

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4402
767-2370

RECORD PACKET COPY



Staff: GDC-SD
Staff Report: 9/20/01
Hearing Date: 10/9-12/01

Fri 9b

STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of Encinitas

DECISION: Approved with Conditions

APPEAL NO.: A-6-ENC-01-103

APPLICANT: Mark and Donna Petersen

PROJECT DESCRIPTION: Boundary adjustment affecting two existing lots (Lot A =8,998 sq. ft.; Lot B = 6,602 sq. ft.) and construction of an approximately 2,856 sq. ft. two-story single-family residence, approximately 583 sq. ft. attached accessory unit and attached approximately 511 sq. ft. garage on Lot B. An existing approximately 1,885 sq. ft. single-family residence will remain on Lot A.

PROJECT LOCATION: Southeast corner of Neptune Avenue and Phoebe Street, Encinitas, San Diego County. APN No. 254-242-31 and 32.

APPELLANT: Jenny Y. Burns

STAFF NOTES: The subject coastal development permit involving the construction of the residence and accessory unit was approved by the City of Encinitas' Director of the Community Development on April 11, 2001. On April 25, 2001, Ms. Jenny Burns appealed the decision to the City Council and on June 13, 2001, the City Council affirmed the Community Development Director's earlier action, thereby denying the appeal request. The local decision was appealed to the Coastal Commission on June 29, 2001 and on August 6, 2001, the Commission found that the appeal raised a Substantial Issue because a lot line adjustment that occurred in 1981 which affected the subject property, had not received a coastal development permit and, thus, the lot on which the home is proposed was not currently a legal lot. The applicants have subsequently revised the application to include the after-the-fact boundary adjustment.

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission find that the proposed development, as conditioned, is consistent with the Certified Encinitas Local Coastal Program. Staff has reviewed the proposed after-the-fact boundary adjustment and finds that it raises no coastal resource or public access issues. In addition, the proposed new residence on the

vacant lot will not adversely affect the visual, public access or community character resources of the surrounding area and the approval has been conditioned to require a drainage and runoff control plan that incorporates Best Management Practices (BMP's) to protect the water quality resources of the area.

SUBSTANTIVE FILE DOCUMENTS: Notice of Decision DCD-2001-36; Coastal Development Permit #01-35; Notice of Final Action for 01-35 CDP; Certified Encinitas Local Coastal Program (LCP); San Diego County Certificate of Compliance dated June 4, 1981, file page # 81-176411; Appeal Application dated 6/29/01; CDP No. 6-92-74 (Henwood).

I. STAFF RECOMMENDATION ON THE COASTAL PERMIT

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission approve Coastal Development Permit No. A-6-ENC-01-103 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

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

RESOLUTION TO APPROVE THE PERMIT:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of the Certified Encinitas Local Coastal Program. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. Standard Conditions.

See attached page.

III. Special Conditions.

The permit is subject to the following conditions:

1. Drainage Plan. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and written approval, a drainage and runoff control plan documenting that the runoff from the roof, driveway and other impervious surfaces shall be collected and directed into pervious areas on the site (landscaped areas) for infiltration and/or percolation in a non-erosive manner, prior to being conveyed off-site.

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

IV. Findings and Declarations:

The Commission finds and declares as follows:

1. Project Description\History. The proposed development involves an after-the-fact boundary adjustment involving two existing parcels that are currently aligned in an east/west orientation. The proposal involves re-orienting the parcels in a north/south alignment. The boundary adjustment will result in two lots of 8,998 sq. ft. (Proposed Lot A) and 6,602 sq. ft. (Proposed Lot B). Also proposed is the construction of an approximately 2,856 sq. ft. two-story single-family residence, approximately 583 sq. ft. attached accessory unit and attached approximately 511 sq. ft. garage on Proposed Lot B. No grading is proposed. Based on public property records, an existing approximately 1,885 sq. ft. single-family residence is located over both existing parcels. As a result of the proposed boundary adjustment, the existing approximately 1,885 sq. ft. residence will be sited on a single lot (Proposed Lot A).

The proposed residence with attached accessory unit will be located in an established residential neighborhood containing single-family and multi-family residences of similar bulk and scale. In 1981, prior to the incorporation of the City of Encinitas, the County of San Diego issued a certificate of compliance for a lot line adjustment affecting the subject lots without benefit of a coastal development permit. In 1992, the Coastal Commission approved an after-the-fact coastal development permit for the lot line adjustment which also included a request to add on to the existing approximately 1,885 sq. ft. single-family residence located on the neighboring property to the west (ref. CDP No. 6-92-74/Henwood). Because the applicant failed to fulfill the prior-to-issuance conditions of approval (relating to the addition to the existing single-family residence), the permit subsequently expired.

The subject site is zoned and planned for residential development in the City's certified LCP. The site is zoned R-11 and the proposed development meets all applicable development standards of the R-11 zone including floor area ratios, setbacks and building height.

The proposed development is located on the southeast corner of Neptune Avenue and Phoebe Street in Encinitas. 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 within 300 feet the edge of the bluff, 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.

2. New Development. The City's certified Land Use Plan contains several policies relating to the requirement that new development be designed to be compatible with existing development and the visual resources of the area. Land Use (LU) Policies 6.5 and 6.6 state as follows:

The design of future development shall consider the constraints and opportunities that are provided by adjacent existing development. (LU Policy 6.5)

The construction of very large buildings shall be discouraged where such structures are incompatible with surrounding development. The building height of both residential and non-residential structures shall be compatible with surrounding development, given topographic and other considerations, and shall protect public views of regional or statewide significance. (LU Policy 6.6)

In addition, if development is located in close proximity to LCP designated view corridors or vista points, additional development standards are required. RM Policy 4.9 states as follows:

It is intended that development would be subject to the design review provisions of the Scenic/Visual Corridor Overlay Zone for those locations within Scenic View Corridors, along scenic highways and adjacent to significant viewsheds and vista points . . .

Boundary Adjustment.

The proposed development involves a boundary adjustment of two lots to re-orient the direction of the lots from east/west to north/south which will result in a vacant lot on which the subject applicant wants to construct the residential development. The current lot configuration involves two lots which front Neptune Avenue containing an existing approximately 1,885 sq. ft. single-family residence that is built straddling the lot lines of both lots. In 1981, prior to the incorporation of the City of Encinitas, the County of San Diego approved a boundary adjustment and issued a certificate of compliance for the subject site. However, the property owner at that time failed to receive a coastal development permit for the boundary adjustment. In 1992, the Coastal Commission approved an after-the-fact lot line adjustment along with a request to add on to the residence that existed on the adjoining lot (6-92-72/Henwood). In its findings for approval, the Commission found that the lot line adjustment, while requiring a permit, did not involve adverse impacts to coastal resources, would not affect public views to and along the coast, and was consistent with the policies of the Coastal Act. However,

because the applicant never complied with a special condition relating to the addition to the single-family residence on the adjoining lot, the permit was never issued and subsequently expired. As a result, the applicant has included the boundary adjustment as part of this coastal development permit request. In addition, the neighboring affected property owner of Proposed Lot A has sent the Commission a letter concurring with the subject development request.

Although the Commission has previously found the proposed boundary adjustment to be consistent with the Coastal Act and did not adversely affect coastal resources, the subject after-the-fact request must now be reviewed for consistency with the certified LCP which is the current standard of review for development within Encinitas. The boundary adjustment proposes to re-orient the existing lot lines between two lots from an east/west orientation to a north/south orientation. The proposed boundary adjustments will result in two reconfigured lots (Proposed Lot A is approximately 8,998 sq. ft. and Proposed Lot B is approximately 6,602 sq. ft.). Minimum lot standards within the subject R-11 Zone is identified in the City's Zoning Code to be a net square footage of 3,950 sq. ft. The proposed realigned lots meet the minimum lot standard requirements, density requirements for the zone and do not result in the creation of any additional lots, but simply re-orient two existing lots. In addition, the newly re-oriented lots will be comparable in size to surrounding residential lots in the area.

The boundary adjustment does raise one concern relating to the setback requirements for the existing single-family residence. The City's zoning ordinance which is included as part of the City's Certified Implementation Plan (IP) requires that single-family homes within the R-11 zone have a minimum front-yard setback of 20 ft. from the street, 5 ft. in the side yards and 20 ft. in the rear-yard. The existing residence on Lot A is currently nonconforming in that the existing front-yard setback from Neptune Avenue is 12 $\frac{1}{4}$ ft. and the rear-yard is 5 ft. The side yards, however, are in excess of the required 5 ft. Once the subject lots are reoriented by the proposed boundary adjustment, both lots will front on Phoebe Street. Section 30.04 of the City's zoning ordinance, a part of the Certified IP, defines "front lot line", in part, as follows:

Front Lot Line shall mean on an interior lot, the front lot line is the property abutting the street. On a corner or reverse corner lot, the front lot line is the shorter property line abutting a street, except in those cases where the subdivision or parcel map specifies another line as the front lot line. . . .

In this case both Proposed Lot A and Lot B will front Phoebe Street and Proposed Lot A, the corner lot, has a property line abutting Phoebe Street which will be shorter than property line abutting Neptune Avenue. Therefore, both proposed lots will front on Phoebe Street. As a result, the setbacks for the existing residence will change. The front-yard setback from Phoebe Street to the existing residence on Proposed Lot A will be 12 feet, the rear-yard will be 20 feet and western side-yard will be 12 $\frac{1}{4}$ feet and the eastern side-yard will be 5 feet. Therefore, even with the boundary adjustment, the existing residence will remain non-conforming relating to the front-yard setback.

Section 24.70.060 of the City's Subdivision Ordinance, which is included as part of the City's Implementation Plan, requires that lot line adjustments be approved unless the resulting parcels will "[c]reate a condition that does not comply with zoning and development regulations." In addition, the intent of the City's IP is to allow for the maintenance of nonconforming structures as long as any future development does not increase the degree of non-conformity. In this case the existing structure is nonconforming (relating to the front and rear-yard setback requirements), and with the boundary adjustment, the existing home will remain non-conforming relating the front-yard setback requirements. However, with approval of the boundary adjustment the degree of the existing structural nonconformity will be decreased because the reorientation of the lots will eliminate the nonconformity of the rear-yard setback. Therefore, the proposed boundary adjustment will not result in the creation or increase in the degree of non-conformity, but will instead reduce the degree of nonconformity that currently exists. Therefore, the boundary adjustment is consistent with Section 24.70.060 of the City's Implementation Plan and can be approved. In addition, Proposed Lot B will meet all the required setback requirements of the Certified LCP.

In addition, Proposed Lot B is a flat and vacant site surrounded by single and multi-family residential structures and does not contain any environmentally sensitive resources. Therefore, the reorientation of the lots in order to accommodate development of a residence does not adversely affect environmentally resources including visual resources as previously discussed. It can also be argued that the re-orientation of the two lots which currently front Neptune Avenue, the first coastal roadway, will result in an improvement to coastal access along Neptune Avenue. By removing one lot from fronting on Neptune Avenue, the area that could have potentially been used to access the lot will now be available for public parking on the street. While there are no beach access points at the immediate site along Neptune Avenue (the beach is below an approximately 80 ft.-high coastal bluff west of the existing development site and Neptune Avenue), Neptune is a highly used one-way street that the public and residents currently use for parking while accessing public stairways and trails to the north and south of the subject site. As such, the addition of parking along Neptune Avenue, no matter how limited, would enhance the public's ability to access the beach. Therefore, the proposed boundary adjustment is consistent with the requirements of the certified LCP and will not adversely affect public access, visual or other coastal resources.

Single-Family Home/Accessory Unit

The proposed residence with attached accessory unit will be located in an established residential neighborhood containing single-family and multi-family residences of similar bulk and scale. Based on public property records, the existing structures along Phoebe Street range in size from an approximately 775 sq. ft. single-family residence (located directly across the street from the proposed development site) to a 10 unit, approximately 5,584 sq. ft. two-story apartment complex (located across the street and one lot east of the proposed development site). A two-story approximately 2,716 sq. ft. residence with approximately 512 sq. ft. accessory unit is located immediately east of the subject site. Therefore, based on square footage alone, the proposed two-story approximately 2,856

sq. ft. residential structure with an attached approximately 583 sq. ft. accessory unit and 511 sq. ft. attached garage, while larger than its immediate neighbor to the east and some other single-family residences along Phoebe Street, is not incompatible with the surrounding neighborhood.

In addition, the City's Zoning Code, which is part of the City's certified Implementation Plan (IP) of the LCP, sets specific development standards for residential development in order to assure compatibility of new development with the community. The IP has height, floor area ratios (FAR) and other design criteria. The subject development is located in the R-11 zone which allows lot coverage of up to 40%, a FAR of .60 and height to 22 ft. but allows roofs to extend an additional four feet (26 ft. maximum). The proposed development involves a height of approximately 25 ft., 9 in., lot coverage of 33% and a FAR of .54. It is therefore well within the quantitative standards set by the LCP to assure that new development is compatible with surrounding development. In addition, the IP requires a front-yard setback of 20 ft., and side-yard setbacks of 5 feet. The proposed development conforms to those requirements and is, therefore, fully consistent with the certified LCP.

In addition, the proposed residential development will be located one lot east of Neptune Avenue, the first coastal roadway east of the Pacific Ocean. However, the blufftop lots along Neptune Avenue are lined with multi-story residences such that no public views of the ocean are available from the project site and no public views will be affected by the proposed two-story residential structure. The only views that may be affected are private views from residential structures to the east. In addition, neither Phoebe Street nor Neptune Avenue at this location lies within any LCP designated view corridor or vista points. Therefore, the proposed development is not subject to the design standards required for projects that lie within designated view corridor or vista points.

In terms of public access, the proposed development will have no adverse effect on the public's ability to access the shoreline. Neptune Avenue is the first public roadway inland of the Pacific Ocean in this area. However, Neptune Avenue and the residences west of the Neptune Avenue across from the subject site are located on an approximately 80 ft.-high blufftop that does not currently provide direct public access to the beach. The closest public access points from the subject site is approximately 5 blocks north at the City of Encinitas "Grandview Stairs" and approximately 4 blocks south at "Beacons Beach". Parking lots are available at both locations; however, Neptune Avenue does offer additional street parking when these lots are full. Since these access points are located no closer than 4 blocks from the subject site, it is unlikely that development at this site would have any adverse effect on the public's ability to access the beach. In addition, Phoebe Street which is approximately 800 feet in length, is one of approximately 16 other east/west residential streets that the public can use to gain access to Neptune Avenue from Highway 101. Also, as previously described, by reorienting the subject lots toward Phoebe Street, the boundary adjustment will improve coastal access. Driveway access to one of the lots will be shifted to Phoebe Street, so an additional area for the public to park on Neptune Avenue will become available. Thus, public, access will not be adversely affected by the subject development.

The appellant on the subject development's initial appeal, while recognizing that the front-yard setback standard is 20 ft. from the ultimate width of the street, has contended that Phoebe Street is designated by the Circulation Element of the LCP to be 56 ft. at its ultimate width and contends that the City has reduced the 56 ft. ultimate width to 40 ft. without amending the LCP. However, this assertion is incorrect. The Circulation Element of the LCP only maps and identifies major, collector and local streets "that provide an additional function beyond that normally expected by local streets". Individual local streets such as Phoebe that connect major streets to local streets are not listed and the Circulation Element does not mandate the ultimate width of the right-of-ways.

In addition, the City's North 101 Corridor Specific Plan, which assigns design criteria for development within the Specific Plan area, specifically identifies that Phoebe Street's ultimate right-of-way width as it connects to Highway 101 shall be 40 feet. While the subject property does not lie within the North 101 Specific Plan area and the Specific Plan's standards do not apply to the subject development, Phoebe Street is only approximately 800 feet in length. Therefore, if the eastern end of Phoebe Street that lies within the North 101 Specific Plan area is required to be 40 ft. in width, the City's action reducing the ultimate width of the remaining portion of Phoebe Street to 40 ft. is a reasonable action, especially since it is also not in conflict with other policies of the LCP.

In summary, the proposed boundary adjustment while allowing an existing home to maintain an existing non-conforming front-yard setback, will not result in any adverse impacts on coastal resources. In addition, the construction of a single family residence and attached accessory unit does not adversely affect any coastal resources including public access, visual, or environmentally sensitive habitat. Therefore, as conditioned, the Commission finds that the proposed development is consistent with LU Policies 6.5 and 6.6, RM Policy 4.9, Section 24.70.060 of the City's IP along with all other applicable Certified LCP requirements.

3. Water Quality Resources. Resource Management (RM) Goal 2 of the City's Certified LCP states that:

The City shall make every effort to improve ocean water quality.

In addition, RM Policy 2.1 requires that:

In that the ocean water quality conditions are of utmost importance, the City shall aggressively pursue the elimination of all forms of potential unacceptable pollution that threatens marine and human health.

Finally, RM Policy 2.3 states, in part:

To minimize harmful pollutants from entering the ocean environment from lagoons, streams, storm drains and other waterways containing potential

contaminants, the City shall mandate the reduction or elimination of contaminants entering all such waterways; . . .

The proposed development involves the construction of an approximately 2,856 sq. ft. two-story single-family residence, approximately 583 sq. ft. attached accessory unit and attached approximately 511 sq. ft. garage and associated driveway on a vacant approximately 6,602 sq. ft. lot. No grading is proposed. Since the subject lot is currently vacant, the development will result in a significant decrease in the amount pervious surfaces available to filter rainwater and polluted runoff before it enters the street and drains onto the public beach and coastal waters.

In order to reduce the potential for adverse impacts to water quality resulting from drainage runoff from the proposed development, Special Condition #1 has been attached. Special Condition #1 requires that runoff from the roof, driveway and other impervious surfaces be directed into the landscaped areas on the site for infiltration and/or percolation, prior to being collected and conveyed off-site. Directing on-site runoff through landscaping for filtration of on-site runoff in this fashion is a well-established Best Management Practice for treating runoff from small developments such as the subject proposal. As conditioned, the filtering of all runoff through landscaping will serve to reduce any impacts to water quality from the project to insignificant levels. Therefore, as conditioned, the Commission finds the proposed project consistent with RM Goal 1 and Policies 2.1 and 2.3 of the City's certified LCP.

4. No Waiver of Violation. The proposed boundary adjustment has already been completed without the benefit of a coastal development permit. Although an apparent violation has occurred, consideration of the application by the Commission is based solely upon consistency with the Certified Encinitas Local Coastal Program (LCP). Approval of this permit does not constitute a waiver of any legal action with regard to this violation that may have occurred; nor does it constitute admission as to the legality of any development undertaken on the subject sites without a coastal development permit.

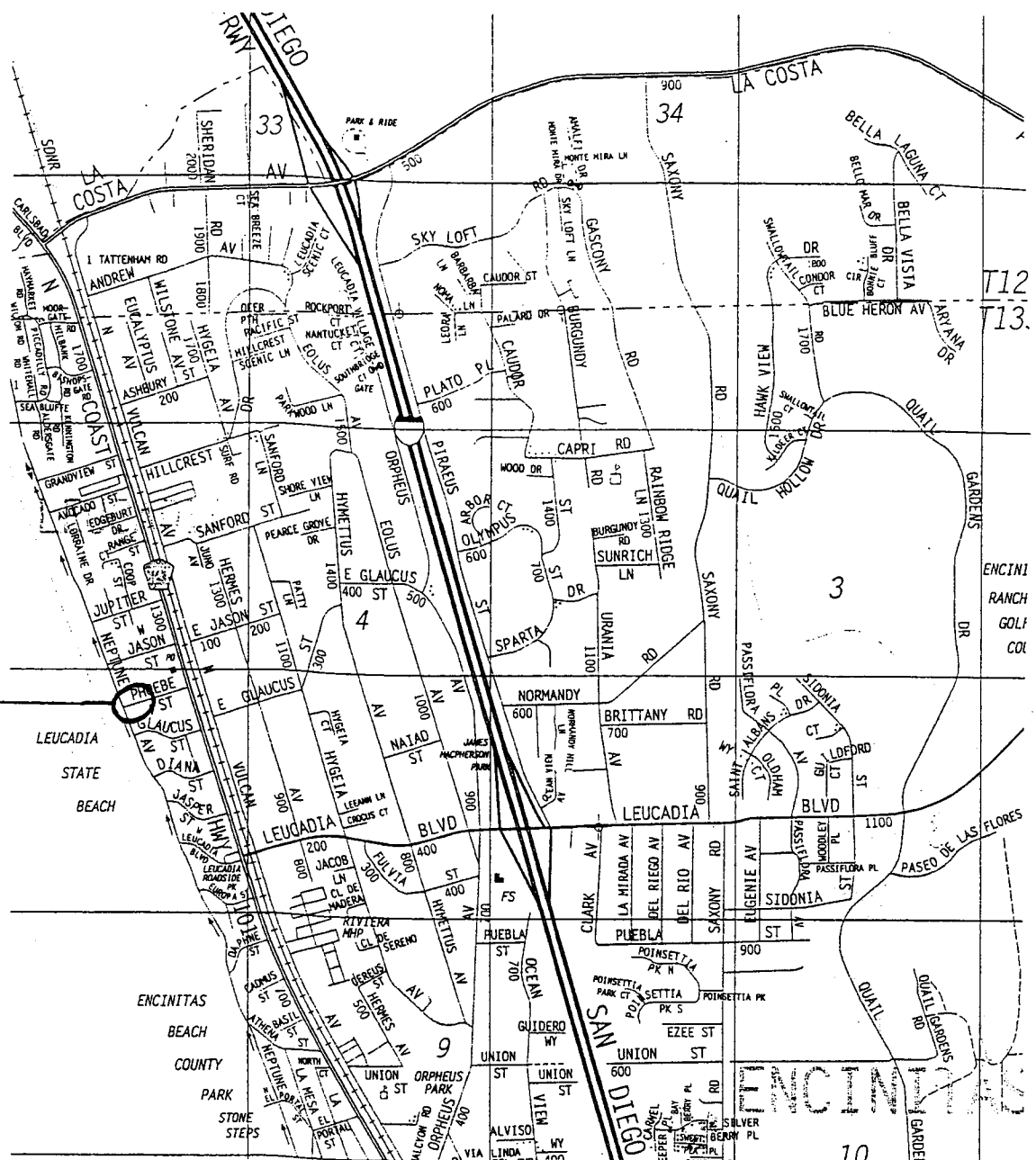
5. Consistency with the California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

As discussed herein, the proposed project will not cause significant adverse impacts to the environment. Specifically, the project, as conditioned, has been found consistent with the water quality protection policies of the Local Coastal Program. There are no feasible alternatives or additional mitigation measures available which would substantially lessen any significant adverse impact which the activity might have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally

damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

STANDARD CONDITIONS:

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



Site

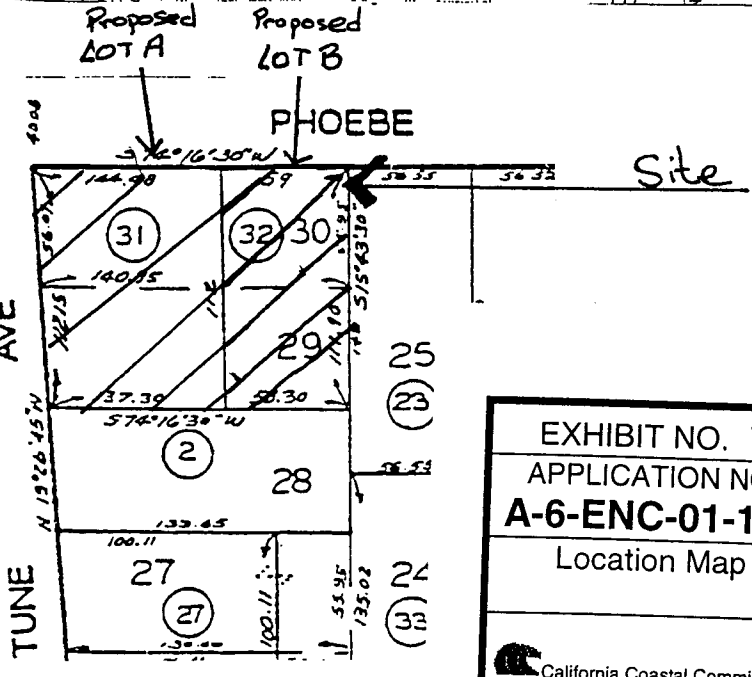
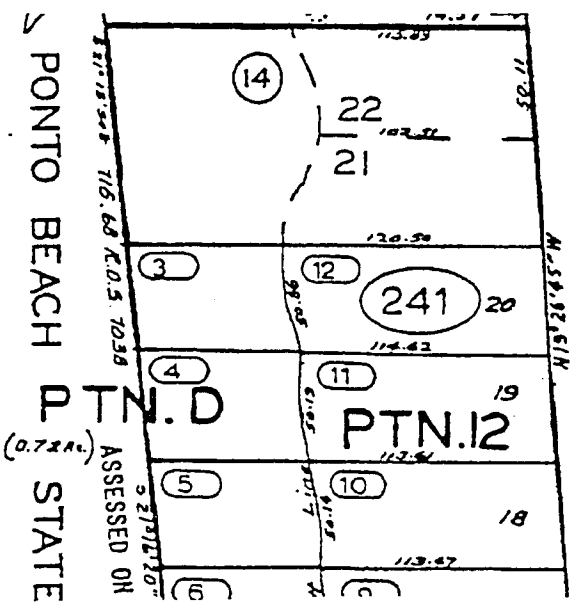
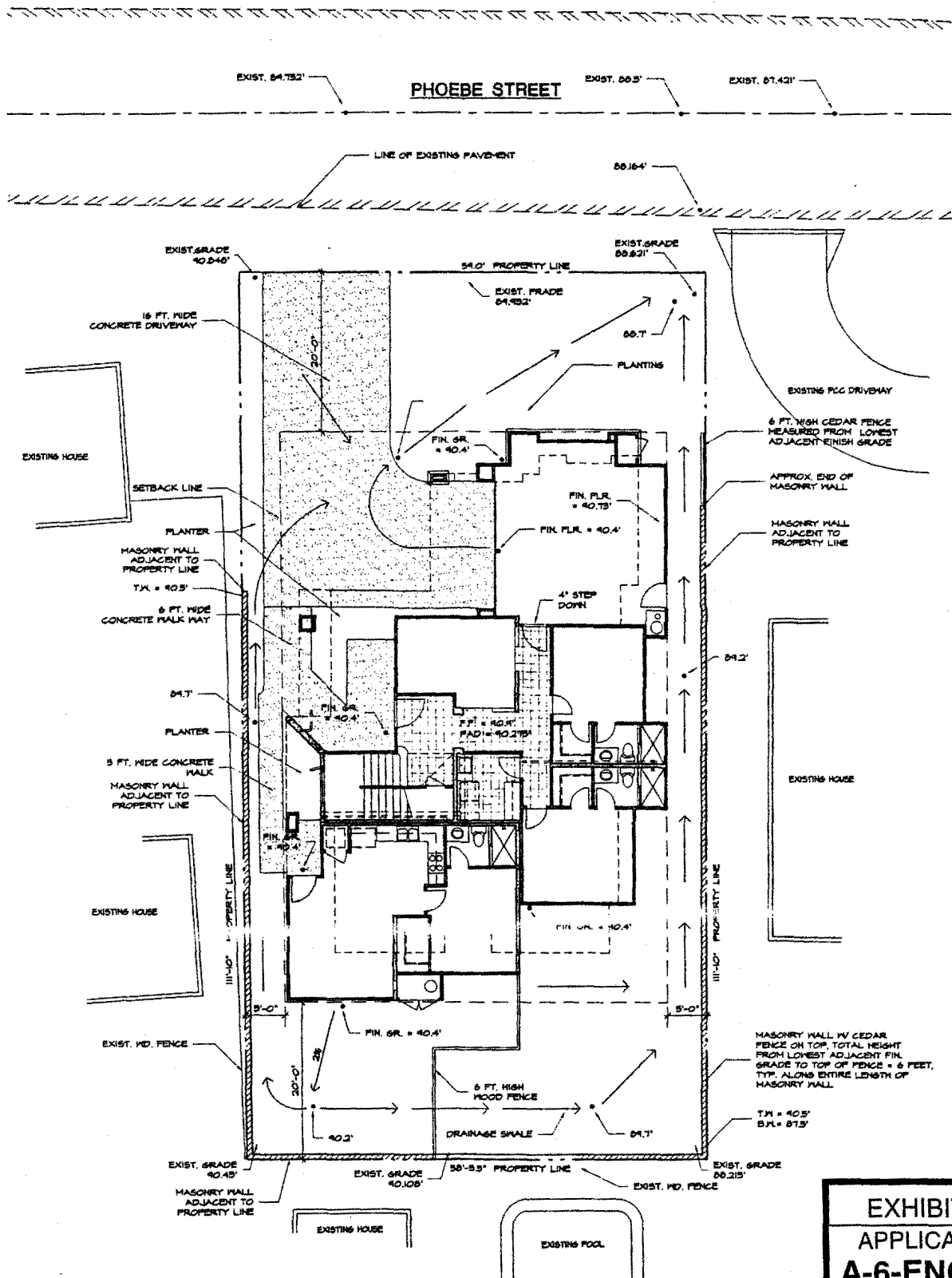


EXHIBIT NO. 1
 APPLICATION NO.
A-6-ENC-01-103
 Location Map

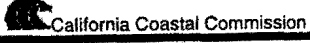
California Coastal Commission

OCEAN LINE
 HIGH TIDE
 PUNTO BEACH STATE PARK



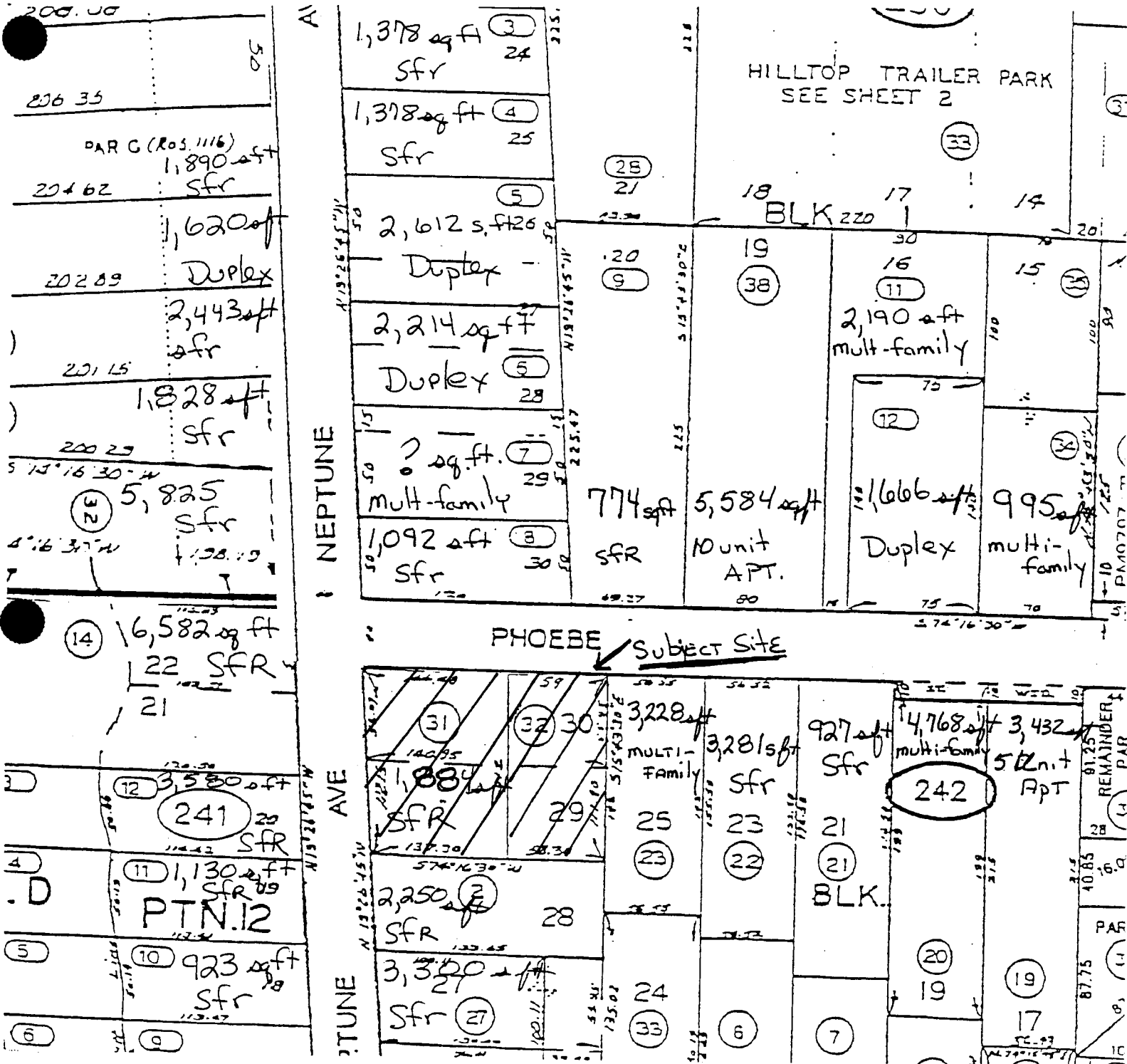
PHOEBE STREET

EXHIBIT NO. 2
APPLICATION NO.
A-6-ENC-01-103
 Site Plan of
 Proposed Residence



SITE PLAN

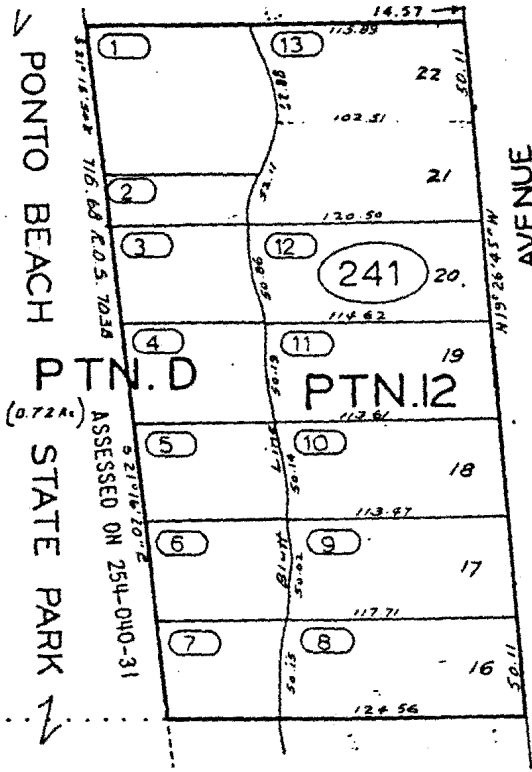
General Survey and Depiction of Existing Development Surrounding the Proposed Development Site.



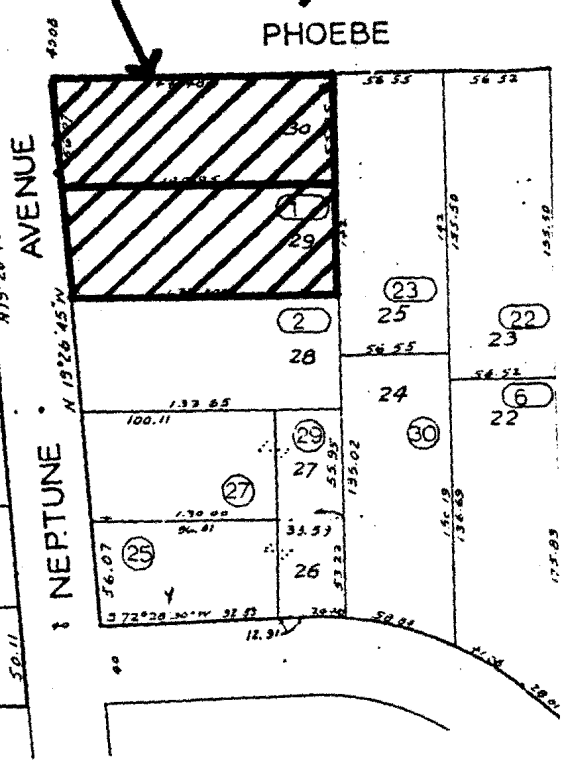
This survey identifies the total square footage and use as identified on "Data Disc" of July 2001 by "First American Real Estate Solutions". The primary source of the information compiled by First American Real Estate Solutions, in this case, are public records from the San Diego County Assessors Office.

EXHIBIT NO. 3
APPLICATION NO.
A-6-ENC-01-103
Depiction of Surrounding Development
California Coastal Commission

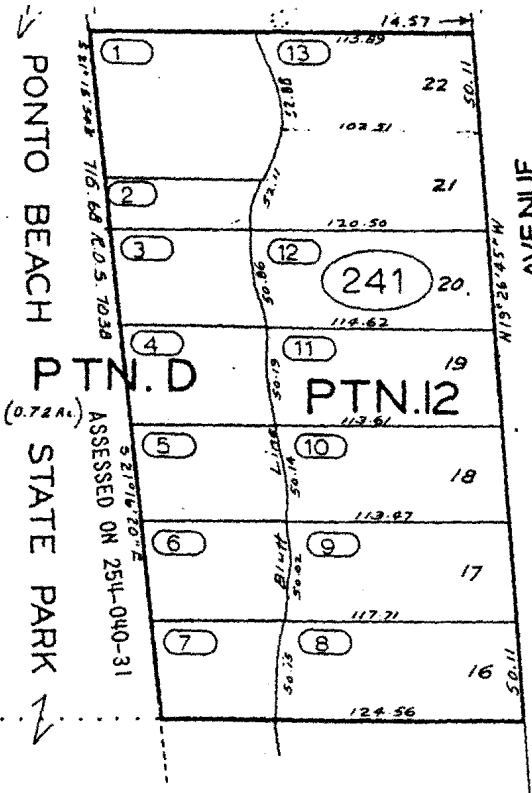
PACIFIC OCEAN
LINE
PACIFIC OCEAN



Existing Orientation



PACIFIC OCEAN
LINE
PACIFIC OCEAN



Proposed Reorientation (Approx.)

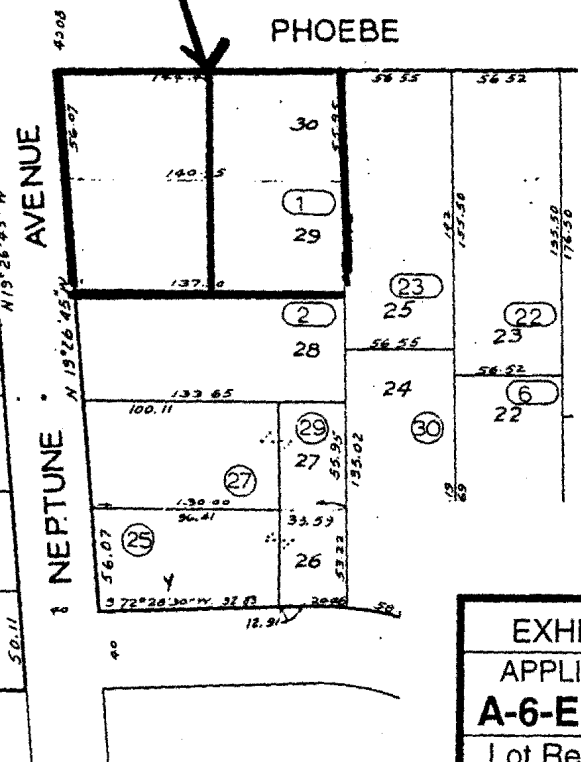


EXHIBIT NO. 4
APPLICATION NO.
A-6-ENC-01-103
Lot Reconfiguration

California Coastal Commission

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SEP 05 2001

August 23, 2001

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

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VIA HAND DELIVERY

The Honorable Mayor and City Council Members
City of Encinitas
505 S. Vulcan Ave.
Encinitas, CA 92024-3633

**Re: 01-35 CDP (Peterson) for vacant property on the south
side of Phoebe St. one lot east of Neptune Ave.**

Dear Mayor Holt and Council Members:

We represent Ms. Jenny Y. Burns with respect to this matter and are writing with regard to the "interim policy" relied upon by the City to narrow the ultimate width of Phoebe St. and to approve the above-referenced Coastal Development Permit ("CDP").

As referenced in Ms. Burn's July 31, 2001 letter to the Coastal Commission (see enclosed copy), the interim policy is illegal. As noted by the California Supreme Court, interim measures are legally valid only if they are designed to preserve the status quo pending establishment of a permanent plan. (*Miller v. Board of Public Works* (1925) 195 Cal. 477, 234 P. 381.) Such measures are never allowed to authorize a permanent structure that could not otherwise be built under the existing law. (*Miller, supra; Silvera v. City of South Lake Tahoe* (1970) 3 Cal.App.3d 554.) In other words, such measures cannot be used to reduce zoning restrictions.

Here, the City has gone well beyond the mere preservation of the status quo until the Road Standards could be properly amended by City Council: it has used an interim policy to approve a proposed permanent structure which could not be built under current law because the structure will encroach 8 ft. into the front yard set back measured from the ultimate right-of-way of 56 ft. In other words, the City used an illegal interim measure to reduce the zoning requirements otherwise

EXHIBIT NO. 5
APPLICATION NO.
A-6-ENC-01-103
Letter Submitted by
Opponent

The Honorable Mayor and City Council Members
August 23, 2001
Page 2

applicable to the Peterson's property. Thus, the CDP cannot be approved unless and until the structure is either (i) set back an additional 8 ft. or (ii) the City properly reduces the ultimate width of Phoebe St. after a noticed public *hearing for that purpose* and after the City obtains a CDP for the resulting "division of land".¹

Apparently, the City Attorney's position is that the Supreme Court's holding in *Miller* is inapplicable because that case dealt with a "temporary emergency ordinance," while the City is relying on a "interim policy". This play on words simply elevates form over substance and does not address the legal reality that a city cannot use an temporary emergency ordinance (or policy, or measure, or whatever the city chooses to call it) to reduce zoning regulations. Even in a legitimate emergency, all a city may do is maintain the status quo by placing a moratorium on development until the problem can be studied, and, if necessary, the zoning regulations can be changed by the requisite legislative process. If a city cannot use an interim policy to reduce zoning regulations even in a bona fide emergency, how can it possibly do so when, as is the case here, no such emergency was ever even identified much less determined to exist? If the City Attorney has legal support for his position, we would be happy to review it.

Furthermore, the assertion made by the City Manager in his July 17, 2001 letter to the Coastal Commission – that the "City Council received information about this issue at their June 13 [2001] meeting, and did not differ with the staff determination to retain the street at the 40 ft. width" – is in error. The width of Phoebe St., as an urban local street, is 56 ft. (see Public Road Standards at p. 29, column 3 of Table 3) and has never been legally reduced to 40 ft. Thus, the City Council could not have decided to *retain* the street at the 40 ft. width. Moreover, the Council could not have voted to reduce the street width from 56 ft. to 40 ft. at the June 13 meeting because the public was never given the legally-required notice that the purpose of such meeting was to consider a change in the width of

¹ However, as noted in Ms. Burn's July 31, 2001 letter to the Coastal Commission, there are several other reasons why a CDP cannot be approved for this project. Thus, even if the ultimate public right-of-way issue were properly resolved, the CDP still cannot be issued.

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Phoebe St. Instead, all the public was told was that the City was considering Ms. Burns appeal of the Peterson's CDP.

In sum, the City's reliance on the interim policy is illegal. Therefore, the CDP was inappropriately approved. We hope the City will correct these errors and revoke its approval of the CDP.

Very truly yours,

McKENNA & CUNEO, L.L.P.



Christian D. Humphreys

CDH/lw

Enclosure

cc: Ms. Jenny Y. Burns
Mr. Kerry Miller, City Manager
Glen Sabine, Esq., City Attorney

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