

CALIFORNIA COASTAL COMMISSION

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Filed: March 29, 2002
49th Day: May 17, 2002
Staff: SFR-LB
Staff Report: April 18, 2002
Hearing Date: May 7-10, 2002
Commission Action:

**STAFF REPORT: APPEAL - SUBSTANTIAL ISSUE**

LOCAL GOVERNMENT: City of Dana Point

LOCAL DECISION: Approval with Conditions

RECORD PACKET COPY

APPEAL NUMBER: A-5-DPT-02-057 and A-5-DPT-02-100

APPLICANT: Dr. and Mrs. Lewis Bruggeman

APPELLANTS: Coastal Commissioners: Sara Wan & Shirley Dettloff

PROJECT LOCATION: 3425 Scenic Drive, Dana Point, Orange County

PROJECT DESCRIPTION: Construction of an 8,620 square foot single family dwelling with an attached 1,125 square foot 4-car garage and basement including retention of a portion of the dwelling that currently encroaches into the bluff top setback; construction of retaining walls that will exceed the permitted 30 inches in height; construction of combination retaining/windscreen walls to exceed the permitted 6 feet in height; construction of right-of-way improvements including a new cul-de-sac, curb and gutter; and implementation of a fuel modification program for fire safety purposes.

**SUMMARY OF STAFF RECOMMENDATION & ISSUES TO BE
RESOLVED:**

The staff recommends that the Commission, after a public hearing, determine that **A SUBSTANTIAL ISSUE EXISTS** with respect to the grounds on which appeal numbers A-5-DPT-02-057 and A-5-DPT-02-100 have been filed because the locally approved development raises issues of consistency with the City of Dana Point Local Coastal Program as well as with the public access policies of Chapter 3 of the Coastal Act. This staff report is a consolidated analysis for both appeals.

The project approved by the City of Dana Point (City) is the substantial demolition of an existing house and construction of a "new" house upon a bluff top lot located on the Headlands. The Headlands is an approximate 120+ acre coastal promontory, portions of which constitute environmentally sensitive habitat, and is a significant landmark that gives

the promontory its name. The Headland bluffs, which are approximately 200 feet high at the project location, are visible for several miles up and down the coast. The project site is between the first public road and the sea.

The project, as approved by the City, involves the retention of the non-conforming portion of the house that encroaches into a required twenty-five (25) foot bluff top setback pursuant to the City's LCP, development which has not been sited and designed to avoid significant adverse impacts to an adjacent environmentally sensitive habitat area based on a required fuel modification plan, and which potentially frustrates the dedication of a usable public access easement.

The standard of review for this appeal is the Dana Point Local Coastal Program and the public access policies of the Coastal Act. Consequently, the major issues before the Commission are:

- 1). Does the substantial demolition (87%) of the existing residence result in classifying the proposed project as "new" development that mandates that the non-conforming portion be removed?
- 2). Has the proposed development been sited and designed to be compatible with the adjacent environmentally sensitive habitat area?
- 3). Did the City of Dana Point, through its conditions attached to the CDP, appropriately condition the development to provide a usable public access easement?

Commission staff is recommending that the Commission find substantial issue on concerns #1 and #2 above. Commission staff is recommending that the Commission find **NO** substantial issue on concern #3 relative to public access. The motions to carry out the staff recommendation are found on pages 5 and 6.

Pursuant to Section 30625 of the Coastal Act, the applicant agreed, on March 22, 2002, to waive the 49-day time limit for hearing the appeal on A-5-DPT-02-057. However, the 49-day time limit for A-5-DPT-02-100 has not been waived. The Notice of Final Action for A-5-DPT-02-100 was received on March 18, 2002 and the appeal was filed on March 29, 2002. Consequently, by May 17, 2002 the Commission must act on appeal A-5-DPT-02-100. This staff report is a consolidated staff report for both appeals.

At this time, all that is before the Commission is the question of whether the appeals raise a substantial issue. If the Commission determines that a substantial issue exists, a de novo hearing will be held at a subsequent meeting.

SUBSTANTIVE FILE DOCUMENTS:

- City of Dana Point Local Coastal Program (LCP)
- City of Dana Point file for City coastal development permit CDP01-11
- Draft Environmental Impact Report, Volume 1, Headlands Development and Conservation Plan, Dana Point, California (SCH#2001071015)
- Commission appeal A-6-LJS-99-160 (Summit Resources, L.P.)
- Commission CDP 5-01-240 (De La Pena)
- Commission CDP 5-99-376-A1 (Langley)

LIST OF EXHIBITS:

1. Location Map
2. Proposed Headlands Land Use Plan
3. Existing LCP Land Use Plan
4. Footprint of Existing Residence
5. Site Plan of Project as Approved by the City
6. Fuel Modification Plan
7. Notice of Final Action, Approval of January 16, 2002
8. Notice of Final Action, Approval of February 20, 2002 (Amends the January 16, 2002 approval)
9. Commission Appeal, March 29, 2002 which is for the appeal of the project as amended by the City on February 20, 2002
10. Resolution No. 02-02-20-10, February 20, 2002 which represents the City's final action on CDP 01-11.
11. Agenda Report for the City's January 16, 2002 approval, which is the City's first action on CDP 01-11
12. U.S. Fish and Wildlife Service Letter, January 16, 2002

APPEAL PROCEDURAL NOTES:

A. APPEALABLE DEVELOPMENT

Section 30603 of the Coastal Act states:

- (a) *After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:*
- (1) *Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.*
 - (2) *Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.*

Sections 30603(a)(1) and (2) of the Coastal Act establishes the project site as being appealable by its location between the sea and first public road (Exhibit 1).

B. GROUNDS FOR APPEAL

The grounds for appeal of an approved local CDP in the appealable area are stated in Section 30603(b)(1), which states:

(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in this division.

The grounds for the current appeal include contentions that the approved development does not conform to the standards set forth in the certified LCP regarding development within a required bluff top setback, the siting and design of a project adjacent to an environmentally sensitive habitat area, and the public access policies set forth in the LCP and the Coastal Act. Review of the administrative record submitted by the City on March 15, 2002 discloses a potential adverse effect on public access, as condition #45 of the Planning Commission's resolution requires the dedication of a public lateral access easement yet no such easement is identified on the plans submitted for the development as approved by the City.

Section 30625(b)(2) of the Coastal Act requires the Commission to conduct a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds stated for the appeal. If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered moot, and the Commission will proceed to the de novo public hearing on the merits of the project. The de novo hearing will be scheduled at a subsequent Commission hearing. A de novo public hearing on the merits of the project uses the certified LCP as the standard of review. In addition, for projects located between the first public road and the sea, findings must be made that any approved project is consistent with the public access and recreation policies of the Coastal Act. Sections 13110-13120 of the California Code of Regulations further explain the appeal hearing process.

C. QUALIFICATIONS TO TESTIFY BEFORE THE COMMISSION

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have an opportunity to address whether the appeal raises a substantial issue. The Chair will set the time limit for public testimony at the time of the hearing. As noted in Section 13117 of the California Code of Regulations, the only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local

government (or their representatives), and the local government. Testimony from other persons must be submitted in writing.

Upon the close of the public hearing, the Commission will vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project.

If the appeals are held to raise a substantial issue, at the de novo hearing, the Commission will hear the proposed project de novo and all interested persons may speak. The de novo hearing will occur at a subsequent meeting date. All that is before the Commission at this time is the question of substantial issue.

I. STAFF RECOMMENDATION FOR SUBSTANTIAL ISSUE:

A. MOTION AND RESOLUTION FOR SUBSTANTIAL ISSUE WITH REGARD TO APPEAL NO. A-5-DPT-02-057

The staff recommends that the Commission make the following motion and adopt the following resolution:

Motion: *I move that the Commission determine that Appeal No. A-5-DPT-02-057 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

Staff Recommendation:

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

Resolution to Find Substantial Issue:

The Commission hereby finds that Appeal No. A-5-DPT-02-057 presents a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

B. MOTION AND RESOLUTION FOR SUBSTANTIAL ISSUE WITH REGARD TO APPEAL NO. A-5-DPT-02-100

The staff recommends that the Commission make the following motion and adopt the following resolution:

Motion: *I move that the Commission determine that Appeal No. A-5-DPT-02-100 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

Staff Recommendation:

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

Resolution to Find Substantial Issue:

The Commission hereby finds that Appeal No. A-5-DPT-02-100 presents a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

II. SUBSTANTIAL ISSUE FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. LOCAL GOVERNMENT ACTION

CDP No. 01-11

On January 16, 2002, the City of Dana Point Planning Commission held a public hearing on the proposed project. At the conclusion of the public hearing, the Planning Commission adopted Resolution No. 02-01-15-05¹, which approved with conditions local Coastal Development Permit CDP No. 01-11 and Site Development Plan SDP 01-81, Variance V01-22, and Conditional Use Permit CUP 01-35 "...to permit the construction of an 8,620 square foot single family dwelling with an attached 1,125 square foot 4-car garage and basement. A site development permit is requested to retain a portion of the dwelling that

¹ Resolution No. 02-01-15-05 has **NOT** been attached as an exhibit to save paper and reduce the bulk of the staff report. Resolution No. 02-02-20-10 (Exhibit 10, which amended CDP 01-11) replaces resolution No. 02-01-15-05 and represents the City most recent action.

currently encroaches into the bluff top setback and retaining walls that will exceed the permitted 30 inches in height. A conditional use permit is requested to construct combination retaining/windscreen walls to exceed the permitted 6 feet in height. Also included in the proposed project is an alternative fuel modification and public right-of-way improvements that include a new cul-de-sac, curb and gutter." The action by the Planning Commission was not appealed to the City Council. The local appeal process expired on January 31, 2002. The City's action was then final and the Commission received the City's Notice of Final Action on February 20, 2002. Two Coastal Commissioners filed an appeal on March 6, 2002 during the Coastal Commission's ten (10) working day appeal period. Although the City had received notice that the Commission's appeal period was running, the City was unaware of the Commission's pending appeal when it acted on an amendment to CDP 01-11 on February 20, 2002.

On February 20, 2002, the City of Dana Point Planning Commission held a public hearing on an amendment to the project as approved by the City on January 16, 2002. At the conclusion of the public hearing, the Planning Commission adopted Resolution No. 02-02-20-10 (Exhibit 10). This resolution amended the conditions to local Coastal Development Permit CDP No. 01-11 and Site Development Plan SDP 01-81, Variance V01-22, and Conditional Use Permit CUP 01-35 to amend conditions principally relating to the type of construction material to be used for certain retaining walls plus other clarifying language. The affected conditions are #13, #18, #27, and #28. The action by the Planning Commission was not appealed to the City Council. The local appeal process expired on March 7, 2002. The Commission on March 18, 2002 received the City's Notice of Final Action. The City's action was then final and two Coastal Commissioners filed an appeal during the Coastal Commission's ten (10) working day appeal period (Exhibit 9).

Analysis of both of these City actions and subsequent Commission appeals has been combined into this one staff report.

B. PROCEDURAL HISTORY OF APPEALS AND APPELLANTS' CONTENTIONS

The Commission received a Notice Of Final Local Action on CDP 01-11 on February 20, 2002 (Exhibit 7). The Commission on March 18, 2002 received the Notice Of Final Action from the City of Dana Point for an amendment to CDP 01-11 (Exhibit 8).

CDP 01-11, as initially adopted by the City, approved the partial demolition of an existing residence and construction of a new 8,620 sq. ft. single-family residence plus associated improvements. On March 6, 2002, within ten working days of receipt of the Notice Of Final Action and prior to learning of the City's amendment to its January 16, 2001 action, Commissioners Wan and Dettloff appealed the original local action on the grounds that the approved project did not conform to the requirements of the certified LCP². This appeal has been assigned Commission appeal number A-5-DPT-02-057.

² The appeal of Commissioners Wan and Dettloff, dated March 6, 2002, has **NOT** been attached as an exhibit. The appeal of Commissioners Wan and Dettloff, dated March 29,

On March 29, 2002, within ten working days of receipt of the Notice Of Final Action for the amendment, Commissioners Wan and Dettloff appealed that local action on the grounds that the approved project does not conform to the requirements of the certified LCP or with the public access policies of Chapter 3 of the Coastal Act (Exhibit 9). The appeal of CDP 01-11 as amended by the City of Dana Point has been assigned Commission appeal number A-5-DPT-02-100.

A copy of the appellants' contentions is attached as Exhibit 9. The appellants, in summary, contend that the substantial demolition of eighty-seven percent of the existing structure qualifies the proposed redevelopment as new development. Consequently, the existing non-conforming development that encroaches into the required bluff top setback should also be removed. Next, the proposed development is adjacent to environmentally sensitive habitat and requires a fuel modification plan. The City's Notice Of Final Action did not contain sufficient information to determine whether the fuel modification would or would not have an adverse effect on the adjacent environmentally sensitive habitat area. Consequently, based on the lack of information, the project as approved by the City warrants Commission review to evaluate the potential impact of the project to adversely affect ESHA areas. Finally, the project plans (Exhibit 5) do not identify a lateral public access easement for a potential bluff-top trail as required by condition #45 of the Planning Commission's resolution (Exhibit 10, Page 12). Development identified by the site plan would obstruct the ability of the public to utilize this trail should it become available.

C. SUBSTANTIAL ISSUE ANALYSIS

1. Project Location, Description and Background

The subject site is located at 3425 Scenic Drive in the City of Dana Point, Orange County (Exhibits 1-3). The project site is located between the first public road and the sea. Of special note is the project site's location on a coastal bluff in an area commonly referred to as the Headlands. The Headlands is an approximate 120+ acre coastal promontory, portions of which constitute environmentally sensitive habitat, and is a significant landmark that gives the promontory its name. The Headland bluffs, which are approximately 200 feet high at the project location, are visible for several miles up and down the coast.

The local government's administrative record indicates that the proposed project is the construction of an 8,620 square foot single family dwelling with an attached 1,125 square foot 4-car garage and basement. A site development permit has been requested to retain a portion of the dwelling that currently encroaches into the bluff top setback required by the City's LCP and for retaining walls that will exceed the permitted 30 inches in height. A conditional use permit has been requested to construct combination retaining/windscreen walls to exceed the permitted 6 feet in height. Also included in the proposed project is an

2002 has been attached as Exhibit 9. The appeal of March 29, 2002 is basically a duplicate of the March 6, 2002 appeal.

alternative fuel modification and public right-of-way improvements that include a new cul-de-sac, curb and gutter.

2. Local Coastal Program Certification

Prior to the City of Dana Point's incorporation in 1989, the Commission approved the segmentation of formerly unincorporated Orange County's coastal zone into the Capistrano Beach, Dana Point, Laguna Niguel, and South Laguna segments. The project site is within the original Orange County Dana Point LCP segment, which was adopted by the Commission in 1986. This document along with the Orange County Zoning Code as it existed at the time of certification constitutes the City's certified LCP at the project site.

3. Analysis of Consistency with Certified LCP and Public Access Policies of the Coastal Act

Pursuant Section 30603 of the Coastal Act, the local CDP may be appealed to the Commission on the grounds that the proposed development does not conform to the standards set forth in the certified Local Coastal Program (LCP) or the public access policies of the Coastal Act. The appeals at issue raise both grounds. Thus, the Commission must assess whether the appeals raise a substantial issue as to the project's consistency with the certified LCP or the access policies of the Coastal Act.

In making the substantial issue assessment, the Commission typically considers whether the appellants' contentions regarding the inconsistency of the local government action with the certified LCP or the Coastal Act raise significant issues in terms of the extent and scope of the approved development, the support for the local action, the precedential nature of the project, whether a significant coastal resource would be affected, and whether the appeal has statewide significance (A-5-LGB-98-141 (Trudeau)).

In the current appeal of the project as approved by the City, the appellants contend that the City's approval of the project does not conform to various provisions of the certified LCP and the public access requirements set forth in the Coastal Act. First, the appellants state (Exhibit 9) that the proposed development as approved by the City of Dana Point qualifies as new development and that the existing non-conforming structure, which encroaches into a required bluff top setback, should be removed. This will be discussed in subsection "a." (Page 10).

Next, appellants contend that the fuel modification plan has potentially adverse impacts on adjacent ESHA areas, which requires further review, as the City's administrative record is unclear regarding this issue. The appeal was filed based on conditions #41 and #64 attached to the Notice Of Final Action (Exhibit 10, Pages 12 & 15), which implied that the fuel modification program approval from the Orange County Fire Authority would be subsequent to the issuance of the City's CDP. This would leave the potential that the fuel modification program could have an unevaluated impact through the City's CDP process on

adjacent ESHA through the clearing of native vegetation to eliminate combustible materials adjacent to the residence. Since the filing of the appeals, the Commission has received the City's administrative record and a copy of the OCFA's approved fuel modification plan (Exhibit 6). The effect of the this most recent fuel modification information on the appeal will be discussed in subsection "b." (Page 15).

In the final assertion, appellants contend, based upon review of the administrative record submitted by the City on March 15, 2002, that the project involves a potential future adverse effect on public access. As approved by the City, condition #45 (Exhibit 10, Page 12) of the Planning Commission's resolution requires the irrevocable dedication of a public lateral access easement as required by the City's LCP. No such easement is identified on the site plans submitted for the development as approved by the City. Consequently, the ability to accept and use the public access easement would be obstructed. The analysis of the public access policies on the project as approved by the City will be discussed in subsection "c." (Page 18).

The application of the City's LCP policies on the project as approved by the City is evaluated below.

a. Bluff Top Development and New Development

The coastal bluffs of Dana Point are a natural scenic resource. Beautiful in themselves, the bluffs provide magnificent vistas of the ocean and shoreline. Understandably, these same qualities provide a tremendous incentive to develop bluff top property. Development on coastal bluffs, however, is inherently dangerous. Consequently, development must be setback a sufficient distance to assure that it will not damage the structural integrity of the bluff or require that the development be protected through the use of protective devices. To address these concerns, the City's certified LCP for this area contains the following policies to guide development in hazardous areas.

Policy #18 of the Geologic Hazards Section states:

In areas of new development, above ground structures will be setback a sufficient distance from the bluff edge to be safe from the threat of bluff erosion for a minimum of 50 years. The City will determine the required setback in order to make this determination.

Moreover, the Headlands High Density Residential development standards section (D1g) of the LCP states:

Rear setback: all structures shall be set back a minimum of 25 feet from the edge of the bluff.

Policy #19 of the Geologic Hazards Section states:

The setback area mentioned in Policy 18 will be dedicated as an open space easement as a condition of the approval of new development. Further setback requirements are specified in the Access Component.

Policy #20 of the Geologic Hazards Section states:

Within the required bluff top setback, drought-tolerant vegetation will be maintained. Grading, as may be required to establish proper drainage or to install landscaping, and minor improvements that do not impact public views or bluff stability, may be permitted.

Section 7-9-151 of the Zoning Code states:

A nonconforming building or structure which conforms as to use but which does not conform to the development standards for the district within which it is located, and which was not established in compliance with an approved variance or use variance, may be altered, added to or enlarged to the extent that such alteration, addition or enlargement complies with the applicable development standards for the district within which it is located and with all other applicable regulations and provided such alteration, addition or enlargement does not increase or expand the area or amount of nonconformity with the existing applicable district regulations.

The development as approved by the City is the substantial demolition (87%) of an existing 3,300 square foot pre-coastal residence that was built in approximately 1926 and the construction of an 8,620 square foot residence on a bluff top lot. The applicant is proposing to retain the seaward most portion of the residence, which is approximately 427 sq. ft. The portion of the residence to be retained is the portion that encroaches into the minimum 25 setback from the bluff edge.

- i. "New" Development versus "Improvements" to an existing structure

The City of Dana Point agenda report of January 16, 2002 notes that the proposed development would retain the 427 sq. ft. of the existing residence that is within the required 25' bluff top setback. The City's agenda report states: *"This portion of the residence is considered non-conforming; however, if this area is retained in this manner, the City has permitted new structures to be built connecting to these areas so long as they are not entirely demolished and replaced."* Section 7-9-151 of the Orange County Zoning Code would allow the non-conforming portion to be retained provided that the development as approved by the City is not considered new development. Additionally, a case could be made that the retention of the non-conforming structure as approved by the City "... does

not increase or expand the area or amount of nonconformity ...". Consequently the first of several issues before the Commission is whether the development as approved by the City should be classified as an *"improvement"* to an existing structure, which would allow the encroachment to remain **OR** as *"new"* development, which would require that the encroaching development be removed.

The City's certified LCP does not specify at what point the extent of an *"improvement"* would qualify as *"new"* development. The Commission has provided guidance on this issue. The Commission, in evaluating its coastal development permit applications, typically considers improvements to a structure to qualify as new development when over 50% of the exterior walls are demolished. In this case only 427 sq. ft. of an existing 3,300 sq. ft. residence are to be retained. This amounts to demolition of 87% of the existing structure. Therefore the project as approved by the City constitutes new development under the Commission's typical applied "rule of thumb".

This interpretation is consistent with the Commission's action on Commission CDP 5-01-240 (De La Pena). In CDP 5-01-240 (De La Pena), the applicant proposed retention of the seaward encroaching development on a coastal bluff in the City of Laguna Beach while undertaking substantial demolition of the landward development. Clearly the intent of the applicant was to retain, as much as possible, the existing non-conforming development for purposes of maximizing private views. The applicant proposed demolition of 48% of the existing development and the Commission found that the proposed development could be considered an *"improvement"* to an existing residence subject to an engineering confirmation that demolition would be limited to 50% or less. As *"new"* development the project would have to comply with bluff top setback standards.

Though one can technically argue that leaving the existing non-conformity *"... does not increase or expand the area or amount of nonconformity ..."*, this is a spacious argument for the reasons discussed below. First, the City administrative record did not include an floor plan for the existing structure. Therefore an assessment cannot be made concerning to what extent the existing non-conforming area is being modified. Next, the life of the non-conforming portion of the development is being significantly extended through the addition of attached *"new"* development. This would have the effect of perpetuating the non-conforming elements that for long-term safety reasons should be removed. Maintaining the non-conforming development conflicts with Section 7-9-151, which requires that the non-conforming development comply with all other applicable regulations which it does not in terms of geotechnical hazards and fuel modification. Furthermore, the Commission notes that the non-conforming portion of the development would obtain its structural support from the *"new"* development. The geotechnical report of August 26, 2001 prepared by Petra recommends deepened foundations to provide adequate safety and states *"Since new footing are not allowed within the 25-foot bluff-edge setback zone, a structural tie-in system will need to be designed."* Thus the non-conforming portion of the development, as approved by the City, would depend on the *"new"* development for its structural support. Additionally, as discussed in the fuel modification section (Page 15), the retention of the non-conforming development requires fuel clearance in ESHA areas. Thus the *"new"* development *"expands"* the nonconformity by extending the nonconformity's life, by

providing the necessary structural support to the non-conforming portion in a hazardous area, not complying with all other applicable regulations, and expanding fuel clearance into an ESHA area in order to protect the non-conforming portion.

Therefore the Commission finds that the development, as approved by the City constitutes, "new" development. Consequently, the existing encroachment must be removed to conform the new development to the requirements of the City's certified LCP. As approved by the City, the development is in conflict with the City's certified LCP, and this stated ground for appeal raises a substantial issue within the meaning of Coastal Act Section 30625(b).

ii. Bluff top Development

Bluff top development is inherently risky. New development must be consequently set back an appropriate distance to minimize the potential that the approved development would be destroyed by a landslide or other geologic instability, that the development itself could affect the structural integrity of the bluff, or in any manner require the use of protective devices.

To minimize the risk of constructing a structure on a bluff top, the City's certified LCP contains policies requiring that proposed development be set back from the bluff edge. Policy #18 of the Geologic Hazards Section states that an above ground structure must be setback a sufficient distance so that the proposed development would be safe from the threat of erosion for a period of fifty (50) years. Additionally, the implementation section of the LCP for the Headlands states that all structures shall be setback a minimum of 25' from the edge of bluff. These two policies, when taken together result in a minimum setback of 25', but a greater setback may be required depending on the results of a geotechnical report.

Policies #19 and #20 of the Geologic Hazards Section also require that development in the setback be limited to open space and requires the use of drought tolerant vegetation to minimize the adverse impacts hardscape could have on bluff stability. The application of these policies is also important relative to public access (Page 18) requirements, which oblige that the applicant offer a public access easement.

Based on the Commission's determination that the development as approved by the City constitutes new development, the project is not in conformance with the City's certified LCP. The site plans document that an existing paved patio area exists right-up to the bluff top edge and that portions of the existing principal structure encroach to within eight feet of the bluff edge. The City's agenda report of January 16, 2002 (Exhibit 11, Page 4) notes that the plans indicate that the existing dwelling encroaches approximately 1' to 16' into the bluff top setback. The area of encroachment for the residence is estimated to be 427 square feet. Clearly, the development as approved by the City, which the Commission considers to be new development, is not in compliance with the distance setback standards of the City's certified LCP.

However, the examination of the project's consistency with the City's LCP is not simply limited to evaluating the 25' setback, but also requires an analysis that proposed development be setback in such a manner that the development would not be adversely affected by erosion for a period of 50 years as determined through a geological evaluation. This aspect of the bluff top setback standard will be evaluated below.

A review of the City's administrative record includes several geotechnical studies related to the proposed project, a response by City's geotechnical consultant to these geotechnical studies, and the City's agenda reports to the Planning Commission (Exhibits 9 & 11). None of these documents specifically evaluate whether or not the development as approved by the City would be safe from bluff erosion for a period of 50 years. The administrative record implies that the development, as approved by the City, may not be appropriately designed or setback.

The City's geotechnical consultant, Zeiser Kling Consultants, in report dated December 28, 2001 stated *"The consultant states that retreat of the bluff top back to the residence is possible during the life expectancy of the project. Therefore, exterior improvements between the house and bluff top could become undermined in the future, and could experience distress and even total loss of support. It is the consultant's responsibility to make the applicant aware of the risks involved. ... The current design proposes to leave a portion of the existing residence within the bluff edge setback zone. This portion of the structure does not conform to current recommendations for deepened footings. The consultant provides a risk assessment statement for structures within the setback zone. The applicant should acknowledge and accept the risk as a condition of approval."* The preceding narrative does not discuss the issue of whether the development as approved by the City would be consistent with Policy #18 which mandates that development be setback to assure that it safe from the threat of erosion for a period of fifty years. The geotechnical recommendation simply asserts that the applicant should assume the risk.

A review of the City's agenda report for January 16, 2002 did not disclose any additional analysis based on Policy #18. The City's agenda report simply acknowledges that the proposed development encroaches into the required setback and that *"A supplemental report was provided by the project geologist to address the retention of the dwelling and the report was reviewed by the City's consultant specializing in bluff-top stability."* (Exhibit 11, Page 4). To demonstrate consistency with the City's LCP the City's agenda report should have contained an analysis that the proposed development would be safe from the threat of erosion for a period of 50 years.

A review of the City's findings for the resolution of adoption (Resolution No. 02-02-20-10) also did not disclose any findings responding to the requirements of LCP Policy #18. Though findings #1 and #11 state that the project is consistent with the City's LCP, none the twenty-five findings explicitly reference project conformance with the requirements of LCP Policy #18. However, finding #12 (Exhibit 10, Page 3) acknowledges that the proposed development *"should not be affected by the expected slow progressive retreat of the present bluff top assuming appropriate foundation design as recommended herein"*.

Though finding #12 acknowledges that the bluff is retreating, no assessment was made that the development would be safe from erosion for the required 50-year minimum period.

A review of the City's conditions of approval for the resolution of adoption (Resolution No. 02-02–20-10, Exhibit 10) also did not disclose any conditions of approval responding to the requirements of LCP Policy #18. Conditions #16 and #25 (Exhibit 10, Pages 8 & 9) for example require that a soils-geotechnical report be prepared. The purpose of the geotechnical report is to make an assessment of the potential soil related constraints and hazards such as slope instability settlement, liquefaction, or related secondary seismic impacts. The Commission notes, that even though two geotechnical reports were prepared and evaluated by the City, that the geotechnical suitability of the site for the proposed development was nevertheless not fully evaluated since additional studies are being proposed. Therefore, the Commission concludes, for the reasons cited above, that the appeal of the proposed development raises a substantial issue with the City's LCP.

b. The Siting and Design of Development Adjacent to an ESHA

The project site is immediately adjacent to an area believed to constitute environmentally sensitive habitat area. The City's agenda report of January 16, 2002 (Exhibit 11, Page 5) notes that the subject property is next to a pocket mouse preserve on the Headlands property. The certified LCP notes the environmental importance of the Headlands area. Under the certified LCP 18.3 acres are designated as "Open Space" and 22.3 acres as "Conservation" to ensure protection of the remaining biotic communities.

Section 7-9-118.3 of the Orange County Zoning Code, which is used as the LCP's implementation program, contains the definition for "*development*". Under the LCP the definition of "*development*" essentially duplicates Section 30106 of the Coastal Act and includes the removal of significant vegetation as meeting the definition of "*development*". Neither the Land Use Plan nor the Zoning Code contains a definition for "*environmentally sensitive habitat area (ESHA)*". Though the LCP lacks a formal definition for ESHA, the LCP acknowledges that the purpose and intent of the Conservation district (5.41 on the Land Use Plan) is to protect and preserve certain bluff areas in a natural state because of unique and sensitive environmental features. Furthermore, under the discussion of Environmentally Sensitive Habitat Areas, the LCP background narrative notes that "*Environmentally sensitive habitat areas are defined as 'any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in the ecosystem and which could easily be disturbed or degraded by human activities and developments.'*" The City's LCP background narrative then goes on to note that the Headlands area contains several rare plant species such as the Blochman's dudleya and contains remnants of coastal sage scrub community. The U.S. Fish and Wildlife service also notes that the project site borders the temporary preserve which supports two Federally listed species, the endangered Pacific Pocket Mouse and the California gnatcatcher. Additionally, the LCP notes that the purpose of the Other Open Space district (5.40 on the Land Use Plan) is provide outdoor recreational opportunities while protecting notable natural resources. The project site is adjacent to areas designated as Open Space (5.4 on the Land Use Plan) and

Conservation (5.41 on the Land Use Plan). Exhibit 3 shows the adjacent land use designations.

In subsection "i" (Page 11) the Commission determined that the project qualified as "new" development. Development as defined by the City's LCP includes the removal of major vegetation. Fuel modification plans, when they involve the removal of major vegetation qualify as development subject to review through the coastal development review process. Consequently the interrelationship of the project to fuel modification must be evaluated to determine if the project has been designed to minimize adverse impacts on ESHA areas. Policy #13 of the Resource Component of the LCP states that development shall be prohibited in areas with high habitat value. Policy #7 states that development adjacent to environmentally sensitive areas should be designed to minimize human encroachment.

The implementation of these LCP policies is acknowledged in finding #8 of the CDP, which states that the proposed development will be sited and designed to prevent adverse impacts to environmentally sensitive habitat areas. The City's Notice of Final Action (dated February 11, 2002) identified that the project would be subject to a fuel modification program (Exhibit 11, Pages 4 & 5). The fuel modification plan could constitute development if it results in the removal of sensitive vegetation, which could adversely impact habitat values. A fuel modification plan, which has an adverse impact on habitat value would be inconsistent with Policies #7 and #13 of the LCP as it would constitute development supporting the proposed residential development. Based on the application of Policies #7 and #13 the proposed development should be sited and designed to avoid offsite adverse impacts of the fuel modification plan.

Policy #7 of LCP Resource Component states:

Development adjacent to significant and sensitive natural areas should be designed to minimize human encroachment.

Policy #13 of LCP Resource Component states:

Development shall be prohibited in areas with high habitat value, except for uses dependent on such resources and shall not significantly disrupt habitat values of such areas. This policy applies only to areas designated as 5.41 (Conservation).

A review of the City's findings and conditions of approval attached to the City's Notice of Final Action disclosed that the project as approved by the City was determined to be sited and designed to prevent adverse impacts to environmentally sensitive habitats and scenic resources located in adjacent parks and recreations areas and will provide an adequate buffer (Finding #8, Exhibit 10). Though the City's findings make the assertion that the project has been sited and designed to prevent adverse impacts to adjacent ESHA areas, Conditions #41 and #64 require that the Orange County Fire Authority (OCFA) approve a fuel modification plan. The implication of Conditions #41 and #64 is that the approval of a fuel modification plan by the Orange County Fire Authority would be occurring subsequent to the City's action approving the coastal development permit. This raises the possibility that the Orange County Fire Authority could require a fuel modification plan that has the

potential for onsite and offsite removal of native vegetation that could be considered part of an ESHA without any additional City review. This would also constitute an encroachment of new development into the setback zone in conflict with Policy #13. Based on the limited information available in the City's Notice of Final Action, an appeal was made.

The Orange County Fire Authority (OCFA) in approving a fuel modification plan, based on its "Fuel Modification Plans and Maintenance" brochure typically requires the following. Zone A is typically 20' deep and involves, but is not limited to, the total removal of fire prone plants, pruning of foliage to reduce fuel loads, the use of "high moisture" plants, the removal of plant litter, and the use of irrigation. Zone B is typically a 50' deep irrigated zone, which is less restrictive than Zone A. Zones C & D combined are 100' deep and consist of thinned vegetation. Zones A through D, when combined constitute a fuel modification zone, which is approximately 170' deep.

Based on the project plans, the structure as approved by the City is approximately 33 feet from the Headlands property line, which implies the potential use of the Headlands ESHA to achieve the fuel modification plan objectives. Additionally, the project as approved by the City would be sited to within 8' of the bluff edge, which implies that fuel modification would have to be undertaken on the bluff face (Exhibit 5). Potentially this negates the findings of the City that the project has been sited and designed to prevent adverse impacts to adjacent ESHA areas. In response to the filing of this appeal, the City submitted its administrative record, which was received by the Commission on March 15, 2002. The City also submitted a copy of the OCFA approved fuel modification plan (Exhibit 6), which was received on April 12, 2002.

Additionally, the administrative record contained two letters from the U.S. Fish and Wildlife Service, which evaluated the effects of the proposed fuel modification plan on the adjacent ESHA. One letter is dated January 16, 2002 (Exhibit 12) and is in response to a December 5, 2001 letter from the City. The other U.S. Fish and Wildlife Service letter is dated October 2, 2001. The October 2, 2001 U.S. Fish and Wildlife Service letter is "obsolete" as the January 16, 2002 letter is most current. Both letters note that the project site borders the temporary preserve which supports two Federally listed species, the endangered Pacific Pocket Mouse and the California gnatcatcher. Both letters state that the *"fuel modification plan includes a proposal to remove vegetation within the Preserve."* Both letters go on to state that the fuel modification plan would involve the removing on the preserve of non-native vegetation, dead brush, and debris within fifty feet of the applicant's property. Following removal, the affected area would be replanted with native fire-resistant plants. This would impact approximately 0.14 acres of the preserve. The U.S. Fish and Wildlife letters conclude that if the Service's recommendations were followed the fuel modification plan would not result in a take of the pocket mouse.

Though the OCFA has approved the fuel modification and the plan has been reviewed by the U.S. Fish and Wildlife Service and found not to have an adverse impact on the adjacent Headlands ESHA, questions requiring Commission review of the interrelationship of the development as approved by the City to the fuel modification plan have materialized.

As discussed in subsection "i" (page 11) of this report, the proposed development has been evaluated and determined to qualify as "new" development. As new development the project must comply with LCP policies #19 and #20, which mandate that the bluff top setback zone be kept as open space and planted with drought tolerant vegetation. Additionally, the "Fuel Modification Plans and Maintenance" brochure prepared by the OCFA states that Zone A *"is to be located on a level graded area at the top or base of slope and immediately adjacent to the protected development."*

The project plans show development in the form of hardscape and a portion of the residence within the setback zones established by both the LCP and OCFA as depicted by the top-of-bluff shown on Exhibit 6, Page 3. The top-of-bluff delineation for the fuel modification plan site plan shown on Exhibit 6 appears incorrect. The fuel modification plan shows a 20' setback between the top of bluff and the structure. However, the site plan depicted in Exhibit 5 shows approximately 8' between portions of the structure and top of bluff. Based on Exhibit 5, the fuel modification plan utilizes the bluff face for portions of Zone A. This is inconsistent with the requirement that Zone A be located on a level graded area. Additionally, the fuel modification plan for Zone B, adjacent to the applicant's northern property line adjacent to Scenic Drive appears to encroach approximately four feet into the Headlands property. Based on the review of the project plans as approved by the City and in comparison with the OCFA approved fuel modification plan, the Commission can not determine that the project as approved by the City is in compliance with the certified LCP and must be further evaluated.

In summary, even though the City's administrative record implies that the development as approved by the City may not have a significant adverse environmental impact on the adjacent area, the approved project is inconsistent with Policies #7 and #13 of the certified LCP. Further, the Commission must review the project to assure that the project is implemented consistent with the City's certified LCP to minimize human encroachment into ESHA areas. Therefore, based on the necessity for additional review, the proposed development raises a substantial issue with the LCP.

c. Public Lateral Access Dedication

One of the basic goals of the Coastal Act is the maximization of public access to and along the coast to promote public recreational opportunities. For example, Section 30212 of the Coastal Act states that public access shall be provided in new development. The City's certified LCP recognizes the public access mandate and has incorporated policies to promote public access and recreational opportunities. These requirements have been incorporated into the City's LCP in a variety of ways. Policy #19 of the Environmental Hazards section requires that the setback area specified by Policy #18 of the Environmental Hazards section be dedicated as an open space easement. Policy #10 of the Public Access section requires that adequate provision for safe public access will be required for each development permit along the shoreline. Policy #18 of the Public Access section requires that the Headlands bluff edge be permanently available for the public as implemented by an

open space management system. Policies #23 through #38 of the Public Access section promote the creation of a bluff top trail, portions of which would be on the Headlands.

Consistent with the public access policies of the Coastal Act and the City's LCP, the City through Condition #45 (Exhibit 10, Page 12) required that, in connection with this permit, that the Bruggeman's irrevocably offer a lateral public access easement for dedication to ensure implementation of the bluff top trail system. Condition #45 requires that the easement be ten (10) feet wide and setback a sufficient distance from the bluff edge to assure safety from the threat of erosion for a period of fifty years. However, a review of the project site plans (Exhibit 5) does not disclose the presence of the easement required by Condition #45. Moreover, the project plans, as approved by the City, show development in the form of hardscape improvements that would obstruct the ability of the public to utilize such an easement should it be obtained (Exhibit 5). To be usable as an easement, the project plans must show the location of the easement and that it is clear of any obstructions.

As to why the site plan does not show a proposed public access easement, the administrative record is unclear. The City's agenda report for January 16, 2002 (Exhibit 11, Pages 3 & 4) states "*The property owner is also required to enter into an Irrevocable Offer to Dedicate (IOD) an easement for connection to a public bluff-top trail in accordance with the currently adopted 1986 Dana point Local Coastal Program. It is anticipated that the Local Coastal Program Amendment currently under review by the Coastal Commission will eliminate this requirement. Until that occurs, the IOD is required as a part of the current adopted LCP.*" Since the City's LCP requires an offer of dedication and the City's permit through Condition #45 requires the IOD, the project plans must be consistent with the future, projected easement. Clearly, the project as approved by the City is inconsistent with the City's LCP since it would result in a public access dedication that would be very difficult to implement.

Though the City's action is clearly inconsistent with its LCP, the U.S. Supreme Court, in 1987 issued its "*Nollan v. California Coastal Commission*" decision, which precludes the exaction of a public access easement unless a nexus can be established. Under the nexus test a dedication for public access can only be imposed if it can be demonstrated that the proposed development would have an adverse impact on public access. Basically there has to be a reasonable relationship between the need for the public access dedication based on the adverse effects of the proposed development on public access. Though, the City's LCP requires that a public access dedication be made, the City's administrative record does not disclose that the proposed development would have an adverse impact on public access. The City's agenda report of January 16, 2001 notes that the project "*will not result in changes to public access and view ...*" The proposed project is the reconstruction of a single family dwelling, as such the use of the land will remain the same and there will be no change in the intensity of use of the site. Based on the lack of nexus for imposing a public access dedication, the Commission concludes that the City's action, though flawed, does **NOT** raise a substantial issue on the public access question.

d. Significance of Issues Raised by Appeal

Two of the appellants' contentions raise significant concerns in terms of the project being precedent setting, that a significant coastal resource would be adversely affected, and that the appeal has statewide significance. If not challenged, the City's decision would encourage future approvals of legal non-conforming development, which should be phased out, involving the substantial demolition of a structure to be considered "*remodeling*". This would allow the non-conforming development to extend beyond its normal lifespan. The inability to correct non-conforming development would perpetuate, Statewide, the existence of non-conforming development in hazardous areas, which because of its proximity to bluff the edges may require, in the future, the use of bluff protective structures to protect the development. To minimize the potential that development in hazardous locations may need future protective devices, development Statewide must be setback an appropriate distance. This mandates that the substantial demolition of a non-conforming structure also results in the non-conformity being eliminated.

The subject approval by the City is significant in terms of protecting an environmentally sensitive area if not challenged. Both the City's LCP and the Coastal Act require that development be sited and designed to avoid significant impacts to environmentally sensitive habitat areas. This can be accomplished by minimizing offsite impacts through siting and designing proposed development in a manner which confines project impacts to the project site to the maximum extent. The project as approved by the City maximizes the development potential of the lot by "*exporting*" some mitigation requirements for fuel modification offsite into an adjacent ESHA. Additionally offsite mitigation should be discouraged due to problems inherent with enforcement and the confusion related to the responsibilities and rights of the parties involved. To minimize impacts on adjacent ESHA areas, any project Statewide should be appropriately setback so that any required fuel modification plan is limited, to the maximum extent feasible, to the applicant's property. If not challenged, other property owners Statewide will seek to use adjacent open space, which may be in public ownership, for fuel modification as a means of maximizing their private development on their property. This would come at the expense of the habitat resources.

e. Conclusion

For the reasons stated above, the appeal raises a substantial issue of consistency with the regulations and standards set forth in the certified City of Dana Point LCP and the public access policies of the Coastal Act.

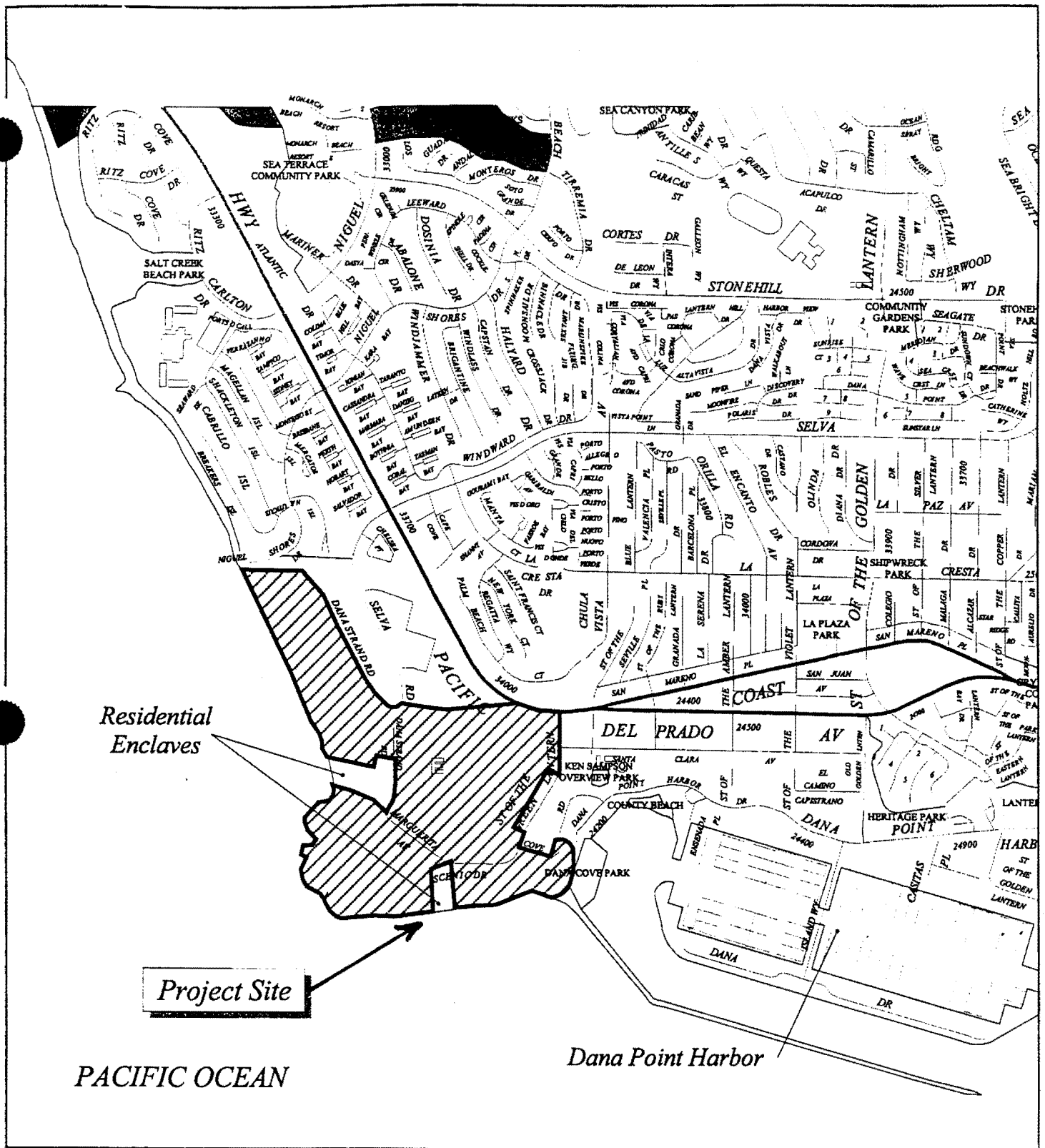


FIGURE 3.2

LSA



0.5 MILES
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EXHIBIT No. 1

Application Number:
A-5-DPT-02-057

Location Map

California Coastal
Commission

HDCP EIR
Local Vicinity

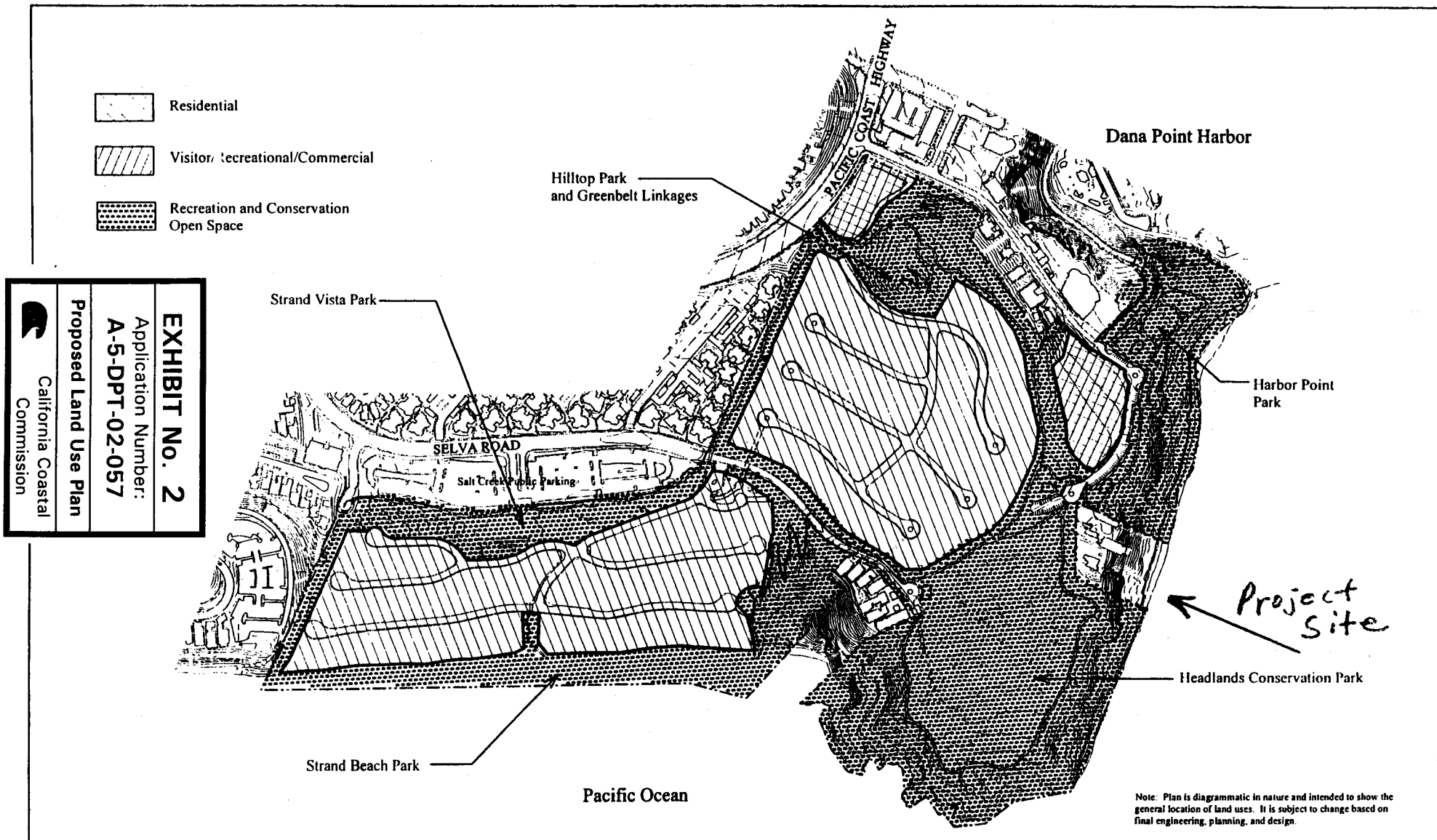
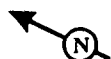


FIGURE 3.3

LSA



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SOURCE: SWA

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HDCEIR
Land Use Plan

Land Use Plan for the Headlands Area

LAND USES

- 14 HIGH DENSITY RESIDENTIAL
- 141 HIGH DENSITY RESIDENTIAL
- 53 RECREATIONAL
- 531 TOURIST RECREATIONAL COMMERCIAL
- 54 OTHER OPEN SPACE
- 541 CONSERVATION

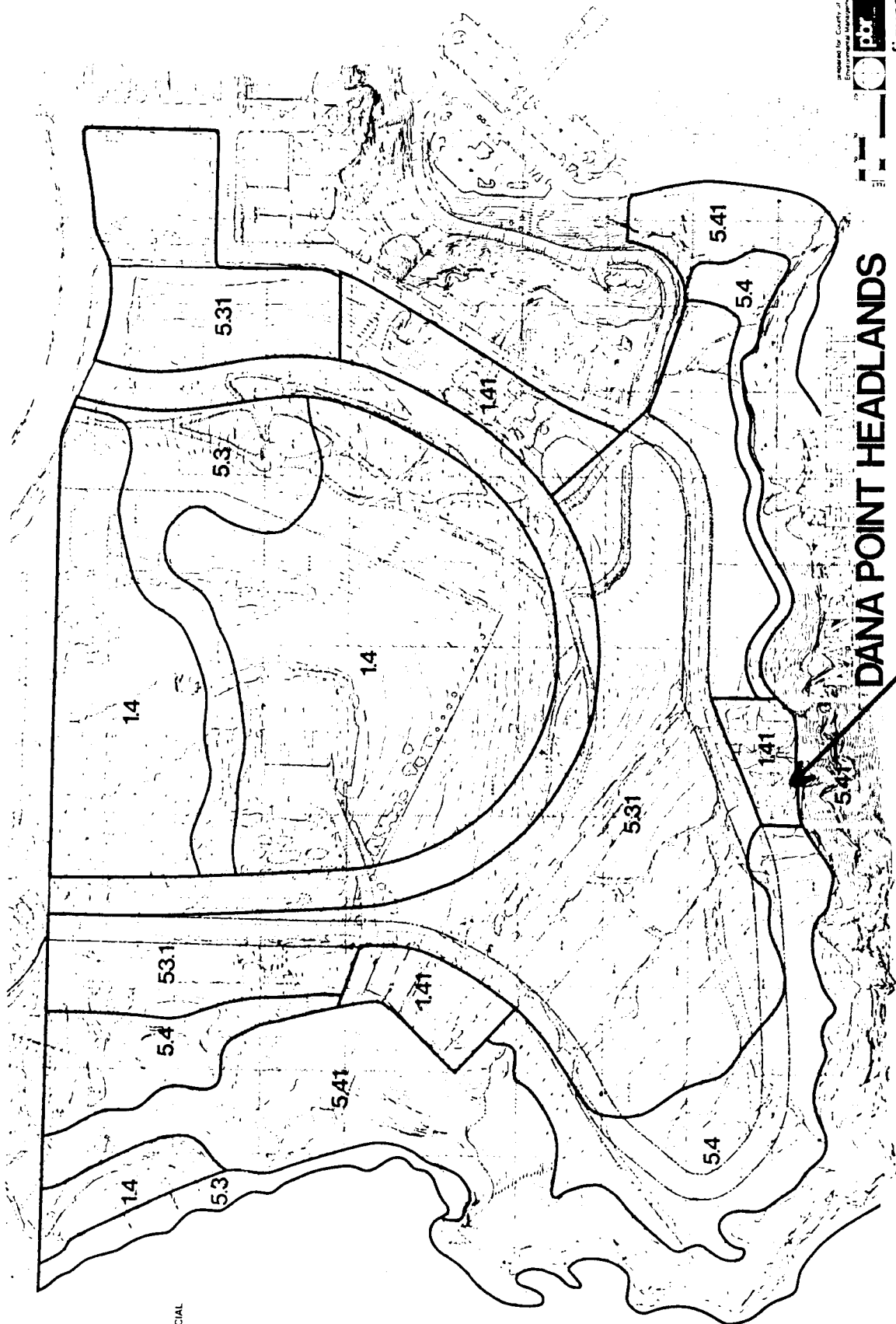


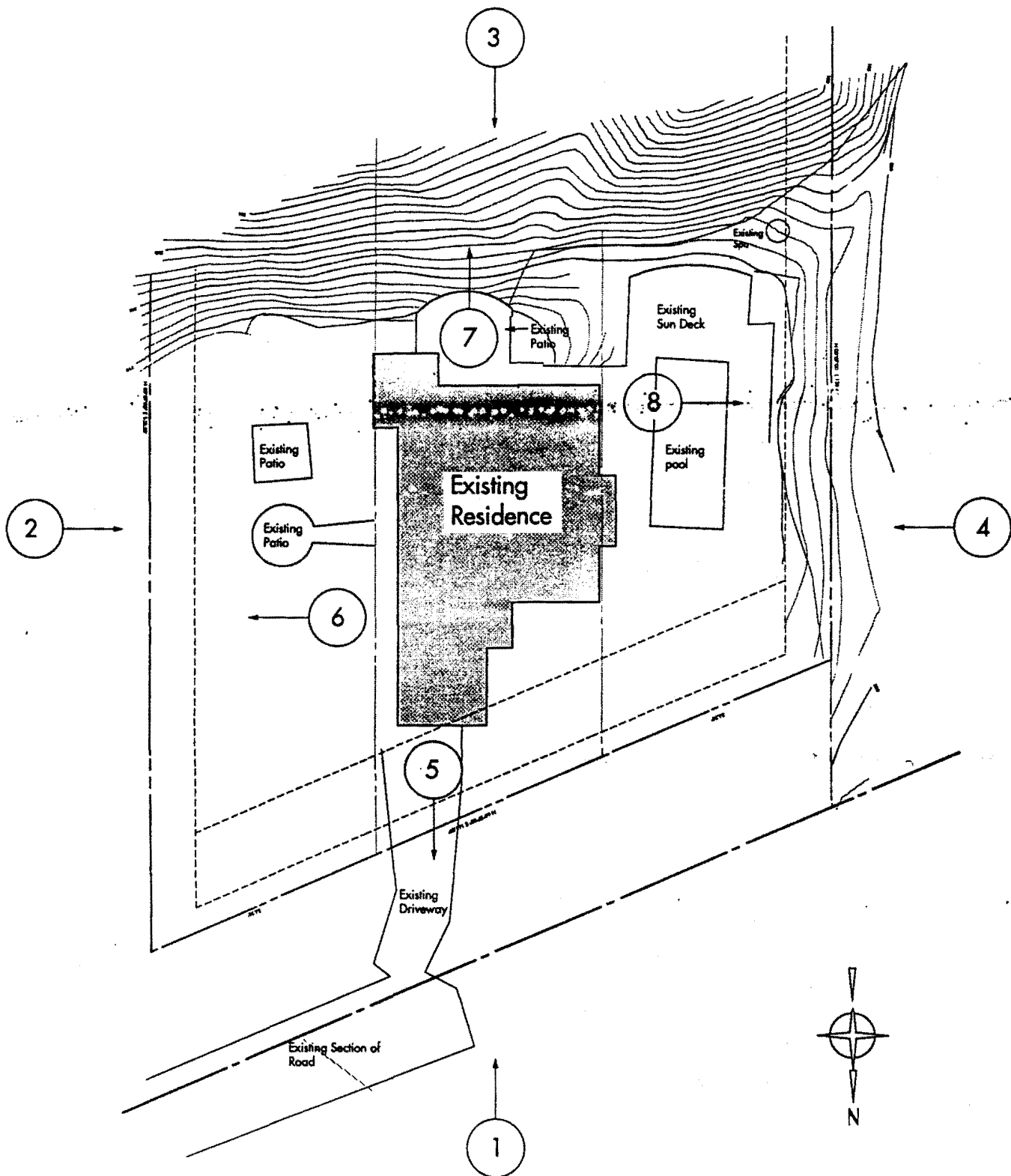
EXHIBIT No. 3

Application Number:
A-5-DPT-02-057

Existing Land Use Plan



California Coastal
Commission



Bruggeman Residence

34525 Scenic Drive • Dana Point • California

Pl

EXHIBIT No. 4

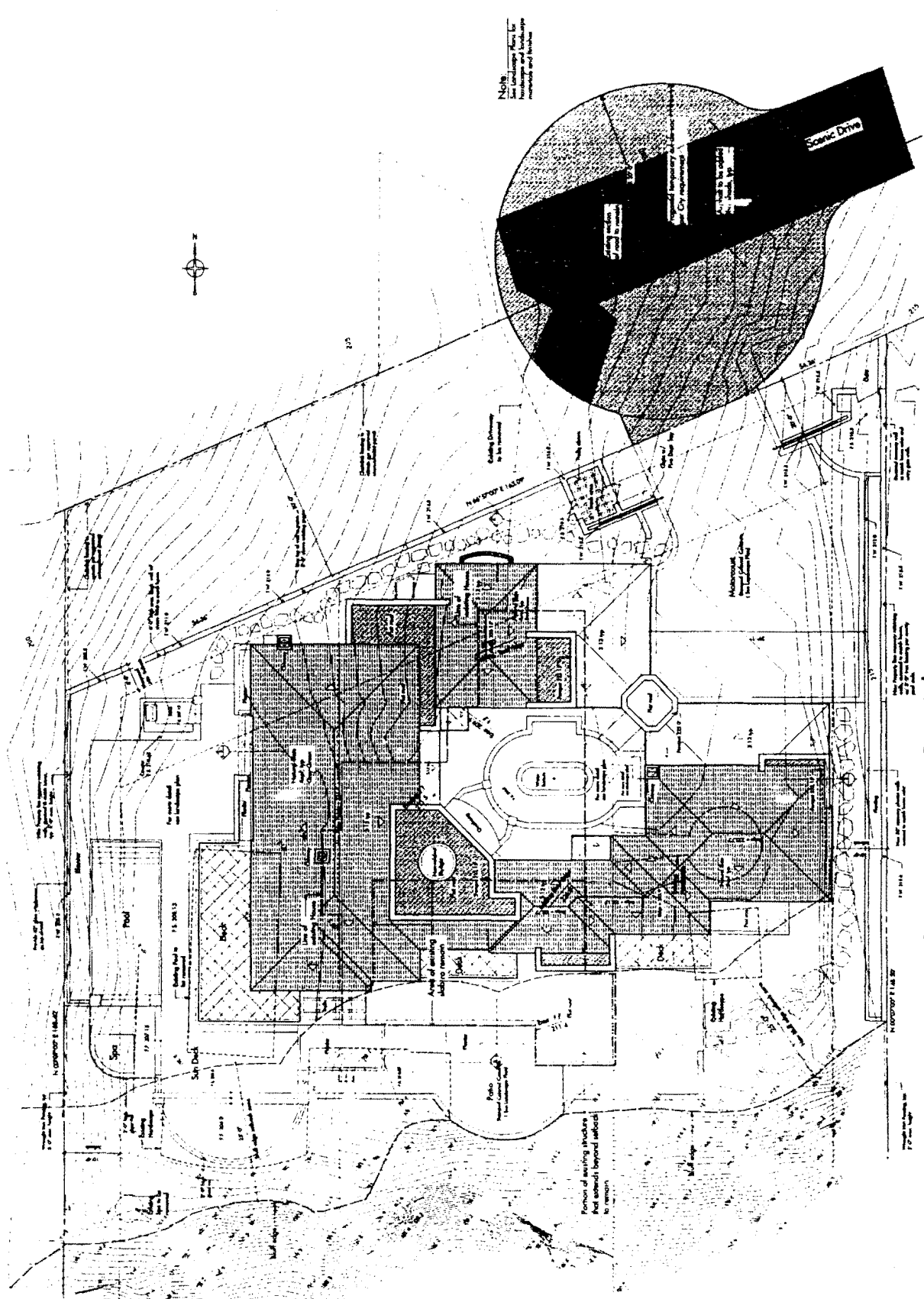
Application Number:

A-5-DPT-02-057

Existing Footprint



California Coastal
Commission



Note:
 1. All existing structures to be removed and replaced with new structures.
 2. All existing structures to be removed and replaced with new structures.
 3. All existing structures to be removed and replaced with new structures.

Site / Roof Plan
 January 4, 2002
 Scale 1/8" = 1'-0"

Bruggeman Residence

34525 Scenic Drive • Dana Point • California

EXHIBIT No. 5

Application Number:
A-5-DPT-02-057

Site Plan



California Coastal
 Commission

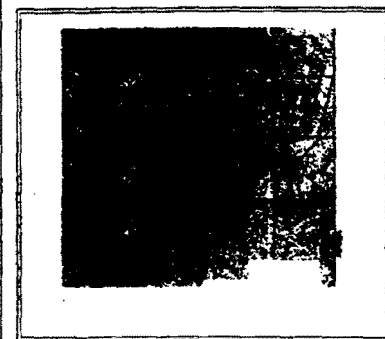
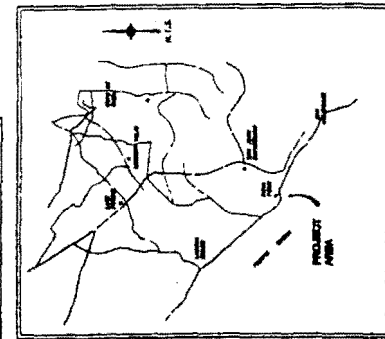
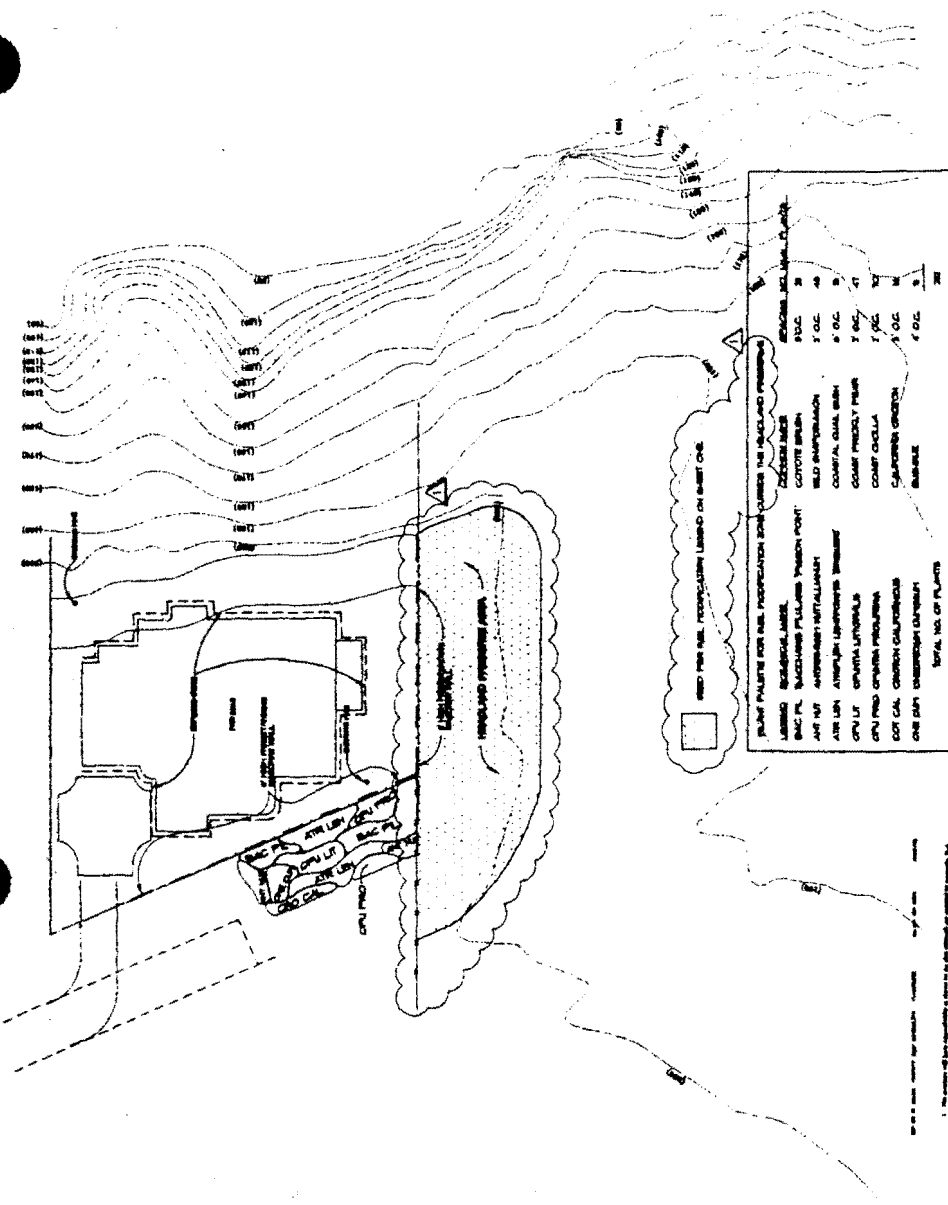




ADMIN

JOHN W. HARRIS, CHAIRMAN

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Approved: _____
Special Agent in Charge

[illegible]



FEB 20 2002

DATE: February 11, 2002

TO: South California District Office
California Coastal Commission
200 Oceangate, Suite 1000
Long Beach, California 90802

FROM: City of Dana Point
Community Development Department
33282 Golden Lantern, Suite 212
Dana Point, California 92629

CALIFORNIA
COASTAL COMMISSION

**COASTAL DEVELOPMENT PERMIT APPLICATION
NOTICE OF FINAL ACTION**

The following project is located within the City of Dana Point's Coastal Zone. A Coastal Development Permit application for the project has been acted upon.

Applicant: Christian Light/Alex Villalpando, Architect/Dr. & Mrs. Lewis L. Bruggeman, owner
Address: 1401 Quail St., Suite 120, Newport Beach, CA 92660 34525 Scenic Drive, Dana Point, CA 92629
Telephone: (949) 489-7659

Project Address: 34525 Scenic Drive, Dana Point, CA 92629/**Assessor's Parcel No.:** 672-581-03,04,05
Application File No.: Coastal Development Permit CDP01-11, Site Development Permit SDP01-81 (I) Variance V01-11/, and Conditional Use Permit CUP01-35.

Project Description: A Coastal Development Permit, Site Development Permit, a Variance, and a Conditional Use Permit to permit the construction of an 8,620 square foot single family dwelling with an attached 1,125 square foot 4-car garage and basement. A Site Development Permit is requested to retain a portion of the dwelling that currently encroaches into the bluff top setback and retaining walls that will exceed the permitted 30 inches in height. A Conditional Use Permit is requested to construct combination retaining/windscreen walls to exceed the permitted 6 feet in height. Also included in the proposed project is an alternative fuel modification and public right-of-way improvements that include a new cul-del-sac, curb and gutter

Filing Date: August 29, 2001 – Application Deemed Complete December 28, 2001
Action Date: January 16, 2002 **Action became final on:** January 31, 2002
Action: ☐ Approved
☒ Approved with conditions
☐ Denied

Draft Findings and Conditions are attached.

☒ Appealable to the Coastal Commission
☐ Non-Appealable to the Coastal Commission.

Reason: Is located in the Appeals Jurisdiction per the Post LCP Certification Map 2/6/91

City of Dana Point Contact:

H:\CDP01-01\CDPFNACT.rtf

FF#0610-70/ E. Juggeman Residence

Eugenia Garcia, AICP, Senior Planner
Telephone: (949) 248-3588

EXHIBIT No. 7

Application Number:
A-5-DPT-02-057

**Jan. 16, 2002 Notice
Final Action**

California Coastal
Commission



MAR 1 8 2002

DATE: March 13, 2002

CALIFORNIA

TO: South California District Office
California Coastal Commission
200 Oceangate, Suite 1000
Long Beach, California 90802**FROM:** City of Dana Point
COASTAL COMMISSION
Community Development Department
33282 Golden Lantern, Suite 212
Dana Point, California 92629**COASTAL DEVELOPMENT PERMIT APPLICATION
NOTICE OF FINAL ACTION**

The following project is located within the City of Dana Point's Coastal Zone. A Coastal Development Permit application for the project has been acted upon.

Applicant: Christian Light/Alex Villalpando, Architect/Dr. & Mrs. Lewis L. Bruggeman, owner
Address: 1401 Quail St., Suite 120, Newport Beach, CA 9266034525 Scenic Drive, Dana Point, CA 92629
Telephone: (949) 489-7659

Project Address: 34525 Scenic Drive, Dana Point, CA 92629/**Assessor's Parcel No.:** 672-581-03,04,05
Application File No.: Coastal Development Permit CDP01-11(1), Site Development Permit SDP01-81 (I) Variance V01-11(1)/, and Conditional Use Permit CUP01-35(1).

Project Description: Amendment of a Coastal Development Permit, a Site Development Permit, a Variance, and a Conditional Use Permit that would allow for the partial demolition of an existing non-conforming single-family dwelling and the construction of a new single-family dwelling. The request is to amend conditions of approval related to the type and construction materials of proposed retaining walls, and minor clarification to other conditions of approval. The property is located in the Coastal Overlay District.

Filing Date: January 25, 2002 – Application Deemed Complete January 25, 2002
Action Date: February 20, 2002 **Action became final on:** March 7, 2002
Action: ☐ Approved
☒ Approved with conditions
☐ Denied

Draft Findings and Conditions are attached.

☒ Appealable to the Coastal Commission
☐ Non-Appealable to the Coastal Commission.

Reason: Is located in the Appeals Jurisdiction per the Post LCP Certification Map 2/6/91

City of Dana Point Contact:

H CDP01-01 5/10/02 ENACTED

FF#0610-70 Bruggeman Residence

Eugenia Garcia
Eugenia Garcia, AICP, Senior Planner
Telephone: (949) 248-3588

EXHIBIT No. 8

Application Number:
A-5-DPT-02-057

**Feb. 20, 2002 Notice of
Final Action**



California Coastal
Commission

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

**APPEAL FROM COASTAL PERMIT
DECISION OF LOCAL GOVERNMENT****EXHIBIT No. 9**Application Number:
A-5-DPT-02-057Commission Appeal
Page 1 of 7California Coastal
Commission**SECTION I. Appellant(s)**

Name, mailing address and telephone number of appellant(s):

Coastal Commissioners: Sara Wan and Shirley Dettloff
200 Oceangate, Suite 1000
Long Beach, CA 90802 (562) 590-5071

SECTION II. Decision Being Appealed

1. Name of local/port government: City of Dana Point
2. Brief description of development being appealed: Amendment of a Coastal Development Permit that would allow for the partial demolition of an existing non-conforming single-family dwelling and the construction of a new single-family dwelling. The request is to amend conditions of approval related to the type and construction materials of proposed retaining walls, and minor clarification to other conditions of approval.
3. Development's location (street address, assessor's parcel no., cross street, etc.): 34525 Scenic Drive, City of Dana Point, Orange County. APN# 672-581-03,04,05
4. Description of decision being appealed:
 - a. Approval; no special conditions: _____
 - b. Approval with special conditions: XX
 - c. Denial: _____

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

TO BE COMPLETED BY COMMISSION:**APPEAL NO:** A-5-DPT-02-100**DATE FILED:**March 29, 2002**DISTRICT:** South Coast

5. Decision being appealed was made by (check one):
- a. Planning Director/Zoning Administrator: _____
 - b. City Council/Board of Supervisors: _____
 - c. Planning Commission: XXX
 - d. Other: _____
6. Date of local government's decision: February 20, 2002
7. Local government's file number: CDP01-11(1), SDP01-81(1), Variance V01-11(1), CUP01-35(1)


SECTION III. Identification of Other Interested Persons

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

1. Name and mailing address of permit applicant:
Dr. and Mrs. Lewis Bruggerman
7 Gavina
Dana Point, CA 92629-4112
- C.J. Light Associates
Attn: Christian R. Light & Alex Villalpando
1401 Quail Street, Suite 120
Newport Beach, CA 92660
2. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

a. _____

b. _____

EXHIBIT No. 9
Application Number: A-5-DPT-02-057
Commission Appeal Page 2 of 7
 California Coastal Commission

SECTION IV. Reasons Supporting This Appeal

Note: Appeals of local government Coastal Permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section, which continues on the next page. Please state briefly your reasons for this appeal. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)

The City of Dana Point through CDP01-11, as amended, would allow the construction of an 8,620 square foot residence including associated development on the Headlands coastal bluff in the City of Dana Point. Development on coastal bluffs is inherently risky. Additionally, the Headlands area is relatively undeveloped and portions of the area are considered to be environmentally sensitive habitat areas. Consistent with the Dana Point LCP, the proposed development should be appropriately setback from the bluff edge and designed in such a manner that it will have minimal impacts on habitat value. However, portions of the proposed development, which are currently not conforming, are to be retained within the City's twenty-five foot setback and the subject site will be subject to a fuel modification program that could have adverse impacts on adjacent habitat. Additionally, Condition #45 of the City's CDP requires an offer to dedicate a lateral public access easement, yet no proposed easement is shown on the site plans. Consequently, the proposed project raises a substantial issue with the City's certified LCP and the public access policies of the Coastal Act for the reasons described below.

ENCROACHMENT CONCERN: The proposed development involves the substantial demolition (87%) of an existing single family home and construction of a new 8,620 square foot single-family residence plus a 1,125 square foot garage on a bluff top lot within the Dana Point Headlands area. The applicant is proposing to retain the seaward most portion (approximately 427 square feet or 13%) of an existing 3,300 square foot residence. The retained portion of the structure encroaches approximately 17 feet into the minimum 25 foot setback from the bluff edge.

The City under the City's certified LCP would not allow this encroachment if this development were considered "*new*" development versus an "*improvement*" to an existing structure. The City has characterized this development as an "*improvement*". The City's certified LCP does not provide guidance on when an "*improvement*" to an existing structure should be considered "*new*" development requiring that the non-conforming elements be corrected. The Commission typically classifies "*improvements*" as "*new*" development when over 50% of the exterior walls are demolished. In this situation, only 13% of the existing development is being retained, which coincidentally is the portion of the development that is non-conforming. Based on the extensive reconstruction taking place, the economic life of the proposed development will be significantly extended which would perpetuate the non-conforming use beyond its normal economic life. Based on the extensive reconstruction taking place, the proposed development qualifies as "*new*" development that mandates that non-conforming elements of the development be corrected.

Geologic Hazard Policy #18 requires that new development be sited a sufficient distance from the bluff edge to be safe from the threat of bluff erosion for a minimum of fifty years. The City staff report of January 16, 2002 does not disclose whether or not a geotechnical analysis evaluating the appropriate setback was undertaken or not. Though geological reports were apparently prepared, such an evaluation does not appear to have been undertaken, as Condition #25 requires that the applicant submit a geotechnical report to assess hazards such as slope instability. Furthermore, a City "Geotechnical Report Review Checklist" prepared by Zeiser Kling Consultants dated December 21, 2001 notes that "... *retreat of the bluff top back to the residence is possible during the life expectancy of the project.*" The checklist also notes that the non-conforming portion of the structure, which is to be, retained "*does not conform to current recommendations for deepened footings.*" Consequently, there is significant potential that the proposed development, because it is not appropriately set back may require a future bluff protective device. Policy #1 of the Beach Erosion section states that the construction of protective devices, such as cliff retaining walls will only be permitted to protect existing structures. Accordingly, new development should be sited far enough from the bluff edge to avoid the use of protective devices. Therefore, the proposed development raises a substantial issue with the City's certified local coastal program and must be appealed.


FUEL MODIFICATION PLAN CONCERN: Prior to issuance of the certificate of occupancy, Condition #56 of the City's coastal development permit requires that the Orange County Fire Authority shall approve a fuel modification plan. The project site is immediately adjacent to an area believed to constitute environmentally sensitive habitat area. The City's staff report of January 16, 2002 notes that the subject property is next to a pocket mouse preserve on the Headlands property. The certified LCP notes the environmental importance of the Headlands area. Under the certified LCP 18.3 acres are designated as "Open Space" and 22.3 acres as "Conservation" to ensure protection of the remaining biotic communities. Policy 13 of the Resource Component of the LCP states that development shall be prohibited in areas with high habitat value. Policy 7 states that development adjacent to environmentally sensitive areas should be designed to minimize human encroachment. The implementation of these LCP policies is acknowledged in finding #8 of the CDP, which states that the proposed development will be sited and designed to prevent adverse impacts to environmentally sensitive habitat areas.

The fuel modification plan constitutes development, which supports the proposed residence that could be inconsistent with these policies if it were to result in the removal of sensitive habitat as a means of facilitating the proposed residential development. Neither the City's staff report of January 16, 2002 nor the approved City coastal development permit address how the fuel modification plan will be implemented in a manner that complies with environmental protection policies of the City's certified LCP. Therefore, based on the lack of appropriate standards in the City's permit to protect environmentally sensitive habitat, the proposed development raises a substantial issue with the City's certified local coastal program and must be appealed.

LATERAL PUBLIC ACCESS EASEMENT: Section 30212 of the Coastal Act stipulates that public access shall be provided in new development. This requirement has been

incorporated into the City's LCP in a variety of ways. Policy 19 of the Environmental Hazards section requires that the setback area specified by Policy 18 of the Environmental Hazards section be dedicated as an open space easement. Policy 10 of the Public Access section requires the adequate provision for safe public access for development along the shoreline. Policy 18 of the Public Access section requires that the Headlands bluff edge be permanently available for the public as implemented by an open space management system. Policies #23 through #38 of the Public Access section promote the creation of a bluff top trail, portions of which would be on the Headlands. Consistent with the public access policies of the Coastal Act and the City's LCP, the City through Condition #45 required that a lateral public access easement be irrevocably offered for dedication to ensure implementation of the bluff top trail system. However, a review of the project site plans does not show the easement required by Condition #45. Moreover, the project plans, as approved by the City, show development in the form of hardscape improvements that would obstruct the ability of the public to utilize such an easement should it be obtained. To be usable as an easement, the project plans must show the location of the easement and that it is clear of any obstructions. Therefore, based on the inconsistency of the project plans with Condition #45, the proposed development raises a substantial issue with the City's certified local coastal program and the public access policies of the Coastal Act and must be appealed

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EXHIBIT No. 9
Application Number: A-5-DPT-02-057
Commission Appeal Page 6 of 7
 California Coastal Commission

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Page 3

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

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

SECTION V. Certification

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

Signed: *[Signature]*
Appellant or Agent

Date: *3/29/02*

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

Signed: _____

Date: _____

(Document2)

EXHIBIT No. 9

Application Number:
A-5-DPT-02-057

Commission Appeal
Page 7 of 7



California Coastal
Commission

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

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

SECTION V. Certification

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

Signed: [Signature]
Appellant or Agent


Date: 3.29.02

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

Signed: _____

Date: _____

(Document 2)

EXHIBIT No. 13
Application Number: A-5-DPT-02-057
Commission Appeal Page 8 of 8
 California Coastal Commission

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF DANA POINT, CALIFORNIA, AMENDING CONDITIONS OF APPROVAL OF A PREVIOUSLY APPROVED COASTAL DEVELOPMENT PERMIT CDP01-11, SITE DEVELOPMENT PERMIT SDP01-81, A VARIANCE V01-22, AND A CONDITIONAL USE PERMIT CUP01-35, TO PERMIT THE CONSTRUCTION OF AN 8,620 SQUARE FOOT SINGLE FAMILY DWELLING WITH AN ATTACHED 1,125 SQUARE FOOT 4-CAR GARAGE AND BASEMENT. ALSO INCLUDED IN THE APPROVED PROJECT IS AN ALTERNATIVE FUEL MODIFICATION AND PUBLIC RIGHT-OF-WAY IMPROVEMENTS THAT INCLUDE A NEW CUL-DE-SAC, CURB AND GUTTER.

Applicant: Christian Light/Alex Villalpando, Architect/Dr. & Mrs. Lewis L. Bruggeman

Case No: FF# 610-070/ CDP01-11(I)/SDP 01-81/V01-22/CUP 01-35/Scenic Drive, 34525

The Planning Commission for the City of Dana Point does hereby resolve as follows:

WHEREAS, the applicant filed a verified application for certain property, to wit:

34525 Scenic Drive (APN 672-581-03,04,05); and

WHEREAS, the applicant has made an application to allow for a 8,620 square foot, two-story, single family residence with a 1,125 square foot attached 4-car garage, and a 260 square foot basement, and

WHEREAS, said verified application constitutes a request as provided by Title 9 of the Dana Point Municipal Code; and

WHEREAS, the Planning Commission did, on the 20th day of February, 2002, hold a duly noticed public hearing as prescribed by law to consider said request, and; and

WHEREAS, at said public hearings, upon hearing and considering all testimony and arguments, if any, of all persons desiring to be heard, said Commission considered all factors relating to said applications.

NOW, THEREFORE, BE IT HEREBY RESOLVED by the Planning Commission of the City of Dana Point as follows:

A) The above recitations are true and correct.

B) Based on the evidence presented at the public hearing, the Planning Commission adopts the following findings and approves Coastal Development Permit CDP01-11(I), Site Development Permit SDP01-81(I), Variance V01-22(I), Minor Conditional Use Permit CUP01-35(M)(I), subject to the following conditions:

EXHIBIT No. 10

Application Number:

A-5-DPT-02-057

Resolution 02-02-20-10


Page 2 of 16

California Coastal
Commission

Findings:

1. That the proposed project is consistent with the Dana Point General Plan and Dana Point Specific Plan/Local Coastal Program in that the site and architectural design of the proposed improvements promote Urban Design Element Goal 2 *"Preserve the individual positive character and identity of the City's communities."*
2. That the proposed project complies with all other applicable requirements of ~~state law and local ordinances.~~
3. That the proposed project qualifies as a Class 3 Categorical Exemption pursuant to Section 15303 of the California Environmental Quality Act (CEQA) in that the project is the construction of a new single-family residence not in conjunction with the construction of two or more of such dwellings.
4. That the proposed project is an enhancement to the residential community and City in that the proposed improvements will result in a new residential structure with its own architectural style and details, which is characteristic of homes in the vicinity.
5. That the proposed development will not encroach upon any existing physical accessway legally utilized by the public or any proposed public accessway identified in an adopted Local Coastal Program Land Use Plan, nor will it obstruct any existing public views to and along the coast from any public road or from a recreational area in that the subject site is a previously developed lot where there is no existing public access or access to views; however, in accordance with the Dana Point Specific Plan/Local Coastal Program, the property owners are required to provide an Irrevocable Offer of Dedication (IOD) as part of development of a public trail system in the vicinity of the project.
6. That the proposed development will not adversely affect marine resources, environmentally sensitive areas, or archaeological or paleontological resources in that the proposed development, which will replace a single-family residence with a new one, will occur on a previously developed lot and will therefore have no impacts to these types of resources.
7. That the proposed development will not adversely affect recreational or visitor-serving facilities or coastal scenic resources in that the subject site was developed previously with a single-family residence and the proposed development, which replaces an older residence with a new one, will have no effect on these facilities or resources, with the exception of a condition of approval requiring an IOD for development of a bluff top trail.

8. That the proposed development will be sited and designed to prevent adverse impacts to environmentally sensitive habitats and scenic resources located in adjacent parks and recreation areas, and will provide adequate buffer areas to protect such resources in that the subject site has been developed with a single-family residence which is proposed to be replaced with a new residence, where there are no such environmentally sensitive habitats or scenic resources in proximity that require a buffer.
9. That the proposed development will minimize the alterations of natural landforms and will not result in undue risks from geologic and erosional forces and/or flood and fire hazards in that the project is proposed to adhere with requirements for development of a bluff top lot satisfying the required setbacks, and construction of the residence will include measures to reduce any such risks.
10. That the proposed development will be visually compatible with the character of surrounding areas, and, where feasible, will restore and enhance visual quality in visually degraded areas in that the proposed improvements will result in the removal of an older residence replacing it with a new residence with a significantly different architectural style than that of the previous, which is a similar occurrence in the vicinity of the subject site.
11. That the proposed development will conform with the General Plan, Zoning Code, applicable Specific Plan, Local Coastal Program, or other applicable adopted plans and programs in that the proposed project conforms with the City's regulations regarding development of single-family residences and the project does not involve any other discretionary approvals.
12. Proposed improvements along the bluff top should not be affected by the expected slow progressive retreat of the present bluff top assuming appropriate foundation design as recommended herein. Shoreline protection of the sea cliff is therefore not anticipated during the life span of proposed improvements.
13. That the proposed perimeter retaining walls, entry gate, and trash enclosure within the front yard setback will be appropriate and compatible with the properties located in the vicinity since there are numerous other parcels that have walls, fences or hedges of a similar height within the front yard area. The walls will not pose a threat to the public health, safety or general welfare in that there is adequate sight distance to view vehicular cross-traffic.
14. That the nature, condition, and development of adjacent uses, buildings, and structures have been considered, and the proposed minor conditional use permit for the combination retaining/windscreen walls will not adversely affect or be materially detrimental to the adjacent uses, buildings, or structures.


EXHIBIT No. 10
Application Number: A-5-DPT-02-057
Resolution 02-02-20-10 Page 4 of 16
 California Coastal Commission

15. That the proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping, and other land use development features prescribed in the Code in order to integrate the walls with existing and planned uses in the vicinity.
16. That restrictions have been incorporated into the project design that would permit the establishment of the retaining walls at the perimeter of the site and in the front yard setback without creating a detrimental, incompatible or threatening effect on the surrounding area. ~~This includes the use of decorative materials in the construction of the proposed retaining walls so as to soften the height of the walls.~~
17. That the nonconforming portion of the dwelling will be maintained and aesthetically improved in compliance with Section 9.63.030 of the Dana Point Municipal Code and involves less than .4% of the proposed new dwelling.
18. That the strict or literal interpretation and enforcement of the specified regulation(s) would result in practical difficulty or unnecessary physical hardships inconsistent with the objectives of the City's Zoning Code in that the shape of the lot and the site's orientation towards the public street results in a hardship when designing a dwelling. When the front and rear yard required setbacks are deducted from the site's depth, there remains an unusually configured developable pad size and the enforcement of the specified regulations could result in practical difficulty or unnecessary physical hardship. Additionally, the layout of the house extends from east to west, resulting in the west side of the property serving more like a rear yard than a side yard. Although there are alternative designs for the residence, the useable size of the home would be considerably less than the surrounding developments and the height of the retaining walls could be more intrusive.
19. That there are exceptional or extraordinary circumstances or conditions applicable to the subject property or to the intended use of the property which do not apply generally to other properties in the same zoning district in that the front property line borders on an undeveloped public right-of-way and is adjacent to the Headlands property. Even without future development on the Headlands property, and because there are no developments further west of the site, access is difficult and maneuverability at the terminus of the right-of-way is impaired. The property characteristics would be considered exceptional or extraordinary.
20. That the strict or literal interpretation and enforcement of the specified regulation(s) would deprive the applicant of privileges enjoyed by the owners of other properties in the same zoning district with similar constraints in that some of the existing residential properties in the enclaves located adjacent to the



Headlands property are not constructed with the required bluff-edge setback, nor are they constructed with the required 20 foot front yard setback. Additionally, the front setback and property line are not adjacent to a street, rather an unimproved right-of-way that is currently open space and proposed to be unimproved. The enforcement of the regulation requiring a 20-foot setback for the dwelling would deprive the applicant of privileges enjoyed by neighboring property owners in the area.

21. That the granting of the Variance amendment will not constitute a grant of special privilege inconsistent with the limitations on other properties in the same zoning district with similar constraints in that there are other properties in close proximity to the subject property have been allowed to develop structures with front yard setbacks of 9 and 11 feet. The proposed residence has an average setback of 10 feet 2 inches, and at no time is less than 5 feet, which is similar to other homes in the area. The design of the structure meets the intent of the Code, while providing for development on an irregularly shaped bluff-top lot. This variance would not establish a precedent for future new construction throughout the City, since the unusual shape and orientation of the site do not occur in most other areas of the city.
22. That the Variance request is made on the basis of a hardship condition and not as a matter of convenience in that the property is irregular in shape, orientation and site access. Although the dwelling is encroaching into the front yard setback, the location of the dwelling on the lot was determined by the wide width of the lot versus the reduced depth of the lot. The proposed design is the best solution, based upon the analysis of several other designs and is not a matter of convenience.
23. That the granting of the Variance amendment will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the vicinity in that construction of the proposed residence will not pose a threat to the public health, safety, or welfare in that the structure is located at the end of a public street and is adjacent to only one other residence. Additionally, the proposed improvements will enhance the appearance of the property as viewed from the street, the adjacent neighbor, or from the Headlands property.
24. That the Variance approval places suitable conditions on the property to protect surrounding properties and does not permit uses which are not otherwise allowed in the zone in that there are conditions included in the resolution to protect the surrounding properties related to landscaping and materials. Further, the use will be compatible with the location, size, design and operation of the surrounding area. The use will not create unusual noise, traffic or other conditions that will be incompatible with the permitted uses in the zoning district.

EXHIBIT No. 10
Application Number: A-5-DPT-02-057
Resolution 02-02-20-10 Page 6 of 16
 California Coastal Commission

25. That granting of the Variance amendment would not result in adverse impacts, either individually or cumulatively, to coastal access, public recreation opportunities, or coastal resources, and the development would be consistent with the policies of the Local Coastal Program certified land use plan in that a Coastal Development Permit is being considered for the applicant's proposal in conjunction with the Variance. The approval of the Variance will not impact coastal access, public recreation or coastal resources. The Variance is consistent with the policies of the Local Coastal Plan.

Conditions:

A. General:

1. Approval of this application is to allow for a 8,620 square foot, two-story, single-family residence with a 1,125 square foot 4-car attached garage, and a 260 square foot basement for storage and mechanical equipment located 34525 Scenic Drive and includes an alternative fuel modification plan, new public street improvements including a new cul-de-sac, curb and gutter. Subsequent submittals for this project shall be in substantial compliance with the plans presented to the Planning Commission, and in compliance with the applicable provisions of the Dana Point General Plan/Local Coastal Program, the Dana Point Specific Plan/Local coastal Program and the Dana Point Zoning Code.
2. Approval of this application is valid for a period of twenty-four (24) months from the date of determination. If the development approved by this action is not established, or a building permit for the project is not issued within such period of time, the approval shall expire and shall thereafter be null and void.
3. The application is approved as a precise plan for the location and design of the uses, structures, features, and materials, shown on the approved plans. Any relocation, alteration, or addition to any use, structure, feature, or material, not specifically approved by this application, will nullify this approving action. If any changes are proposed regarding the location or alteration to the appearance or use of any structure, an amendment to this permit shall be submitted for approval by the Director of Community Development. If the Director of Community Development determines that the proposed change complies with the provisions and the spirit and intent of this approval action, and that the action would have been the same for the amendment as for the approved plot plan, he may approve the amendment without requiring a new public hearing.
4. Failure to abide by and faithfully comply with any and all conditions attached to the granting of this permit shall constitute grounds for revocation of said permit.




5. The applicant, and applicant's successors, heirs, and assigns, shall protect, defend, indemnify, and hold harmless the City, its officers, employees, and agents from any claim, action, or proceeding against the City, its officers, employees, or agents to attack, set aside, void, or annul the approval granted by this Resolution, which action is brought within the appropriate statute of limitations period.
6. The applicant, and the applicant's successors, heirs, and assigns, shall further ~~protect, defend, indemnify and hold harmless the City, its officers, employees,~~ and agents from any and all claims, actions, or proceedings against the City, its officers, employees, or agents arising out of or resulting from the negligence of the applicant or the applicant's agents employees, or contractors.
7. The applicant and applicant's successors in interest shall be fully responsible for knowing and complying with all conditions of approval, including making known the conditions to City staff for future governmental permits or actions on the project site.
8. The applicant and applicant's successors in interest shall be responsible for payment of all applicable fees along with reimbursement for all City expense in ensuring compliance with these conditions.

B. Prior to Issuance of a Grading Permit, the applicant shall meet the following conditions:

Engineering

9. The construction site shall be posted with signage indicating that construction may not commence before 7 a.m. and must cease by 8 p.m., Monday through Saturday, and no construction activity is permitted on Sundays or Federal holidays.
10. The applicant shall obtain all applicable permits for the proposed improvements.
11. All grading and improvements on the subject property shall be made in accordance with the Grading Ordinance and to the satisfaction of the Director of Public Works. Grading plans shall be in substantial conformance with the approved conceptual plans. Surety to guarantee the completion of the project grading and drainage improvements, including erosion control, shall be posted to the satisfaction of the Director of Public Works and City Attorney.
12. The applicant shall submit a grading plan, in compliance with City standards, for

EXHIBIT No. 10
Application Number: A-5-DPT-02-057
Resolution 02-02-20-10 Page 8 of 16
 California Coastal Commission

review and approval by the Director of Public Works. All grading work must be in compliance with the approved plan and completed to the satisfaction of the Director of Public Works. All conditions of approval shall be shown on the cover sheet and show all existing easements, their dimensions and purpose.

13. The applicant shall submit a drainage and hydrology plan showing on-site detention basin if required by the City Engineer and street improvements with storm drain improvements, including curb and gutter, catch basin, storm drain piping, energy dissipater and rip rap to spread the flow and disperse the same. If ~~street improvements (cul-de-sac, curb and gutter, energy dissipater)~~ are not constructed due to street vacation, an on-site detention basin or other acceptable drainage device approved by the City Engineer, shall be constructed to prevent increasing the amount of runoff to downstream properties. All surface and subsurface runoff shall be directed to the nearest acceptable drainage facility via sump pumps if necessary, as determined by the Director of Public Works.
14. The proposed swimming pool and spa shall be drained only to the public sewer system.
15. On-site drainage and subdrain systems shall not drain over the bluff top. All roof gutter drains shall be required to connect into a tight line drainage pipe or concrete swales that drain to an acceptable drainage facility, as determined by the Director of Public Works.
16. A soils-geotechnical report addressing the extent of uncompacted fill and remedial grading on-site. The report including the recommended bluff protection measures and vibration monitoring system, shall be submitted for the review and approval of the Director of Public Works. Heavy vibrating compaction equipment will not be allowed near the bluff face.
17. The applicant shall provide to the City a hydrology study report and a conceptual site drainage system and its outlet/outlets for review and approval by the Director of Public Works. No water from the parcel shall drain towards the bluff; all the water shall be drain towards the street and discharged in an approved manner addressing flow control measures preventing increased runoff and/or concentrated flows downstream parcels.
18. The proposed energy dissipater, catch basin, storm drain and storm drain line shall be constructed in the south 30 feet of the 60 foot public right-of-way consistent with Exhibit 2 provided by the Headlands Reserve LLC, letter dated January 16, 2002, so as to not disturb sensitive habitat and plantings.

19. The applicant shall install an on-site septic system for the subject property until such time as public sewer facilities become available.
20. The applicant shall address on plans how the proposed parcel will be served from all utilities. The plans shall be prepared as per the most current City standards and submitted for review and approval of the Director of Public Works.
21. A landscape plan utilizing native drought tolerant landscape materials. Irrigation lines are not permitted in the rear yard area.
22. Incorporate all recommendations of the approved soils/geotechnical report into the construction design of the project.
23. The applicant shall submit a grading, drainage and retaining wall plan with a geotechnical soils report for review and approval by the Director of Public Works. The following notes shall be included:
 - a. All construction vehicles or equipment, fixed or mobile operated within 1,000 feet of a dwelling shall be equipped with properly operating and maintained mufflers.
 - b. All operations shall comply with the City's Noise Ordinance.
 - c. Stockpiling and/or vehicle staging areas shall be located as far as practicable from dwellings.
24. Applicant shall prepare a lot consolidation plan/document according the Map Act, Orange County Subdivision Code-Subdivision Manual and the City of Dana Point Standards, the plan/document shall be submitted to the City of Dana Point for review and approval of the Director of Public Works. Applicant shall provide an easement for public access trail on bluff top.

The plan/document shall be recorded at the County of Orange and a conformed copy of the recorded document shall be provided to the City Public Works and Engineering Department.
25. The applicant shall submit a geotechnical report for review and approval by the Director of Public Works. This report will primarily involve the assessment of potential soil related constraints and hazards such as slope instability, settlement, liquefaction, or related secondary seismic impacts, where determined to be appropriate by the Director of Public Works. The report shall also include an evaluation of potentially expansive soils and recommend construction procedures and/or design criteria to minimize the effect of these soils on the proposed development. All reports shall recommend appropriate mitigation

measures and be completed in the manner specified by the Grading Manual and Grading Ordinance.

26. As applicable, the applicant shall submit a construction area traffic control plan for review and approval by the Director of Public Works. The plan shall be designed by a registered civil engineer and shall address traffic control for any street closure, detour, or other disruption to traffic circulation as result of the necessary on- and off-site improvements.
27. Retaining walls located along the front and west property line adjacent to the Headlands property shall be constructed of "loffel" type construction with appropriate native plantings for landscape pockets within the wall, or, as an alternative, a masonry wall, solid split-faced wall, or other decorative material may be used and stuccoed to match the dwelling. The wall shall be located a minimum of 2 feet back from the west and north property lines in order to provide a planting strip in front of and at the base of the walls and include a drip or low flow irrigation system. The walls are limited to a maximum height of 6 feet for the retaining portion of the wall and shall include the Code required guardrail.
28. The guardrails/windcreens proposed in conjunction with the proposed retaining walls along the west and north property lines shall be constructed of glass, Plexiglas, other clear material or open wrought iron that is constructed a minimum of 50% open.
29. An encroachment permit application and fee shall be filed with the City, and a permit issued, prior to the commencement of any improvements within the public right-of-way.
30. The applicant shall provide street improvement plans reflecting Scenic Dr. full right-of-way. Plans shall include public road improvements meeting the most current City standards, the street improvements shall be prepared on standard size sheets, designed by a registered civil engineer per City design standards. Street improvement plans shall include signatures from the following agencies: fire department, sewer district and the water district.
31. The applicant shall submit plans to the Public Works/Engineering Department for the approval of new street improvements prior to the issuance of building permits.
32. The applicant shall exercise special care during the construction phase of this project to prevent any off-site siltation. The applicant shall provide erosion control measures and shall construct temporary desiltation/detention basins of a type, size and location as approved by the Director of Public Works. The basins

and erosion control measures shall be shown and specified on the grading plan and shall be constructed to the satisfaction of the Director of Public Works prior to the start of any other grading operations. Prior to the removal of any basins or erosion control devices so constructed, the area served shall be protected by additional drainage facilities, slope erosion control measures and other methods as may be required by the Director of Public Works. The applicant shall maintain the temporary basins and erosion control devices until the Director of Public Works approves the removal of said facilities.

33. The applicant shall submit a final landscape and irrigation plan for review and approval by the Engineering Department and Community Development Department. The plan shall be prepared by a State licensed landscape architect and shall include all proposed and existing plant materials (location, type, size, quantity), an irrigation plan, a grading plan, an approved site plan and a copy of the entitlement conditions of approval. The plan shall be in substantial compliance with the applicable provisions of the Zoning Code, the preliminary plan approved by the Planning Commission and further, recognize the principles of drought tolerant landscaping. The applicant shall not use any of the invasive plant species shown in table 4.14.4 of the proposed Headlands Development and Conservation Plan (HDCP). The landscape plan shall, as practical as possible, use native or indigenous plants as shown in table 4.16.1 in the proposed HDCP for area 6, the Upper Headlands.
 34. A landscape architect shall certify that the landscaping has been installed per the approved final landscape plan.
 35. Applicant /Developer shall comply with all requirements outlined by NPDES Statewide Industrial Stormwater Permit for General Construction Activities from the State Water Resources Control Board. Applicant shall prepare a WQMP document and submit it to the City for review and approval of the Director of Public Works and Engineering
 36. The final landscape and irrigation plan shall be approved and permitted prior to the issuance of a grading permit or the grading plan shall provide temporary hydroseed and irrigation to the satisfaction of the Director of Public Works. Any temporary hydroseed mix or application shall follow any applicable recommendations shown in the proposed HDCP.
- D. Prior to issuance of a building permit or release on certain related inspections, the applicant shall meet the following conditions:**
37. The applicant shall obtain grading plan approval from the Public Works/Engineering Department.



38. Existing structures shall be demolished and removed in a manner meeting the approval of the Building Official. In conjunction with this action, rodent control measures shall be coordinated with the Orange County Vector Control District.
39. The applicant shall submit two (2) sets of construction plans for building plan check, including structural and energy calculations and a soils/geology report. A third set of plans containing only the site plan, floor plans and elevations is required to be submitted at the time of final approval. The licensed professional that prepared them shall sign all documents.
40. The building shall comply with the most recent edition of the local and state building code regulations, which may include the 1997 UBC, UMC, UPC and 1998 NEC with state amendments for disability and energy conservation, and all amendments to the codes.
41. Proof of all approvals from applicable outside departments and agencies is required, including the Orange County Fire Authority (OCFA), particularly for residential fire sprinkler requirements and approval of fuel modification plan.
42. In order to provide for access to the subject property by the Orange County Fire Authority, the applicant shall install a Knox box entry system to be approved by the OCFA.
43. The cover sheet of the building construction documents shall contain a blue-line print of the City's conditions of approval and it shall be attached to each set of plans submitted for City approval or shall be printed on the title sheet verbatim.
44. The applicant shall execute the City's standard deed restriction or, if prepared by the owner(s), shall be submitted for review and approval by the City Attorney. The deed restriction shall provide that: (1) the applicant understands that the subject site is subject to bluff retreat and that the owner(s) assumes the liability from these hazards; (2) the owner(s) unconditionally waive any claim of liability on the part of the City or any other public agency from any damage from such hazards; and (3) the owner(s) assume all liability for damages incurred as a result of any required off-site grading. The deed restriction shall be recorded, free of prior liens, to bind the owner(s) and any successors in interest or otherwise recorded to the satisfaction of the City Attorney.
45. A lateral access easement shall be irrevocably offered for dedication to ensure implementation of the bluff top trail system shown in the Dana Point Specific Plan/Local Coastal Program. Said easement shall be ten (10) feet wide and setback a sufficient distance from the bluff edge to assure safety from the threat

of erosion for 50 years. Said dedication shall be in the form of a recorded, irrevocable offer to dedicate until the City acquires the same rights from continuous bluff top property owners. This offer to dedicate shall be valid for 21 years or until the City accepts the easement, or until an amendment of the Local Coastal Program deleting the requirement of dedication of a lateral access easement for trail purposes, whichever occurs first. The irrevocable offer to dedicate shall be in the standard City format or, if prepared by the property owner(s), submitted for review and approval by the Director of Community Development and the City Attorney prior to being executed and ultimately recorded.

46. By acceptance of this permit, the applicant agrees, on behalf of him/herself and all other successors and assigns, that no shoreline protective device(s) shall ever be constructed to protect the expansion of development at the subject site approved pursuant to Coastal Development Permit No. 01-11 including future improvements, in the event that the property is threatened with damage or destruction from bluff and slope instability, erosion, landslides or other natural hazards in the future. By acceptance of this permit, the applicant hereby waives, on behalf of him/herself and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235 and Policies of the certified Local Coastal Program.
47. By acceptance of this permit, the applicant further agrees, on behalf of him/herself and all successors and assigns, that the landowner shall remove the development authorized by this permit, including the expansion of the single family residence and patio area, and swimming pool, if any government agency has ordered that the structure is not to be occupied due to any of the hazards identified above. In the event that any portion of the development is destroyed, the permittee shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit.
48. In the event the bluff recedes to within 10 feet of the principal residence but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed coastal engineer and geologist retained by the permittee, that addresses whether any portions of the residence are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the principal residence without shore or bluff protection, including but not limited to removal or relocation of portions of the residence. If the geotechnical report concludes that the residence or any portion of the residence is unsafe for occupancy, the permittee shall, in accordance with a coastal development permit remove the threatened portion of the structure.

EXHIBIT No. 10

Application Number:
A-5-DPT-02-057

Resolution 02-02-20-10
Page 14 of 16

49. Prior to issuance of the Coastal Development Permit, the applicant shall execute and record a deed restriction in a form and content acceptable to the Community Development Director, which reflects the above restriction on development. The deed restriction shall include a legal description of the applicant's entire parcel. The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens that the Community Development Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without an amendment to this coastal development permit.
50. Building address shall be located facing street fronting property. Addresses shall be 4" high with 1" stroke and of noncombustible, contrasting materials.
51. A minimum roofing classification of type "B" is required.
52. Chimneys shall terminate in an approved/listed cap.
53. The applicant shall submit a report by an engineering geologist indicating the ground surface acceleration from earth movement for the subject property. All structures within this development shall be constructed in compliance with the g-factors as indicated by the geologist's report. Calculations for footings and structural members to withstand anticipated g-factors shall be submitted for review and approval by the Directory of Public Works.
54. A rough grade certification is required from the Director of Public Works by separate submittal.
55. Prior to the release of the footing inspection, the applicant shall submit certification, by survey or other appropriate method, that the structure will be constructed in compliance with the dimensions shown and in compliance with the setbacks of the applicable zoning district.
56. Prior to the release of the roof sheathing inspection, the applicant shall submit certification, by a survey or other appropriate method, that the height of the structure is in compliance with the dimensions shown, and the height limitations of the applicable zoning district. A written report certifying the above shall be prepared by the applicant and submitted to the Building Department.
57. The applicant shall submit payment for any and all applicable school, park, water, sewer, Transportation Corridor, and Coastal Area Road Improvement and Traffic Signal fees.
58. All plan check and building permit fees shall be paid to the City of Dana Point.

D. Prior to the issuance of a certificate of occupancy, the applicant shall meet the following:

59. An encroachment permit shall be issued and finalized for any improvements in the public right-of-way.
60. All proposed utilities within the project shall be installed underground.
61. All landscaping and irrigation shall be installed per the approved final landscape and irrigation plan. A State licensed landscape architect shall certify that all plant and irrigation materials have been installed in accordance with the specifications of the final plan and shall submit said certification in writing to the Director of Community Development. The Community Development Department shall inspect the final landscaping to ensure that the installation matches the approved landscaping plan.
62. A certified engineering geologist shall certify that the "as built" grading, drainage and landscaping are satisfactory to sustain bluff stability.
63. The applicant shall be responsible for payment of applicable development impact fees including General Government, Fire Protection and Transportation.
64. The fuel modification plan shall be approved by the Orange County Fire Authority shall be implemented and installed prior to occupancy and written verification from OCFA that it has been installed shall per the approved plan shall be provided to the Director of Community Development.

EXHIBIT No. 10

Application Number:
A-5-DPT-02-057

Resolution 02-02-20-10
Page 15 of 16



California Coastal
Commission

PASSED, APPROVED, AND ADOPTED at a regular meeting of the Planning Commission of the City of Dana Point, California, held on this 20th day of February, 2002, by the following vote, to wit:

AYES: Chilton, Denton, Goodkind, Lacy, Schoeffel

NOES: None

ABSENT: None

ABSTAIN: None


J. Scott Schoeffel, Chairman
Planning Commission

ATTEST:


Edward M. Knight, AICP
Director of Community Development

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FF#0610-70/34525 Scenic Drive/Bruggeman Residence

EXHIBIT No. 10

Application Number:
A-5-DPT-02-057

Resolution 02-02-20-10
Page 16 of 16




California Coastal
Commission

**CITY OF DANA POINT
AGENDA REPORT**

EXHIBIT No. 11

Application Number:
A-5-DPT-02-057

City Agenda Report
Page 1 of 9

 California Coastal
Commission

DATE: JANUARY 16, 2002

TO: DANA POINT PLANNING COMMISSION

FROM: COMMUNITY DEVELOPMENT DEPARTMENT

SUBJECT: A COASTAL DEVELOPMENT PERMIT CDP01-11/SITE DEVELOPMENT PERMIT SDP01-81/VARIANCE V01-22/CONDITIONAL USE PERMIT CUP01-35 TO PERMIT THE CONSTRUCTION OF AN 8,620 SQUARE FOOT SINGLE FAMILY DWELLING WITH AN ATTACHED 1,125 SQUARE FOOT 4-CAR GARAGE AND BASEMENT. A SITE DEVELOPMENT PERMIT IS REQUESTED TO RETAIN A PORTION OF THE DWELLING THAT CURRENTLY ENCROACHES INTO THE BLUFF TOP SETBACK AND RETAINING WALLS THAT WILL EXCEED THE PERMITTED 30 INCHES IN HEIGHT. A CONDITIONAL USE PERMIT IS REQUESTED TO CONSTRUCT COMBINATION RETAINING/WINDSCREEN WALLS TO EXCEED THE PERMITTED 6 FEET IN HEIGHT.

(FF# 610-070/ CDP01-11/ SDP 01-81/V01-22/CUP 01-35/(34525 Scenic Drive))[GG]

RECOMMENDATION: That the Planning Commission adopt the attached Draft Resolution (Attachment 1) approving Coastal Development Permit, Site Development Permit, Variance, and Conditional Use Permit for the proposed project.

APPLICANT: Christian Light/Alex Villalpando, Architect/Dr. & Mrs. Lewis L. Bruggeman

OWNER: Dr. and Mrs. Lewis L. Bruggeman

REQUEST: Approval of a Coastal Development Permit, a Site Development Permit, a Variance, and a Conditional Use Permit to allow for the partial demolition of an existing non-conforming single-family dwelling and the construction of a new single-family dwelling. The request includes the construction of combination retaining and windscreen walls to exceed the permitted 6 feet up to 10 feet, and an encroachment with portions of the building into the front setback. The property is located in the Coastal Overlay District.

LOCATION: 34525 Scenic Drive (APN 672-581-03,04,05)

NOTICE: Notices were mailed to property owners within a 500-foot radius of the site. A notice was also published in the Dana Point News and Notices were posted on October 4, 2001 at the Dana Point City Hall, the Dana Point Post Office, the Capistrano Beach Post Office, and the Dana Point Library.

ENVIRONMENTAL: This project is categorically exempt (Class 3 - Section 15303 - New Construction) from the provisions of the California Environmental Quality Act (CEQA) because it consists of new construction of a single-family residence.

ATTACHMENT 6

ISSUES:

1. Is the proposal consistent with the City's adopted General Plan/Local Coastal Program?
2. Is the proposal compatible with and an enhancement to the surrounding neighborhood and City?
3. Does the project satisfy all the findings required pursuant to the City's Zoning Code for approving a Coastal Development Permit, a Site Development Permit, and a Conditional Use Permit?
4. Can the findings for a variance be adopted?

BACKGROUND:

The subject property is located in the residential enclave adjacent to the Headlands property above the Dana Point Harbor. The subject site is a bluff-top lot, comprised of three existing, legal building sites of approximately 20,000 square feet each (approximately 11,600 square-foot useable lot area), and is located at the physical terminus of Scenic Drive adjacent to the Headlands Specific Plan Area. The site is developed with a 3,300 square foot single-story, single-family residence with a pool and playhouse that was built around 1926 and is currently unoccupied. The three lots are elevated (212 feet above mean sea level) and overlook the Pacific Ocean. The site is bordered by Scenic Drive to the north, the Pacific Ocean to the south, undeveloped land, the Headlands property, to the west, and two residential properties to the east. The subject site lies within the Coastal Overlay Boundary on the City's Zoning Map and is subject to the requirements under the Dana Point Local Coastal Program for "High Density Residential 1.41." The site is located within the Residential Multiple Family RMF 22 zoning district and is designated Residential 14 - 22 D.U./AC in the City's General Plan Land Use Element

On August 19, 1998, the Planning Commission approved a Coastal Development Permit CDP98-01, CDP98-02, CDP98-03, which was a request to demolish one single-family dwelling and construct three single-family residences on the three separate lots. The project was never constructed and the Coastal Development Permit became null and void after 24 months.

DISCUSSION:

The applicant is proposing to demolish a large portion of an existing nonconforming single-family dwelling and construct a new 8,620 square foot single family dwelling with an attached 1,125 square foot 4-car garage and a basement. Approval of a Coastal Development Permit is

required for new single-family homes located within the appeals area. The proposal will retain a portion of the existing structure that currently encroaches into the 25-foot bluff top setback.

The applicant is requesting a Variance to encroach 15-feet into the required 20-foot front yard setback with a portion of the dwelling and a Minor Conditional Use Permit is required in order to construct combination retaining and windscreen walls that will exceed the permitted 6 feet up to 10 feet for portions of the walls. In addition, the proposal will include perimeter walls, a trash enclosure and entry gate that exceed the permitted 42 inches in the front yard setback for which the approval of a Minor Conditional Use Permit is required.

As shown on Exhibit A, the site is approximately 56,750 square-feet of land area and is comprised of three lots. Prior to the issuance of construction permits, a lot merger will be required to combine the lots. The residence features a kitchen, dining room, guest bedroom, media room, den/library, art room, foyer and four-car garage on the first floor for a total of 5,545 square feet. The second story includes the master bedroom and bath, guest bedroom, maid's quarters, a game room, office, and an exercise room totaling 3,940 square feet. A 260 square foot basement is located below the media and guest bedroom on the north side of the property. The basement includes storage and mechanical uses only.

Overall, the proposed improvements will require some grading and cut and fill dirt to ensure that the lot drains towards the street and not over the bluff. The site slopes slightly from east to west and, in order to achieve proper drainage for the site, it will be necessary to reduce the existing site elevations on the east side and raise the existing elevations on the west side. In order to achieve the required site elevations, 30 inches of fill dirt will be required, which the Code permits. The applicant is proposing a pool and spa in the west side yard; however, it is located beyond the 25-foot structural setback requirement.

The structure is proposed to be 26 feet in height, utilizing a 3:12 roof pitch which is in conformance with the height limit required by the Code. The exterior finish materials propose a Permian mist limestone fascia with a smooth oatmeal colored stucco. The roof is proposed to be a natural gray-green slate roofing material with copper chimney accents. In addition to the residence, the applicant has included a conceptual landscape/hardscape plan, which features the use of drought-tolerant plant species in conformance with the City's regulations for the bluff edge setback area, with some hardscape for patio area. The landscape plans includes a plant palette with a variety of shrubs and ground cover.

There are many off-site improvements that are necessary to support the proposed development. The existing residence is served by a septic system, which will be required to be abandoned and replaced with new sewer improvements in compliance with the City's requirements. Other right-of-way improvements which include new pavement, sidewalk, cul-de-sac with curb and gutter, storm drain, water, and utility connections are required to serve the subject site and have been included in the conditions of approval. The property owner is also required to enter into an

Irrevocable Offer to Dedicate (IOD) an easement for connection to a public bluff-top trail in accordance with the currently adopted 1986 Dana Point Local Coastal Program. It is anticipated that the Local Coastal Program Amendment currently under review by the Coastal Commission will eliminate this requirement. Until that occurs, the IOD is required as a part of the current adopted LCP. Due to the site's close proximity to the undeveloped portions of the Headlands property, a fuel modification plan is also required. However, a standard fuel modification could not be carried out due to the sensitive habitat conditions that exist in the area; therefore the Orange County Fire Authority (OCFA) has conceptually approved an alternative methods approach for this project and conditions have been modified accordingly.

Coastal Development Permit

Bluff top lots developed within this area are required to maintain a minimum bluff edge setback of 25 feet. Submitted plans indicate that the existing dwelling encroaches approximately 1 to 16 feet into the bluff top setback. A supplemental report was provided by the project geologist to address the retention of a portion of the dwelling and the report was reviewed by the City's consultant specializing in bluff-top stability. The applicant is proposing to retain the complete foundation, walls, and roof structure of the retained portion of the dwelling and construct new walls, foundation and roof structure for the new portion connecting the old to the new construction. The area of the encroachment is 427 square feet, which is approximately .04% of the total square footage of the proposed dwelling. This portion of the residence is considered non-conforming; however, if this area is retained in this manner, the City has permitted new structures to be built connecting to these areas so long as they are not entirely demolished and replaced. Additionally, a minimal amount of grading will occur along the bluff top and the existing deck and low guardrail will be retained. Minor improvements such as walls and patio areas within the bluff edge setback area are allowed by the Zoning Code.

Approval of a Coastal Development Permit is required since the project is located within the Coastal Overlay Boundary and is appealable to the California Coastal Commission. The Coastal Overlay District requires review of all new commercial development to ensure that the proposed development: 1) will not encroach upon any public accessway; 2) will not obstruct any existing public views to and along the coast; 3) will not adversely affect marine resources; 4) will not adversely affect recreational or visitor-serving facilities or coastal scenic resources; 5) will be sited and designed to prevent adverse impact to environmentally sensitive habitats and scenic resources; 6) will minimize the alterations of natural landforms; and 7) will be visually compatible with the character of surrounding areas. The proposal has been evaluated in light of these requirements and staff believes that the applicant's proposal is consistent and will be compatible with development in the City that is within proximity to the coast. The grading for the dwelling is minimal and will not impact the appearance of the bluff face. Additionally, the proposal will not result in changes to public access and view, marine resources or visitor-serving facilities.



Site Development Permit and Conditional Use Permit

The applicant proposes to construct several retaining walls around three sides of the site, at the east and west sides and along the front of the property at the street side/undeveloped right-of-way area in order to facilitate site drainage. The Code requires that walls in excess of 2.5 feet in height be landscaped and not create a condition or situation that is detrimental or incompatible with other permitted uses in the vicinity. The retaining walls will be visible from the outside on the west side and at the front adjacent to the proposed Headlands nature preserve. On the east side, the retaining walls will be visible from within the subject site due to the change in elevation between the subject property and the adjacent residential property to the east that is 5 feet higher. The retaining wall on the east side will be 5 feet of retaining with a 5 foot wrought iron fence on top for a total height of 10 feet from inside the property and 5 feet in height on the adjacent neighbor's side. A 2-foot planter wall will be located along the retaining wall and will be planted with 24-inch boxed ficus nitida trees.

Within the front yard setback the retaining wall will transition from 3 feet in height with a 3 foot guardrail at the west corner, to 6 feet in height with a 3 foot guardrail at the east corner as viewed from outside the property. From inside the property the combination retaining walls/guardrails will range from 3 to 5 feet. Part of the reason for the request to construct 6-foot retaining walls along the front of the property is as a result of the required fuel modification plan. Because a Pocket Mouse Preserve is located on the adjacent Headlands property, the Orange County Fire Authority required a minimum 6-foot retaining wall to mitigate the potential fire hazard from the adjacent Preserve.

Along the west side property line, the retaining walls will be approximately 6 feet of retaining with a 3 foot guardrail for a total height of 9 feet as viewed from the Headlands property which is at a lower elevation. Due to the site's developable buildable area, the layout of the house extends from east to west, resulting in the west side of the property serving more like a rear yard and is where the pool and spa are to be located. The Code limits wall heights within the front yard setback area to a maximum of 42 inches. Approval of a Minor Conditional Use Permit is necessary to exceed this limit. Staff recommends that the height of the walls be limited to 9 feet in height and all retaining walls visible from outside the property be constructed of split-faced block or other decorative material in order to soften the appearance of the height of the walls. A condition of approval has been included in the attached resolution limiting the height and construction materials of the walls.

The plans indicate that a front courtyard area with landscaping, entry gates and a trash enclosure are located within the front yard setback on the north side of the property. The height of the entry gates and trash enclosure are 5 feet where the Code limits walls and fences to 42 inches in height. Both the entry gates and trash enclosure are located within the front yard setback due to the unusual configuration of the access to the property and the location of the

dwelling on the lot. The trash enclosure must be located in an area that will facilitate access for trash collection by Solag and the entry gates are located approximately 9 feet back from the front property line but will provide the required Fire truck turn-around area.

Sections 9.71.050 and 9.65.040 of the Dana Point Zoning Code establishes the findings required to approve a Site Development Permit and a Minor Conditional Use Permit. Generally, the Commission must consider the merits of a project based upon its suitability, compliance with development standards, function and design. Staff believes that the findings for the approval of the Site Development Permit and Minor Conditional Use Permit can be made in this case and are included in the attached resolution.

Variance

The applicant is proposing to encroach into the front yard setback with portions of the new dwelling and will require the approval of a Variance. The subject site is irregular in shape with more width across the front of the property than depth and the front property line is at an angle to both side property lines, which restricts site access and limits the location and the design of the of the proposed dwelling. The front property line is approximately 163.09 (comprised of three separate lots to be merged in conjunction with this development), the west property line to the bluff's edge is approximately 138.40, and the east interior side property line to the bluff's edge is 148.50. Deducting the required 20-foot front yard setback and the required 25-foot bluff edge setback, there is approximately 98.5 feet of buildable depth remaining and approximately 153 feet of buildable width that results in the side yard functioning more as a rear yard. Because of the shape of the lot, the proposed dwelling will encroach with portions of the structure approximately 12 to 15 feet at the furthest part of the encroachment.

The orientation of the site makes it difficult to design a dwelling that fits within the buildable area of the lot because the public street and the site's access end at the east corner of the lot resulting in the need to design the garages at the easterly portion of the site. Because the site is irregular in shape and orientation, a variance is needed for the encroachments.

Section 9.67.050 of the Dana Point Zoning Code establishes the findings required to approve a Variance. The required findings are listed below, followed by a Staff analysis of the finding:

Required Finding: That the strict or literal interpretation and enforcement of the specified regulation(s) would result in practical difficulty or unnecessary physical hardships inconsistent with the objectives of this Chapter; and

As noted above, due to the shape of the lot and the site's orientation towards the public street results in a hardship when designing a dwelling. When the front and rear yard required setbacks are deducted from the site's depth, there remains an unusually configured developable pad size and the

enforcement of the specified regulations could result in practical difficulty or unnecessary physical hardship. Additionally, the layout of the house extends from east to west, resulting in the west side of the property serving more like a rear yard than a side yard. Although there are alternative designs for the residence, the useable size of the home would be considerably less than the surrounding developments and the height of the retaining walls could be more intrusive.

Required Finding: That there are exceptional or extraordinary circumstances or conditions applicable to the subject property or to the intended use of the property which do not apply generally to the properties in the same zoning district; and

The front property line borders on an undeveloped public right-of-way and is adjacent to the Headlands property. Even without future development on the Headlands property, and because there are no developments further west of the site, access is difficult and maneuverability at the terminus of the right-of-way is impaired. The property characteristics would be considered exceptional or extraordinary.

Required Finding: That the strict or literal interpretation and enforcement of the specified regulation(s) would deprive the Applicant of privileges enjoyed by the owners of other properties in the same zoning district with similar constraints; and

Some of the existing residential properties in the enclaves located adjacent to the Headlands property are not constructed with the required bluff-edge setback, nor are they constructed with the required 20 foot front yard setback. Additionally, the front setback and property line are not adjacent to a street, rather an unimproved right-of-way that is currently open space and proposed to be unimproved. The enforcement of the regulation requiring a 20-foot setback for the dwelling would deprive the applicant of privileges enjoyed by neighboring property owners in the area.

Required Finding: That the granting of the variance will not constitute a grant of special privilege inconsistent with the limitations on other properties in the same zoning district with similar constraints; and

The granting of the variance request would not constitute a grant of special privilege since other properties in close proximity to the subject property have been allowed to develop structures with front yard setbacks of 9 and 11 feet. The proposed residence has an average setback of 10 feet 2

inches, and at no time is less than 5 feet, which is similar to other homes in the area. The design of the structure meets the intent of the Code, while providing for development on an irregularly shaped bluff-top lot. This variance would not establish a precedent for future new construction throughout the City, since the unusual shape and orientation of the site do not occur in most other areas of the city.

Required Finding: That the variance request is made on the basis of a hardship condition and not as a matter of convenience; and

The property is irregular in shape, orientation and site access. Although the dwelling is encroaching into the front yard setback, the location of the dwelling on the lot was determined by the wide width of the lot versus the reduced depth of the lot. The proposed design is the best solution, based upon the analysis of several other designs and is not a matter of convenience.

Required Finding: That the granting of the variance will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the vicinity;

Construction of the proposed residence will not pose a threat to the public health, safety, or welfare in that the structure is located at the end of a public street and is adjacent to only one other residence. Additionally, the proposed improvements will enhance the appearance of the property as viewed from the street, the adjacent neighbor, or from the Headlands property.

Required Finding: That the variance approval places suitable conditions on the property to protect surrounding properties and does not permit uses which are not otherwise allowed in the zone;

There are conditions included in the resolution to protect the surrounding properties related to landscaping and materials. Further, the use will be compatible with the location, size, design and operation of the surrounding area. The use will not create unusual noise, traffic or other conditions that will be incompatible with the permitted uses in the zoning district.

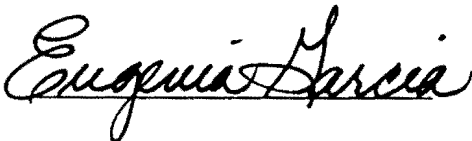
Required Finding: That the granting of the Variance would not result in adverse impacts, either individually or cumulatively, to coastal access, public recreation opportunities, or coastal resources, and the development would be consistent with the policies of the Local Coastal Program certified land use

plan.

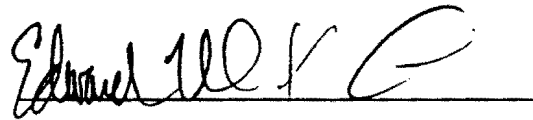
The approval of the Variance will not impact coastal access, public recreation or coastal resources. The Variance is consistent with the policies of the Local Coastal Plan.

CONCLUSION:

Based on the above analysis, Staff has determined that the required findings can be made and recommends that the Planning Commission approve Coastal Development Permit CDP01-28, Site Development Permit SDP01-81, variance V01-22, and Conditional Use Permit CUP01-35,



Eugenia Garcia, AICP
Senior Planner



Edward M. Knight, AICP
Director of Community Development

ACTION DOCUMENTS:

1. Draft Planning Commission Resolution

SUPPORTING DOCUMENTS:

2. Location Map
3. Letter of Justification from Applicant
4. Color Board

EXHIBITS:

- A. Building Plans and Elevations

EXHIBIT No. 11

Application Number:
A-5-DPT-02-057

City Agenda Report
Page 9 of 9



California Coastal
Commission



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Carlsbad Fish and Wildlife Office
2730 Loker Avenue West
Carlsbad, California 92008



In Reply Refer To:
FWS-OR-1927.3

Eugenia Garcia
Community Development Department
City of Dana Point
33282 Golden Lantern
Dana Point, California 92629-1805

JAN 16 2002

Re: Fuel Modification Plan for 34525 Scenic Drive, City of Dana Point, Orange County, California

Dear Ms. Garcia:

This letter responds to your letter dated December 5, 2001, regarding a proposed fuel modification plan for the property at 34525 Scenic Drive in Dana Point, Orange County, California. This property shares a border with the Dana Point Headlands Temporary Preserve (Preserve), an area that is known to support two federally listed species, the endangered Pacific pocket mouse (*Perognathus longimembris pacificus*, "pocket mouse") and threatened coastal California gnatcatcher (*Poliophtila californica californica*, "gnatcatcher"). The Preserve was created under the terms of the Orange County Central/Coastal Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP), which was adopted in 1996 to provide for regional protection and perpetuation of natural wildlife diversity while allowing compatible land use and appropriate development growth. The fuel modification plan includes a proposal to remove vegetation within the Preserve.

We provide these comments in keeping with our agency's mission to work "with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people." Specifically, we administer the Endangered Species Act (Act) of 1973, as amended. Section 9 of the Act prohibits the "take" (e.g., harm, harassment, pursuit, injury, kill) of federally listed wildlife. "Harm" is further defined to include habitat modification or degradation where it kills or injures wildlife by impairing essential behavioral patterns including breeding, feeding, or sheltering. Take incidental to otherwise lawful activities can be permitted under the provisions of sections 7 (Federal consultations) and 10 of the Act.

The fuel modification proposal included with your December 5, 2001, letter involves removing non-native vegetation, dead brush, and debris within 50 feet of your property boundary. No native vegetation would be removed. Approximately 0.14 acres of non-native vegetation would be removed using hand tools only. Access to the fuel modification zone would be provided through the residential lot at 34525 Scenic Drive, thus avoiding access-related impacts to

EXHIBIT No. 12

Application Number:
A-5-DPT-02-057

vegetation on the Preserve. The fuel modification plan proposes to replant the affected area following the first fall rains with a variety of native, fire-resistant plants. Work would be conducted by Clark and Green, landscape architects.

In our October 2, 2001, letter to Dr. Lewis Bruggeman, the owner of the property, we recommended that the following measures be incorporated into the final fuel management plan to avoid potential "take" (e.g., harm, harassment, pursuit, injury, kill) of the pocket mouse or gnatcatcher:

1. The removal of vegetation, brush, and debris will be conducted between November and January, when the pocket mouse is least likely to be active above ground. This time period is also outside the gnatcatcher breeding season.
2. Removal of vegetation and debris will be conducted in a manner that results in minimal soil disturbance. Non-native trees and bushes will be removed above-ground only (e.g., stump-cut) to minimize the likelihood of affecting pocket mice underground. Non-native annuals, such as grasses and mustard, may be removed by the roots.
3. Seed collected from native plants on-site will be broadcast by hand instead of using a combination of hydroseed mix and container planting. Hand broadcast seeding is intended to minimize impacts to pocket mouse burrowing activities by eliminating the use of an organic binder typically associated with hydroseed mixes that could alter soil surface properties and by avoiding direct disturbance to the soil through the use of container plants.
4. Broadcast seed will only include seed from plants native to the Dana Point Headlands that have been approved by the local fire authority and the U.S. Fish and Wildlife Service (Service). Some of the plant species presently proposed for use in the draft fire management plan are not known from the Dana Point Headlands and, therefore, are not appropriate for use. Acceptable species include California croton (*Croton californicus*), cliff spurge (*Euphorbia misera*), and bush sunflower (*Encelia californica*). Additional native plant species should be added to this list subject to the review and approval of the fire authority and the Service. ✓
5. Vegetation removal and seed broadcasting will be monitored by a qualified biological monitor. The biologist should have a minimum of 50 hours of experience trapping Pacific pocket mice and have handled a minimum of 15 individuals in the field. Biologists who have trapped the Pacific pocket mouse must have a valid recovery permit issued under section 10(a)(1)(A) of the Endangered Species Act. The biologist will also be able to identify the coastal California gnatcatcher by sight and sound and be able to identify coastal sage scrub species. The biological monitor will supervise activities to minimize the likelihood of impacting the pocket mouse or gnatcatcher and to ensure that only non-native plants are removed.

EXHIBIT No. 12

Application Number:

A-5-DPT-02-057

U.S. Fish and Wildlife

Page 2 of 3


California Coastal
Commission

6. The revegetated area will not be watered to minimize the likelihood of non-native vegetation becoming established in the area.
7. A three-year non-native plant removal program will be implemented. Non-native plant removal will be conducted twice per year, in March and October, before many of the spring and fall blooming annuals have gone to seed and when the pocket mouse is less likely to be active. Plant removal will be conducted in a manner that results in minimal soil disturbance. Non-native trees and shrubs will be removed above-ground only, but non-native annuals may be removed by their roots. Removal activities will be supervised by a qualified biological monitor. This program will be coordinated with the future Preserve manager and the Service.
8. No thinning or removal of native vegetation in the fuel management zone is anticipated now or in the future. However, should the fire department ever conclude that native vegetation adjacent to 34525 Scenic Drive, Dana Point, must be thinned or removed to minimize the threat of fire, these impacts will be the responsibility of the property owner of 34525 Scenic Drive, and proposed conservation measures to avoid and minimize impacts will be subject to approval by the Service.


All of the suggested measures have been incorporated into the final fuel modification plan included with your December 5, 2001, letter. Therefore, based on our knowledge of the biology and distribution of the pocket mouse and gnatcatcher on the Dana Point Headlands, we believe that the fuel modification, as proposed, will not result in take of the pocket mouse. Should any changes be made to the proposed fuel modification plan, we request an opportunity to review the modified proposal to ensure that it is consistent with the Act.

We appreciate your efforts to avoid impacts to federally listed species. If you have further questions, please contact Jonathan Snyder of my staff at (760) 431-9440.

Sincerely,


Karen A. Evans
Assistant Field Supervisor

cc: Dr. Lewis Bruggeman
Brett Anderson, Orange County Fire Authority

EXHIBIT No. 12
Application Number: A-5-DPT-02-057
U.S. Fish and Wildlife Page 3 of 3
 California Coastal Commission