

CALIFORNIA COASTAL COMMISSION

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Staff: ALB-LB
Staff Report: December 22, 2005
Hearing Date: January 11-13, 2006
Commission Action:



Item W4d

STAFF REPORT: CONSENT CALENDAR

APPLICATION NUMBER: 5-05-415

APPLICANT: Barry and Amy Fieldman

AGENT: Kevin Schley

PROJECT LOCATION: 3911 Seashore Drive, City of Newport Beach, County of Orange

PROJECT DESCRIPTION: Demolition of an existing 1,690 single-family residence and construction of a new 2,232 square foot, two-story single-family residence with an attached 428 square foot two-car garage on a beachfront lot. The project also involves the reconstruction of a 10' by 25' concrete patio and maximum 3' high perimeter wall within the City's oceanfront encroachment area. No landscaping is proposed. No grading is proposed.

LOCAL APPROVALS RECEIVED: City of Newport Beach Approval-In-Concept (No. 2214-2005) dated October 14, 2005.

SUMMARY OF STAFF RECOMMENDATION:

The applicant is proposing construction of a new beach-fronting single-family residence. The major issue of this staff report concerns beachfront development that could be affected by flooding during strong storm events.

Staff is recommending **APPROVAL** of the proposed project with seven (7) special conditions regarding: 1) assumption of risk; 2) no future shoreline protective device; 3) conformance with the submitted drainage and run-off control plan; 4) deviation from approved encroachments; 5) City's right to revoke the encroachments; 6) future development; and 7) a deed restriction against the property, referencing all of the Special Conditions contained in this staff report.

Section 30600(c) of the Coastal Act provides for the issuance of coastal development permits directly by the Commission in regions where the local government having jurisdiction does not have a certified Local Coastal Program. The City of Newport Beach only has a certified Land Use Plan and has not exercised the options provided in 30600(b) or 30600.5 to issue its own permits. Therefore, the Coastal Commission is the permit issuing entity and the standard of review is Chapter 3 of the Coastal Act. The certified Land Use Plan may be used for guidance.

SUBSTANTIVE FILE DOCUMENTS: City of Newport Beach certified Land Use Plan and *Coastal Hazard and Wave Runup Study for 3911 Seashore Drive, Newport Beach, CA* prepared by *Geosoils, Inc.* dated August 2005.

LIST OF EXHIBITS

1. Location Map
 2. Assessor’s Parcel Map
 3. Project Plans
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STAFF RECOMMENDATION:

Staff recommends that the Commission **APPROVE** the permit application with special conditions.

MOTION:

I move that the Commission approve the coastal development permit applications included on the consent calendar in accordance with the staff recommendations.

Staff recommends a **YES** vote. Passage of this motion will result in approval of all the permits included on the consent calendar. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION:

I. APPROVAL WITH CONDITIONS

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

II. STANDARD CONDITIONS

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date this permit is reported to the Commission. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

4. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS

1. Assumption of Risk, Waiver of Liability and Indemnity

By acceptance of this permit, the applicants acknowledge and agree (i) that the site may be subject to hazards from flooding and wave uprush; (ii) to assume the risks to the applicants and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

2. No Future Shoreline Protective Device

- A. By acceptance of this permit, the applicants agree, on behalf of themselves and all other successors and assigns, that no shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 5-05-415 including, but not limited to, the residence, garage, foundations, and patio, and any future improvements, in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions or other natural hazards in the future. By acceptance of this permit, the applicants hereby waive, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235.
- B. By acceptance of this permit, the applicants further agree, on behalf of themselves and all successors and assigns, that the landowners shall remove the development authorized by this permit, including the residence, garage, foundations, and patio, 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 portions of the development fall to the beach before they are removed, the landowners 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.

3. Drainage and Run-Off Control Plan

The applicants shall conform with the drainage and run-off control plan received on December 15, 2005 showing roof drainage and runoff from all impervious areas directed to dry wells. Any proposed changes to the approved plan shall be reported to the Executive Director. No changes to the approved plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

4. Deviation from Approved Encroachments

- A. The only encroachment into the 10-foot wide encroachment area within the City of Newport Beach Oceanfront public right-of-way allowed by this coastal development permit is a patio wall (no more than 3 feet high) around the perimeter of an at-grade 10' by 25' concrete patio. Any development in the public right of way, including improvements, repairs, and maintenance, cannot occur without an amendment to this coastal development permit or a new coastal development permit from the Coastal Commission, unless the Executive Director determines that no amendment or new permit is required.
- B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit evidence, for the review and approval of the Executive Director, that the encroachment fee required by the City to construct the proposed encroachments has been paid.

5. City's Right to Revoke Encroachment Permit

Approval of this coastal development permit shall not restrict the City's right and ability to revoke, without cause, the approved City encroachment permit in order to construct public access and recreation improvements within the public right of way.

6. Future Development

This permit is only for the development described in Coastal Development Permit No. 5-05-415. Pursuant to Title 14 California Code of Regulations Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) shall not apply to the development governed by Coastal Development Permit No. 5-05-415. Accordingly, any future improvements to the single-family house authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Section 30610(d) and Title 14 California Code of Regulations Sections 13252(a)-(b), shall require an amendment to Permit No. 5-05-415 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

7. Generic Deed Restriction

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the landowner(s) have executed and recorded against the parcel(s) governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating

that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

IV. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. PROJECT LOCATION AND DESCRIPTION

The subject site is located at 3911 Seashore Drive within the City of Newport Beach, Orange County (Exhibits 1 & 2). The lot size is 1,991 square feet. The City of Newport Beach Land Use Plan (LUP) designates the site Single-Family Residential and the proposed project adheres to this designation. The project is located within an existing urban residential area, located between the Santa Ana River Mouth and Newport Pier.

The site is a beachfront lot located between the first public road and the sea. There is a wide sandy beach (approx. 280 feet wide) between the subject property and the Pacific Ocean. Due to its oceanfront location, the project site may be potentially exposed to the hazard of wave uprush during a severe storm event.

The proposed project will not have an adverse effect on public access. The project site is located north of the portion of Oceanfront bordered by the City's paved beachfront public lateral access way (boardwalk). The Commission has found through previous permit actions in this area that the City's setback in this area is acceptable for maintaining public access. The proposed project is consistent with the City's 5-foot required setback from the seaward property line. Vertical public access to this beach is available at the end of 40th Street, approximately 50 feet west of the site. Lateral public access is available along the wide sandy beach seaward of the subject site.

The applicant is proposing to demolish an existing 1,690 single-family residence and construct a new 2,232 square foot, 29' high, two-story single-family residence with an attached 428 square foot two-car garage on a beachfront lot (Exhibit 3). In addition, the proposed project consists of hardscape and landscape improvements, including new concrete side yard walkways, and replacement of a rear yard patio wall (no more than 3-feet high) and concrete patio into the 10-foot wide encroachment area within the City of Newport Beach Oceanfront public right-of-way. The applicant is proposing water quality improvements as part of the proposed project, including directing roof and surface runoff to dry wells. No landscaping is proposed.

As stated above, the proposed development includes replacement of existing patio development that encroaches 10 feet into the City of Newport Beach Oceanfront public right-of-way at the seaward side of the home (see Exhibit C). The City holds the public right-of-way for street/walkway/bikeway purposes. The portions of Oceanfront in the central part of the Balboa

Peninsula near the City's two municipal piers are developed with a public walkway/bikeway. In the vicinity of the subject site, however, the City has never constructed any part of the Oceanfront street, but it has at times addressed the possibility of constructing a bike path and pedestrian walkway in the right-of-way in this area. The development now pending proposes to replace a 3-foot high patio wall around the perimeter of an at-grade, 10' by 25' concrete patio encroachment.

Construction of the existing encroachments would contribute to the cumulative adverse impact on beach use resulting from the various existing encroachments on the public right-of-way in the area. In addition, the encroachments could make it difficult in the future for the City to improve the public right-of-way for lateral access purposes.

In 1991, the Commission certified an amendment to the City of Newport Beach Land Use Plan (LUP). The LUP acknowledges the adverse public access impacts that will result from the development on the sandy beach area which is owned by the City for street purposes. This cumulative impact is addressed in the certified LUP by imposition of a mitigation plan. The mitigation plan requires that fees paid by encroaching homeowners be applied to improving public access in Newport Beach. The City has constructed a number of public access improvements (including street end improvements which provide additional parking spaces) using the encroachment fee funds. When it certified the LUP amendment allowing these encroachments, the Commission found that, if developed consistent with the mitigation plan, encroachments onto the City's Oceanfront public right-of-way would be consistent with the public access and recreation policies of Chapter 3 of the Coastal Act.

The LUP encroachment policies allow encroachment onto the Oceanfront right-of-way in the area of the subject site, which is between 52nd Street and 36th Street. Encroachments in this area may encroach up to 10 feet. The LUP policies allow encroachments only if they do not interfere with access to the beach or ocean, when no building permit is required, and subject to payment of a mitigation fee. Except for an absence of evidence that the mitigation fee has been paid, the proposed encroachment at the subject site complies with these standards.

The Commission finds that construction of the encroachments is consistent with the certified LUP encroachment policies. In addition, the City is continuing to carry out the public access improvements required by the LUP mitigation plan to offset any adverse impacts of the encroachments. However, in order to assure that the encroachments are consistent with the Land Use Plan policies addressing Oceanfront encroachments as certified by the Commission, and so are consistent with the public access policies of the Coastal Act, evidence that the required encroachment fee has been paid must be submitted. Therefore, as a condition of approval the applicant is required to submit, for the review and approval of the Executive Director, evidence that the current encroachment permit fee has been paid.

Section 13250 of the California Code of Regulations provides that development such as the proposed encroachments are not exempt from obtaining a coastal development permit pursuant to Coastal Act Section 30610(a). However, to ensure that no further encroachments occur without an approved amendment to this coastal development permit or approval of a new coastal development permit, the Commission imposes a special condition which requires that an amendment to this permit or a new coastal development permit be obtained for any deviations to the encroachments described in this permit. This would allow the Commission to evaluate future encroachment deviations for adverse public access and recreation impacts.

As a condition of the City's approval of an encroachment permit, the permittee must sign an encroachment agreement in which the permittee waives his or her right to contest the ability of the City to remove the encroachments in order to build public access improvements within the public right of way. Thus the proposed project is being conditioned to provide that issuance of the coastal development permit does not restrict nor interfere with the City's right to revoke its encroachment permit, without cause, in order to construct public access and recreation improvements in the public right-of way. This would ensure future opportunities for public access and recreation.

B. HAZARDS

Development adjacent to the ocean is inherently hazardous. Development which may require a protective device in the future cannot be allowed due to the adverse impacts such devices have upon, among other things, public access, visual resources and shoreline processes. To minimize the project's impact on shoreline processes, and to minimize risks to life and property, the development has been conditioned to: require an appropriate set-back from the water; require a drainage and runoff control plan to direct, treat, and minimize the flow of water offsite; prohibit construction of protective devices (such as a seawall) in the future; and to require that the landowner and any successor-in-interest assume the risk of undertaking the development. As conditioned, the Commission finds that the development conforms to the requirements of Sections 30235 and 30253 of the Coastal Act regarding the siting of development in hazardous locations.

C. DEVELOPMENT

The development is located within an existing developed area and is compatible with the character and scale of the surrounding area. However, the proposed project raises concerns that future development of the project site potentially may result in a development which is not consistent with the Chapter 3 policies of the Coastal Act. To assure that future development is consistent with the Chapter 3 policies of the Coastal Act, the Commission finds that a future improvements special condition be imposed. As conditioned the development conforms with the Chapter 3 policies of the Coastal Act.

D. PUBLIC ACCESS

The proposed development will not affect the public's ability to gain access to, and/or to use the coast and nearby recreational facilities. Therefore, as proposed the development, as conditioned, conforms with Sections 30210 through 30214, Sections 30220 through 30224, and 30252 of the Coastal Act.

E. WATER QUALITY

The proposed development has a potential for a discharge of polluted runoff from the project site into coastal waters. The development, as proposed and as conditioned, incorporates design features to minimize the effect of construction and post-construction activities on the marine environment. These design features include, but are not limited to, the appropriate management of equipment and construction materials, reducing runoff through the use of permeable surfaces, the use of non-invasive drought tolerant vegetation to reduce and treat the runoff discharged from the site, and for the use of post-construction best management practices to minimize the project's adverse impact on coastal waters. Therefore, the Commission finds that the proposed development, as conditioned, conforms with Sections 30230 and 30231 of the Coastal Act

regarding the protection of water quality to promote the biological productivity of coastal waters and to protect human health.

F. DEED RESTRICTION

To ensure that any prospective future owners of the property are made aware of the applicability of the conditions of this permit, the Commission imposes one additional condition requiring that the property owner record a deed restriction against the property, referencing all of the above Special Conditions of this permit and imposing them as covenants, conditions and restrictions on the use and enjoyment of the property. Thus, as conditioned, any prospective future owner will receive actual notice of the restrictions and/or obligations imposed on the use and enjoyment of the land including the risks of the development and/or hazards to which the site is subject, and the Commission's immunity from liability.

G. LOCAL COASTAL PROGRAM

Coastal Act section 30604(a) states that, prior to certification of a local coastal program ("LCP"), a coastal development permit can only be issued upon a finding that the proposed development is in conformity with Chapter 3 of the Act and that the permitted development will not prejudice the ability of the local government to prepare an LCP that is in conformity with Chapter 3. The Land Use Plan for the City of Newport Beach was effectively certified on May 19, 1982. The certified LUP was updated on January 9, 1990. As conditioned, the proposed development is consistent with Chapter 3 of the Coastal Act and with the certified Land Use Plan for the area. Approval of the project, as conditioned, will not prejudice the ability of the local government to prepare an LCP that is in conformity with the provisions of Chapter 3 of the Coastal Act.

H. CALIFORNIA ENVIRONMENTAL QUALITY ACT

As conditioned, there are no feasible alternatives or additional feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, is the least environmentally damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.