

CALIFORNIA COASTAL COMMISSION

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

T 19a

Staff: Fernie Sy-LB
Staff Report: October 26, 2006
Hearing Date: November 14-17, 2006
Commission Action:

**STAFF REPORT: APPEALABILITY****DISPUTE RESOLUTION**

NUMBER: 5-06-401-EDD

LOCAL CDP NO.: 05-25

LOCAL JURISDICTION: City of Dana Point

“APPELLANT”: The Williams Law Firm, PC,
Attn: Joseph R. McFaul, Esq.

APPLICANT FOR LOCAL PERMIT: Usha Gopal

PROJECT LOCATION: 34142 Chula Vista, City of Dana Point
(Orange County)

DESCRIPTION: Public hearing on appealability to Commission of the City of Dana Point's approval of Coastal Development Permit application #05-25 for the construction of a new 4,485 square foot, 3-level single-family residence on a 6,004 square foot parcel.

SUMMARY OF STAFF RECOMMENDATION:

The project opponent and would-be appellant (hereinafter, “McFaul”) contends that the City of Dana Point's decision to grant Coastal Development Permit (herein “CDP”) 05-25 is appealable to the Coastal Commission. According to the City of Dana Point (herein “City”), the proposed project is not appealable to the Coastal Commission. McFaul claims that the proposed project is appealable because: 1) the development is located on a coastal bluff, making it appealable to the Coastal Commission based on Section 9.75.010 of the City Zoning Code and Section 30603(a)(2) of the Coastal Act; and 2) the development is located within a sensitive coastal resource area, making it appealable to the Coastal Commission based on Section 9.75.010 of the City Zoning Code and Section 30603(a)(3) of the Coastal Act. The Executive Director has reviewed McFaul's claims and has determined that the City's action on Coastal Development Permit 05-25 is not appealable to the Commission. Commission staff recommends that the Commission uphold the Executive Director's determination that the City's action is not appealable.

I. STAFF RECOMMENDATION ON APPEALABILITY DETERMINATION

Staff recommends that the Commission adopt the following findings and resolution to determine that the City's approval of Local Coastal Development Permit 05-25 is an action on a Coastal Development Permit application that is not appealable to the Commission.

MOTION: *I move that the Commission reject the Executive Director's determination that Coastal Development Permit 05-25, approved by the City of Dana Point on August 23, 2006, is not appealable to the Coastal Commission under Public Resources Code Section 30603.*

Staff Recommendation that City of Dana Point Coastal Development Permit No. 05-25 is NOT Appealable:

Staff recommends a **NO** vote on the motion. Failure of this motion will result in (1) the Commission upholding the Executive Director's determination that the City's approval of CDP 05-25 is an action on a Coastal Development Permit application that is not appealable to the Commission, (2) the Commission's adoption of the following resolution and findings, and (3) the local government action becoming effective. A majority of the Commissioners present is required to approve the motion.

RESOLUTION:

The Commission hereby (1) finds that it does not have appeal jurisdiction in this matter pursuant to California Public Resources Code Section 30603 because the City's approval of CDP 05-25 is not an action on a Coastal Development Permit application that is appealable to the Commission and (2) adopts the findings recommended by staff below, or as modified at the hearing, to support the conclusions set forth in the staff report.

II. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. BACKGROUND ON THE PROJECT AND COASTAL COMMISSION AND CITY ACTIONS

The subject site is located at 34142 Chula Vista, in the City of Dana Point, Orange County (Exhibit #1). The project site is a 6,004 square foot vacant lot that fronts Chula Vista and Street of the Blue Lantern, and the site is zoned as Residential Single Family 7 (RSF 7-1) and has a land use designation of Residential 3.5-7 DU/AC. A single-family structure was previously located on the property, but it was demolished in October 2005. Currently, three vacant, contiguous parcels are located in this area of Chula Vista. Single-family residential developments surround these parcels. The applicant has received a Coastal Development Permit (CDP No. 05-25) from the City of Dana Point ("City") for construction of a new 4,485 square foot, 3-level single-family residence on a 6,004 square foot parcel.

The City has issued grading permits and development has commenced at the subject site. However, the property owner has been asked by the City to voluntarily hold off on further development activity pending resolution of this matter. The events leading up to this point are as follows:

On November 23, 2005 and January 20, 2006, the City issued Public Hearing notices on a proposal for a three-story single-family residence, both listing the project as within "the Appeal Jurisdiction of the City's Local Coastal Program" and appealable to the Commission. However, on March 24, 2006, the City issued a Public Hearing Notice listing a scaled down version of the same project as not within the appeals jurisdiction and therefore not appealable to the Commission.

On July 10, 2006, Commission staff received a copy of a letter and documents addressed to the City of Dana Point City Council, from Joseph R. McFaul, Esq., of The Williams Law Firm, PC, relating to a City of Dana Point City Council public hearing taking place on July 12, 2006. The submitted information included comments, objections and legal analysis of the proposed project.

On August 23, 2006, the City of Dana Point City Council approved Coastal Development Permit 05-25.

On August 31, 2006, Commission staff received a Notice of Final Action dated August 29, 2006, for Coastal Development Permit 05-25 that stated that the project was not appealable to the Commission.

On August 31, 2006, Commission staff also received a letter (Exhibit #2) and attachments from Joseph R. McFaul, Esq., of The Williams Law Firm, PC, discussing the appealability of the proposed project to the Coastal Commission. In the letter, Mr. McFaul requested that the Commission make its own determination regarding the appealability of the City's action and urged the Commission to find that the City's action was appealable. He claimed that the proposed project is appealable because: 1) the development is located on a coastal bluff, making it appealable to the Coastal Commission based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(2) of the Coastal Act; and 2) the development is located within a "sensitive local coastal area,"¹ making it appealable to the Coastal Commission based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(3) of the Coastal Act.

On September 5, 2006, Commission staff sent a letter (Exhibit #3) to Joseph R. McFaul, Esq., of The Williams Law Firm, PC, explaining why they believed his argument for appealability of the project to the Coastal Commission was wrong. This letter contained the Executive Director's determination that the City's action on Coastal Development Permit 05-25 is not appealable to the Coastal Commission. The letter also informed McFaul about the procedures necessary to request an Executive Director determination regarding appealability, which procedures are outlined in Section 9.69.050(d) of the City's Zoning Code/implementation plan. These procedures required that he file his objection to the City's appealability determination with the City, and that the City then make contact with the Commission and request a determination regarding appealability. Id. at § 9.69.050(d)(3)(B); *see also* Cal. Code Regs., tit. 14 (herein "14 CCR"), § 13569(b) (establishing the same procedure). In this case, McFaul filed his objection directly with the Commission instead of through the City. However, by the time of Commission staff's September 5 letter, Commission

¹ There is no definition of, or provision for appealability based on, the phrase "sensitive local coastal area" in either Chapter 9.75 of the City's Zoning Code or in Section 30603(a) of the Coastal Act. Rather, the City Zoning Code and Coastal Act make reference to and define the phrase "Sensitive Coastal Resources Area." The Commission assumes that McFaul intended to assert that the site of the proposed project is a sensitive coastal resources area.

staff had already contacted the City relative to this issue. Commission staff's September 5 letter therefore explained that, with the City's concurrence, although McFaul had not followed the procedures outlined in the City's Zoning Code and the Commission's regulations, Commission staff was providing the Executive Director's determination because staff was treating McFaul's request for a determination regarding appealability as if it were made by the City in accordance with the procedures described in the sections of the City's Zoning Code and the Commission's regulations.

On September 11, 2006, Commission staff received a letter (Exhibit #4) from Joseph R. McFaul, Esq., of The Williams Law Firm, PC, stating: 1) disagreement with Commission staff's response to his appealability argument; and 2) his arguments regarding the project's inconsistency with the City of Dana Point's Local Coastal Program (LCP). The letter did not further discuss the appealability of the project to the Coastal Commission. The letter also purported to submit an appeal of the City's approval of CDP 5-25.

B. COMMISSION DETERMINATION OF NON-APPEALABILITY

The Commission finds that City approval of CDP No. 05-25 is an action on a Coastal Development Permit application that is not appealable to the Commission.

McFaul claims that the project is appealable to the Coastal Commission based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(2) of the Coastal Act in that the development is located on a coastal bluff. The proposed project site is not appealable based on these two sections because the project site is not a coastal bluff (the coastal bluffs in this area are located several hundred feet seaward of the project site). The Commission's staff geologist reviewed information on the subject site and determined that although the site could arguably be defined as a bluff, it is not a coastal bluff pursuant to Section 9.75.30 of the City of Dana Point Zoning Code and Section 30603(a)(2) of the Coastal Act. These sections state that coastal bluffs are defined as " ... *those bluffs, the toe of which is now or was historically (generally within the last 200 years) subject to marine erosion.*" The base of the subject bluff is at an elevation of approximately 180-feet above sea level, and clearly has not been subject to marine erosion in historic times. Therefore, the Commission concurs with the determination of its staff geologist and concludes that the project is not appealable to the Coastal Commission based on this claim.

McFaul also claims that the project is appealable to the Coastal Commission based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(3) of the Coastal Act in that the development is located in a highly scenic sensitive coastal resources area. Section 9.75.190 of the City's Zoning Code / implementation plan defines "sensitive coastal resources area" (herein 'SCRA') as, in part, " ... *an identifiable and geographically bounded land and water areas [sic] within the coastal zone of vital interest...*," and states that the phrase includes "...*highly scenic areas...*" This definition comes verbatim from Coastal Act Section 30116. The Coastal Act also specifies that SCRA's are to be designated primarily by the Coastal Commission and the Legislature. See Cal. Pub. Res. Code §§ 30502 and 30502.5. Moreover, the designation must include a map of the designated area showing its precise location. *Id.* at § 30502(b)(4). Thus, at a minimum, the specific boundary of the SCRA must be identified on a map that is approved by the Commission. The proposed project site is not within any mapped SCRA, whether in the City's LCP or based on any independent action by the Commission. The project site is not even identified as a "Scenic Overlook From Public Lands" in figure COS-5 in the Conservation Open Space Element of the City's LCP, nor is it identified in figure-3 (View Analysis) in the Dana Point Specific Plan LCP. Therefore, the project is also not appealable to the Coastal Commission based on this claim.

C. CONCLUSION

Thus, the City's action on Coastal Development Permit 05-25 is not appealable to the Commission pursuant to Section 9.75.010 of the City of Dana Point Zoning Code or Section 30603(a)(2) or (3) of the Coastal Act. The Commission is aware of no evidence to support the appealability of the City's action under any other provision of the City's LCP or the Coastal Act either. Thus, the Commission agrees with and will not overturn the Executive Director's determination that the City's action is not appealable to the Commission.

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August 30, 2006

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South Coast Region

AUG 31 2006

**CALIFORNIA
COASTAL COMMISSION**

VIA FACSIMILE

562 590 5084

California Coastal Commission
c/o South Coast District Office
Deborah Lee, Sr. Deputy Director
Teresa Henry, District Manager
200 OceanGate, 10th Floor
Long Beach, CA 90802-4416

COASTAL COMMISSION

EXHIBIT # 2
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Re: Appealability of Dana Point Issuance of Coastal Development Permit CDP05-25

Dear Commissioners,

This letter inquires into the appealability of a Dana Point City Council decision to issue a coastal development permit number CDP05-25. The city has at various times stated that the decision is, and is not, appealable to the Coastal Commission. We are enclosing two City of Dana Point Public Notices that state the decision is appealable, one stating the decision is not appealable and one not referring to appealability at all. All relate to the application for permit CDP05-25. A copy of this letter has been sent to interested parties and Dana Point city council members.

We believe the decision is appealable and the Coastal Commission should hear the appeal.

I. Applicable Legal Authorities Relating to Appealability.

The relevant section of the Public Resources code, section 30603 governs appeals taken after certification of local coastal programs. We do not know why Dana Point changed its mind after originally stating the matter was appealable to the Coastal Commission.

100 BAYVIEW CIRCLE, SOUTH TOWER, SUITE 330
NEWPORT BEACH, CA 92660-2984
TELEPHONE: 949-833-1088
FACSIMILE: 949-833-1058
WWW.WLF-LAW.COM

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We suggest two reasons why the matter is appealable. First, the development may be located within a "scenic coastal resource area." Section 30603(a)(3). Second, the development is on a bluff providing a panoramic 180 degree postcard-perfect view of the beach, harbor, shoreline and ocean, extending to the horizon. The development appears to be within "300 feet of the top of the seaward face of any coastal bluff." Section 30603(a)(2).

Dana Point ordinances also allow for appeals under the same circumstances provided for in section 30603 of the Coastal Act. Dana Point City Ordinance 9.69.090(b) provides for appeals to the Coastal Commission only for the types of development defined in Section 9.75.010 of the Zoning Code under "Appealable Development, Coastal". (Coastal Act/30603(a)).

Section 9.75.010 "Appealable Development, Coastal" defines such a appealable issuance of a development permit in language identical to Section 30603, including developments located in "sensitive local coastal areas, and those within 300 feet of the top of the seaward face of a coastal bluff.

II. The Proposed Development is located on a Coastal Bluff," subjecting it to Coastal Commission appealability.

Dana Point ordinance section 9.75.010 states that "within the Coastal Zone, coastal bluffs are: (1) those bluffs, the toe of which is now or was historically (generally within the last 200 years) subject to marine erosion; and (2) those bluffs, the toe of which is not now or was not historically subject to marine erosion, but the toe of which lies within an area otherwise identified as an Appealable Area. (Coastal Act/30501, 30620.6; 14 Cal. Code of Regulations/13577(h))."

The location of this project lies within a coastal bluff. Although roads such as Blue Lantern cut across the face of the slope, rendering a terraced effect, the fundamental landform from the location of the proposed project slopes consistently to the Dana Point harbor area and nearby beaches north of the harbor. It comprises a single bluff area, although it has been developed. The bases of these bluffs shows obvious marine erosion caused by blowing surf and sand. The bluff top at Chula Vista street therefore is a "coastal bluff." It also appears that, in places, the bases of the bluffs end "within 300 feet of the inland extent of any beach." This project is accordingly appealable under Public Resources Code section 30603(a)(2).

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III. The Project Lies within a "Sensitive Local Coastal Area." Subject to Coastal Commission Appealability.

Second, this project lies within a "sensitive local coastal area" defined by Dana Point ordinances. Dana Point defines "sensitive coastal local coastal areas" as:

- (a) Special marine and land habitat areas, wetlands, lagoons, and estuaries as mapped generally in the Conservation/Open Space Element Figure COS-1.
- (b) Areas possessing significant recreational value.
- (c) Highly scenic areas.
- (d) Archaeological sites designated by the State Historic Preservation Officer.
- (e) Special communities or neighborhoods which are significant visitor destination areas.
- (f) Areas that provide existing coastal recreational opportunities for low-and moderate-income persons. Dana Point City Ordinance 9.75.010 "Sensitive Coastal Areas."

The background of this matter demonstrates why this project is located in a sensitive coastal area. The central issue raised by the Dana Point Vista Preservation Organization (Dana Point Vista) was the loss of a highly scenic area located all along and at the viewpoint at the end of Chula Vista Avenue in Dana Point.

There are protected spectacular, panoramic ocean, harbor, headlands and coastline views at the Chula Vista Avenue viewpoint. These views exist not only at the site itself, but extend nearly half a mile down this public street allowing these scenic vistas to be enjoyed by neighborhood residents, those broader neighborhood members who walk the street to enjoy these views and the citizens of Dana Point.

We have attached photographs of these views as exhibits to this letter, but, just as a photograph is worth 1,000 words, a visit to the location is worth 1,000 photographs. Walking down Chula Vista shows open, ocean, harbor, headlands and coastline views framed by the trees lining both sides of the street. These are the glorious views enjoyed by children, visitors, tourists and residents of the neighborhood. As you approach the viewpoint, the views get even better, opening out onto a 180-degree view of the harbor, cove, canyons, headlands and, at night, city lights, viewing the coastline as it fades south toward San Diego, into "infinity."

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Some scenic views are so spectacular that they are suitably placed on postcards and in Chamber of Commerce brochures. This Chula Vista view is one such series of "postcard perfect" views. Examination of the photographs clearly establish that this project is proposed in a "highly scenic area."

Furthermore, the scenic view creates a local neighborhood that is well suited for family activities such as walking and viewing the ocean. The incredible scenic views make this "Lantern District" neighborhood a visitor destination area. The location of the views, the views' promotion of pedestrian traffic creates an area and environment of significant recreational value to this neighborhood and also to those visiting the neighborhood specifically to partake of the scenic public views from the vista points along Chula Vista.

The proposed project lies in (and will obstruct) a highly scenic area, the area possesses significant recreational opportunities and the historic neighborhood itself, and its accompanying views, is a visitor destination worthy of protection. The spectacular viewpoint and the project meet several criteria necessary to be a "sensitive local coastal area" making this matter appealable to the Coastal Commission.

III. Conclusion.

The city of Dana Point's confusion regarding appealability is perhaps understandable. Our client has received conflicting opinions in the Hearing Notices, as well in communications from the city staff. There are at least two solid grounds for Appealability of this matter by the Coastal Commission. Please make an appealability determination as soon as possible so that we can advise our clients regarding the proper course of action. In light of the applicable statutes, the Commission should find that the City of Dana Point's decision to grant Coastal Development Permit CDP05-25 is appealable to the Coastal Commission.

Very truly yours,

WLF | The Williams Law Firm, PC


Joseph R. McFaul

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COASTAL COMMISSION

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JRM/jm

Enclosures as noted

cc: Lara Anderson, Mayor
Russ Chilton, City Council Member
Wayne Rayfield, City Council Member
James V. Lacy, City Council Member
Diane L. Harkey, City Council Member

A. Patrick Muñoz, Esq., City of Dana Point City Attorney
M. Stephen Coontz, Esq., Attorney for Project Developer

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bcc: Clients

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Jun 29 06 11:06p S&K Howell

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COASTAL COMMISSION

**PUBLIC NOTICE
CITY OF DANA POINT
NOTICE OF PUBLIC MEETING**

EXHIBIT # 2
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NOTICE IS HEREBY GIVEN THAT a public meeting will be held by the City Council of the City of Dana Point to consider the following:

APPEAL OF THE APPROVAL BY THE PLANNING COMMISSION OF VARIANCE V05-08, COASTAL DEVELOPMENT PERMIT CDP05-25, SITE DEVELOPMENT PERMIT SDP05-65M: An appeal to the City Council to overturn the Planning Commission's approval for the construction of a new 4,485 square foot, single-family dwelling, 442 square foot attached garage and associated improvements. The proposed structure would be three levels, 31-feet in height, including a garage at the upper, street level and two habitable levels below. The proposed project requires approval of a Variance to allow the structure to exceed the City's building height requirements of 26-feet. Retaining walls, up to 6-feet in height, are proposed at the front of the property and along a portion of the southern property line. Construction of the retaining walls requires approval of a Site Development Permit. Because the property is located in the Coastal Overlay Zone, a Coastal Development Permit is also required.

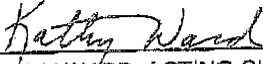
Project Number: Variance V05-08, Coastal Development Permit CDP05-25, Site Development Permit SDP05-65(M)
Project Location: 34142 Chula Vista (APN 682-245-14)
Applicant/Owner: Lynn Muir/Usha Gopal
Environmental: Categorically Exempt (Class 3 & 5 - Sections 15303 & 15305)

Hearing Date and Time: July 12, 2006, 6:00 p.m. (or as soon thereafter as possible)

Hearing Location: 33282 Golden Lantern, Suite 210, Dana Point, California 92629

Those desiring to be heard in favor of or in opposition to this item will be given an opportunity to do so during such meeting or by writing to the City Council at 33282 Street of the Golden Lantern, Suite 203, Dana Point, California 92629-1805, Attention: City Clerk. Please reference the item title and date of meeting in any correspondence. For further information, you may contact the City Clerk at (949) 248-3505.

Note: Any petition for judicial review of a decision of the Dana Point City Council is controlled by the statute of limitations provisions set forth in Sections 2.50.010 and 2.50.020 of the Dana Point Municipal Code and Sections 1094.5 and 1094.6 of the California Code of Civil Procedure. Any action or proceeding to attack, review, set aside, or void any decision of the Dana Point City Council is controlled by Section 2.50.010 and Section 2.50.020 of the Dana Point Municipal Code. Any such action or proceeding seeking judicial review of, which attacks or seeks to set aside or void, any decision of the Dana Point City Council, shall be limited to those issues raised at the meeting as provided in Chapter 2.50 of the Dana Point Municipal Code. Copies of the procedures for the conduct of City Council public meetings are available from the City Clerk.


KATHY WARD, ACTING CITY CLERK
City of Dana Point

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Third Notice
PUBLIC NOTICE

(Hearing) **COASTAL COMMISSION**

**CITY OF DANA POINT
NOTICE OF PUBLIC HEARING**

EXHIBIT # 2

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NOTICE IS HEREBY GIVEN THAT a public hearing will be held by the Planning Commission of the City of Dana Point to consider the following:

Variance V05-08, Site Development Permit SDP05-65M and Coastal Development Permit CDP05-25 at 34142 Chula Vista: A request to authorize the construction of a new 4,485 square foot, single-family dwelling, 442 square foot attached garage and associated improvements. The proposed structure would be three levels, 31-feet in height, including a garage at the upper, street level and two habitable levels below. The proposed project requires approval of a Variance to allow the structure to exceed the City's building height requirements of 26-feet. Retaining walls, up to 6-feet in height, are proposed at the front of the property and along a portion of the southern property line. Construction of the retaining walls requires approval of a Site Development Permit. Because the property is located in the Coastal Overlay Zone a Coastal Development Permit is also required.

Project Number: Variance V05-08/Site Development Permit SDP05-65M/
Coastal Development Permit CDP05-25
Project Location: 34142 Chula Vista (APN 682-245-14)
Applicant/Owner: Lynn Muir/Usha Gopal
Environmental: Categorically Exempt (Class 3 & 5 - Sections 15303 & 15305)
Hearing Date: April 5, 2006
Hearing Time: 7:00 p.m. (or as soon thereafter as possible)
Hearing Location: 33282 Golden Lantern, Suite 210, Dana Point, California 92629

All persons either favoring or opposing this proposal are invited to present their views on the above referenced project to the Commission at this hearing.

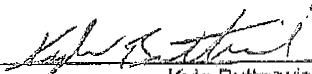
Note: This project may be appealed to the City Council. If you challenge the action taken on this proposal in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Dana Point prior to the public hearing.

This project lies within the Coastal Overlay District, but is not in the Appeal Jurisdiction of the City's Local Coastal Program and may not be appealed to the California Coastal Commission.

For further information, please contact Brenda Chase, Senior Planner for the City of Dana Point, Community Development Department, 33282 Golden Lantern, Suite 212, Dana Point, (949) 248-3568.

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss AFFIDAVIT OF POSTING
CITY OF DANA POINT)

I, Kyle Butterwick, Director, Community Development Department of the City of Dana Point, do hereby certify that on March 24, 2006, I caused the above notice to be posted in four (4) places in the City of Dana Point, to wit: City Hall, the Dana Point Post Office, the Capistrano Beach Post Office, and the Dana Point Library.



Kyle Butterwick, Director
Community Development Department

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PUBLIC NOTICE
CITY OF DANA POINT
NOTICE OF PUBLIC HEARING

Second Notice
(Ultimately Granted)
COASTAL COMMISSION

EXHIBIT # 2
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NOTICE IS HEREBY GIVEN THAT a public hearing will be held by the Planning Commission of the City of Dana Point to consider the following:

Variance V04-01, Site Development Permit SDP04-02M and Coastal Development Permit CDP05-26 at 34142 Chula Vista: A request to authorize the construction of a new 5,370 square foot, single-family dwelling and associated improvements. The proposed structure would be three levels, 32-feet, 9-inches in height, including a garage at the upper, street level and two habitable levels below. The proposed project requires approval of a Variance to allow the structure to exceed the City's building height requirements of 26-feet. Retaining walls, up to 6-feet in height, are proposed at the front of the property and along a portion of the southern property line. Construction of the retaining walls requires approval of a Site Development Permit. Because the property is located in the Coastal Overlay Zone a Coastal Development Permit is also required.

Project Number: Variance V06-08/Site Development Permit SDP05-65M/
Coastal Development Permit CDP05-25
Project Location: 34142 Chula Vista (APN 682-245-14)
Applicant/Owner: Lynn Muir/Usha Gopal
Environmental: Categorically Exempt (Class 3 & 5 - Sections 15303 & 15305)
Hearing Date: February 1, 2006
Hearing Time: 7:00 p.m. (or as soon thereafter as possible)
Hearing Location: 33282 Golden Lantern, Suite 210, Dana Point, California 92629

All persons either favoring or opposing this proposal are invited to present their views on the above referenced project to the Commission at this hearing.

Note: This project may be appealed to the City Council. If you challenge the action taken on this proposal in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Dana Point prior to the public hearing.

This project lies within the Coastal Overlay District and the Appeal Jurisdiction of the City's Local Coastal Program and may be appealed to the California Coastal Commission.

For further information, please contact Brenda Chase, Senior Planner for the City of Dana Point, Community Development Department, 33282 Golden Lantern, Suite 212, Dana Point, (949) 248-3568.

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss AFFIDAVIT OF POSTING
CITY OF DANA POINT)

I, Kyle Butterwick, Director, Community Development Department of the City of Dana Point, do hereby certify that on January 20, 2006, I caused the above notice to be posted in four (4) places in the City of Dana Point, to wit: City Hall, the Dana Point Post Office, the Capistrano Beach Post Office, and the Dana Point Library.


Kyle Butterwick, Director
Community Development Department

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PUBLIC NOTICE

First Notice
(ultimately confirmed
by developer)

**CITY OF DANA POINT
NOTICE OF PUBLIC HEARING**

COASTAL COMMISSION

NOTICE IS HEREBY GIVEN THAT a public hearing will be held by the Planning Commission of the City of Dana Point to consider the following:

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Variance V04-01/Site Development Permit SDP04-02M/ Coastal Development Permit CDP04-02M/ Chula Vista: A request to authorize the construction of a new 5,370 square foot, single-family residence at a 6,004 square foot, downward sloping lot. The proposed structure would be three stories, 32-feet, 9-inches in height, including a garage at the upper, street level and two habitable levels below. The proposed project requires approval of a Variance to allow the structure to exceed the City's height requirements by 6-feet, 9-inches. Due to the sloping conditions of the site, retaining walls up to 6-feet in height are proposed to step the front of the property and along a portion of the southern property line. Construction of the retaining walls requires approval of a Site Development Permit. Because the property is located in the Coastal Overlay Zone a Coastal Development Permit is also required.

Project Number: Variance V05-08/Site Development Permit SDP05-05M/
Coastal Development Permit CDP05-25
Project Location: 34142 Chula Vista (APN 682-245-14)
Applicant/Owner: Lynn Muir/Usha Gopal
Environmental: Categorically Exempt (Class 3 & 5 - Sections 15303 & 15305)
Hearing Date: December 7, 2005
Hearing Time: 7:00 p.m. (or as soon thereafter as possible)
Hearing Location: 33282 Golden Lantern, Suite 210, Dana Point, California 92629

All persons either favoring or opposing this proposal are invited to present their views on the above referenced project to the Commission at this hearing.

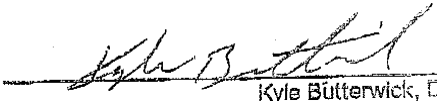
Note: This project may be appealed to the City Council. If you challenge the action taken on this proposal in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Dana Point prior to the public hearing.

This project lies within the Coastal Overlay District and the Appeal Jurisdiction of the City's Local Coastal Program and may be appealed to the California Coastal Commission.

For further information, please contact Brenda Chase, Associate Planner for the City of Dana Point, Community Development Department, 33282 Golden Lantern, Suite 212, Dana Point, (949) 248-3568.

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss AFFIDAVIT OF POSTING
CITY OF DANA POINT)

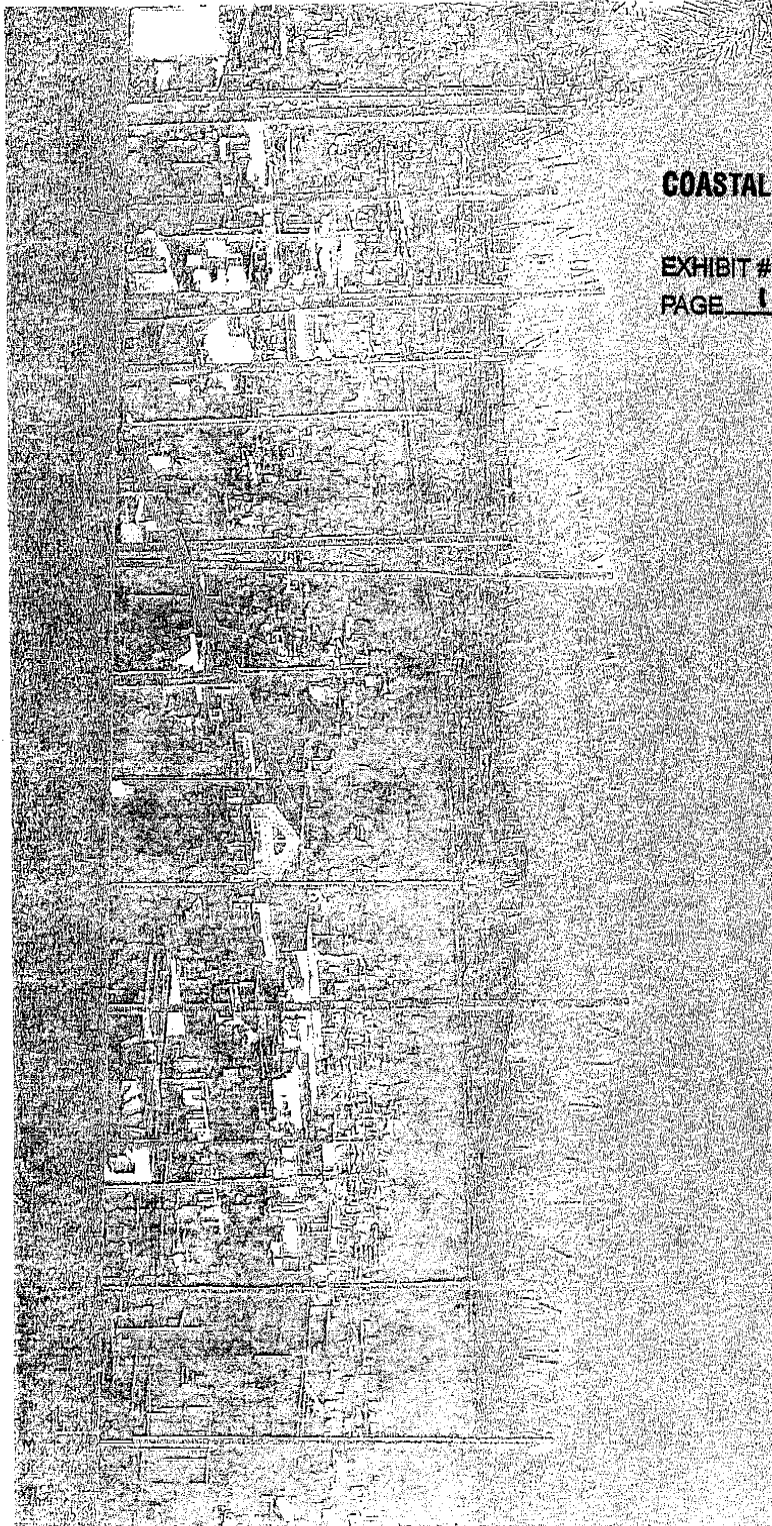
I, Kyle Butterwick, Director, Community Development Department of the City of Dana Point, do hereby certify that on November 23, 2005, I caused the above notice to be posted in four (4) places in the City of Dana Point, to wit: City Hall, the Dana Point Post Office, the Capistrano Beach Post Office, and the Dana Point Library.


Kyle Butterwick, Director
Community Development Department

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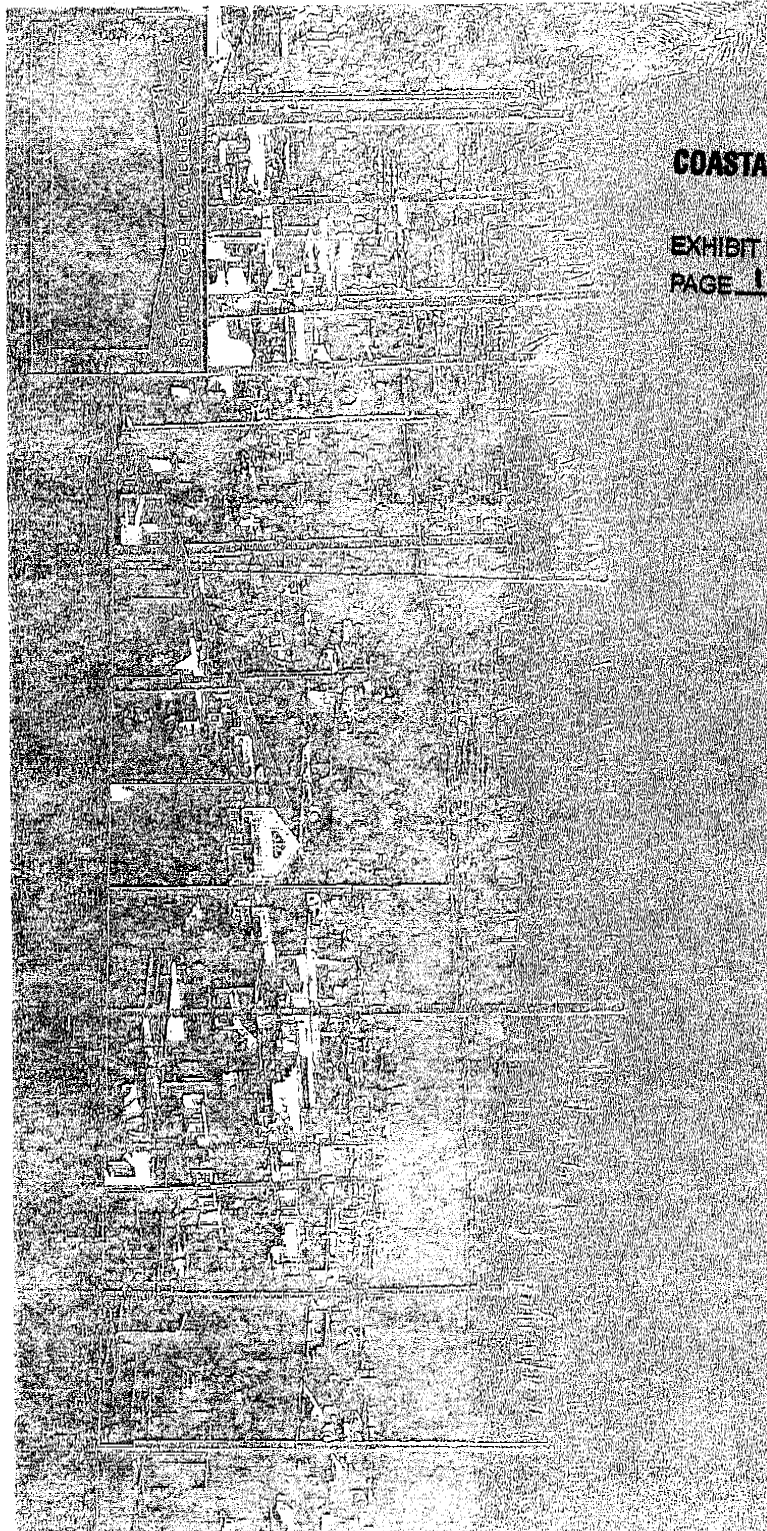
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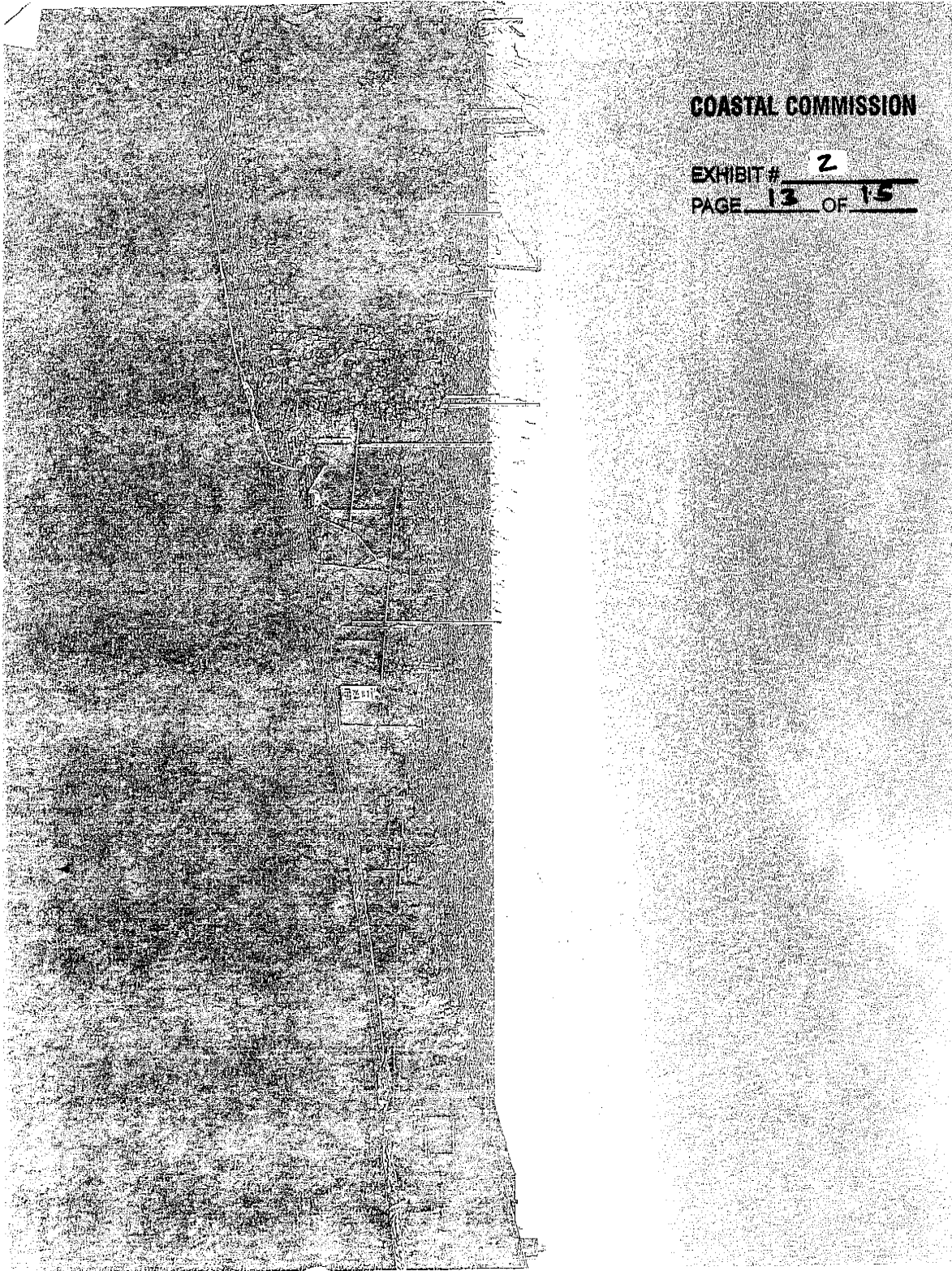
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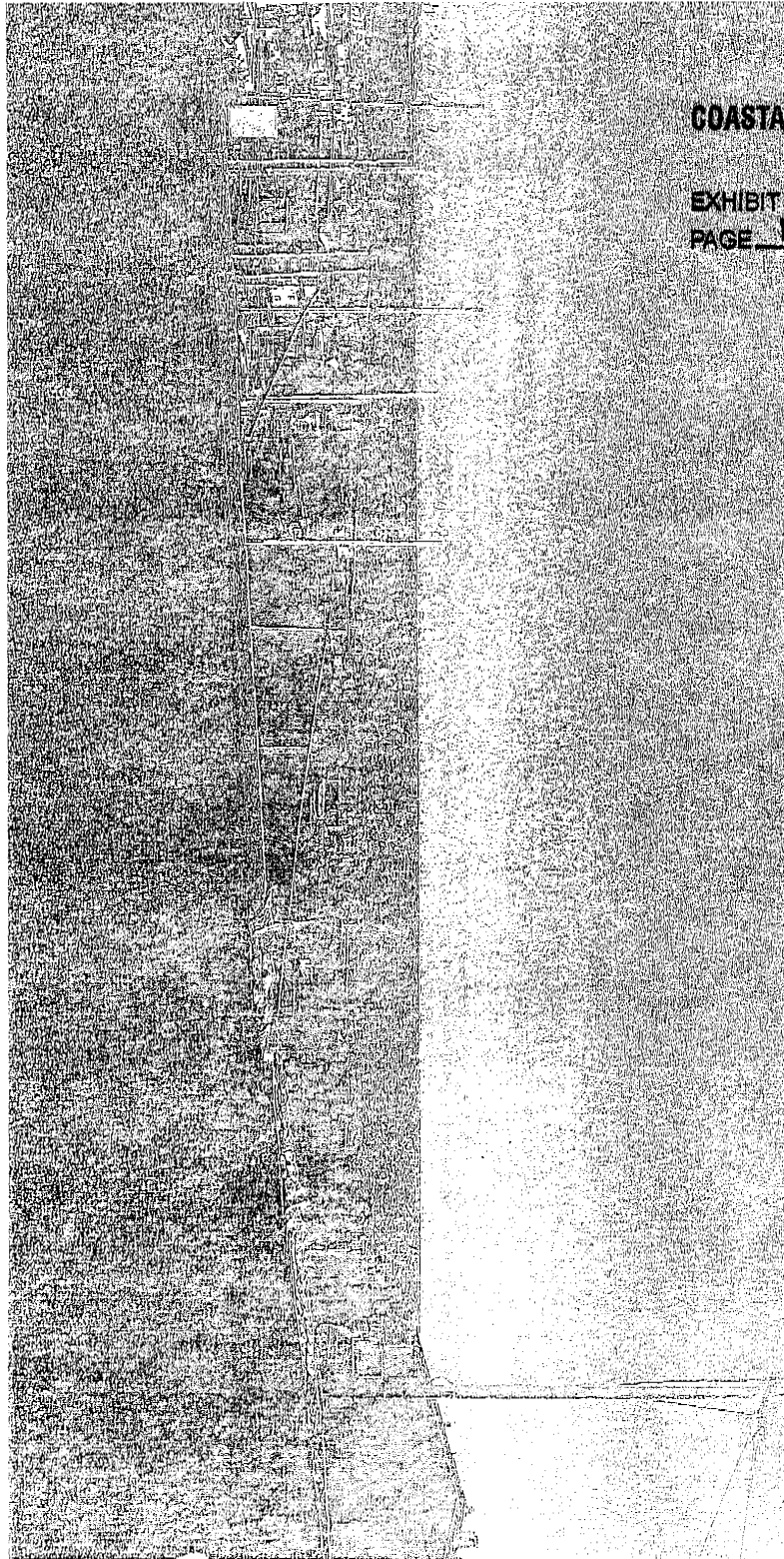
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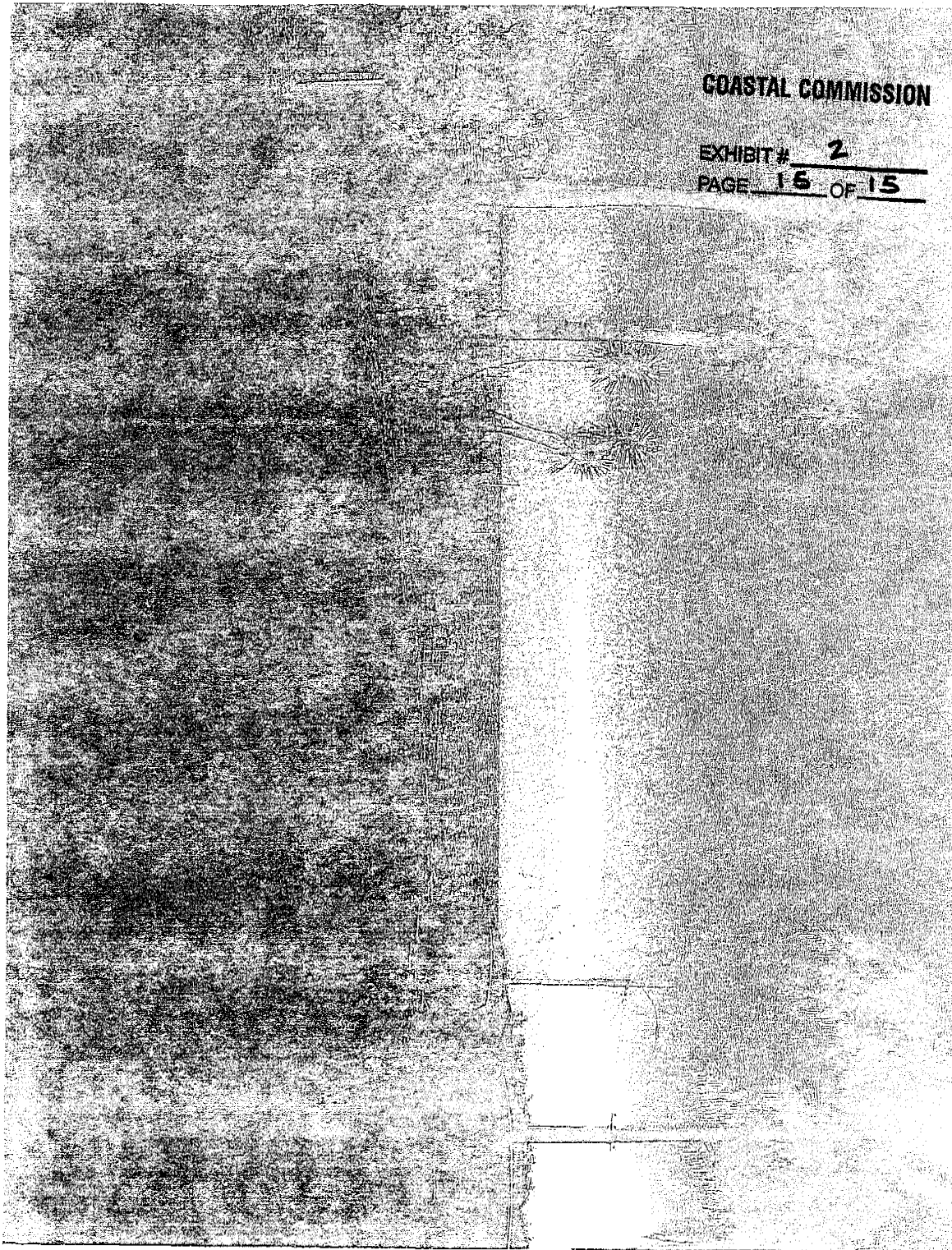
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CALIFORNIA COASTAL COMMISSION

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



September 5, 2006

The Williams Law Firm, PC
Attn: Joseph R. McFaul, Esq.
100 Bayview Circle, South Tower, Suite 330
Newport Beach, CA 92660-2984

COASTAL COMMISSION

EXHIBIT # 3
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RE: Coastal Development Permit CDP05-25
Lynn J. Muir; Applicant
34142 Chula Vista, Dana Point (Orange County); Location

Dear Mr. McFaul, Esq.,

On August 31, 2006, Coastal Commission staff received your letter inquiring into the appealability of a Dana Point City Council decision to issue Coastal Development Permit (herein "CDP") 05-25. CDP05-25 is for the construction of a new 4,485 square foot, 3-level single-family residence on a 6,004 square foot parcel at 34142 Chula Vista, Dana Point. According to the City of Dana Point (herein "City"), the proposed project is not appealable to the Coastal Commission. However, in your letter, you claim that it is appealable because: 1) the development is located on a coastal bluff, making it appealable to the Coastal Commission based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(2) of the Coastal Act; and 2) the development is located within a "sensitive local coastal area,"¹ making it appealable to the Coastal Commission based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(3) of the Coastal Act. As described more fully below, the Executive Director has reviewed your claims and has determined that the City's action on Coastal Development Permit 05-25 is not appealable to the Commission.

Please note that your request for an Executive Director determination regarding appealability of the City's action has not been filed in accordance with the procedures outlined in Section 9.69.050(d) of the City's Zoning Code /implementation plan. These procedures require that you file your objection to the City's appealability determination with the City, and the City must then make contact with the Commission and request a determination regarding appealability. Id. at § 9.69.050(d)(3)(B); see also Cal. Code Regs., tit. 14 (herein "14 CCR"), § 13569(b). In this case, you filed your objection directly with the Commission instead of through the City. Commission staff contacted the City relative to this issue. With the City's concurrence, although you haven't followed the procedures outlined in the City's Zoning Code, Commission staff are treating your request for a determination regarding appealability as if it were made by the City in accordance

¹ There is no definition of or appealability based on the phrase "sensitive local coastal area" in Chapter 9.75 of the City's Zoning Code nor in Section 30603(a) of the Coastal Act. Rather, the City Zoning Code and Coastal Act make reference to and define "Sensitive Coastal Resources Area." For purposes of this letter, we'll assume you intended to assert that the project is located within a Sensitive Coastal Resources Area.

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with the procedures described in the sections of the City's Zoning Code and the Commission's regulations listed in this paragraph.

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The 1st reason you claim that the project is appealable to the Coastal Commission is that, based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(2) of the Coastal Act, the development is located on a coastal bluff. The proposed project site is not appealable based on these two sections because the project site is not a coastal bluff (the coastal bluffs in this area are located several hundred feet seaward of the project site). After review by the Commission staff geologist, staff has determined that although the site could arguably be defined as a bluff, it is not a coastal bluff pursuant to Section 9.75.30 of the City of Dana Point Zoning Code and Section 30603(a)(2) of the Coastal Act. These sections state that coastal bluffs are defined as "...those bluffs, the toe of which is now or was historically (generally within the last 200 years) subject to marine erosion." The base of the subject bluff is at an elevation of approximately 180 feet above sea level, and clearly has not been subject to marine erosion in historic times. Therefore, the project is not appealable to the Coastal Commission based on your first claim.

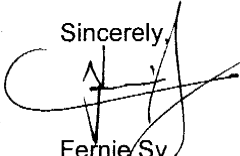
The 2nd reason you claim that the project is appealable to the Coastal Commission is that, based on Section 9.75.010 of the City of Dana Point Zoning Code and Section 30603(a)(3) of the Coastal Act, the development is located in a highly scenic "sensitive coastal resources area" and is thus appealable. Section 9.75.190 of the City's Zoning Code / implementation plan defines "sensitive coastal resources area" (herein 'SCRA') as, in part, "... an identifiable and geographically bounded land and water areas [sic] within the coastal zone of vital interest...", and includes "...highly scenic areas..." This definition comes verbatim from Coastal Act Section 30116. The Coastal Act also specifies that SCRA's are to be designated primarily by the Coastal Commission and the Legislature. See Cal. Pub. Res. Code §§ 30502 and 30502.5. Moreover, the designation must include a map of the designated area showing its precise location. *Id.* at § 30502(b)(4). Thus, at a minimum, the specific boundary of the SCRA must be identified on a map that is approved by the Commission. Based on our review of the certified Local Coastal Program (herein "LCP"), the proposed project site is not within any mapped SCRA. The project site is not even identified as a "Scenic Overlook From Public Lands" in figure COS-5 in the Conservation Open Space Element of the City's LCP, nor is it identified in figure-3 (View Analysis) in the Dana Point Specific Plan LCP. Therefore, the project is not appealable to the Coastal Commission based on your claims.

The Executive Director of the Commission has reviewed your claims regarding appealability and has determined that the proposed project is not appealable to the Coastal Commission. Please note that Section 9.69.050 of the City's Zoning Code /implementation plan provides that the Commission shall hold a hearing on a determination of appealability when "...the executive director's determination is not in accordance with the local government determination..." § 9.69.050(d)(3)(D). See also 14 CCR § 13569(d). In this case, since the Executive Director's ultimate determination is in accordance with the City's, there are no provisions for the Executive Director to schedule a hearing on the matter before the Coastal Commission. On the other hand, if you wish to make your viewpoint on this matter known to the Commission, itself you may correspond directly with Commissioners and/or make a presentation during the public comments period held (typically daily) during the Commission's regularly scheduled public hearings. The next

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two hearing are September 13-15, 2006 in Eureka, California and October 11-13, 2006 in Long Beach, California.

Sincerely,

Fernie Sy
Coastal Program Analyst II

COASTAL COMMISSION

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CC: Brenda Chase, City of Dana Point Senior Planner
Deborah Lee, California Coastal Commission Senior Deputy Director
Teresa Henry, California Coastal Commission, South Coast Area, District Manager
Karl Schwing, California Coastal Commission, South Coast Area, Orange County Supervisor

H:\fsy\Letters\Appealability(DP)

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LAW FIRM, PC.

~~COPY~~

September 11, 2006

RECEIVED
South Coast Region

SEP 11 2006

Via Hand Delivery

California Coastal Commission
c/o South Coast District Office
Deborah Lee, Sr. Deputy Director
Teresa Henry, District Manager
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

CALIFORNIA
COASTAL COMMISSION

Re: Appeal of City of Dana Point's Approval of Local Coastal Development Permit

Dear Commissioners:

This firm has the pleasure of representing a group of concerned residents of Dana Point known as the Dana Point Vista Preservation Organization ("Dana Point Vista"). This letter is an attachment to the preceding "Appeal from Coastal Permit Decision of Local Government" form. Dana Point Vista appeals from the Dana Point City Council's August 23, 2006 decision to approve the issuance of a Coastal Development Permit for the construction of a single-family residence.

This single-family residence is in reality a mega-mansion that not only changes the character of the surrounding neighborhood, but once constructed, will also obstruct public scenic coastal views of spectacular, panoramic ocean, harbor, headlands, coastline and blue water views that extend back from the viewpoint over half a mile down Chula Vista Street in Dana Point. This bluff viewpoint has been historically enjoyed by walkers, bikers, visitors and other neighborhood residents who can look over this bluff from the public road and sidewalk.

This appeal arises from the Dana Point City Council's approval of a developer's application for four permits. The permits are all required prior to construction of this project

COASTAL COMMISSION

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100 BAYVIEW CIRCLE, SOUTH TOWER, SUITE 330
NEWPORT BEACH, CA 92660-2984
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WWW.WLF-LAW.COM

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located at 34142 Chula Vista Avenue, Dana Point, California. The proposed project would obstruct public views overlooking the Dana Point coastline at this location and degrade the character of the neighborhood, and diminish the area's recreational draw. The developer applied for the following permits:

1. Proposed height variance;
2. Proposed Coastal Development Permit;
3. Proposed Site Development Permit; and,
4. Proposed California Environmental Quality Act action (either through issuance of a Categorical Exemption or a Negative Declaration).

Also, the developers were parties to the creation of three building lots from two. The developers subdivided the parcel without filing the required parcel map and failed to comply with the California Subdivision Map Act.

On August 23, 2006, the Dana Point City Council approved the variances and applications for this project, including the Coastal Development Permit, without changes. Dana Point Vista appeals the approval of the Coastal Development Permit to the Coastal Commission.

I. Introduction.

The City of Dana Point prides itself on charming neighborhoods and its stunning ocean views and considers these neighborhoods and views to be unique City assets, and rightly so. These views exist throughout the City in various neighborhoods. Indeed, some of these views are the protected spectacular, panoramic ocean views at the Chula Vista Avenue bluff viewpoint. These views exist not only at the site itself, but also extend nearly a half mile down this public street, allowing these scenic vistas to be enjoyed by neighborhood residents, those broader neighborhood members who walk the street to enjoy these views, and the citizens of Dana Point.

By law, the public's access to this ocean/coastline view must be preserved or enhanced. Any proposed degradation of the public view should be minimized and mitigated. The project as proposed would violate numerous laws and regulations, including the core principle of the Coastal Act, by taking away a public coastal resource and giving it to one homeowner who has feasible alternatives.



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Photographs of these views are attached as exhibits, but, just as a photograph is worth 1,000 words, a visit to the location is worth 1,000 photographs. Walking down Chula Vista Avenue for over a half mile shows expansive, open ocean views framed by the trees lining both sides of the street. These are the glorious blue ocean views enjoyed by children, visitors, tourists, exercisers, and residents of the neighborhood. As you approach the viewpoint overlooking the bluff, the resplendent views get even better, opening out onto 180-degree panoramas of the harbor, cove, canyons and headlands, which all highlight the ocean and coastline as it fades South toward San Diego into "infinity." The views do not stop when the sun goes down either; they extend into the night with sparkling city lights glowing in the distance.

Some scenic views are so spectacular that they are suitably placed on postcards and in Chamber of Commerce brochures. These Chula Vista Avenue views over the bluff are one such series of "postcard perfect" views. The Dana Point Vista Preservation Organization works to preserve these irreplaceable views. Please see Exhibit 1 to this appeal, depicting just one aspect of these picture-postcard views.

If the project is completed as proposed, then it will eliminate these outstanding public views. Exhibit 2 depicts the view obstruction as the project is proposed to be built. As fully discussed below, and in addition to other objections, the proposed project fails to comply with the California Coastal Act and regulations of the California Coastal Commission.

In addition to its adverse effect eliminating these stunning views, this proposed mega-mansion is grossly oversized compared to other houses in this neighborhood. In addition to eliminating the view overlooking this bluff in Dana Point, the developers are changing the character of the neighborhood by constructing a mega-mansion, which is more than double the size of the neighborhood's average home and 50% larger than the largest house on the street. The mega-mansion stretches from boundary line to boundary line on a hillside bluff. The proposed project required a size variance, which was granted by the City Council. This project has a Floor-to-Area Ratio of 0.75, compared with an average Floor-to-Area Ratio of only 0.36.

This proposed oversized project far exceeds the average recently permitted construction. This project calls for a 4,485 square foot, multi-story mega-mansion on a reduced and sloping lot. Its Floor-to-Area Ratio of 0.75 dwarfs most of the other homes in the Lantern District and is clearly out of character when compared with the rest of the neighborhood. The worst visual effect of this overbuilding, aside for the loss of the public ocean vista from the street above, will be at the base of the bluffs looking up the slope. The angle of view, when combined with the project's massive size, will dominate the skyline at this location.

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This proposed project also fails to comply with a number of goals and policies set out in the Dana Point General Plan and its Coastal Overlay Plan. These goals and policies are required elements of General Plan. Without these goals and policies, the Coastal Commission would not have approved the City of Dana Point's Local Coastal Plan.

This appeal tests whether the words in the Dana Point General Plan were merely a means of surreptitiously obtaining Coastal Commission approval of its Local Coastal Plan, or whether those words will be backed up by action.

II. The Developer failed to provide complete and accurate environmental impact information to the City Council.

The City Council had an incomplete and inaccurate record before it. The developer's application was replete with errors and omissions. The Dana Point Vista spokesperson met with members of the City's Community Development Department and asked why no action was taken to have the developer correct the Environmental Impact form mistakes and perform the required Visual Impact Study as required by 9.69050(b)(7)(F). The resident was told, "Those questions [on the Environmental Questionnaire] are all subjective." And, "We don't care what they put on that form. We're looking at the plans, the drawings." Those staff members' statements plus the fact they failed to compel the developer to address numerous errors and omissions, can lead one to conclude the Community Development Department may not respect the importance of the environmental impact forms which are designed to force developers to disclose potential environmental impacts. Also, the pattern of inaccuracies (all in the developer's "favor") could call into question the developer's credibility. In this case, the Planning Commission and City Council clearly made their decisions based on incomplete and inaccurate information.

Some of the application's errors and omissions are discussed in the following paragraphs.

The applicant incorrectly claimed there would be no significant change in scenic views or vistas from existing residential areas or roads, even though the proposed development would eliminate a long-standing panoramic public ocean view.

The applicant incorrectly claimed no significant "historical or scenic aspects" exist though a 50-year ocean vista would be eliminated on Dana Point's most historic residential street.

The applicant incorrectly claimed there would be no significant change the character of the area even though the elimination of the vista would dramatically degrade the area's character.

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The applicant incorrectly claimed the project is not part of a larger project, that there was no significant change in the scale of the area, and there was no change in the intensity of land use. In fact, the developer was party to multiple, adjacent land transactions and conducted a parcel split and parcel merger, resulting in the possible building of three large homes where there were two smaller homes. This would increase the number of homes on the three adjacent lots by 50%. On lot 190 alone, the intensity of land use would increase by more than three times (3x) if comparing square footage of old home (1,365*) to proposed home (4,485).

The underlying application wrongly stated that it does not affect public views.¹ The reason for such an omission is obvious: to have admitted the proposed development would adversely affect views risked not only outright rejection of the application, but that also would have delayed the application through the process. Had the developers correctly admitted that their proposed development adversely affected protected views, then the developers would have been required to prepare a View Impact Study, required by Dana Point City ordinances. Here, however, this shortcut deprived the Dana Point City Council of the full information it needed to consider this project since no such study was ever conducted.

The developers have now obtained from the City a Height Variance, a Coastal Development Permit and a Site Development Permit, all of which ignore the previous view available to the general public from this site. A single-family residence previously on the property was demolished in October 2005. The property developers now own at least two, if not three contiguous lots, potentially allowing for the construction of three, single-family residences.²

The previous residence (prior to being demolished) did not interfere with the protected public views from Chula Vista Avenue because its roof line was only three feet above street level. People standing on the street could readily see over the building to the fantastic harbor,

¹ Exhibit 3 is the developer's representation that the project would not affect scenic views.

² While the construction of single-family residences may be consistent with the zoning and the character of the surrounding neighborhood, the developers have failed to comply with the Subdivision Map Act. There is no inherent problem with the construction of the three residences on what was two parcels. In this case, however, the most convenient garage location for the construction of the first of the three residences will obstruct the public view. If only two residences were to be constructed, then it is a simple matter to locate the garages on two parcels so that public views would be preserved as they had been historically.

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white water and ocean panoramas. The current project as proposed, however, will eliminate with these dramatic public views. The proposed roof line of the main floor of the proposed residence extends not only well above street level, but also the views are obliterated by the proposed garage/entryway/elevator structures extending more than ten feet above street level. The siting of the garage/entryway/elevator structures in this configuration effectively blocks the Chula Vista Avenue protected public views.

The Dana Point Planning Commission, and later, the City Council, "found" that the project did not obstruct public views. As can be readily seen by comparing Exhibits 1 and 2, the views are most definitely affected. The City Council also "found" that the project conforms with the California Environmental Quality Act, is consistent with the Local Coastal Plan and Dana Point General Plan and "does not affect public views, as defined in the General Plan."³ Dana Point Vista contests the accuracy of these "findings."

III. Because the City Council Relied On Mistaken Information, Its Finding That Protected Public Views Would Not Be Obstructed Cannot Be Correct.

The proverbial 1,000-word picture demonstrates the current views and the view blockage if the proposed variance is granted. Exhibit 1 depicts the current public views. The current views encompass scenic vistas of the harbor, coastline, headlands, white water, the City of Dana Point, Doheny State Beach, extending to vistas of San Juan Capistrano and points of land from San Clemente south to San Diego, and broad panoramic ocean views as well. The storey poles depicted in Exhibit 2 show these views will be obscured if the project is built as proposed. The proposed project will block protected public views of the harbor, the breakwater, the cityscapes, the white water and almost all of the ocean. The views will be reduced to what a real estate agent euphemistically refers to as a "peek-a-boo" view, if even that.

Significantly, the developers' application did not contain photographs setting out any affected public views. The developers' application contained only: (a) views of nearby homes; and, (b) one view of the proposed development, in an attempt to show that the proposed development supposedly does not differ from other homes in the area. The developers' application omitted any photographs of the views that would be potentially lost.

The developers did not submit to the City any photographs showing the present views from Chula Vista Avenue and the extent of the view blockage caused by the proposed

³ Draft Resolution No. 06-04-05-XX Finding C1, C3 and D3.



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construction. The City Development Department apparently relied on this lack of documentation and apparently assumed (incorrectly) that there were no public view obstructions. The developers' lack of photographic evidence fails to establish that no views exist, however. It was simply not in the developers' interest to document the significant views that would be lost. Exhibit 4 is the group of developers' photographs submitted as part of the developers' application package, and demonstrates that the developers failed to include the views as shown in Exhibit 1, the actual views that will be lost if the proposed project now that the City has approved the project.

Exhibits 1 and 2 demonstrate that there are superb public views, some of the finest in Dana Point neighborhoods. The exhibits also establish that the views will be substantially or completely obstructed if the Coastal Commission allows the proposed project to be completed. The photographs depict the irreplaceable public views from Chula Vista Avenue and the obstruction of those views if the proposed project is approved.⁴

IV. The California Coastal Act Mandates Public View Protection, A Condition Not Satisfied By The City's Approval of Developers' Permits.

A. The Coastal Development Permit violates the policy and language of the Coastal Act.

The California legislature enacted the Coastal Act to protect the "natural and scenic resources" in the California coastal zone.⁵ The legislature also determined "[t]hat existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this State"⁶

⁴ Dana Point Vista's PowerPoint presentation and written materials depicting the view impacts from several angles submitted to the City of Dana Point Planning Commission at its April 5, 2006 hearing are attached as Exhibit 5. Also included is Dana Point Vista's Position Statement and Analysis of City's Position.

⁵ California Public Resources Code § 30001(b).

⁶ California Public Resources Code § 30001(d).



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California Public Resources Code section 30251 specifically protects public views:

The scenic and visual qualities of coastal areas **shall be** considered and protected as a resource of public importance. Permitted **development shall be sited and designed to protect views to and along the ocean and scenic coastal areas**, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting. (Emphasis added).

Despite the City of Dana Point Community Development Department's suggestion that this statute merely expresses a policy in general terms, the operative words are "Permitted development **shall be** sited and designed to protect views." (emphasis added). The permits for the project make no attempt to protect the scenic coastal views, as required by the law's **mandatory** language. The Community Development Department's interpretation of the statute inexplicably overlooked this mandatory language of section 30251.

The Supreme Court of California recognizes that one of the stated purposes of the Coastal Act is to protect public scenic views.⁷ Furthermore, the Coastal Act is to be construed "liberally" in order to achieve that stated purpose.⁸ Courts routinely approve Coastal Commission actions requiring developers in the coastal zone to provide or protect public scenic views.⁹ In fact, the

⁷ *Yost v. Thomas* (1984) 36 Cal.3d 561, 567.

⁸ *Sierra Club v. California Coastal Commission* (2005) 35 Cal.4th 839.

⁹ See, e.g., *Sierra Club, supra*; *Yost, supra*; *Landgate, Inc. v. California Coastal Commission*, (1998) 17 Cal.4th 1006; *La Costa Beach Homeowners' Assn. v. California Coastal Commission* (2002) 101 Cal. App.4th 804; *Paoli v. California Coastal Commission* (1986) 178 Cal.App.3d 544; and, *Bel Air Estates v. California Coastal Commission* (1981) 115 Cal.App.3d 936, 941.



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court in *Paoli* stated that view protection was “one of the principal objectives” of the Coastal Act, as set out on Public Resources Code section 30251.¹⁰

The City should not have simply dismissed the mandatory language of section 30251 as merely expressing “general policy.” Such a reading contradicted not only a substantial body of court decisions interpreting section 30251, but also the plain language of the statute itself.

B. The City Council Failed to Follow Its Own Ordinances that Likewise Protect Public Views.

City Ordinances also protect public views, and the City’s General Plan includes protection for the views from Chula Vista Avenue. The City’s Introduction to its General Plan states this point best:

With its combination of high coastal bluffs and coastal access where the San Juan and Salt creek basins meet the ocean, both inhabitants and visitors to Dana Point have the opportunity to enjoy the coastline by viewing it from visual vantage points along the bluffs or further inland, or by utilizing community beaches and the Harbor. Maintaining these different ways of experiencing the attractions offered by a beautiful coastline setting is fundamental in the establishment of an image of Dana Point’s future.¹¹

◀ This language shows the General Plan drafters had Chula Vista Avenue and the Lantern District¹² in mind when they chose to protect these views. The views in the Lantern District are specifically identified for protection in the Urban Design Element of the General Plan. That element points out, “The area’s close walking distance to the Town Center, view corridors to the ocean along streets, and strong neighborhood identity are assets.”¹³

¹⁰ *Paoli, supra*, 178 Cal.App.3d at 554.

¹¹ Dana Point General Plan, Introduction, pp. 2-3.

¹² This project is located in Dana Point’s Lantern District.

¹³ Dana Point General Plan, Urban Design Element, p. 70.



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Dana Point is required to have a Local Coastal Program approved by the Coastal Commission. It meets this requirement by specific elements in the General Plan and specific Ordinances set out at 9.75 of its Zoning Code. For example:

9.05.170 Coastal Views from Public Areas.

To protect the coastal scenic overlooks from public lands identified in the General Plan Urban Design and Conservation/Open Space Elements, a detailed view impact study which includes recommendations to avoid impacts to coastal views from public lands **shall be** prepared and incorporated into projects where the proposed development impacts such views. (Added by Ord. 93-16, 11/23/93). (Emphasis added).

Here, however, no such View Impact Study was performed. This failure fatally dooms the City's approval of the permits for the proposed project.

A View Impact Study was **required** to be part of the application package. The City agreed that the proposed project **requires** a Coastal Development Permit. The applicant for the permit **should have** prepared the View Impact Study, **but did not**:

[f]or proposed development which would result in significant adverse impacts to public views, a visual impact study prepared pursuant to the requirements of the Urban Design Element of the General Plan.¹⁴

All parties concede that the required view impact study was not performed. In addition to this omission, the proposed project failed to comply with the Ordinance because it did not offer "plans to mitigate adverse impacts, plans to monitor the mitigation, and an alternatives analysis."¹⁵

The requirement for a view impact study was included in the General Plan so that the City could properly exercise the authority delegated by the Coastal Commission after a Local Coastal

¹⁴ Dana Point Municipal Ordinance 9.69.050 (b) (7)(F) and (H).

¹⁵ Dana Point Municipal Ordinance 9.69.050 (b) (7).



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Plan was approved. The view impact study implements the policy of California Public Resources Code section 30251 at the local level--but only if the city ordinances are actually followed.

C. Dana Point's General Plan Also Protects Public Views And Specifically Protects The Chula Vista Avenue Views, Likewise Ignored By The Developers

The City's General Plan incorporates several important requirements of the California Coastal Act. These requirements are set out in various elements of the General Plan. Policy 4.6 of the land Use Element states that it is the policy of the City of Dana Point to ensure land uses within designated and proposed scenic corridors are compatible with scenic enhancement and preservation. This goal specifically references California Public Resources Code section 30251 regarding public views, quoted above.

The City's General Plan Urban Design Element is even more specific. Urban Design Element Policy 1.4 cannot be more plain:

Preserve public views from streets and public places. (Emphasis added).

Policy 4.5 is similar:

Protect and enhance existing public views to the ocean through open space designations and innovative design techniques. (Emphasis added).

The Dana Point Design Guidelines are quite specific about requirements for a view analysis. Section IV.B. entitled "Scenic Highways and Public View Corridors," states that the primary concern of that Section is the protection of ocean and coastal views from public areas, rather than coastal views from private residences.¹⁶ If a proposed project has "the potential to impact" public views of the coastline, ocean or inland mountains, then the potential impact must be carefully documented. Unfortunately, no such documentation exists here.

¹⁶ Dana Point Design Guidelines, p. 50. Excerpts from the Introduction and Section IV.B. are attached to this letter as Exhibit 6.



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In order to provide that documentation, the developers were first required to prepare a series of photographs to record the existing public views. They did not. These photographs should be taken from public viewpoints within 500 feet of the site. No such photographs were submitted. Next, the developers must prepare sketches or other acceptable drawings that illustrate the changes to the views that would result from the project's construction. None were submitted. Side-by-side or other comparisons of the "before" and "after" views must be prepared. No comparisons were made. A written summary of the view impacts must then be prepared. No summary was prepared.

The Design Guidelines state that when public views are affected, careful site planning, architecture and landscape design should be used to minimize interference with views. Variances may be required to achieve this goal. Variances are designed to enhance views, not eliminate them, as is the case here. The City Design Guidelines are consistent with State law, the General Plan and City Ordinances. It is the application of these guidelines to the proposed development that misses the mark. As just one of numerous feasible alternatives proposed by Dana Point Vista (but ignored by the City and the developer), relocating the garage from the top of the residence to the bottom (the lot extends from one street, Chula Vista, to another, Blue Lantern). By relocating the garage, the project could have easily accommodated the previously (and currently) existing views from the bluff. The project should comply with the Design Guidelines and relocate the garage to Blue Lantern, or elsewhere on the lot, to preserve the Chula Vista Avenue views.

In response to the admitted failure to prepare the statutorily required view impact studies, the Dana Point Community Development Department made a confusing argument. Although City Ordinances require view impact studies on all projects that have the potential to impact public views, the Community Development Department impliedly suggested that view impact studies are required only on projects impacting those specific protected views on General Plan Figure COS-5, which generally describes viewsheds in the City. This suggestion flies in the face of the language set out above for view impact studies throughout the City. That language does not reference Figure COS-5 at all.

The Community Development Department suggested that Dana Point Vista's analysis created a false, slippery slope, turning every public view into a protected view. That suggestion misstated Dana Point Vista's position and wrongly attempted to shift the burden to Dana Point



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Vista. The burden to meet Dana Point's Ordinances belongs to the developers, not Dana Point Vista.¹⁷

The Department next attempted to address the language of California Public Resources Code section 30251 and the language in various elements of the City's General Plan protecting public views, but failed. The Department wrongly claimed that only those public views specifically identified on General Plan Figure COS-5 are protectable.¹⁸ While Dana Point Vista did not argue that all public views are protectable, the views from Chula Vista Avenue are identified on General Plan Figure COS-5, and thus fall within the Department's criteria for protection.

Even if the Chula Vista Avenue views did not specifically appear on General Plan Figure COS-5, the Chula Vista Avenue views are unique views of the harbor, the ocean, white water, headlands and surrounding coastline and bluffs that are every bit as scenic as any of the views identified in Figure COS-5. Numerous case authorities, California Public Resources Code section 30251 and Dana Point General Plan elements and Ordinances all protect "scenic" and ocean views. The Chula Vista Avenue views are just such scenic or ocean views. They are postcard-perfect. These views are exactly the type of view that are protected. On the other hand, courts recognize that views of flat urban neighborhoods, for example, are admittedly not protectable.¹⁹

Figure COS-5 was prepared in 1991 and has never been updated. The document does not claim to be an exclusive list of scenic views, or even claim exclusivity for those views that existed in 1991. It is instead a depiction of general locations where views are likely to be found, and the views from Chula Vista Avenue are one of several locations depicted in the Figure. Even the language of the Exhibit notes that it is not an exclusive list of public views and it includes streets like Chula Vista Avenue where it states on the face of the map, "The community has many local streets with excellent views and scenic opportunities."

Chula Vista Avenue is one such local street. The City treated COS-5 as the exclusive list of views within the scope of Public Resources Code section 30251. Any claim that Figure COS-

¹⁷ Dana Point Vista's View Corridor depictions are attached as Exhibit 7.

¹⁸ COS-5 is attached to this letter as Exhibit 8.

¹⁹ *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 587.

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5 is merely an exclusive list of scenic views guts the meaning of the sentence on the map as well as the meaning of the plain language in the California Public Resources Code, Dana Point Ordinances and various sections of the City's General Plan. Indeed, courts have rejected such categorical exemptions that do not comply with the law.²⁰

If Figure COS-5 was intended²¹ to be such an exclusive list of protected public views, then such a list would have been referenced in City Ordinances and in the General Plan sections discussing those views. No such list appears in any City Ordinance. Furthermore, the map would have been rendered to a larger scale so that the specific scenic view areas could be delineated. As it exists, however, the scale is too small to determine whether any particular location is among the allegedly exclusively-protected views.

On the other hand, if it is intended merely to depict typical general locations of scenic views, then the scale is appropriate and the language on the map also makes sense. Figure COS-5 is not referenced as an exclusive list of protected views in any General Plan Element or City Ordinance discussing public views. It makes sense only as a representation of likely locations where protectable public views may be found. Chula Vista Avenue is one such location, and specifically appears on the map with protected views from South of Chula Vista Avenue, directly along the path of the existing views that are affected by the developer's proposed project.

"Public view" is defined in City ordinances as any "publicly accessible location on dedicated or publicly owned property, including but not limited to roadways, parks, and cultural or recreational facilities, which affords a view of the ocean, a coastal lagoon, a canyon or hillside

²⁰ *Salmon Protection and Watershed Network v. County of Marin* (2005) 125 Cal.App.4th 1098, 1103 (City's categorical exemption of residential projects from EIRs held incompatible with city's own policy statement in its general plan and with CEQA requirements).

²¹ Figure COS-5 was originally included as an exhibit to the City of Dana Point "Conservation / Open Space Technical Report" prepared by Cotton / Beland / Associates, Inc., 1028 North Lake Ave., Suite 107 Pasadena, CA. The Cotton / Beland report Figure COTR-7 dated April 1, 1991, appears to be nearly identical to COS-5 dated July 9, 1991, and was apparently copied from it, without this subcontractor's permission. Significantly, COS-5 contains the "local streets" language, while COTR-7 does not. Figure COTR-7 of the Technical Report is attached as Exhibit 9.



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area or any other open space area identified in an adopted community plan.²² The view from Chula Vista Avenue meets the definitions of “public view” and “significant public views” set out in the City of Dana Point Ordinances.

D. The City Council’s Approval of the Project Violated State Law and Local Ordinances.

The Coastal Commission requires that public views be taken into account in approving projects within the Coastal Zone, such as this one. In *La Costa Beach Homeowners Association*,²³ the Coastal Commission correctly refused to issue permits for construction of three beachfront homes that impeded coastal views from Pacific Coast Highway in Malibu until the developer agreed to mitigate the loss of views at that site by dedicating to public use a nearby, vacant beachfront lot that provided both coastal views and public access.²⁴ The court upheld the Commission, and ruled that California Public Resources Code section 30251 requires the Coastal Commission to consider view degradation in its approval process, but allowed the developer to mitigate this degradation through offsite dedications of view properties that provided public viewing access. The City of Dana Point, in its own exercise of authority delegated by the Coastal Commission under the Local Coastal Plan, is bound by these same requirements in its own approval process, but in approving these permits, ignored that delegation of authority.

The Coastal Commission has the power to prohibit development altogether if the development affects any of the scenic and visual qualities described in California Public Resources Code section 30251.²⁵ The City of Dana Point’s Community Development Department incorrectly asserted that California Public Resources Code section 30251 is a general statement of policy. It is not. It requires that the regulatory agency to consider *and protect* the public views and visual resources. Development *shall be* sited to protect views. The statute is **mandatory, not discretionary**.

²² City Ordinance 9.75.160. See also City Ordinance 9.75.190 “S” Definitions defining “significant public views” in nearly identical terms.

²³ (2002) 101 Cal.App.4th 804.

²⁴ *Id.*, at 818.

²⁵ *Bel Air Estates v. California Coastal Commission* (1981) 115 Cal.App.3d 936, 941.



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The City of Dana Point Planning Commission failed initially in not requiring the developers to prepare the View Impact Study set out in City Ordinance 9.05.170, described above. There are no questions that there are panoramic ocean views from Chula Vista Avenue that start in front of the lot at 34142 Chula Vista Avenue and extend one-half mile up the Avenue.

To suggest otherwise denies the reality of the photographs attached to this letter as exhibits. If, for the sake of argument only, there is only "the potential" for impaired public views, then the Dana Point Design Guidelines require that a View Impact Study be completed. The views depicted in the attached exhibits are much more than "potential." They are real, dramatic and irreplaceable. The City Council should have required the View Impact Study mandated by City Ordinance, and the Coastal Commission should overturn these approvals based on this failure.

The View Impact Study must also address plans to mitigate adverse impacts, plans to monitor the mitigation, and an alternative's analysis. The City's Planning Commission's conclusion that the project "does not affect public views" was plainly wrong. The project does affect public views. The City Council should have, but did not, require the developer to prepare View Impact Study and likewise require that potential alternatives and mitigation measures be included in the Study, as mandated by law. By not requiring the developer to prepare a View Impact Study, the City failed to comply with the California Coastal Act, the California Environmental Quality Act or even its own Ordinances and Regulations.

E. The City Applied a proposed Coastal Zone Ordinance not yet Approved by the Coastal Commission.

The City recently passed an ordinance that would increase the allowable building height on sloped lots in the Coastal Zone (LCPA06-02) by nearly 20%. However, that LCP amendment has not yet gone before the Coastal Commission for review or approval. There is significant indication (in staff reports, emails, and extensive discussion at Planning Commission and City Council public hearings) that the City is evaluating this Chula Vistas Avenue Coastal Zone development based in part on an ordinance that has not yet, and may never be, approved by the Coastal Commission. It appears the City Council has, in this instance, "jumped the gun" on the Coastal Commission's authority.

V. Recent Similar Coastal Commission Case.



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Recently the Coastal Commission denied an application for a permit at a property located in Venice, California.²⁶ Dana Point Vista recognizes that each property is unique. In that case the proposed project called for the construction of a three story house in a mostly one story neighborhood. Nevertheless, the principles set out in the Coastal Commission's decision appear to apply equally to this case. There are striking similarities between this denied Venice project and the development proposed for 34142 Chula Vista:

- Both involve single family residences located inland, not on the beach.
- Both deal with an historic, walking street. The Venice findings note the Coastal Commission's consistent application of standards "... to preserve the special character of the community and its historic walk streets."
- Both deal with "character" (the Venice project was found to be "... incompatible with the character of the surrounding area ..." and "... detrimental to the character of the neighborhood."
- Both deal with requirements to protect "special neighborhoods."
- Both deal with setting precedent. The Commission findings in its Venice matter noted: "The proposed 33-foot high, 3,900 square foot, single-family residence, because its height and mass, would be detrimental to the character of the neighborhood and would set a bad precedent for future development as it would certainly be followed by similarly-sized development proposals." The Dana Point Vista community group is similarly concerned about setting precedent that might apply to the two vacant lots to the southwest of the subject property.
- Both have significant community opposition.
- Both deal with the California Environmental Quality Act (CEQA). The Commission findings note: "Feasible alternatives exist to the applicant's proposed project. Therefore, the Commission finds that the proposed project is not consistent with CEQA" Note that the Commission applied CEQA guidelines to this project, even though it was a single-family residence. The Dana Point City Attorney's opinion that the 34142 Chula Vista project is CEQA exempt appears to be in conflict with the Coastal Commission's practice.

²⁶

Application 5-05-414, enclosed as Exhibit 10.



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VI. The City Council Ignored Its General Plan Protections for Neighborhood Character, History Recreation and Appearance.

A. The Proposed Mega-Mansion Destroys The Character Of The Neighborhood

In addition to its adverse effect on these stunning views, this proposed mega-mansion is grossly oversized compared to other houses in this neighborhood. The proposed project required a size variance, which was granted by the City Council. The proposed development is a 4,485 square foot home on a 6,004 square foot lot. The analysis of the size of the proposed structure in relation to the lot size is referred to as the Floor-to-Area Ratio. This project has a Floor-to-Area Ratio of 0.75. The City's own reports document that typical houses in this Lantern District neighborhood have an average Floor-to-Area Ratio of only 0.36. Indeed, the newest approved structure, located at 34182 Chula Vista has a floor area ratio of only 0.35, consistent with the neighborhood. The Lantern District is an older district so new home construction and remodeling has resulted in an increase of the average floor-to-area ratio. The average project approved for construction in the lantern District in the last two years was for a 3,000 square foot home with a Floor Area Ratio of 0.58.

This proposed oversized project far exceeds the average recently permitted construction. This project calls for a 4,485 square foot multi-story house on a reduced and sloping lot that runs from street to street. Its Floor-to-Area Ratio of 0.75 dwarfs the other homes in the Lantern District and is clearly out of character when compared with the rest of the neighborhood. The worst visual affect of this overbuilding will be at the base of the bluffs looking up the slope. The angle of view, combined with the mega-mansion's massive size will dominate the skyline at this location, and will likely be visible from the beaches, harbor and ocean due to its mass.

The panoramic scenic vista is the most important feature contributing to the unique character of this neighborhood. The Dana Point Strategic Plan requires the City to: "[p]rotect the unique character and eclectic architecture of residential neighborhoods." The General Plan observes that it is important to "[p]reserve the individual positive character and identity of the City's communities." City Ordinance 9.69.070(f). That section adds: "[t]hat the proposed development will be visually compatible with the character of surrounding areas"

B. History and Heritage.

Chula Vista Avenue is Dana Point's most historic residential street. It was one of the first streets developed in the City (1920's) and has more Registered Historic and Mills Act contracted homes than any other street. It is a very popular "historic walk" street. The Dana



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Point Strategic Plan requires the city "[t]o preserve the heritage and historical value of the community." The General Plan also has an explicit goal to "[e]ncourage the preservation of significant historical or culturally significant buildings, sites or features within the community." The scenic vista is an important historical feature of this street that will be lost when this megamansion is constructed and blocks the stunning views.

C. The Recreational Aspects of the Scenic Vista.

The vista is a destination point for many walkers, joggers and bikers. Regardless of the fact the vista is viewed from a street rather than a park, this public access point to the ocean view is protected as a scenic resource located in an adjacent recreation area described in City Ordinance 9.69.070(d): "That the proposed development will be sited and designed to prevent adverse impacts to . . . scenic resources located in adjacent parks and recreation areas, and will provide adequate buffer areas to protect such resources." Also, the General Plan requires the City ". . . to the maximum extent feasible, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses. (Coastal Act/30251)"

D. Appearance, Beauty, and Aesthetics.

The scenic vista adds great beauty to the neighborhood. Dana Point's Strategic Plan explicitly asserts as a goal: "Maintain, modernize and beautify the City's infrastructure and neighborhoods;" "to protect its citizens and their property from conditions which are . . . detrimental to property values and community appearance . . ."; and, "to effectively abate or prevent the development of such conditions in the City of Dana Point." 6.14.001(a)

VII. There is no "Regulatory Taking" of Property.

A City decision to approve a construction project that preserves public views is consistent with the Supreme Court holding in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825. Protection of the public view is neither a deprivation of the developer's property rights nor will it deny the applicant all economically beneficial or productive use of the property, or unreasonably limit the owner's reasonable investment-backed expectations of the property.

Dana Point Vista is not attempting to prevent construction on the property and welcomes a potential new neighbor whose upscale property will add value to the neighborhood. The Developer could easily build a beautiful upscale home replete with fabulous ocean views and still comply with applicable ordinances, CEQA, and the Coastal Act provisions protecting public



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views.²⁷ The developer can build a one-of-a-kind house in a unique location with its own panoramic views with only a minor adjustment that protects scenic public ocean views. The *Nollan* "takings" question is not implicated in this appeal.

VIII. Conclusion.

The City Council's approval of the Coastal Development Permit flies in the face of the policy and the language of provisions of the Coastal Act and of Dana Point's City ordinances required in order to obtain Coastal Commission approval for the Local Coastal Plan. The quality of the panoramic vistas is not seriously contested. The adverse effect of such a massive, megamansion on the character of the neighborhood likewise cannot seriously be contested. The views are public views benefitting City residents, visitors and current and future citizens of the State of California. Once such views are obstructed, it will be very difficult to recover the views later.

The public's access to this ocean/coastline view must be preserved or enhanced, as required by law. Any proposed degradation of the public view should be minimized and mitigated. The project as proposed would violate numerous laws and regulations including the core principle of the Coastal Act, by taking away a public coastal resource and giving it to one homeowner who has feasible alternatives.

The Coastal Commission should reverse the Dana Point City Council's decision and deny the Coastal Development Permit.

Very truly yours,

WLF | The Williams Law Firm, PC


Joseph R. McFaul

JCW/jm

Enclosures as noted

²⁷

One of several feasible alternatives is attached as Exhibit 11.