

CALIFORNIA COASTAL COMMISSION

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



Filed: August 15, 2002
49th Day: NA
180th Day: NA
Staff: FSY-LB FSY
Staff Report: August 22, 2002
Hearing Date: September 9-13, 2002
Commission Action:

TUES 9.5**STAFF REPORT: REVOCATION REQUEST****RECORD PACKET COPY**

APPLICATION NO.: R-5-01-029

APPLICANT: City of Newport Beach, Department of Public Works, Attn: Bill Patapoff

AGENT: None

PROJECT LOCATION: Balboa Village, City of Newport Beach, County of Orange

PROJECT DESCRIPTION: Proposed redevelopment will construct street, sidewalk, sewer, water, irrigation, hardscape, landscape and lighting throughout the Balboa Village area. In addition, redesign of Balboa Village parking, reconfiguration of the Balboa Pier Parking Lot, improvements to Peninsula Park and Pier Plaza, reconstruction of the Balboa Pier and Washington Street restrooms, installation of an Odor Control System, installation of catch basins and filters, installation of a larger water main, installation of a new storm drain system and replace a storm drain pipe that outlets into Newport Harbor.

PARTIES REQUESTING REVOCATION: Jan D. Vandersloot, MD

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends that the Commission **DENY** the request to revoke permit 5-01-029 because the request does not establish the grounds required by Section 13105 (a) or (b) of the Commission's regulations. In addition, the request was not filed with due diligence as required by Section 13108(d) of the Commission's regulations.

LOCAL APPROVALS RECEIVED:

City of Newport Beach Approval-in-Concept # 0244-2001 dated January 29, 2000; Mitigated Negative Declaration SCH #2001011130 for the Balboa Village Improvement Project dated January 29, 2001; Regional Water Quality Control Board (RWQCB) Santa Ana Region Discharge permit, Order No. 98-67, NPDES No. CAG998001 dated September 24, 1998; Regional Water Quality Control Board (RWQCB) Section 401 permit dated May 22, 2001; and U. S. Army Corps of Engineers Provisional Permit dated June 11, 2001.

SUBSTANTIVE FILE DOCUMENTS:

City of Newport Beach certified Land Use Plan; Screening Risk Evaluation, Balboa Village Improvement Project, Newport Beach, California, prepared by Enviro-Tox Services, Inc. dated April 4, 2001; Odor Assessment Report and Recommendations, prepared by Environmental Support Technologies Inc. dated August 11, 2001; Marine Resources Environmental Assessment for a Proposed Storm Drainpipe in Newport Bay, Newport Beach, California, Coastal Development Permit Application 5-01-029, Balboa Village, prepared by Coastal Resources Management dated April 3, 2001; Storm Water Pollution Prevention Plan (SWPPP), prepared by PSOMAS & Associates dated March 2001; Geotechnical Investigation (Project No. 102-04), Balboa Village Improvement Plans, Newport Beach, California, prepared by PSOMAS & Associates dated May 31, 2001; Hydrology and Hydraulic Report for Balboa Village, prepared by PSOMAS & Associates dated May 2001; Letter from Haissam Y. Salloum, P.E., Department of Toxic Substances Control Unit Chief, dated May 25, 2001; Letter from Marilyn J. Fluharty, Department of Fish and Game Environmental Specialist, dated May 9, 2001; Letter from Bob Stein, City of Newport Beach Senior Civil Engineer, dated July 6, 2001; Letter from Jon Allen, Staff Ecologist, dated July 16, 2001; Letter from Mary Howe, California State Lands Commission Public Land Management Specialist, dated July 12, 2001; Regional Water Quality Control Board (RWQCB) Santa Ana Region Discharge permit, Order No. 98-67, NPDES No. CAG998001 dated September 24, 1998; Regional Water Quality Control Board (RWQCB) Section 401 permit dated May 22, 2001; and U. S. Army Corps of Engineers (ACOE) Provisional Permit dated June 11, 2001.

PROCEDURAL NOTE:

This revocation request was received on August 15, 2002. The regulations require the Executive Director to report a revocation request at the next regularly scheduled Commission meeting. The next regularly scheduled meeting is September 9-13, 2002.

The Commission's regulations identify the grounds for the revocation of a coastal development permit as follows:

- (a) *Intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the Commission finds that accurate and complete information would have caused the Commission to require additional or different conditions on a permit or deny an application;*
- (b) *Failure to comply with the notice provisions of Section 13054 Cal. (s) Code of Regulations Section 13105.14, where the views of the person not notified were not otherwise made known to the Commission and could have caused the Commission to require additional or different conditions on a permit or deny an application.*

14 Cal. Code Regs. § 13105

The Commission's regulations further specify:

If the commission finds that the request for revocation was not filed with due diligence, it shall deny the request.

Id. at § 13108 (d)

I. MOTIONS AND RESOLUTIONS:

A. MOTION AND RESOLUTION FOR REVOCATION OF PERMIT NO. 5-01-029

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

MOTION

I move that the Commission grant revocation of Coastal Development Permit No. 5-01-029.

STAFF RECOMMENDATION

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

RESOLUTION TO DENY REVOCATION

The Commission hereby denies the request for revocation of the Commission's decision on coastal development permit no. 5-01-029 on the grounds that 1) there is no intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the Commission finds that accurate and complete information would have caused the Commission to require additional or different conditions on a permit or deny an application; 2) although there was a failure to comply with the notice provisions of Section 13054 of the Regulations, where the views of the person not notified were not otherwise made known to the Commission, the information that would have been provided could not and would not have caused the Commission to require additional or different conditions on a permit or denied the application; and 3) the request for revocation was not filed with due diligence.

II. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. Project Location, Description and Background

Project Location

The project area and its immediate vicinity are characterized by mixed commercial recreational and residential uses in the area known as "Balboa Village" on the Balboa Peninsula in the City of Newport Beach. The boundaries of the project area are Adams Street, Edgewater Street, A Street, Peninsula Park and the Balboa Pier Parking Lot. The area consists of a commercially developed area and is a unique mixture of visitor-oriented and neighborhood retail and service uses.

Project Description

The approved project is an improvement and rehabilitation project for the Balboa Village. The key elements of this project are to widen the sidewalks to encourage pedestrian passage along Balboa Boulevard and the side streets connecting Oceanfront and Edgewater and to solve existing flooding problems of the Balboa Village area. In order to encourage pedestrian passage, existing parallel parking spaces need to be reduced. The loss of parallel parking spaces is offset by the net gain of metered parking in the approved Balboa Pier Parking Lot improvement.

Approved redevelopment will construct street, sidewalk, water, irrigation, hardscape, landscape and lighting throughout the Balboa Village area. Also, sewer work will only occur in Alley 221. No additional sewer work will occur in the Balboa Village area. In addition, redesign of Balboa Village parking, reconfiguration of the Balboa Pier Parking Lot, improvements to Peninsula Park and Pier Plaza, reconstruction of the Balboa Pier and Washington Street restrooms, installation of an odor control system, installation of catch basins and filters, installation of a larger water main, installation of a new storm drain system and replace a storm drain pipe that outlets into Newport Harbor will take place with the proposed project.

The following elements were removed from the project: a Landmark Tower and trellises at the intersection of Balboa Boulevard and Palm Street, development of the Bay Avenue parcel into public parking and the development of the Orange County Sanitation District Parcel on A Street. Thus, these items were deleted from the project plans.

Project Background

On August 7, 2001, the Coastal Commission approved coastal development permit 5-01-029 as recommended by staff with the following six (6) Special Conditions: 1) storage of construction materials, mechanized equipment and removal of construction debris; 2) adherence to best management practices; 3) submittal of a traffic control plan; 4) adherence to specific timing of construction; 5) submittal of an assumption of risk, waiver of liability and indemnification agreement; and 6) submittal of proof of legal interest. On August 14, 2001, the Notice of Intent to Issue Permit was issued, and on October 15, 2001 the coastal development permit was issued after the applicant complied with all Special Conditions.

B. Summary of Revocation Request's Contentions

The revocation request has been filed by Jan D. Vandersloot, MD. Although his contentions are summarized below, the full text of the revocation request is included in Exhibit #1.

As detailed in the Procedural Note on page 2 of this staff report, the grounds for revocation, as identified in Section 13105 (a) and (b) of the California Code of Regulations, are 1) intentional inclusion of inaccurate, erroneous or incomplete information where the accurate and complete information would have caused different conditions or denial of the permit and 2) failure to comply with the notice provisions, where the views of the person not notified were not otherwise made known to the Commission and could have caused different conditions or denial of the project. Either ground, if proven, will suffice to allow revocation. 14 Cal. Code Regs. § 13108 (d).

The revocation request asserts both grounds for the revocation of this permit. The contention alleges that the applicant intentionally withheld information: 1) that the *figus* trees in the project area are significant vegetation and that wildlife use these *figus* trees; 2) that the City planned the removal of *figus* trees as part of the project; 3) regarding the City's designation of a number of these *figus* trees as "Special Landmark Trees;" 4) regarding the water quality benefit of *figus* trees; 5) regarding the impacts of these *figus* trees on existing sewer lines and also alleges 6) that Mr. Vandersloot was not notified of the Coastal Commission hearing for the subject coastal development permit 5-01-029.

C. Analysis of the Revocation Request's Contentions with Respect to Section 13105 of the California Code Of Regulations

Because of the impacts on a permittee, the grounds for revocation are necessarily narrow. The rules of revocation do not allow the Commission to revisit a previously issued permit based on information that came into existence after the Commission acted, no matter how compelling that information might be. Similarly a violation of the Coastal Act or the terms and conditions of a permit or an allegation that a violation has occurred are not grounds for revocation under the California Code of Regulations. The grounds for revocation are, of necessity, confined to information in existence at the time of the Commission's action. In this case, the Commission approved the subject permit on August 7, 2001. The three elements that must be proved before a permit can be revoked under Section 13105 (a) are:

- 1) That the applicant provided inaccurate, erroneous or incomplete information,
- 2) That the inaccurate, erroneous or incomplete information was supplied knowingly and intentionally, **AND**
- 3) That if the Commission had accurate and complete information at the time it approved the application, it would have required additional or different conditions or denied the application.

Similarly, the three elements that must be proved before a permit can be revoked under Section 13105 (b) are:

- 1) That there was a failure to comply with the notice provisions of Section 13054 of the Regulations,
- 2) That the views of the person not notified were not otherwise made known to the Commission, **AND**
- 3) That, if the Commission had been aware of those views, they could have caused the Commission to require additional or different conditions on a permit or denied the application.

In addition, Section 13108 (d) requires the Commission to deny a request for revocation if it finds that the request for revocation was not filed with due diligence. These criteria will be discussed below.

1. Intentional Inclusion of Incomplete or False Information Provided by Applicant

The contention raised in the revocation request alleges grounds for revocation relevant to the grounds identified in Section 13105 (a) of the California Code of Regulations. The contention alleges that the applicant intentionally withheld information: 1) that the *figus* trees in the project area are significant vegetation and that wildlife use these *figus* trees; 2) that the City planned the removal of *figus* trees as part of the project; 3) regarding the City's designation of a

number of these *figus* trees as "Special Landmark Trees;" 4) regarding the water quality benefit of *figus* trees; and 5) regarding the impacts of these *figus* trees on existing sewer lines and also alleges. To meet this requirement, the revocation request must pass three tests: First, that complete or correct information was not provided. Second that the applicants had intent to supply the incomplete or false information. (Common mistakes and/or omissions do not constitute intent to provide inaccurate, erroneous or incomplete information or evidence of having knowingly done so). Third, if the first two tests have been met, that the Commission would have imposed different conditions or denied the application. These tests are discussed below.

a. **Wildlife Habitat**

The revocation request states: *"Additionally, the evaluation of these trees [figus] as wildlife habitat for being significant vegetation to the coastal environment was not included in the application. The public has testified that wildlife uses the tree canopy, including the heron. Because this information was not included in the application, grounds for revocation include (a) Intentional..."* Mr. Vandersloot claims that the *figus* trees are significant vegetation and that wildlife including the heron use the canopy which would require state wide protection of the *figus* trees under the Coastal Act.

The local government went through the CEQA process in conjunction with their approval of this project. A Negative Declaration was completed and determined that the removal of the *figus* trees would have a less than significant impact. Commission staff has analyzed minutes from the City of Newport Beach Parks, Beaches, and Recreation Commission meeting held on July 3, 2001, which was prior to the Commission action, to determine if any public comment revolved around herons or other wildlife using the canopy of the *figus* trees. No such comment was found.

Mr. Vandersloot does not provide any evidence that the *figus* trees are a significant habitat or that the heron use the tree canopy. Also, Mr. Vandersloot does not provide evidence that the applicant had intent to supply the allegedly incomplete or false information. Therefore, there is no evidence of inaccurate or incomplete information that, had it been corrected or completed and presented to the Commission, would have caused the Commission to impose different conditions or deny the project.

b. **Ficus Trees as Described in "Permit Application"**

Mr. Vandersloot states in the revocation request that: *"The Application Number 5-01-029 is inaccurate, erroneous, and misleading, because the fact of the proposed removal of City-Policy designated Special Landmark Trees within the project area is entirely omitted from the application. In particular, currently existing in the project area are 25 mature Ficus trees on Main Street, 10 of which are on the 'Preservation of Special City Trees' list within the City's G-1 Policy."*

However, in Section II.11 on page 4 of the application received on January 29, 2001 (Exhibit #2), the applicant states that 33 *figus* trees will be removed. Therefore, Mr. Vandersloot's claim that the applicant supplied inaccurate, erroneous and misleading information is incorrect with regards to the removal of the *figus* trees in and of itself. However, the revocation request is correct in stating that the designation of these trees as "Special Landmark Trees" was not described.

The City of Newport Beach's G-1 Policy, referred to by Mr. Vandersloot, is found in the "Newport Beach City Council Policy Manual." This G-1 policy provides that the Parks, Beaches, and Recreation (PB&R) Commission shall administer Special City Trees, and that the General Services Director shall provide recommendations on the removal of "All Other" City trees. The *ficus* trees in question are located on Main Street. There are 15 *ficus* trees on Main Street that are designated "Special/Landmark trees" while, the remaining 10 are designated "All Other Trees" by City Council Policy G-1.

The Commission was aware that removal of these trees would occur, however the City's designation of these trees was not discussed. The Landscaping Plans submitted showed that these *ficus* trees would be replaced with Coral Gum trees. Landscaping, including the removal of the *ficus* trees, was not a major issue of the project at the August 2001 Commission hearing. *Ficus* trees are not considered to be an environmentally sensitive species and therefore do not require or receive statewide protection under the Coastal Act.

The decision surrounding the removal of the *ficus* trees is consequently a local issue. Information has been provided which states that there has been local review and approval for the removal of the *ficus* trees subsequent to the Commission's action on the coastal permit. Mr. Vandersloot states that he had made comments to the City of Newport Beach City Council regarding the retainment of the existing *ficus* trees instead of replacing them, and their special significance, in a letter dated June 24, 2001. He was present at the July 3, 2001, City of Newport Beach Parks, Beaches, and Recreation Commission meeting where he voiced his concern through public comments at the hearing and also submitted the June 24, 2001 letter regarding retaining the existing *ficus* trees instead of replacing them. At the conclusion of this meeting the Coral Gum tree was approved as the designated street tree for Main Street. This meeting was held prior to the Coastal Commission hearing on August 7, 2001 where the permit application was approved. The City of Newport Beach Parks, Beaches, and Recreation Commission approved the removal of the *ficus* trees at their May 7, 2002 meeting and the City of Newport Beach City Council approved the removal of these trees subsequently at their May 28, 2002 meeting. The party requesting revocation, Mr. Vandersloot, was also at these meetings and voiced his concern through public comments at the hearings regarding removal of the existing *ficus* trees.

Although the designation of the *ficus* trees was not provided, Mr. Vandersloot does not provide evidence that the applicant had intent to supply the allegedly incomplete information. Therefore, this information does not constitute intentionally omitted information that would have caused the Commission to impose different conditions or deny the project had it been presented at the time of Coastal Commission action.

c. **Water Quality**

The revocation request states that: *"Additionally, the commission did not consider the protection from urban runoff that is provided by the large canopy of these trees...According to this report [Fact Sheet #1: Benefits of the Urban Forest issued by the Center for Urban Forest research, Pacific Southwest Research Station, USDA Forest Service, Davis, California (Exhibit #3)], each of the 25 large existing ficus trees 'intercepts 760 gallons [annually] of rainfall in its crown, thereby reducing runoff of polluted stormwater and flooding.'" This aspect of runoff being helped by the existing*

tree canopy, not mentioned in the application, constitutes grounds for Revocation under Section 13105: (a)..."

The information that Mr. Vandersloot submitted (Exhibit #3) did not specifically state that a *figus* tree can intercept 760 gallons of water annually. The fact sheet information did not specify the type of tree but was also based on the San Joaquin Valley, i.e. Modesto, and not the City of Newport Beach or Southern California examples. Water quality issues were addressed by other methods in the project. New filters would be installed in existing and new catch basins and daily street sweeping during the summer and street sweeping three times a week during the off-season were requirements imposed by the Commission.

Mr. Vandersloot does not provide any evidence that *figus* trees can intercept 760 gallons of water annually. Also, Mr. Vandersloot does not provide evidence that the applicant was even aware of the information contained in the Fact Sheet or had an intent to withhold that information. Therefore, this information does not constitute intentionally misleading or incomplete information that would have caused the Commission to impose different conditions or deny the project had it been presented at the time of Coastal Commission action.

d. Sewer Lines

Mr. Vandersloot states: *"Moreover, because of roots from the trees in the sewer systems and plumbing of the adjacent buildings has been cited as a reason for removal of the trees, logically there is raw sewage leaking into the ground from cracks in the sewer systems. The roots would not be in the sewer system if there were not cracks or leaks in the sewer system...This aspect of the roots in the pipes indicating leaking sewer pipes constitutes grounds for Revocation under Section 13105:..."*

Mr. Vandersloot alleges that there are leaking sewer pipes, however, does not provide evidence that leaking is occurring. Mr. Vandersloot is apparently using information from a report by City of Newport Beach Parks, Beaches and Recreation Commission dated May 7, 2002 that was completed after the coastal development permit for the project was issued. In addition, this report does not state that there are sewer line leakages occurring. It does state that the *figus* tree roots have caused reoccurring public and private property damage. Damage within the public right-of-way has included cracked, raised, and broken sidewalks, curbs, gutters, and street pavements, as well as damage to underground utilities. The report further states that damage to private property has been primarily associated with the sewer lines blocked by *figus* tree roots. The only evidence that Mr. Vandersloot provides for his allegation of leaking pipes sewer pipes is the report's reference to blockage of sewer lines by *figus* trees. This fact does not prove that the sewer lines are leaking, much less that the applicant knew of such leakages and intentionally withheld that information.

Mr. Vandersloot does not provide any evidence that there are leaking sewer pipes. Also, Mr. Vandersloot does not provide evidence that the applicant had intent to supply incomplete or false information concerning any alleged leaks. Therefore, this information does not constitute accurate or complete information that would have caused the Commission to impose different conditions or deny the project had it been presented at the time of Coastal Commission action.

2. Failure to Comply with the Notice Provisions

One of the contentions raised in the revocation request alleges grounds for revocation relevant to the grounds identified in Section 13105 (b) of the California Code of Regulations. The contention alleges that there was a failure by the City of Newport Beach to include Mr. Jan D. Vandersloot as a "Known Interested Party" so that he would be notified of the coastal development permit hearing and that his views could have been known to the Commission. To meet this requirement, the revocation request must pass two tests: First, that there was a failure to comply with the notice provisions of Section 13054 of the Regulations, where the views of the person not notified were not otherwise made known to the Commission. Second, if the first test had been met, that the Commission would have imposed different conditions or denied the application. These tests are discussed below.

Mr. Vandersloot states that he had made comments to the City of Newport Beach City Council regarding the retainment of the existing *ficus* trees instead of replacing them, and their special significance, in a letter dated June 24, 2001. In addition, Mr. Vandersloot attended the July 3, 2001, City of Newport Beach Parks, Beaches, and Recreation Commission meeting and voiced his concern through public comments at the hearing and also submitted a copy of his June 24, 2001 letter. Because of his involvement at the local level, he should have been notified of the City's permit application 5-01-029 when it was submitted to the Coastal Commission. However, he was not listed on the City's notice material with the submitted permit application. If he were notified, he states that he would have provided the Commission with information concerning how the *ficus* trees are significant vegetation and wildlife use of the trees, that the removal of *ficus* trees was not in the permit application, local designation of a number of the trees as "Special Landmark Trees," water quality benefits of the trees and the impacts of these *ficus* trees on existing sewer lines. This staff report has analyzed each of these contentions. The information does not constitute views that could have caused the Commission to require additional or different conditions on the permit or to deny the permit application.

3. Due Diligence

The request for revocation was filed on August 15, 2002. To comply with the due diligence requirements, the party making the revocation request must file the request in a timely manner. Time is of the essence as the applicant has undertaken a substantial amount of development since permit issuance in October 2001. Consequently, it would be difficult to correct any concerns that may prove valid as development progresses.

According to Section 13108 (d) of the California Code of Regulations, "*if the commission finds that the request for revocation was not filed with due diligence, it shall deny the request.*" The request in this case was received approximately 10 months after the permit was issued. The revocation request does not discuss why it was not filed sooner. Mr. Vandersloot was fully aware that the City intended to remove the *ficus* trees as he participated at local hearings on this matter months prior to Coastal Commission action. In the meantime, the permittee has initiated substantial construction activities and incurred significant construction-related expenses. As such, the current request for revocation has not been filed in a timely manner and therefore does not meet the due diligence test. Therefore, pursuant to Section 13108 (d) of the California Code of Regulations, this revocation request must be rejected.

D. Conclusion

The revocation request does not demonstrate that the applicant intentionally provided incomplete or false information that would have altered the Commission's decision. The Commission concludes that the party making the revocation request has not proved that the applicant intended to supply incomplete or false information. In addition, even if Mr. Vandersloot had received notice of the coastal development permit hearing, the information he could have provided would not have caused the Commission to impose different conditions or deny the permit.

The Commission finds that the revocation request shall be denied because the contentions raised in the revocation request do not establish all of the grounds identified in either Section 13105 (a) or (b) of the California Code of Regulations. Furthermore, as a separate basis for denying the revocation request, the Commission finds that the request for revocation was not filed with due diligence.

JAN D. VANDERSLOOT, M.D.

2221 East 16th Street
Newport Beach, CA 92663

Home Phone (949) 548-6326
Office FAX (714) 848-6643

August 15, 2002

Peter Douglas
Executive Director
California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

RECEIVED
South Coast Region

AUG 15 2002

CALIFORNIA
COASTAL COMMISSION

Re: Request for Permit Revocation
Application Number: 5-01-029
Balboa Village, City of Newport Beach, County of Orange

Dear Mr. Douglas,

Pursuant to the California Code of Regulations, Article 16, Section 13105, I am requesting a Revocation of Permit Number 5-01-029, which was granted by the California Coastal Commission on August 7, 2001. The Grounds for Revocation include (a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with this coastal development permit application which would have caused the commission to require additional or different conditions on this permit or deny the application, and (b) failure to comply with the notice provisions of Section 13054, where the views of person(s) not notified were not otherwise known to the commission and could have caused the commission to require additional or different conditions on a permit or deny the application.

In particular, the above application included information on page 7, second paragraph, first sentence, under the heading: IV. Findings and Declarations, A. Project Location and Description, the statement "Proposed redevelopment will construct street, sidewalk, sewer, water, irrigation, hardscape, landscape and lighting throughout the Balboa Village area." (emphasis added).

On page 14 is the statement: The proposed project requires compliance with National Pollution Discharge Elimination Systems (NPDES) Best Management Practices, which require that measures be taken to minimize runoff of contaminants and siltation, that would reduce this impact to a level that is less than significant." (emphasis added).

Another reference on page 15 states: "During the first three years, there will be an average of one full-time person in the Village area, seven days a week, maintaining the landscaping and irrigation, trimming trees and shrubs, cleaning up spills and gum, and picking up leaves and litter" (emphasis added).

On page 18, under Conclusion, it is stated: In response to this issue, the implementation of Best Management Practices (BMP's) is necessary to reduce the cumulative adverse impact existing polluted runoff has upon Newport Harbor." (emphasis added).

On page 22, under Hazards, the propensity for flooding and rainwater draining into Newport Harbor is mentioned.

COASTAL COMMISSION

EXHIBIT # 1
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Newport Beach, CA 92663

Home Phone (949) 548-6326
Office FAX (714) 848-6643

On page 24, under Visual Impacts, Section 30251 of the Coastal Act states "The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance" (emphasis added).

The last paragraph on this page states: "The proposed project will not hamper or adversely impact coastal views. The proposed project will enhance the Balboa Village area visually with the proposed improvements. Therefore, no coastal views are impacted and the proposed development is compatible with the character of the surrounding area and is compatible with Section 30251 of the Coastal Act." (emphasis added).

The Application Number 5-01-029 is inaccurate, erroneous, and misleading, because the fact of the proposed removal of City-Policy designated Special Landmark Trees within the project area is entirely omitted from the application.

In particular, currently existing in the project area are 25 mature Ficus trees on Main Street, 10 of which are on the "Preservation of Special City Trees" list within the City's G-1 Policy.

See attached G-1 Policy: "Retention or Removal of City Trees", Special City Trees Section. The referenced trees are dedicated Landmark Trees that contribute to and give character to an entire neighborhood. Note the paragraph on Special City Trees and note inclusion of the Ficus trees on Main Street (between East Bay Ave. and Balboa Blvd.) as Landmark Trees on the Preservation of Special Trees list.

According to this G-1 Policy, "Special Trees shall be retained, unless there are overriding problems, such as death, disease, or the creation of a hazardous situation, which requires their removal". Moreover, "...the General Services Director...shall prepare a report identifying and implementing specific treatment to retain the tree(s)"

This section of the City's G-1 Policy protects these trees from removal unless these certain findings are made by the Newport Beach City Council, none of which was made in the Application, and none of which was made available to the commission when it made its decision to approve the project. In fact, the very existence of these trees was not made available to the commission. The Application makes no mention of these trees or their special significance.

If the commission knew of these trees and their special significance, the commission may have conditioned the project to protect these trees.

At the time of the Application, the City had not yet made the decision to remove these trees. The decision to remove these trees was made by a split vote, 4-3, of the Newport Beach Parks, Beaches, and Recreation Commission on May 7, 2002, well after the August 7, 2001 application number 5-01-029 approved by the Coastal Commission. The City Council affirmed this decision by a split vote, 3-2, on May 28, 2002.

However, the City made no environmental documentation regarding these Special City Trees when they made this decision. The only historical reference to the Ficus trees was made in a passing sentence of a mitigated negative declaration for the Balboa Village Improvement Project dated January 2001, with comment period to March 5, 2001. Notably, the negative declaration did not mention the Ficus trees in the project description. No mention of the trees in the City's records.

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EXHIBIT # 1
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or the Landmark Special City Tree status of the Main Street Ficus trees was made in this negative declaration.

However, a certified arborist for the City made an evaluation of these Special City Trees in April 23, 2001, well after the comment period was over for the mitigated negative declaration. This report is entitled "City Ficus Landmark Trees Arboricultural Services, prepared for the City of Newport Beach, prepared by Integrated Urban Forestry, April 23, 2001. This report is attached.

This report was not made available to the Coastal Commission in Application Number 5-01-029. Quotes from this report include:

"With the age and maturity of the trees, a full canopy that frames and encloses the space has been created. This dense, full canopy covers the community creating a protected space for pedestrians desiring shade. Within this overhead canopy, a comfortable microclimate is maintained. In addition, the trees act to soften the buildings and frame the view down Main Street of the Pacific Ocean." (p.3)

"The Ficus in this area have proven to be solid performers, tolerant of seacoast conditions, salt water intrusion, and restricted planter space. Despite these conditions, the trees have thrived within this environment and proven extremely adaptable. Many other species would be hard pressed to survive under these conditions." (p.4)

"Severe root pruning will be necessary for the installation of linear root barriers adjacent to the street and for the surrounding utilities and hardscape. Based on our experience with Ficus trees and data obtained from several cities, there is a high probability of survival for the trees due to their known resiliency and high tolerance of root pruning." (p.4)

"In this case, the trees contribute heavily to the aesthetics of the area through their mature size, significant canopy, and heritage in the community. A rating of 90% was assigned." (p.5)

"Placement in the site is also important from an aesthetic viewpoint. Here, the trees frame the view of the ocean, create a lush overhead canopy, and soften building facades." (p.5)

"Over their approximately 40 year life span, the trees have adapted well and even flourished, developing a lush overhead canopy. The trees have been designated as City Landmark trees. Enduring many conditions over a 40 year period, they have "earned" their place in the heritage of the area." (p.6)

"The Landmark Ficus trees have performed well, in terms of appearance, canopy size, and health, for approximately 40 years thus far. With proper management and sound cultural practices, some of which are discussed below, we would expect these trees to live at least another 30 years and possibly longer. Within Southern California, known specimens exist that are over 100 years old." (p.6)

"Any trees, whether existing or new, will eventually have to contend with existing sewer lines in proximity." (p.6)

"The roots of the Ficus trees have adapted well to the limited space in which they have grown. Most root growth of trees is found in the upper 12-36 inches of soil. In this case in particular, the

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JAN D. VANDERSLOOT, M.D.

2221 East 16th Street
Newport Beach, CA 92663

Home Phone (949) 548-6326
Office FAX (714) 848-6643

roots have stayed above the 5-6 foot salt water intrusion depth and have probably followed surrounding wet and dry lines for water and space respectively." (p.7)

"Roots will probably continue to grow out and seek water, from cracks in the sewer lines" (p.8)

"To prevent or at least delay the invasion of sewer lines, a sewer pipe would be wrapped wherever roots might come in contact with it. This would protect the joints and cracks from invasion and greatly reduce the possibility of nearby expanding roots cracking or collapsing the pipe. Wrapping sewer lines with root resistant geotextiles will not prevent joint or pipe cracking by roots, but it should keep invading roots from entering cracks. If a sewer line is not fractured or racked, roots will not enter. Moisture from a sewer crack could result in excessive root growth adjacent to the crack causing further displacement." (p.11)

"Many cultural and aesthetic requirements are placed on possible replacement trees. Newly planted street trees will take up to 20 years to attain the size and canopy as large as provided by the existing Ficus trees. It will take real efforts to establish anything of size. Young trees will require thinning to eliminate blocked views of building signage, and thinning will reduce the crown size." (p.12)

"The existing Ficus trees provide a broad canopy for the community. They have been successful performers on site with coastal winds, salt spray, and salt water intrusion. They have endured many harsh conditions over their approximately 40 year life span so far and still have managed to develop the overhead canopy that frames the community. If the new trees perform well, a nice canopy will still take many years to achieve. With proper management and hardscape that works with the growth habits of the trees to create easier maintenance, the Landmark Ficus trees can benefit the community for many more years to come." (p.13)

The failure of the City to include the existence and special protections of these Special City Landmark Tree in the landscape provisions of the application constitute grounds for Revocation which include (a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with this coastal development permit application which would have caused the commission to require additional or different conditions on this permit or deny the application. If the commission had accurate and complete information, including this report, it would have caused the commission to require additional or different conditions on the permit, including retention of the trees, or denied the application. The Newport Beach City Council had not yet made the decision to remove these trees in its application number 5-01-029 on August 7, 2001.

Moreover, since I had made comments to the City Council regarding these trees and their special significance in a letter to the Newport Beach City Council on June 24, 2001, I should have been notified of the City's Application Number 5-01-029 when it was submitted to the Coastal Commission for consideration by the Commission on August 7, 2001. See attached letter dated June 24, 2001.

I was not notified of the Coastal Commission Application Number 5-01-029.

This constitutes grounds for Revocation under Section 13105 (b) "Failure to comply with the notice provisions of Section 13054, where the views of the person(s) not notified were not otherwise made known to the commission and could have caused the commission to require additional or different conditions on a permit or deny an application.

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Had I been notified, I would have informed the Commission of the City's policy to protect its Special City Trees.

The subject of inadequate environmental documentation of the City Council decision to remove these Special City Trees has resulted in a lawsuit by the Balboa Arbor Society against the City of Newport Beach. A copy of this lawsuit is attached.

The preparation of the arborist report occurred after the comment period for the negative declaration, and the City Council did not consider this new information when it approved the negative declaration or made the decision to remove the trees on May 28, 2002.

Additionally, the commission did not consider the protection from urban runoff that is provided by the large canopy of these trees. See attached "Fact Sheet #1: Benefits of the Urban Forest" issued by the Center for Urban Forest Research, Pacific Southwest Research Station, USDA Forest Service, Davis, California.

According to this report, each of the 25 large existing ficus trees "intercepts 760 gallons of rainfall in its crown, thereby reducing runoff of polluted stormwater and flooding". This aspect of runoff being helped by the existing tree canopy, not mentioned in the application, constitutes grounds for Revocation under Section 13105: (a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with this coastal development permit application which would have caused the commission to require additional or different conditions on this permit or deny the application.

The Commission could have required retention of the canopy as a way to absorb rainfall and decrease runoff.

Moreover, because complaints of roots from the trees in the sewer systems and plumbing of the adjacent buildings has been cited as a reason for removal of the trees, logically there is raw sewage leaking into the ground from cracks in the sewer systems. The roots would not be in the sewer system if there were not cracks or leaks in the sewer systems.

This leakage of raw sewage into the ground may find its way into the adjacent Newport Bay and ocean.

Raw sewage from leaking sewer pipes has been cited as a land-based cause of beach pollution along the Orange County coast, including Huntington Beach and Newport Beach, especially Newport Bay, whose beaches record some of the most frequent beach postings and closures in California.

The existence of these leaking sewer pipes was not made to the Coastal Commission in the Application 5-01-029.

This aspect of the roots in the pipes indicating leaking sewer pipes constitutes grounds for Revocation under Section 13105: (a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with this coastal development permit application which would have caused the commission to require additional or different conditions on this permit or deny the

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application. The commission could have made conditions such as identification, repair, and replacement of the leaking sewer pipes.

Additionally, the evaluation of these trees as wildlife habitat and potential for being significant vegetation to the coastal environment was not included in the application. The public has testified that wildlife uses the tree canopy, including the heron. Because this information was not included in the application, grounds for Revocation include (a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with this coastal development permit application which would have caused the commission to require additional or different conditions on this permit or deny the application.

The commission could have required retention of the trees because of its wildlife habitat, included under section 30240 of the Coastal Act.

Because of all these reasons, I respectfully request Revocation of Application Number 5-01-029.

Thank you for your consideration.

Sincerely,


Jan D. Vandersloot, MD

Attachments:

1. City of Newport Beach G-1 Policy "Retention or Removal of City Trees"
2. City Ficus Landmark Trees Arboricultural Services, Integrated Urban Forestry, April 23, 2001
3. Letter to Newport Beach Mayor Gary Adams, and Newport Beach City Council from Jan D. Vandersloot MD, June 24, 2001
4. Fact Sheet #1: Benefits of the Urban Forest, Center for Urban Research, Pacific Southwest Research Station, USDA Forest Service, Davis, California
5. Lawsuit, Balboa Arbor Society versus City of Newport Beach

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Is tandem parking existing and/or proposed? ☐ Yes ☒ No

If yes, how many tandem sets? N/A size _____

10. Are utility extensions for the following needed to serve the project? (Please check yes or no)

a) water b) gas c) sewer d) electric e) telephone

☐ Yes ☐ Yes ☐ Yes ☐ Yes ☐ Yes

☒ No ☒ No ☒ No ☒ No ☒ No

Will electric or telephone extensions be above-ground? N/A ☐ Yes ☐ No

11. Does project include removal of trees or other vegetation? See Attachment A ☒ Yes ☐ No

If yes, indicate number, type and size of trees Removal: 33 Ficus trees, 9" - 20" diameter;
13 Eucalyptus trees, 10" diameter. Relocation: 40 Mexican fan and California
palms, 12" - 24" diameter.
or type and area of other vegetation N/A

SECTION III. ADDITIONAL INFORMATION

The relationship of the development to the applicable items below must be explained fully. Attach additional sheets if necessary.

1. Present use of property.

a. Are there existing structures on the property? ☒ Yes ☐ No

<i>If yes, describe</i> <u>The Washington Street restroom and the Balboa Pier restroom</u> <u>will be demolished and replaced.</u> _____ _____ _____
--

b. Will any existing structures be demolished? ☒ Yes ☐ No

Will any existing structures be removed? ☐ Yes ☒ No

<i>If yes to either question, describe the type of development to be demolished or removed, including the relocation site, if applicable.</i> <u>Both restrooms will be demolished and replaced with ADA</u> <u>compliant restroom facilities.</u> _____ _____ _____
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2. Is the proposed development to be governed by any Development Agreement? ☐ Yes ☒ No

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Fact Sheet #1: Benefits of the Urban Forest

AUG 15 2002

Did you know?

A large front yard tree can provide the following benefits each year:*

- 1** Saves \$29 in summertime air conditioning by shading the building and cooling the air (250 kWh), about 9% of a typical residential building's total annual air conditioning cost. (This finding assumes tree is west of the residence where it provides maximum shading benefit.)
- 2** Absorbs 10 lbs. of air pollutants, including 4 lbs. of ozone and 3 lbs. of particulates. The value of pollutant uptake by the tree is \$45 using the local market price of emission reduction credits. Uptake of NOx by the tree (1.07 lb) is equivalent to NOx emitted by a typical car driven 188 miles. (NOx emissions taken from a *Sacramento Bee* article, Dec. 7, 1997, Forum 2, that lists EPA test results of measured emissions at 4,000 miles, as well as maximum emissions allowed at 50,000 miles for 7 car models and 11 models of light trucks. This calculation assumes 30 grams/yr. uptake by tree and car emission rate of 0.16 grams/mile for Ford Taurus at 4,000 miles. Emission rates ranged from 0.06-0.16 for the cars listed.)
- 3** Intercepts 760 gal of rainfall in its crown, thereby reducing runoff of polluted stormwater and flooding. This benefit is valued at \$6 based on local expenditures for water quality management and flood control. (Interception is relatively low for this deciduous species in a climate with predominately winter precipitation. An evergreen camphor tree in coastal Southern California was estimated to intercept 4,000 gals annually, see page 82, "Tree Guidelines for Coastal Southern California Communities.")
- 4** Cleans 330 lbs. of CO₂ (90 lbs. C) from the atmosphere through direct sequestration in the tree's wood and reduced power plant emissions due to cooling energy savings. The value of this benefit is \$5 assuming the California Energy Commission's price of \$30/ton. This tree reduces the same amount of atmospheric CO₂ as released by a typical car driven 388 miles. (From the same *Sacramento Bee* article, Dec. 7, 1997, Forum 2, CO₂ per year assuming 15,000 miles driven a year (55% city, 45% highway). Assuming an average emission rate of 0.85 lb/mile, the CO₂ offset by the tree is equivalent to 388 miles driven. Emission rates ranged from 9,200-14,800 lb/yr. for the cars listed.)
- 5** Adds about 1% to the sales price of the property, or about \$25 each year when annualized over a 40-year period. This assumes a median residential property sales price of \$100,000. (Based on research that found a large front yard tree increased the sales price of residential properties by nearly 1%: Anderson, L.M. and Cordell, H.K., 1988. "Residential Property Values Improve by Landscaping." *Journal of Applied Forestry*, 9:162-166.)

* in a San Joaquin Valley community like Modesto

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The value of all benefits is \$111 in this example. Typically, a city will spend \$20-\$30 per year to maintain a street tree of this size (sometimes located in a front yard easement) and a resident will spend about \$10-\$30 per year maintaining a large yard tree. Our benefit-cost analysis for Modesto's 90,000 street/park trees found \$1.89 returned annually for every \$1 invested in stewardship. The net annual benefit of \$2.3 million (\$13/resident, \$26/tree) can be referenced as follows: McPherson, E.G.; Simpson, J.R.; Peper, P. & Xiao, Q. 1999. "Benefit-Cost Analysis of Modesto's Municipal Urban Forest." *Journal of Arboriculture*, 25(5):235-248.

All tree data taken from "Tree Guidelines for San Joaquin Valley Communities," by McPherson, E.G., Simpson, J.R., Peper, P. and Xiao, Q. 1999, published by Local Government Commission, Sacramento, CA. (See back page for more information.)