed with a foundation that includes caissons that have been installed up to 35 feet deep into the bluff. The pre-existing Coastal Act stairway and tram were subsequently removed or destroyed as a result of bluff failures. The current stairway was constructed in approximately 1995 in a different location than the previous stairway and tram. The current stairway is attached to the northern upper bluff retaining wall and traverses down the face of the bluff to the top of an unpermitted seawall below. A metal stairway extension has been placed on the face of the lower seawall leading to the beach below with concrete steps extending onto the beach.

The approximately 37 foot-high, 67 foot-long seawall located on the beach at the base of the bluff was also constructed without a coastal development permit. At its August 1999 hearing, the Commission denied an after-the-fact permit for retention and repairs to the lower seawall finding that the seawall is inconsistent with Chapter 3 policies of the Coastal Act (ref. CDP No. 6-99-8/Lamp1). The Commission found that although a lower seawall was necessary to protect the blufftop duplex, the proposed seawall was not the least environmentally damaging design. On January 12, 2000, the Commission also denied the applicant's request for reconsideration of its earlier denial (Ref. CDP No. 6-99-8-R).

The proposed approximately 35 foot-high, 50 foot-long (total) upper bluff retaining wall is located on the bluff face of the upper bluff and consists of two sections. The northern section of the wall consists of tied back concrete columns with horizontal wood lagging. The southern section of the wall consists of tied back wood/timber columns, one horizontal wood/timber waler with tie backs and horizontal wood lagging. The applicant's engineer asserts that the southern upper wall was probably constructed in 1989 and the northern upper wall in 1995 following an upper bluff failure. The applicant has identified these upper walls to be in a state of failure that threatens the duplex and has requested repairs and improvements to the walls. The proposed repairs consist of installation of a new row of approximately 40 foot-long tie backs near the bottom of walls and a reinforced concrete waler. Corrosion protected steel channel splints are also proposed to be installed onto the existing wood/timber columns.

The proposed mid-bluff wall consists of an existing approximately 10 foot-high, 18 foot-long retaining wall located on the southern half of the bluff face consisting of vertical and horizontal wood timbers with wooden bracing. The mid bluff wall was constructed at an unknown time between 1972 and 1985. The applicant also proposes to repair the mid-bluff wall by re-bracing the wall and replacing some vertical wood or timber supports, and reducing the height of the backfill by about 1 foot to reduce the load on the wall.

Finally, the applicant proposes to construct an approximately 338 sq. ft. addition to the existing approximately 4,426 sq. ft. duplex. The development consists of a 130 sq. ft. first floor and a 208 sq. ft. second floor addition located directly above the first floor addition. The entire addition will be placed back approximately 41 feet from the edge of

the bluff and the applicant asserts that it has been designed so as not to preclude its removal if threatened in the future by shoreline or bluff erosion.

The City approved a permit for the mid and upper walls, repair work for the walls and the addition to the duplex. With respect to the stairway, which was included in the applicant's permit application, the City required the applicant to record a covenant in which the City agreed not to order removal of the stairway and the applicant agreed not to remove and replace the stairway. The covenant allows the applicant to perform routine repair and maintenance of the stairway. The City required the recorded covenant in response to the applicant's application for a permit for the stairway. Since the covenant allows the stairway to remain, it is in effect a permit for the stairway and therefore, is part of the permit that was been appealed to the Commission.

The City of Encinitas has a certified Local Coastal Program (LCP) and has been issuing coastal development permits since May of 1995. The proposed development, which is located on the bluff face landward of the MHTL, is located within the permit jurisdiction of the City's LCP and, therefore, the standard of review for the subject development is the Certified Encinitas LCP and the public access and recreational policies of the Coastal Act.

B. Reconsideration Request. The applicant's request for reconsideration (ref. Exhibit No. 1) contends that errors of fact and law occurred which have the potential for altering the Commission's decision. The applicant has generally cited nine points of contention:

1. "Although the Commission does have appellate jurisdiction over local decisions pursuant to Regulations §13110, et seq. and Public Resources Code §30603, the two appeals were not properly prepared, signed or filed, and as such are invalid. The two identical appeals that were filed by the Commission Staff were not filed within the time frames as set forth within Public Resources Code §30603, California Coastal Commission Regulations §13110 et seq. and Chapter 30.04 of the City's Municipal Code."

The applicant contends that the Commission's procedures of preparing Commissioner signed appeals is invalid and that the subject appeal applications were filed after the appeal deadline had expired. Both of these arguments were presented to the Commission before it acted on the de novo permit application. Therefore, neither argument constitutes new evidence under Coastal Act section 30627. Further, neither of these arguments demonstrates that there was an error of law or fact.

With respect to the timing of the filing of the appeal, the applicant contends that the 10 working-day appeal period begins on the date of receipt of the local government notice of action on the permit. However, the Commission has consistently interpreted the Coastal Act and regulations as providing that the 10 working-day appeal period begins the first working day after the day the notice of the permit decision is received. Section 30603 of the Coastal Act states that a local government action on a permit "shall become

final at the close of business on the 10th working day from the date of receipt by the Commission of the notice of the local government's final action, unless an appeal is submitted with that time." Section 13111(b) of the Commission's regulations states that appeals must be filed "on or before the tenth (10th) working day after receipt of the notice of the permit decision by the executive director" (emphasis added). Thus, the regulation clearly interprets the Coastal Act as requiring that the counting of the appeal period must begin the first working day after receipt of the notice of the permit decision. This interpretation is consistent with California law governing civil procedure. In this case, the Notice of Final Action was received in the Commission's San Diego office on August 9, 1999. The first working day after the date of receipt was August 10, 1999. Therefore, the ten working day appeal period expired at 5:00 p.m. on August 23, 1999, the day on which appeals from Commissioners Wan and Daniels were received. Thus, the appeal was timely filed.

With respect to the Commission's procedures for preparation of Commissioner appeals, the Coastal Act authorizes the Commission to have a staff to assist it with carrying out the provisions of the Act. The Commission has given staff the responsibility to review local government notices of final action on permit decisions for consistency with the applicable LCP and to notify the Commission of projects that appear to be inconsistent with an LCP. If two Commissioners decide to appeal a local government action, the staff prepares an appeal form that identifies the basis for the appeal. This is similar to, and consistent with, staff's responsibility to draft staff reports that are presented to the Commission for adoption as findings. The Commissioners do not individually draft findings in support of the Commission's action; this is a responsibility properly delegated to the staff. Similarly, appeal forms that contain all of the information needed to appeal a local government permit decision are prepared by staff. When an individual Commissioner decides to appeal a local action, he/she either signs the proposed appeal application himself/herself, or authorizes Commission staff, as his/her agent, to use a pre-signed blank form. (The Commissioners have the option to pre-sign blank appeal forms that are then stored in the Commission's San Francisco office.) The use of the pre-signed forms is consistent with California law, which provides that individuals can authorize another person to sign their name or use their signature. In this case, Commissioners Wan and Daniels either signed the subject appeals application on August 19, 1999 or authorized use of their pre-signed form on that date and the completed applications were submitted to the San Diego office on August 23, 1999. Therefore, no error of fact or law occurred as it relates to the Commission's appeal application procedures.

2. "Staff analyzed my project based upon Chapter 3 Policies rather than the City's adopted and certified LCP. [. . .] Staff's use of the Chapter 3 Policies in justifying its recommendation of denial rather than the City's Certified LCP constituted an error of law. [. . .] The Commission has approved Coastal Development and Emergency Permits for seawalls and mid- and upper bluff retaining structures along this stretch of beachfront residences which are of the same size, configuration and dimension of my seawall and mid- and upper bluff retaining structures. . . . Yet, contrary to those previous approvals and actions, . . . the Commission denied [Lamp's application].

This action constituted a de facto amendment to the City's Certified LCP, since the Certified LCP authorizes such shoreline protection measures.

As indicated above, the applicant asserts that the Commission erroneously applied Chapter 3 as the standard of review of the application, and that since the Commission has approved similar shoreline protection nearby, the Commission's denial of the applicant's shoreline protection devices indicates that it, in effect, changed the LCP policies. Neither of these arguments constitutes new evidence that could not have been presented at the hearing. Nor do these arguments demonstrate that there was an error of law or fact. Because the proposed development is located landward of the MHTL, it is not within the Commission's area of original jurisdiction, but instead is within the coastal permit jurisdiction of the City of Encinitas. Sections 30604(b) & (c) of the Coastal Act provide that after certification of an LCP, the standard of review for coastal development permits is the certified LCP and, for projects located between the nearest public road and the sea, the public access and recreation policies of Chapter 3. Therefore, in this case, the Commission based its decision, as indicated throughout the Commission's staff report, on the City of Encinitas' Certified LCP, along with the public access and recreation policies of Chapter 3, as required by section 30604 of the Coastal Act. (Section 30.80.090 of the Certified LCP also requires that projects located between the sea and the first coastal roadway must be consistent with the public access and recreation policies of the Coastal Act.) In this case, the subject development is located between Neptune Avenue (the first coastal roadway) and the sea. The staff report that was provided to the Commission repeatedly cited and analyzed the project's consistency with various LCP provisions as well as the Chapter 3 public access and recreation policies. The Commission agreed with the staff recommendation insofar as it recommended denial of the mid and upper bluff walls, the stairway, and the addition. The Commission did not state that the basis for this denial was something other than the analysis in the staff report. Thus, the Commission acted based upon the analysis set forth in the staff report, as reflected in the revised findings dated April 20, 2000 and scheduled for adoption at the Commission's May meeting. Thus, the Commission applied the correct standard of review.

Since the Commission based its decision on whether the project was consistent with Certified LCP and the public access and recreational policies of the Coastal Act, the Commission's denial of the after-the-fact mid and upper bluff walls and private access stairway, and the proposed duplex addition did not result in a "de facto LCP amendment." In addition, the Commission's approval of repairs to unpermitted walls based on its consistency with Certified LCP also did not result in a "de facto LCP amendment."

3. "The Applicant was prevented from asserting this error of law [concerning application of Chapter 3 policies and the "de facto" LCP amendment] at the public hearing because of the Commission's hearing procedures. The discussion by Commissioners revealed the true nature of the Commission's intent to apply special and stringent new controls, and arbitrary limits (regardless of the existence of the LCP which contains contrary policies) occurred after the close of the public testimony

portion of the hearing. The Commission's hearing procedures prevented members of the public, including the Applicant, from addressing the Commission or participating in any discussion by the Commissioners after the public testimony portion of the hearing was closed."

Prior to the hearing, the applicant was given a copy of the written staff report detailing the staff recommendation. The staff report explained that because the proposed development was located on the bluff face landward of the MHTL, it was within the area of the City's LCP jurisdiction and would therefore be reviewed for consistency with the Certified Encinitas LCP. In addition, the report explained that since the proposed development is located between the first public roadway (Neptune Avenue) and the sea, Coastal Act section 30604(c) and Section 30.80.090 of the City's LCP require that the development must be found to be in conformity with the public access and recreation policies of the Coastal Act. The staff report then analyzed the project for consistency with the City's LCP and the public access and recreational policies of the Coastal Act. The applicant was afforded an opportunity to speak at the hearing and, in fact, the applicant and his representative made formal presentations at the public hearing. Since the applicant had been informed of the Commission staff's application of the Certified Encinitas LCP and the public access and recreational policies of the Coastal Act in the staff report, nothing precluded the applicant or his agent from addressing these concerns at the hearing. Furthermore, the Commission discussion after the close of the public comment portion of the hearing did not suggest that the Commission was applying any standard other than those described in the staff report. In fact, the only change made after the close of the public testimony was the executive director's revision to the staff recommendation to recommend approval of the proposed repairs to the mid and upper bluff walls. The applicant was given an opportunity to address this change. Thus, there were no "special and stringent controls and arbitrary limits" applied to the applicant's project, and no error of law or fact occurred.

4. "There were numerous errors and non-supported Soils and Engineering Analysis and conclusions contained within the Staff Report. These errors of fact and analysis may have misled Commissioners concerning my Project. These errors were not responded to by Staff. The record upon which the Commission relied for its denial was inaccurate and incomplete"

The applicant contends that errors of fact occurred in the staff report and that those errors may have misled the Commission. The applicant does not identify any specific errors of fact. The Commission considered each of the factual assertions that the applicant supplied in advance of and during the public hearing, and concluded that the facts as set forth in the staff report were accurate in terms of its finding for denial of the proposed mid and upper bluff walls and private access stairway, and the proposed addition to the existing duplex. Thus, the applicant has not identified, and the Commission did not make, any errors of fact which would have the potential for altering the initial decision of the Commission.

5. "The above referenced appeal and Staff Report also purported to assert jurisdiction over a stairway which provides beach access. [. . .] The stairs were separately authorized by an executed and recorded Stipulation between the City and myself, and were not authorized by the City's Approval of the MUP/CDP. Staff reference to the stairs within the appeal document and within the Staff Report did not legally give the Commission jurisdiction over the stairs and as such, the Commission violated Public Resources Code §30603 by attempting to take action on a portion of my Project which was not legally before the Commission on appeal."

The applicant contends that the unpermitted private beach access stairway on the subject site was not subject to Commission review as part of the appeal. The applicant contends that since the City and the applicant agreed to a separate covenant to allow the stairway to remain outside of the coastal development permit process, the Commission had no authority to review the stairway. However, the proposed stairway was included within the coastal development application submitted to the City for the mid and upper walls, repairs to the walls and the addition onto the duplex. In response to the permit application, the City entered into the covenant that allowed the stairway to remain. Thus, the covenant was effectively an after-the-fact permit for the stairway. As such, the stairway which the City approved through the coastal development permit process was subject to Commission review on appeal. Thus, the Commission did not make any errors of fact or law which would have the potential for altering the initial decision of the Commission.

6. "There are also issues associated with the Commission's denial that clearly violate certain constitutionally mandated protections; to wit, equal protection and due process of law. [. . .] Since the Commission has denied my Project, how am I to conduct the badly needed repairs to the seawall and bluff retaining structures? In addition, the arbitrary denial is an unreasonable restriction of land use which bears absolutely no relationship or 'nexus' to the impacts of this existing Project."

The Commission did not arbitrarily deny the illegally constructed mid and upper bluff retaining walls and private access stairway, or the addition to the existing duplex. The staff report and the revised findings dated April 20, 2000 and scheduled for adoption at the Commission's May meeting, explain in detail the basis for denying the proposed development. The findings demonstrate that the denial was based upon the project's adverse impacts, its inconsistencies with the certified LCP and public access and recreation policies of Chapter 3, and the fact that there are less environmentally damaging alternatives. Thus, the Commission finds that it did not make any error of law in this regard. In addition, the Commission approved the proposed repairs to the unpermitted mid and upper bluffs and directed the applicant to submit a new application for repairs to the lower seawall. Thus, this argument does not demonstrate an error of fact or law.

7. "In reviewing the Staff Report, the Coastal Commission Staff (in attempting to justify its recommendation of denial) cited alleged violations of the California Environmental Quality Act ("CEQA"). In its consistency determination Staff alleged

that there were feasible alternatives or mitigation measures which could have been incorporated which would have substantially lessened significant adverse effects. However, neither the Coastal Commission Staff, the Reports, or the Commission, as a whole, indicated with any evidence what the significant effect was. In addition, there was no evidence of a feasible alternative for me to consider (to lessen or otherwise avoid the alleged, yet unidentified, impacts).

The staff report that analyzed the proposed project explained in detail the basis for staff's recommendation of denial of the mid and upper bluff walls and private access stairway portions of the proposed development. The Commission is required to review after-the-fact development as if the development had not been constructed. As indicated in the staff report, because the mid and upper walls and stairway were constructed several years ago, without permits and without a thorough examination of alternatives, the applicant was unable to demonstrate that there were no feasible alternatives or the existing structures were the least environmentally damaging alternative. The staff report specifically identified the significant adverse impacts of the proposed development, including the adverse impacts to the natural bluff landforms, the visual quality of the area, and public access opportunities through reduction of sand supply. The staff report also identified potential alternatives. Although the Commission has not yet adopted revised findings, the only change made at the hearing was that the Commission approved the applicant's proposed repairs to the mid and upper bluff walls. Thus, the findings for the Commission's denial of the mid and upper bluff walls, stairway, and addition, will be the analysis set forth in the staff report.

8. "I believe that Staff also violated the CEQA by not responding at all to the extended initial study (Environmental Document) that was processed and certified for the City's approval of the MUP No. 95-106 (which Permit also included an after the fact authorization of the existing seawall). . . . This inaction should preclude Staff from challenging the Environmental Document or otherwise raising alleged CEQA violations at the Coastal Commission level. Staff's tardy challenge to the Certified Mitigated Negative Declaration clearly constituted an error of law."

The applicant contends that because Commission staff did not respond to the City's initial study, it is precluded from making a finding of inconsistency with the California Environmental Quality Act (CEQA). The CEQA finding that the Commission made in its denial of the proposed development, was that there were feasible alternatives that would substantially lessen any significant adverse effects of the proposed project. The Commission is required to consider whether there are feasible alternatives with substantially less environmental effects. Section 21080.5(d)(2)(A) of CEQA requires that the Commission's regulations prohibit any 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. This requirement is incorporated into the Commission's regulations at Section 13096. Thus, the alternatives finding is a requirement of the Commission's regulations. Further, the Coastal Act and implementing regulations require that the Commission approve proposed development only if consistent with certified Local Coastal Program. The

Commission staff's lack of comments on the initial study prepared by the City of Encinitas does not preclude the Commission from denying the project on grounds that it is inconsistent with the Certified LCP policies and that there are other feasible alternatives that would substantially lessen any significant adverse effects of the proposed project. Thus, the applicant has not identified, and the Commission did not make, any errors of fact or law in this regard.

9. "The Commission's denial of my Project has resulted in a taking and confiscation of my property rights to develop and protect my property as permitted by the LCP, thereby depriving me of the reasonable and valuable use of my property. In a recent article in the North County Times on February 23, 2000, Chairperson Wan purportedly stated 'In certain areas, state and local governments must consider buying the row of house fronting the ocean so that nature can take its course without seawalls getting in the way.' [. . .] This is relevant new evidence that could not have been presented at the hearing."

The Commission's action was based upon the proposed project's consistency with the LCP and the public access and recreation policies of Chapter 3. The newspaper article purporting to quote Chairperson Wan's does not constitute relevant new evidence in that it is not relevant to the Commission's decision in this case. Regardless of whether Chairperson Wan made such comments, the comments are not relevant to whether the proposed project is consistent with the LCP or public access and recreation policies of Chapter 3. Further, the Commission's decision did not result in a taking of the subject property. The Commission found that the construction of the mid and upper walls, the private access stairway, and the addition were inconsistent with the certified LCP. This did not result in a denial of all reasonable economic use of the property or interfere with investment backed expectations. In addition, the applicant has acknowledged that he was fully informed of the unpermitted development that existed on the property (and the subsequent need for after-the-fact approvals) at the time of its purchase in February 1998. Furthermore, the Commission approved the proposed repairs to the mid and upper bluff walls. Thus, this argument does not demonstrate that an error of law or fact occurred.

In summary, the Commission finds that the applicant has not presented any new relevant facts or information that could not have been presented at the original hearing. In addition, the applicant has not demonstrated any error of fact or law that has the potential for altering the Commission's previous decision. Therefore, the reconsideration request is denied.

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MAR 10 2000

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Jack Lampl
678 Neptune Ave.
Encinitas, CA 92024

March 10, 2000

Mr. Peter M. Douglas, Executive Director
California Coastal Commission
45 Fremont St., Ste. 2000
San Francisco, CA 94105-2219

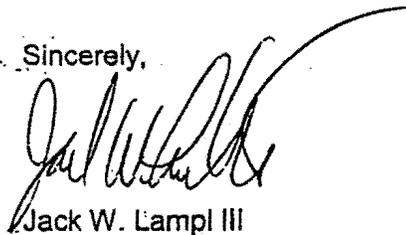
Re: Application No. A-6-ENC-99-115 – Request for Reconsideration
(676-678 Neptune Ave., Encinitas, CA 92024)

Dear Mr. Douglas:

My lawyer, Matt Peterson has been working diligently to resolve the various issues through Enforcement. Unfortunately, your Legal Staff would not agree to toll the various statutes of limitations and as such, I have been forced to have my attorney prepare and file a lawsuit against the Commission and prepare and file this Request for Reconsideration. I can tell you that I am very disappointed in this process and the apparent lack of your Legal Staff's commitment to quickly and fairly resolve the issues.

Pursuant to the California Coastal Commission Regulation Section No. 13109.1 et seq., please accept this as my Request for Reconsideration of the denial of the above-referenced Permit concerning the Coastal Commission's action on February 15, 2000. The justification for the Request for Reconsideration is attached hereto.

Sincerely,



Jack W. Lampl III

Enclosure

cc: Chairperson Sara Wan and Members of the California Coastal Commission
Daniel A. Olivas, Esq., Deputy Attorney General
Chuck Damm, Senior Deputy Director
Ralph Faust, Chief Legal Counsel
Amy Roach, Esq., Staff Counsel
Nancy L. Cave, Manager of Statewide Enforcement Program
Laurinda Owens, Coastal Planner
Matthew A. Peterson, Esq., Peterson & Price, APC



Date: March 10, 2000

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MAR 10 2000

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Jack Lampl
676-678 Neptune Ave., Encinitas, CA
Application No. A-6-ENC-99-115

REQUEST FOR RECONSIDERATION

California Coastal Commission Regulation §13109.1 et seq. deals with the topic of reconsideration. Section 13109.2 states that:

"Anytime within 30 days following a final vote upon an application for a coastal development permit, the applicant of record may request the Regional Commission to grant a reconsideration of the denial of an application for a coastal development permit, or of any term or condition of a coastal development permit which has been granted. This request shall be in writing and shall be received by the Executive Director of the Commission within 30 days of the final vote."

The Coastal Commission denied my Project on February 15, 2000.

The grounds for reconsideration of a permit action are provided in Public Resources Code § 30627 that states in part:

"The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error in fact or law has occurred which has the potential of altering the initial decision."

The purpose of this letter is to request that the Commission reconsider its denial.

ERRORS OF FACT AND LAW

After certification of an LCP, the Act provides for limited appeals to the Commission for certain local government actions concerning Coastal Development permits. For developments approved by the City, which are located between the ocean and the first

public road parallel to the ocean, the grounds for an appeal to the Commission are contained within Public Resources Code §30603 and Regulations §13111. Appeals are limited to an allegation that the development does not conform to the standards set forth in the Certified LCP or the Public Access Policies of the Act.

Following the Planning Commission's unanimous approval of my Project, as set forth in attached Resolution No. PC-99-34, on or about August 23, 1999, the Commission Staff purportedly filed two separate, albeit identical, appeals challenging the City's approval of my Project.

Although the Commission does have appellate jurisdiction over local decisions pursuant to Regulations §13110, *et seq.* and Public Resources Code §30603, the two appeals were not properly prepared, signed or filed, and as such, are invalid. The two identical appeals that were filed by the Commission Staff were not filed within the time frames as set forth within Public Resources Code §30603, California Coastal Commission Regulations §13110 *et. seq.* and Chapter 30.04 of the City's Municipal Code. Such appeals must be filed within ten (10) working days of the Commission's "receipt" of the Notice of Final Action. The Notice of Final Action was received by the Commission, San Diego Coast District office on August 9, 1999. By my calculation, the 10-day appeal period expired August 20, 1999. Staff's handwritten date on the appeals (purportedly filed with Xerox copies of signature pages of Chairperson Sara Wan ("Wan") and Commissioner Paula Daniels) ("Daniels") was August 23, 1999, three (3) days after the expiration of the appeal period. Consequently, the City's approval was final and was not subject to the

Commission's appellate review.

The invalid appeals which were filed concerning my Project also violated Public Resources Code §30603, *et seq.* and Regulations §13110, as well as my procedural due process rights and rights of equal protection under the State and Federal Constitutions. I believe the following procedure was utilized:

(a) The local Commission Staff, Gary Cannon, Coastal Program Analyst ("Cannon") determined that my Project warranted a review by the Commission.

(b) Cannon then prepared the "reasons for appeal" and asserts to have informed Wan and Daniels concerning Staff's request to file the appeal.

(c) Shortly thereafter, Staff removed from a drawer either a signed or photocopied signature page of a blank appeal form(s) containing Wan and Daniels' signature(s). Staff then hand wrote the date of 8/23/99 on the signature page(s), "slip sheeted" or otherwise attached the signature page(s) to the appeal package which Staff prepared.

(d) The Commission Staff then utilized a photocopy of the exact same reasons (or justifications) of appeal for both of the Commissioners' appeal forms. The Commission Staff then assembled the appeal and filed it at the local Commission office on August 23, 1999 and assigned an appeal number to the Case, to wit: Application No. 6-ENC-99-123.

I do not believe that the appeal procedures utilized comply with the Public Resources Code or the Regulations sections as referenced above. These procedural and substantive due process violations clearly constitute an error of law. Further, based upon my lawyer's investigation, it would appear that this invalid appeal procedure

is now widely utilized by the Commission. This is relevant new evidence that was not available to me at the time of the hearing.

Staff analyzed my project based upon Chapter 3 Policies rather than the City's adopted and certified LCP. As submitted, my Project is permitted by the Certified LCP and was designed in accordance with all of the standards of the LCP and the various Implementing Ordinances (see Chapters 30.74, 30.80 and 30.34 -- the Coastal Bluff Overlay Zone of the Encinitas Zoning Code). Staff's use of the Chapter 3 Policies in justifying its recommendation of denial rather than the City's Certified LCP constituted an error of law.

In declaring its intent to apply a new standard to my Project, as a result of the denial, (irregardless of LCP policies to the contrary), the Commission exceeded both its appellate and planning authority jurisdiction, and essentially imposed a "de facto LCP amendment" on the City of Encinitas.

The Commission has approved Coastal Development and Emergency Permits for seawalls and mid- and upper bluff retaining structures along this stretch of beachfront residences which are of the same size, configuration and dimension of my seawall and mid- and upper bluff retaining structures. The "after the fact" Permit, as approved by the City of Encinitas, authorized the existing seawall and mid- and upper bluff retaining structures. The shoreline erosion control and bluff stabilization measures are of the same size, height and configuration as the adjacent shoreline protective

devices/slope stabilization retaining walls. Yet, contrary to those previous approvals and actions, the Certified LCP, and the City's approval of my Major Use Permit ("MUP"), the Commission denied Application No. A-6-ENC-99-115. This action constituted a de facto amendment to the City's Certified LCP, since the Certified LCP authorizes such shoreline protection measures.

The appropriate vehicle for imposing new requirements or additional restrictions that deviate from a Certified LCP is to process and approve an LCP Amendment. Under Section 30500(c) of the California Coastal Act ("Coastal Act"), it is the local government, in this case, the City of Encinitas, which determines the precise content of an LCP, subject to Commission certification. Under Section 30514(a) of the Coastal Act, that LCP can be amended, but such an amendment can only be initiated by the local government (in this case, the City of Encinitas). The City has not proposed an amendment that would justify the Commission's denial of my Project. Moreover, even if the Commission possessed the lawful authority to initiate an LCP Amendment of its own volition, it failed to conform to the public participation, public notice and public hearing requirements of Section 30503 of the Coastal Act.

The Commission's de facto LCP Amendment was a clear error of law. If the Commission believes an amendment to an LCP is necessary to prevent homeowners from protecting their properties from coastal erosion and catastrophic bluff failure, the procedure for accomplishing such an amendment is set forth in Section 30519.5 of the

Coastal Act. The Commission cannot unilaterally amend a Certified LCP or lawfully take action to deny a permit which is authorized by the existing Certified LCP.

The Applicant was prevented from asserting this error of law at the public hearing because of the Commission's hearing procedures. The discussion by Commissioners which revealed the true nature of the Commission's intent to apply special and stringent new controls, and arbitrary limits (regardless of the existence of the LCP which contains contrary policies) occurred after the close of the public testimony portion of the hearing. The Commission's hearing procedures prevented members of the public, including the Applicant, from addressing the Commission or participating in any discussion by the Commissioners after the public testimony portion of the hearing was closed.

There were numerous errors and non-supported Soils and Engineering Analysis and conclusions contained within the Staff Report. These errors of fact and analysis may have misled Commissioners concerning my Project. These errors were not responded to by Staff. The record upon which the Commission relied for its denial was inaccurate and incomplete.

The above-referenced appeal and Staff Report also purported to assert jurisdiction over a stairway which provides beach access. However, both the Staff and the Commission were informed that the upper stairs were not included within the City's approval of my Project. The stairs were separately authorized by an executed and

recorded Stipulation between the City and myself, and were not authorized by the City's Approval of the MUP/CDP. Staff's reference to the stairs within the appeal document and within the Staff Report did not legally give the Commission jurisdiction over the stairs and as such, the Commission violated Public Resources Code §30603 by attempting to take action on a portion of my Project which was not legally before the Commission on appeal.

There are also issues associated with the Commission's denial that clearly violate certain constitutionally mandated protections; to wit, equal protection and due process of law.

Public Resources Code § 30010 states in part:

"The Legislature hereby finds and declares that this division is not intended and shall not be construed as authorizing the Commission for a governing body or a local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore."

The arbitrary denial of the Coastal Permit will clearly damage my property for some alleged public benefit without the payment of just compensation. Since the Commission has denied my Project, how am I to conduct the badly needed repairs to the seawall and bluff retaining structures? In addition, the arbitrary denial is an unreasonable restriction of land use which bears absolutely no relationship or "nexus" to the impacts of this existing Project. Removal of the shoreline protective device and slope stabilization retaining walls will clearly jeopardize the stability of my property, the adjacent properties, and will place the public in imminent danger. This conclusion was

well documented in the various Geotechnical, Engineering and Soils Reports. Without the existing slope stabilization and shoreline protection, the bluff will collapse and fail again and endanger my home, the occupants of the other Duplex unit, the adjacent properties, and the beach going public below.

In reviewing the Staff Report, the Coastal Commission Staff (in attempting to justify its recommendation of denial) cited alleged violations of the California Environmental Quality Act ("CEQA"). In its consistency determination Staff alleged that there were feasible alternatives or mitigation measures which could have been incorporated which would have substantially lessened significant adverse effects. However, neither the Coastal Commission Staff, the Reports, or the Commission, as a whole, indicated with any evidence what the significant effect was. In addition, there was no evidence of a feasible alternative for me to consider (to lessen or otherwise avoid the alleged, yet unidentified, impacts).

I believe that Staff also violated the CEQA by not responding at all to the extended initial study (Environmental Document) that was processed and certified for the City's approval of the MUP No. 95-106 (which Permit also included an after the fact authorization of the existing seawall). Despite the fact that the California Coastal Commission was on the distribution list, Staff failed to respond at all to the Draft Environmental Document within the mandated time frames of the public review. Further, Coastal Staff did not: 1) notify the City of its objection to the approval of the MUP/CDP, or 2) show up at the public hearing to object to the City's issuance of the

Permit. This inaction should preclude Staff from challenging the Environmental Document or otherwise raising alleged CEQA violations at the Coastal Commission level. Staff's tardy challenge to the Certified Mitigated Negative Declaration clearly constituted an error of law.

The Commission's denial of my Project has resulted in a taking and confiscation of my property rights to develop and protect my property as permitted by the LCP, thereby depriving me of the reasonable and valuable use of my property. In a recent article in the North County Times on February 23, 2000, Chairperson Wan purportedly stated "In certain areas, state and local governments must consider buying the row of houses fronting the ocean so that nature can take its course without seawalls getting in the way." (Emphasis Added.) This quote is a clear acknowledgment and admission by the Chairperson of the Coastal Commission that its actions which deny a property owner of the right to protect its property will, in fact, constitute a "taking" of private property for a public purpose. This is relevant new evidence that could not have been presented at the hearing.

G:\wp\5654\003\request

RESOLUTION NO. PC 99-34

**A RESOLUTION OF THE CITY OF ENCINITAS PLANNING COMMISSION
APPROVING A MAJOR USE PERMIT
AND COASTAL DEVELOPMENT PERMIT
AND ADOPTING A NEGATIVE DECLARATION
AUTHORIZING AN EXISTING LOWER SEAWALL,
EXISTING MID AND UPPER BLUFF RETAINING WALLS, AND
PROPOSED REPAIRS AND IMPROVEMENTS TO THE EXISTING WALLS,
AND AN ADDITION/REMODEL TO THE EXISTING DUPLEX**

(CASE NO.: 95-106 MUP/CDP/EIA; APN: 256-051-07)

WHEREAS, a request for consideration of a Major Use Permit and Coastal Development Permit was filed by Jack Lampl to allow an existing lower seawall, existing mid and upper bluff retaining walls, and proposed repairs and improvements to the existing walls, and an addition/remodel to the existing duplex in accordance with Chapters 30.34, 30.74 and 30.80 of the Encinitas Municipal Code, for the property located in the R-11 Zone and Coastal Bluff Overlay Zone, legally described as:

Lot 19 in Block "E" and a portion of Block "F" in South Coast Park No. 3, in the City of Encinitas, County of San Diego, State of California, according to Map thereof No. 1935, filed in the Office of the County Recorder of San Diego County, August 17, 1926, described as follows:

Beginning at the northwesterly corner of Lot 19, Block "E" of said South Coast Park No. 3; thence westerly along the westerly prolongation of the northerly line of said Lot 19, Block "E" to its intersection with the easterly line of that tract of land as conveyed by the South Coast Land Co. to the County of San Diego by deed dated January 10, 1930 and recorded in Book 1731, Page 256 of Deeds, Records of San Diego County; thence southerly along the said easterly line to its intersection with the westerly prolongation of the southerly line of said Lot 19, Block "K"; thence easterly along said westerly prolongation to the southwest corner of said Lot 19, Block "E"; thence northerly along said westerly line of said Lot 19, Block "E" to the Point of Beginning.

Excepting therefrom that portion, if any, heretofore or now lying below the mean high tide of the Pacific Ocean.

WHEREAS, the Planning Commission conducted a noticed public hearing on the application on July 22, 1999, at which time all those desiring to be heard were heard; and

WHEREAS, the Planning Commission considered, without limitation:

1. The July 22, 1999 agenda report to the Planning Commission with attachments;
2. The General Plan, Local Coastal Program, Municipal Code, and associated Land Use Maps;
3. Oral evidence submitted at the hearing;
4. Written evidence submitted at the hearing;
5. Project Plans for the coastal bluff walls consisting of eleven sheets total including Project Overview, consisting of 1 sheet, dated May 28, 1999 and dated Received by the City of Encinitas on July 14, 1999; Plans for the proposed Repairs and Improvements by SEC, consisting of three sheets, dated December 11, 1998 and dated Received by the City of Encinitas on December 22, 1998; Plans for Slope Stabilization Walls by Skelly Engineering, consisting of 3 sheets, dated April 6, 1995 and dated Received by the City of Encinitas on May 5, 1995; Plans for Residential Seawall by First Phase Engineering, consisting of one sheet, dated Received by the City of Encinitas on January 21, 1999; Upper Wall Repair by Earth Systems Design Group, consisting of two sheets, dated as-built January 4, 1993, and dated received by the City of Encinitas on January 21, 1999; As-Built Landscape Plan by Brian L. Thompson, consisting of one sheet, dated January 27, 1998 and dated received by the City of Encinitas on January 29, 1998; and project plans for the residential remodel/addition consisting of seven sheets total, including Site Plan, Floor Plans, Foundation Plan, Framing Plans, Building Elevations, and Sections, dated August 28, 1998 and dated received by the City of Encinitas on December 22, 1998; and

WHEREAS, the Planning Commission made the following findings pursuant to Chapters 30.34, 30.74 and 30.80 of the Encinitas Municipal Code:

(SEE ATTACHMENT "A")

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission of the City of Encinitas hereby approves application 95-106 MUP/CDP/EIA subject to the following conditions:

(SEE ATTACHMENT "B")

BE IT FURTHER RESOLVED that the Planning Commission, in its independent judgment, has reviewed the Environmental Initial Study prepared for the project and has determined that with incorporation of the mitigation measures contained therein and made conditions of approval for the application herein, all project impacts will be reduced to levels of insignificance and the Mitigated Negative Declaration is hereby adopted in accordance with the provisions of the California Environmental Quality Act (CEQA). This project will not individually or cumulatively have an adverse effect on wildlife resources as defined in Section 711.2 of the Fish and Game Code, and, therefore, a Certificate of Fee Exemption shall be made with De Minimus Impact Findings.

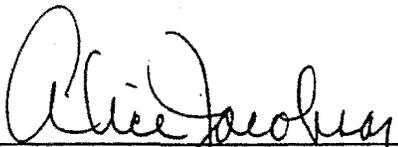
PASSED AND ADOPTED this 22ND day of July, 1999 by the following vote, to wit:

AYES: Commissioners Jacobson, Patton, Bagg and Crosthwaite

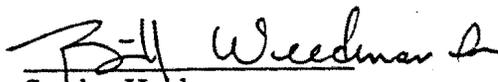
NAYS: Commissioner Birnbaum

ABSENT: None

ABSTAIN: None


Alice Jacobson, Chair of the
Encinitas Planning Commission

ATTEST:


Sandra Holder
Secretary

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

ATTACHMENT "A"
Resolution No. PC 99-34
Case No. 95-106 MUP/CDP/DR

FINDINGS FOR A USE PERMIT

STANDARD: In accordance with Section 30.74.070 of the Municipal Code, a use permit application shall be approved unless findings of fact are made, based upon the information presented in the application or during the hearing, which support one or more of the following conclusions:

1. The location, size, design or operating characteristics of the proposed project will be incompatible with or will adversely affect or will be materially detrimental to adjacent uses, residences, buildings, structures or natural resources, with consideration given to, but not limited to:
 - a. The inadequacy of public facilities, services and utilities to serve the proposed project;
 - b. The unsuitability of the site for the type and intensity of use or development which is proposed; and
 - c. The harmful effect, if any, upon environmental quality and natural resources of the city;

Facts: The Major Use Permit application includes the request to approve an existing lower seawall, existing mid and upper bluff retaining walls, and proposed repairs and improvements to the walls. The existing landscaping planted in association with bluff face improvements is also included as part of the Use Permit.

The existing bluff face improvements were constructed over the years between approximately 1972 and 1995 due to a number of failures on the site. The lower seawall maintains an overall height of approximately 36.5 feet above mean sea level (AMSL) and is comprised of a concrete base with wave reflecting apron, segments of concrete columns with tiebacks and horizontal timber lagging and a segment including a tied back, reinforced, solid concrete wall. Repair work is proposed in order to improve the stability of the existing lower seawall. The proposed work includes corrosion protection of the salvageable existing tiebacks and adding new tiebacks and concrete grade beams between the existing concrete pilings as required for support.

The upper retaining wall consists of two segments (northern and southern). The northern portion of the upper wall consists of tied back concrete columns and horizontal timber lagging. The southern half of the wall consists of tied back wood/timber columns, one horizontal wood/timber waler with tiebacks and

horizontal wood lagging. The wall is approximately 35 feet in height and is at an elevation of approximately 95.5AMSL at the highest point. Repair work is proposed in order to improve the stability of the existing upper bluff retaining wall. The proposed work includes construction of a concrete grade beam and tiebacks at the base of the upper wall and replacement of existing vertical wooden columns and installation of corrosion protected steel channel splints on the upper wall.

The existing mid-bluff retaining wall is a remnant of some of the early bluff stabilization construction. The wall consists of vertical and horizontal wood timbers with wooden bracing. The mid-bluff wall is approximately 18 feet long and maintains an elevation of approximately 50.6 feet AMSL. Repair work is proposed in order to improve the stability of the existing mid-bluff retaining wall. The proposed work includes rebracing portions of the mid-bluff wall, replacement of vertical wood and timber supports, and reducing the height of the backfill by approximately one-foot to reduce loading on the wall.

In association with the 1995 bluff face improvements, the backfill slope between the lower seawall and upper bluff retaining wall was improved with plantings and an irrigation system. The plantings were completed to protect the newly created slope and consist of ground cover (pink Rosea ice plant) and medium shrubs (Pink Melaleuca, Myoporum, and Sea Lavender).

Discussion: The project does not create the need for any public facilities, services and utilities other than what are already servicing the existing residences. Based on past bluff failures, the pre-construction condition of the bluff represented an imminent danger to the existing residences. Site conditions created the need for the bluff face improvements. Although the structures are out of place in an unaltered natural coastal bluff environment, seawalls and mid and upper bluff walls have been in place along this section of the bluff for an extended period of time. Existing bluff walls in this section of the bluff are of similar construction, size and scale. The construction of the walls and proposed improvements are not a new element in the visual landscape of the beach. Some natural discoloration of the concrete has occurred due to rust, moss, and natural weathering and erosional processes, which at least blends with the natural colors of the coastal bluffs. The plantings appear to adequately cover the bluff face to provide erosion control as well as soften the appearance of the newly created slope bank and walls when viewed from a distance.

As noted in a letter report dated April 19, 1999, the project engineer, Soil Engineering Construction (SEC), state that "if the structures were not already present, the site would be in a state of failure that would imminently threaten the primary residential structure." Additionally, the project engineer notes that "repair construction proposed as an element of this project will negate the existing potential for failures of existing bluff protective devices that would place the primary residential structure in imminent threat of damage and/or failure." Based on an environmental initial study conducted by A.D. Hinshaw Associates, dated June 8,

1999, it was determined that the project will not have a significant effect on the environment with incorporation of the mitigation measures prescribed therein and required under this resolution.

Conclusion: The Planning Commission finds that the location, size, design and characteristics of the existing lower seawall and the existing mid and upper bluff walls with associated landscaping and proposed repairs and improvements are compatible with and do not adversely affect and are not materially detrimental to adjacent uses, residences, buildings, structures or natural resources.

2. The impacts of the proposed project will adversely affect the policies of the Encinitas General Plan or the provisions of the Municipal Code; and
3. The project fails to comply with any other regulations, conditions, or policies imposed by the Municipal Code.

Facts: The Major Use Permit application includes the request to approve an existing lower seawall, existing mid and upper bluff retaining walls, and proposed repairs and improvements to the walls. The existing landscaping planted in association with bluff face improvements is also included as part of the Use Permit. Due to upper bluff failures, portions of the beach access stairway were re-constructed in 1995.

Pursuant to Section 30.34.020B2.b of the Municipal Code, preemptive measures are allowed on the face of the coastal bluff in accordance with the development processing and approval regulations specified in Section 30.34.020C of the Municipal Code. Additionally, Section 30.34.020B.9 of the Municipal Code stipulates that until the comprehensive plan is adopted, the City shall 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 permit are designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Pursuant to Section 30.80.180.B of the Municipal Code, the Coastal Commission is the authorized agency for issuing emergency permits for any development that falls within an area in which the Coastal Commission retains direct permit review authority, or for any development that is appealable to the Coastal Commission. In order to construct a new seawall or any erosion control device on the face of the bluff at this time, prior to adoption of a comprehensive plan, an emergency permit is required from the Coastal Commission. However, both Coastal Commission staff and City staff have agreed that property owners trying to legalize existing seawalls shall be subject to the standard Major Use Permit and Coastal Development Permit Process. The criteria stipulated in Section 30.34.020B.9 of the Municipal Code related to imminent threat, thorough alternatives analysis and mitigating adverse impacts on local shoreline sand supply shall be addressed as part of the project review.

Discussion: The criteria stipulated in Section 30.34.020B.9 of the Municipal Code has been addressed in the geotechnical reports prepared for the project by the project engineer, SEC, and other previous geotechnical and engineering professionals. Background information, including photographs, provided by the project applicant also provides information relative to the bluff failures.

Related to the emergency nature of the project, it is clear through background information provided by the applicant that the walls were constructed as a result of a number of bluff failures which occurred at different times on the property. As noted in the September 19, 1995, letter report by Skelly Engineering related to construction work in 1995, "the failure that occurred on [the site] was determined to require emergency protection measures to prevent imminent massive failure which could jeopardize his residence and the residence to the north." Additionally, as noted in the April 19, 1999, letter report from SEC, "if the structures were not already present, the site would be in a state of failure that would imminently threaten the primary residential structure."

Related to an alternatives analysis, the project engineer, SEC, notes in their April 19, 1999 letter report that "the removal, or reduction in scope, of any bluff retention structures presently on the project site would immediately cause failure on the property that would threaten the primary residential structure."

Related to mitigating adverse impacts on local shoreline sand supply, the project engineer notes in the April 19, 1999 letter report, that "the project, as designed will not have a significant adverse impact on local shoreline sand supply.

The reconstruction of the existing stairway changed the configuration and location of the previously existing stairway and the reconstruction was completed without permits or other entitlements from the City. In consideration of the City not ordering the removal of the existing bluff stairway, the City and the owner have entered into a Covenant (San Diego County Recorder Document No. 1999-0350629). The Covenant provides that the stairway may remain in place as constructed and that routine maintenance and repair may be accomplished as defined in the Covenant. The approval of the Use Permit does not in any way apply to the existing stairway.

The project has been reviewed for conformance with the policies of the General Plan related to coastal bluffs and the provisions of the Municipal Code for the Coastal Bluff Overlay Zone and Use Permits including the criteria stipulated in Section 30.34.020B.9 of the Municipal Code. Excluding the stairway, which is authorized to remain pursuant to criteria outlined in a recorded Covenant, the project complies or has been conditioned to comply with said regulations and policies.

Conclusion: The Planning Commission finds that approval of the Use Permit allowing the as-built seawall and mid and upper bluff walls with proposed repairs

and improvements, as conditioned, will not adversely affect the policies of the Encinitas General Plan or the provisions of the Municipal Code.

FINDINGS FOR PREEMPTIVE MEASURES

STANDARD: In accordance with Section 30.34.020C.2 of the Municipal Code, when a preemptive measure is proposed, the following findings shall be made if the authorized agency determines to grant approval:

c.(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.

Facts: The application includes the request to approve an existing lower seawall, existing mid and upper bluff retaining walls, and proposed repairs and improvements to the walls. The existing landscaping planted in association with bluff face improvements is also included as part of the application. The existing and proposed bluff stabilization measures are further described above in the findings related to the Major Use Permit.

Discussion: As noted in the August 6, 1997 letter report prepared by GeoSoils, Inc., "... the new walls have enhanced the stability of the slope and residence, the slope is in more stable condition subsequent to construction than prior to construction. Accordingly, the impact of the construction activity on the stability of the site and adjacent area is favorable. The potential erodibility of the site has been reduced by the construction. The effects of marine erosion on the seacliffs and seacliff retreat has been greatly reduced by the construction of the walls." Additionally, as noted in the December 14, 1998 Limited Geotechnical Assessment Update prepared by SEC, the proposed repairs will "restore the upper retaining wall and lower seawall to its originally designed condition."

Conclusion: The Planning Commission finds that information contained within the soils and geotechnical reports demonstrates that the proposed measures are substantially effective for the intended purpose of bluff erosion/failure protection, within the specific setting of the development site's coastal bluffs.

c.(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 geotechnical report.

Facts: Background information provided by the applicant, including photographs, and statements from engineers and geologists document the fact that bluff failures have occurred on the site in past years between approximately 1972 and 1995.

Discussion: As noted in the September 19, 1995 letter report by Skelly Engineering related to construction work in 1995, "the failure that occurred on [the site] was determined to require emergency protection measures to prevent imminent massive failure which could jeopardize [the] residence and the residence to the north." Additionally, as noted in the April 19, 1999 letter report from SEC, "if the structures

were not already present, the site would be in a state of failure that would imminently threaten the primary residential structure.” SEC further notes that “Repair construction proposed as an element of this project will negate the existing potential for failures of existing bluff protective devices that would place the primary residential structure in imminent threat of damage and/or failure.”

Conclusion: The Planning Commission finds that the proposed measure is necessary for the protection of the principal structure on the blufftop to which there is a demonstrated threat as substantiated by the geotechnical reports.

c.(3) The proposed measure will not directly or indirectly cause, promote or encourage bluff erosion or 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 erosion will not occur at the ends because of the device.

Facts: The application includes the request to approve an existing lower seawall, existing mid and upper bluff retaining walls, and proposed repairs and improvements to the walls. The existing landscaping planted in association with bluff face improvements is also included as part of the application.

Discussion: In the February 8, 1999 Response to Third Party Review of Geotechnical Information, SEC states that they “... certify that the Proposed development will have no adverse affect on the stability of the bluff, will not endanger life or property, and that the proposed structure is expected to be reasonable safe from failure over its expected lifetime.” SEC further states that “the project has been designed so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project or over its lifetime without having to propose any further shore or bluff stabilization to protect the structure in the future.” Additionally, as noted in the June 14, 1995 Reply to Third Party Geotechnical Review prepared by Skelly Engineering, “The proposed project will not directly or indirectly cause promote or encourage bluff erosion or failure at the property or on adjacent properties. The lower wall is part of a continuous series of walls and therefore has no ‘end effects’.”

Conclusion: The Planning Commission finds that there is no evidence to indicate that the proposed measures will directly or indirectly cause, promote or encourage bluff erosion or failure, either on site or for an adjacent property, within the site-specific setting as demonstrated in the soils and geotechnical report.

c.(4) 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 area; and not cause a significant alteration of the natural character of the bluff face.

Facts: The application includes the request to approve an existing lower seawall, existing mid and upper bluff retaining walls, and proposed repairs and

improvements to the walls. The existing landscaping planted in association with bluff face improvements is also included as part of the application. The existing and proposed bluff stabilization measures are further described above in the findings related to the Major Use Permit.

Discussion: Although the structures are out of place in an unaltered natural coastal bluff environment, seawalls and mid and upper bluff walls have been in place along this section of the bluff for an extended period of time. Existing bluff walls in this section of the bluff are of similar construction, size and scale. The construction of the walls and proposed improvements are not a new element in the visual landscape of the beach. Some natural discoloration of the concrete has occurred due to rust, moss, and natural weathering and erosional processes, which at least blends with the natural colors of the coastal bluffs. The plantings appear to adequately cover the bluff face to provide erosion control as well as soften the appearance of the newly created slope bank and walls when viewed from a distance.

Conclusion: The Planning Commission finds that the seawall and mid and upper bluff walls are visually compatible with the character of the surrounding area since the surrounding area includes bluff stabilization measures of similar construction, size and scale. Due to natural coloring of the walls and the existing plantings the walls do not cause a significant alteration of the natural character of the bluff face.

c.(5) The proposed device/activity will not serve to unnecessarily restrict or reduce the existing beach width for use or access.

Facts: As shown on the project plans, the lower seawall is constructed as close to the base of the bluff as feasible.

Discussion: The seawall is horizontally aligned with the other existing seawalls directly adjacent to the property.

Conclusion: The Planning Commission finds that the seawall does not serve to unnecessarily restrict or reduce the existing beach width for use or access.

d. No preemptive measure at the base of the bluff or along the beach shall be approved until a comprehensive plan is adopted as Council policy for such preemptive treatment, for at least the corresponding contiguous portion of the coastal bluff. Preemptive measures approved thereafter shall be consistent with adopted plan.

Discussion: The preemptive measures were constructed in response to emergency conditions which resulted due to bluff failures; the applicants are requesting approval of the existing structures and additional repairs and improvements which are necessary to meet the required factor of safety and which are necessary due to the current site conditions. The fact that the structures are existing and the emergency nature of the improvements proposed on the site precludes a

comprehensive plan from being adopted as policy by City Council for this specific site. The criteria required to be addressed pursuant to Section 30.34.020B.9 of the Municipal Code for preemptive measures approved prior to adoption of the comprehensive plan has been addressed. Preparation of the comprehensive plan is currently in process. If feasible from a geotechnical point of view and not resulting in an economic hardship based upon evidence submitted to the City Council, the applicant may be required to participate in the future comprehensive plans, which include their properties.

Conclusion: If feasible from a geotechnical point of view and not resulting in an economic hardship based upon evidence submitted to the City Council, the applicant shall be required to participate in the future comprehensive plans which include the subject property.

Preemptive Measure and Bluff Setback Determination:

The criteria required to be considered in order to approve construction on the coastal bluff maintaining the standard 40 foot setback and the criteria required to authorize preemptive measures on the face of the bluff have been addressed by the geotechnical reports submitted for the project which include the following:

- Preliminary Review of Rear Slope Failure by Accutech Engineering Systems, Inc., dated January 17, 1995
- Geologic Reconnaissance by Michael W. Hart, dated February 6, 1995
- Reply to Third Party Geotechnical Review by Skelly Engineering, dated June 14, 1995
- Letter Report by Skelly Engineering, dated September 19, 1995
- Summary of In-Place Density Tests by Southern California Soil & Testing, Inc., dated May 29, 1996
- Response to City Reviews by GeoSoils, Inc., dated August 4, 1997
- Limited Geotechnical Assessment Update by Soil Engineering Construction (SEC), dated December 14, 1998
- Structural Calculations for Limited Repairs by SEC, dated December 11, 1998
- Foundation Recommendations by SEC, dated August 3, 1998
- Response to Third Party Review by SEC, dated February 8, 1999
- Response to Third Party Review by SEC, dated April 19, 1999

The geotechnical reports/letters were reviewed by Third Party Geotechnical Consultant Ernie Artim, which found that said reports provide information to adequately meet the standards of the City of Encinitas Municipal Code, Section 30.34.020 C and D.

FINDINGS FOR A COASTAL DEVELOPMENT PERMIT

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

1. The project is consistent with the certified Local Coastal Program of the City of Encinitas; and
2. The proposed development conforms with Public Resources Code Section 21000 and following (CEQA) in that there are no feasible mitigation measures or feasible alternatives available which would substantially lessen any significant adverse impact that the activity may have on the environment; and

Facts: The site is designated as Residential 8.01 - 11.0 du/ac on the Land Use Designation map of the General Plan and is zoned R-11 on the Zoning Map. Additionally, as the site sits atop the coastal bluff it lies within the Coastal Bluff Overlay Zone. The lower seawall which is included as part of the Major Use Permit application lies within the boundaries of the original jurisdiction of the Coastal Commission and requires a Coastal Development Permit under the authority of the Coastal Commission. The portion of the Coastal Development Permit subject to review by the City relates to the existing mid and upper bluff walls with proposed repairs and improvements to the walls, existing bluff face landscaping and a proposed residential remodel/addition. Due to upper bluff failures, portions of the beach access stairway were re-constructed in 1995. The beach access stairway is not a part of the subject application.

A 338 square foot addition and other remodel improvements are proposed for the existing two story duplex. The addition is proposed on the north side of the structure and relocates the entry foyer on the lower level and provides additional floor space on the second floor. The addition will maintain a maximum height of 22 feet. Composition roof shingles and wood siding are proposed to match the existing residence. Other improvements include wall changes, replacement and addition of windows and doors, deck refurbishing.

Additions to existing structures on blufftop properties are subject to the provisions of Section 30.34.020B.9 of the Municipal Code which stipulates that if a comprehensive plan (addressing coastal bluff recession and shoreline erosion problems in the City) is not adopted by November 17, 1996, then no additions or expansions to existing structures shall be permitted on coastal blufftop lots except for minor additions or expansions that comprise no greater than a 10 percent increase above the existing gross floor area or 250 square feet, whichever is greater, provided such additions/expansions are located at least 40 feet or more from the bluff edge.

Section 30.34.020B.9 of the Municipal Code also stipulates that any allowed addition shall be constructed in a manner so that it could be removed in its entirety, and the applicants shall agree to participate in any future comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

Discussion: The subject project conforms with the limitations of Section 30.34.020B.9 of the Municipal Code given the fact that the 338 square foot addition equates to 7.6% of the gross floor area of the 4426 square foot duplex (2843 sq. ft. - main unit, 815 sq. ft. - second unit, 768 sq. ft. - garage). Additionally, the addition maintains a setback of 41 feet from the coastal bluff edge. The addition is small in scale and located in one portion of the structure, whereby it could potentially be removed in its entirety. The application is conditioned to have the applicant provide a letter stating that they agree to participate in any future comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

With approval of the Major Use Permit and the bluff setback and preemptive measure determination, the proposed project is in conformance with the development standards of the R-11 zone, the Coastal Bluff Overlay Zone and the General Plan. Additionally, with approval of the Coastal Development Permit for the remodel/addition, the mid and upper bluff retaining walls, proposed repairs and improvements and landscaping, the project is consistent with the Local Coastal Plan. As discussed in further detail as part of the Use Permit findings, the stairway is **authorized to remain** pursuant to an agreement between the City and the property owner set forth in a Covenant recorded on the property. This authorization to remain does **not** approve the stairs to be in conformance with the General Plan, Municipal Code or Local Coastal Program. With implementation of the mitigation measures established through the environmental initial study and required as a condition of approval there will not be a significant effect on the environment.

Conclusion: The Planning Commission finds that 1) the project is consistent with the certified Local Coastal Program of the City of Encinitas, and 2) that the potential adverse impacts associated with the project will be eliminated or reduced to a level of insignificance with implementation of the required mitigation measures.

3. For projects involving development between the sea or other body of water and the nearest public road, approval shall include a specific finding that such development is in conformity with the public access and public recreation policies of Section 30200 et. seq. of the Coastal Act.

Facts: The subject site is currently developed with a duplex, mid and upper bluff retaining walls, a lower seawall, and a beach access stairway on a coastal bluff lot in the Coastal Bluff Overlay Zone. The project site does not currently provide public

access to the shore, and the project does not propose any public access or public recreational facilities.

Discussion: Public access or public recreational facilities are not feasible given the project site's condition as a bluff-top residential property. Therefore, no condition requiring public access is imposed with this approval. Public access to the shore is available in the near vicinity with Beacon's and Grandview access and further to the south with Moonlight Beach and the Stone Steps stairway. Since there was not public access through the property prior to this application, the ability of the public to access the shore is not adversely impacted with this application.

Conclusion: The Planning Commission finds that the providing of public access or recreational facilities is not feasible or appropriate for a project of this scale.

ATTACHMENT "B"
Resolution No. PC 99-34
Case No. 95-106 MUP/CDP/EIA

Applicant: Jack Lampl

Location: 678 Neptune Avenue

SC1 SPECIFIC CONDITIONS:

- SC2 This approval will expire on July 22, 2002 at 5:00 pm, two years after the approval of this project, unless the conditions have been met or an extension of time has been approved pursuant to the Municipal Code.
- SC5 This project is conditionally approved as set forth on the application and project plans for the coastal bluff walls consisting of eleven sheets total including Project Overview, consisting of 1 sheet, dated May 28, 1999 and dated Received by the City of Encinitas on July 14, 1999; Plans for the proposed Repairs and Improvements by SEC, consisting of three sheets, dated December 11, 1998 and dated Received by the City of Encinitas on December 22, 1998; Plans for Slope Stabilization Walls by Skelly Engineering, consisting of 3 sheets, dated April 6, 1995 and dated Received by the City of Encinitas on May 5, 1995; Plans for Residential Seawall by First Phase Engineering, consisting of one sheet, dated Received by the City of Encinitas on January 21, 1999; Upper Wall Repair by Earth Systems Design Group, consisting of two sheets, dated as-built January 4, 1993, and dated received by the City of Encinitas on January 21, 1999; As-Built Landscape Plan by Brian L. Thompson, consisting of one sheet, dated January 27, 1998 and dated received by the City of Encinitas on January 29, 1998; and project plans for the residential remodel/addition consisting of seven sheets total, including Site Plan, Floor Plans, Foundation Plan, Framing Plans, Building Elevations, and Sections, dated August 28, 1998 and dated received by the City of Encinitas on December 22, 1998; all designated as approved by the Planning Commission on July 22, 1999 and shall not be altered without express authorization by the Community Development Department.
- SC8 Project participants shall agree in writing not to oppose participating in any proposed future governmental study addressing bluff stability and/or beach sand transport along the entire City coastline. Additionally, the applicants shall agree in writing to participate in any future comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.
- SC9 Before initiating work on the bluff walls, a Coastal Development Permit shall be received from the California Coastal Commission for the lower seawall and the associated repairs and improvements.

- SC10 All construction and improvements under the authority of a Coastal development Permit issued by the Coastal Commission must be in conformance with and approved by the Coastal Commission prior to final inspection by the Community Development Department.
- SC9 The additional repairs and improvements proposed for the existing lower seawall and the mid and upper bluff retaining walls shall be completed prior to final approval of the remodel/addition of the existing duplex.
- SC10 All drainage shall be directed away from within five feet of the edge and face of the bluff.
- SC11 When and if the rosea iceplant presently existing on the bluff face slope needs to be replaced, a more drought resistant plant material shall be selected in place of the rosea iceplant. The applicant shall contact the Community Development Department prior to replacing any of the rosea iceplant. Prior to planting the new groundcover, documentation shall be provided to show that the planting material is drought tolerant and provides good erosion control.
- SC12 A Temporary Beach Encroachment Permit shall be received from the Engineering Services Department prior to initiating any work on the beach.

G1 STANDARD CONDITIONS:

CONTACT THE COMMUNITY DEVELOPMENT DEPARTMENT REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):

- G2 This approval may be appealed to the City Council within 15 calendar days from the date of this approval in accordance with Chapter 1.12 of the Municipal Code.
- G3 This project is located within the Coastal Appeal Zone and may be appealed to the California Coastal Commission pursuant to Coastal Act Section 30603 and Chapter 30.04 of the City of Encinitas Municipal Code. An appeal of the Planning Commission's decision must be filed with the Coastal Commission within 10 days following the Coastal Commission's receipt of the Notice of Final Action. Applicants will be notified by the Coastal Commission as to the date the Commission's appeal period will conclude. Appeals must be in writing to the Coastal Commission, San Diego Coast District office.
- G4 Prior to building permit issuance, the applicant shall cause a covenant regarding real property to be recorded. Said covenant shall set forth the terms and conditions of this grant of approval and shall be of a form and content satisfactory to the Community Development Director.

covenant is applicable to any bluff failure and erosion resulting from the development project.

- BL2 The applicant shall execute and record a covenant to the satisfaction of the Community Development Department setting forth the terms and conditions of this approval prior to the issuance of building permits. Said covenant shall also provide that the property owner shall be responsible for maintaining the approved structure(s) in good visual and structural condition in a manner satisfactory to the Directors of Engineering Services and Community Development.
- BL3 An "as-built geotechnical report" shall be submitted to the Community Development and Engineering Services Departments, for review and acceptance, prior to approval of the foundation inspection. The report shall outline all field test locations and results, and observations performed by the consultant during construction of the proposed structure(s), and especially relative to the depths and actual location of the foundations. The report shall also verify that the recommendations contained in the Geotechnical Investigation Report, prepared and submitted in conjunction with the application, have been properly implemented and completed.
- BL4 An "as-built geotechnical report", reviewed and signed by both the soils/geotechnical engineer and the project engineering geologist, shall be completed and submitted to the City within 15 working days after completion of the project. The project shall not be considered complete (and thereby approved for use or occupancy) until the as-built report is received and the content of the report is found acceptable by the Community Development and Engineering Services Departments.
- BL5 The applicant shall submit on or before September 1 of each year a written report by a qualified professional engineer assessing the condition of the approved structure(s). The report shall indicate the condition of the approved structures as well as any maintenance/repair actions needed to maintain the efficacy of the structure(s). The assessment shall also include monitoring of the erosion rate on both sides of sea wall(s). If erosion is occurring that may eventually expose the cliff wall, remedial measures shall be made to prevent the erosion. Said monitoring program shall be submitted to, and corrective measures shall be reviewed and approved by the Community Development Department and Engineering Services Department, prior to implementation of any corrective measures. Any maintenance/repair work needed shall be completed prior to the next winter storm period.
- BL6 The property owner shall monitor the irrigation system to ensure that no over-watering occurs. The proposed landscape system shall be disconnected within one year from final approval of the project. If sufficient evidence is submitted showing that the plantings are not fully established after one year, the time period for utilization of the irrigation system may be extended to ensure the proper establishment of the plantings.

B1 BUILDING CONDITION(S):

CONTACT THE ENCINITAS BUILDING DIVISION REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):

B2 The applicant shall submit a complete set of construction plans to the Building Division for plancheck processing. The submittal shall include a Soils/Geotechnical Report, structural calculations, and State Energy compliance documentation (Title 24). Construction plans shall include a site plan, a foundation plan, floor and roof framing plans, floor plan(s), section details, exterior elevations, and materials specifications. Submitted plans must show compliance with the latest adopted editions of the California Building Code (The Uniform Building Code with California Amendments, the California Mechanical, Electrical and Plumbing Codes). Commercial and Multi-residential construction must also contain details and notes to show compliance with State disabled accessibility mandates. These comments are preliminary only. A comprehensive plancheck will be completed prior to permit issuance and additional technical code requirements may be identified and changes to the originally submitted plans may be required.

F1 FIRE CONDITIONS:

CONTACT THE ENCINITAS FIRE DEPARTMENT REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):

F13 ADDRESS NUMBERS: Address numbers shall be placed in a location that will allow them to be clearly visible from the street fronting the structure. The height of the address numbers shall conform to Fire Department Standards.

E1 ENGINEERING CONDITIONS:

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

E2 All City Codes, regulations, and policies in effect at the time of building/grading permit issuance shall apply.