

CALIFORNIA COASTAL COMMISSION

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Fri 8c

Filed: 4/23/07
49th Day: 6/11/07
Staff: G. Cannon-SD
Staff Report: 4/25/07
Hearing Date: 5/9-11/07

STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of Encinitas

DECISION: Approved with Conditions

APPEAL NO.: A-6-ENC-07-51

APPLICANT: Surfer's Point, LLC AGENT: Dan Reedy

PROJECT DESCRIPTION: Construction of a 29,975 sq. ft. two-story, 30 ft. high, 26-unit timeshare/hotel resort with an approximately 23,500 sq. ft. subterranean garage on a 1.81 acre site.

PROJECT LOCATION: Northeast corner of North Coast Highway 101 and La Costa Avenue, Leucadia, Encinitas, San Diego County.

APPELLANTS: Coastal Commissioners Sara Wan & Mary Shallenberger

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed.

SUBSTANTIVE FILE DOCUMENTS: Certified City of Encinitas Local Coastal Program, City of Encinitas Staff Report and Resolution dated September 1, 2005, Final EIR dated October 1, 2004 by Curtis Scott Englehorn and Associates.

I. Appellants Contend That: The development, as approved by the City, is inconsistent with the certified LCP with respect to protection of environmentally sensitive habitat areas and visual resources. First, the proposed development relies on the use of a parcel owned by the North County Transit District (NCTD) to site both some of the timeshare units, as well as the partial public access path/overlook included on the eastern edge of the parcel. The applicant has apparently not secured the use of the railroad property at this time; thus, calling into question the implementation of these features. In addition,

potential use of the NCTD parcel may undermine efforts for future double-tracking and/or use of this transit corridor to offset and complement anticipated Interstate 5 corridor proposals that could significantly impact coastal resources. Second, the proposed landscaping plan, contrary to direction from DFG and Commission staff, includes non-native and invasive plant species and trees that could serve as predator perches for raptors. In addition, the City failed to adequately assess and protect historic use by the public of the subject site. Commission staff had recommended a continuous public access loop along the lagoon hillside be provided connecting La Costa Avenue to North Coast Highway 101. Thus, the appellants also claim that the project, as approved by the City, is inconsistent with the public access policies of Chapter 3 of the Coastal Act.

II. Local Government Action: The project was approved, with conditions, by the City of Encinitas Planning Commission on September 1, 2005. Specific conditions were attached which, among other things, require implementation of BMPs and other measures to control erosion and treat runoff from the site, recordation of a deed restriction over steep slopes on the site, a requirement that a minimum of 7 of the 26-units be reserved for exclusive use as traditional hotel units available at all times as transient overnight accommodations and submittal of CC&Rs and a management plan to assure the overnight units are reserved for such and to assure compliance with other length of stay limitations.

III. Appeal Procedures: After certification of a municipality's Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permit applications. One example is that the approval of projects within cities and counties may be appealed if the projects are located within mapped appealable areas. The grounds for such an appeal are limited to the assertion that "development does not conform to the standards set forth in the certified local coastal program or the [Coastal Act] public access policies." Cal. Pub. Res. Code § 30603(b)(1).

After the local government has taken final action on an appealable project, it must send a notice of that final action (NOFA) to the Commission. Cal. Pub. Res. Code § 30603(d); 14 C.C.R. § 13571. Upon proper receipt of a valid NOFA, the Commission establishes an appeal period, which runs for 10 working days. Cal. Pub. Res. Code § 30603(c); 14 C.C.R. § 13110 and 13111(b). If an appeal is filed during the appeal period, the Commission must "notify the local government and the applicant that the effective date of the local government action has been suspended," 14 C.C.R. § 13572, and it must set the appeal for a hearing no later than 49 days after the date on which the appeal was filed, unless the time limit is waived by the applicant. Cal. Pub. Res. Code § 30621(a), 30625(a).

Section 30625(b)(2) of the Coastal Act requires the Commission to hear an appeal of the sort involved here unless the Commission determines that no substantial issue is raised by the appeal. If the staff recommends "substantial issue" and no Commissioner objects, the

Commission may proceed directly to a de novo hearing on the merits of the project then, or at a later date.

If the staff recommends “no substantial issue” or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If a substantial issue is found, the Commission will proceed to the de novo portion of the hearing either immediately or at a subsequent meeting. If the Commission conducts a de novo review of the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program.

In addition, for projects located between the sea and the first public road paralleling the sea, Sec. 30604(c) of the Coastal Act requires that, for a permit to be granted, a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act.

The only persons qualified to testify before the Commission at the “substantial issue” stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

IV. Staff Recommendation On Substantial Issue.

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission determine that Appeal No. A-6-ENC-07-51 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

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

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. **A-6-ENC-07-51** presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act

regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

V. Findings and Declarations.

1. Project Description. The project, as approved by the City, includes the construction of a 29,975 sq. ft., two-story, 30-ft. high, 26-unit timeshare/hotel resort with underground parking for 43 parking spaces. The 1.81 acre vacant site, consisting of 3 parcels, is located at the northeast corner of North Coast Highway 101 and La Costa Avenue in the Leucadia community of the City of Encinitas. One of the parcels is owned by the North County Transit District (NCTD), and includes the existing NCTD rail line that is used both for passenger rail and freight. A portion of the development is proposed to be constructed on the NCTD property, including a proposed access path that leads from La Costa Avenue, north along the railroad tracks to a viewing platform overlooking Batiquitos Lagoon.

The subject site is an inland hillside site overlooking Batiquitos Lagoon. The site extends down a steep north facing slope and includes a small portion of Batiquitos Lagoon. The upper portion of the site has been previously graded, is relatively flat and is devoid of native vegetation. The north facing slope contains a mixture of non-native habitat, interspersed with disturbed upland native habitat and patches of coastal sage scrub vegetation. The lower northwest portion of the site contains a small area of lagoon coastal salt marsh. Surrounding uses includes Batiquitos Lagoon to the north, North Coast Highway 101 and the Ponto State Beach parking lot to the west, the NCTD railroad tracks and a single-family home to the east, and La Costa Avenue and two small office buildings to the south.

The subject review is an appeal of a City approved coastal development permit. As such, the standard of review is the certified City of Encinitas Local Coastal Program. Because the subject site is located between the first public road and the sea, the standard of review also includes the public access and recreation policies of the Coastal Act.

2. Environmentally Sensitive Habitat Areas. The appellants contend that the development, as approved by the City, fails to adequately protect adjacent environmentally sensitive habitat areas (ESHA). The City's LCP contains a number of provisions that require protection of wetlands and other environmentally sensitive resources. Specially, the LCP provisions applicable to the subject development include:

Section 30.34.040 (B) (3) (c) of the certified Implementation Plan states:

All buildings or other improvements proposed to be placed or erected, and all grading activities proposed to be undertaken adjacent to a wetland shall be located so as not to contribute to increased sediment loading of the wetland, cause disturbance to its habitat values, or otherwise impair the functional capacity of the wetland. (emphasis added)

In addition, the Resource Management Element of the Land Use Plan contains the following:

GOAL 10: The City will preserve the integrity, function, productivity, and long term viability of environmentally sensitive habitats throughout the City, including kelp-beds, ocean recreational areas, coastal water, beaches, lagoons and their up-lands, riparian areas, coastal strand areas, coastal sage scrub and coastal mixed chaparral habitats. (Coastal Act/30230/30231/30240)

POLICY 10.9: The City will encourage the preservation and the function of San Elijo Lagoon and Batiquitos Lagoon and their adjacent uplands as viable wetlands, ecosystems and habitat for resident and migratory wildlife, by prohibiting actions (subject to the detailed provisions of RM policy 10.6) which:

[. . .]

- adversely affect existing wildlife habitats.

As noted above, the subject site is located adjacent to Batiquitos Lagoon and in fact, includes a small portion of the lagoon and its associated salt marsh habitat. Batiquitos Lagoon was approved for enhancement through dredging by the Commission in the early 1990s. As a result of that enhancement, the lagoon mouth remains open year round, providing continuous tidal flushing. Aside from the sensitive native plant communities that occupy the lagoon and its environs, a number of sensitive bird species visit and nest at this lagoon. According to the EIR for the project, both California least terns and western snowy plovers nest within 750 ft. of the project site. Given the sensitive nature of the surrounding area, care must be taken to assure development does not directly or indirectly impact these areas.

The project site does contain a small wetland area at the far northwestern portion of the site. While the proposed development will be located greater than 125 ft. from the identified wetlands and the north facing slope leading down to the lagoon has been placed in open space by the City, the landscape plan approved by the City includes extensive use of invasive plant species (*Myoporum Laetum*) throughout the development site and specifically along the top of the slope overlooking Batiquitos Lagoon. In addition, the landscape plan approved by the City includes the use of King Palms in the areas adjacent to the top of slope. These trees have been identified by the California Department of Fish and Game as a concern because they can serve as a predator perch for raptors that prey on the terns and plovers that nest in the lagoon below. Approval of the development utilizing invasive plant species and trees that serve as predator perches could adversely impact the adjacent lagoon and its identified sensitive biological resources, inconsistent with the above-cited LCP provisions.

Another issue raised by the development relates to the applicant's lease of NCTD property to accommodate the development. As noted above, a single line of railroad tracks exists along the eastern boundary of the property and a portion of the subject site is

owned by NCTD and will be leased by the applicant. The applicant is proposing to construct several of the proposed units and the public path on the property leased from NCTD. The appellants assert that by allowing development to occur on NCTD property, there is a concern that the development may affect the ability of NCTD to construct double-rail tracks at this location in the future. Currently, the distance between the subject development and the residence to the east is minimal. With the addition of the timeshare development within the NCTD right-of-way, the concern is raised that there will not be adequate room to accommodate a double track and thus NCTD may be precluded from providing double-tracking at this location. This raises a public access and resource concern because if this development impedes future double-tracking at this location, it may preclude the opportunity to increase passenger rail service as an alternative form of transportation, resulting in greater demands to widen, among others, Interstate 5, which could have significant adverse impacts on environmentally-sensitive habitat areas. Therefore, the development raises a substantial issue with regard to protection of ESHA.

3. Protection of Public Access & Visual Resources. The appellants assert that the development, as approved by the City, fails to adequately address the protection of public access or views. The City's LCP contains several provisions that address protection of scenic visual resources. Specifically, the Resource Management Element of the LUP includes:

GOAL 4: The City, with the assistance of the State, Federal and Regional Agencies, shall provide the maximum visual access to coastal and inland views through the acquisition and development of a system of coastal and inland vista points. (Coastal Act/30251)

POLICY 4.1: The following Vista Points and others will be acquired and developed, as feasible:

[. . .]

- Highway 101, north of La Costa Avenue

[. . .]

POLICY 4.4: The system of Vista Points will provide for the differing needs of automobile, bicycle, and pedestrian users, and will recognize as a recreational resource, the function of Vista Points as facilities for the passive, and occasionally remote enjoyment of the coastal and inland view. (Coastal Act/30251/30212.5/30210)

POLICY 4.7: The City will designate the following view corridors as scenic highway/visual corridor viewsheds:

[. . .]

- Highway 101, La Costa Ave. to South Carlsbad Beach

[. . .]

In addition, because the project site is located between the sea and the first coastal roadway, the development must also be consistent with the public access and recreation policies of the Coastal Act. Applicable Coastal Act provisions are as follows:

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or,

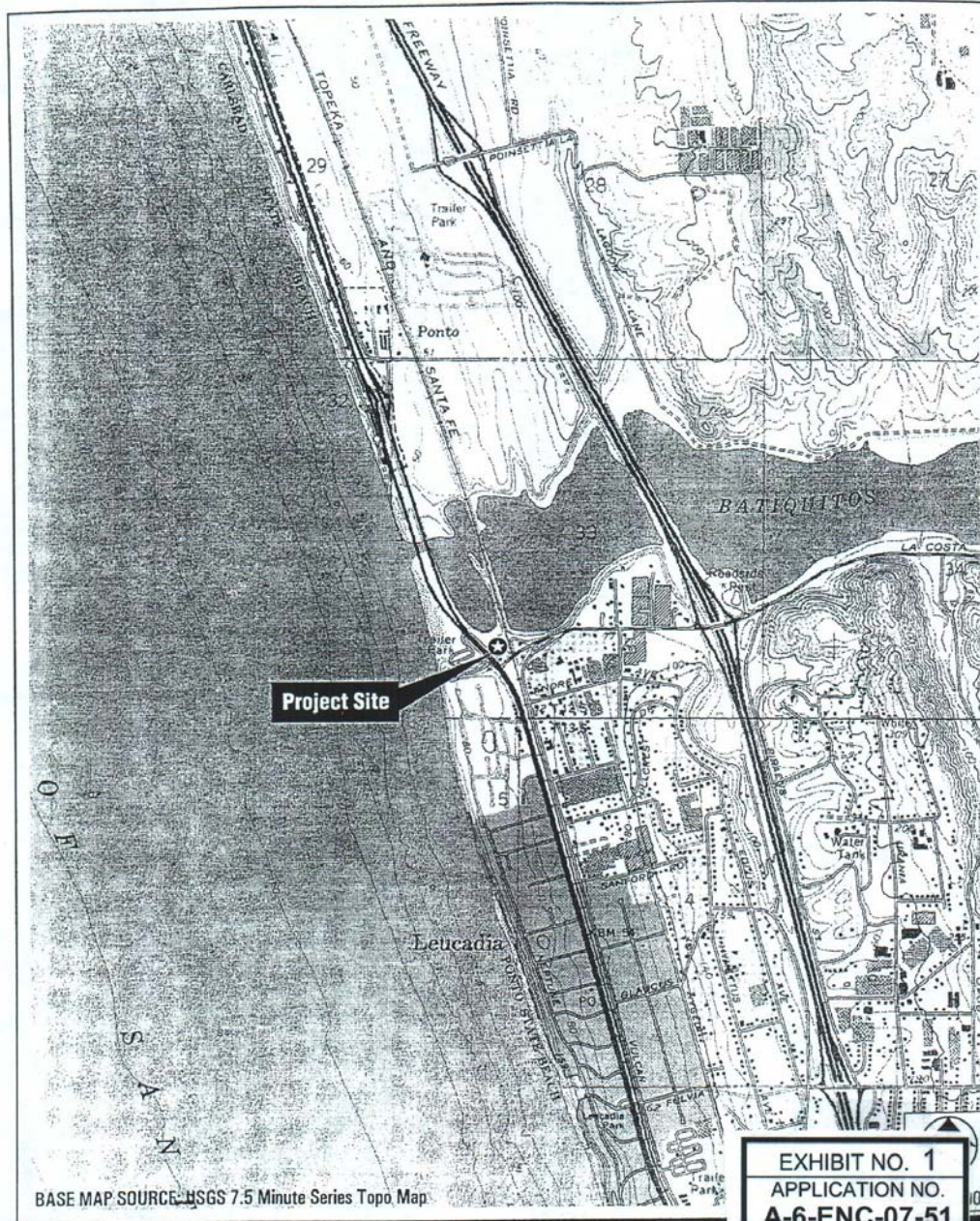
(3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

As noted previously, the subject site is located adjacent to Batiquitos Lagoon. The subject site is currently vacant and provides expansive views of Batiquitos Lagoon, Ponto State Beach and the Pacific Ocean. Currently, there are public views of the ocean available to motorists across the subject site as they travel westbound on La Costa Avenue. With approval of the subject development, these views will be lost. In addition, the subject development will be visible from offsite locations including the beach, the public trail that runs along the north side of Batiquitos Lagoon, Interstate 5 and North Coast Highway 101. As approved by the City, though, the project does include a design

that breaks the development into several buildings to help reduce the appearance and mass of the development and is setback at least 25 ft. from the top of the slope and includes landscaping to help screen and reduce the visibility of the structures as seen from these offsite locations.

More significant, however, is that the City failed to adequately address protection of public access across the site and public views from the site itself. While the development does include an improved public trail that runs along the eastern edge of the development next to the NCTD railroad tracks, terminating at a public overlook at the top edge of the slope, the City failed to address what appears to be evidence of historic public use of the site. In looking at aerial photographs of the site, there is clear evidence of a well worn trail that runs not only along the railroad tracks where the proposed trail is located, but also from North Coast Highway 101 across the site along the top of the slope. The City's action did not require the public trail to be provided along the top of the bluff. Instead, the City approved the trail next to the railroad tracks on NCTD property and required that if the applicant's lease with NCTD is ever terminated, then access equal or better to the approved access shall be provided. Given the significant impacts on public views of the lagoon and ocean that will result from construction of the 26-unit resort, what appears to be evidence of historical public use of the site and the significant views provided from this location, the City should have required adequate mitigation in the form of a continuous public access trail/linkage along the top of the slope as well as the trail that parallels the railroad tracks. In not requiring this mitigation, the City's approval is not consistent with the above cited LCP provisions to provide "...maximum visual access to coastal and inland views." In addition, by failing to address historic public use of the site along the top of slope, the City failed to assure adequate protection of public access.

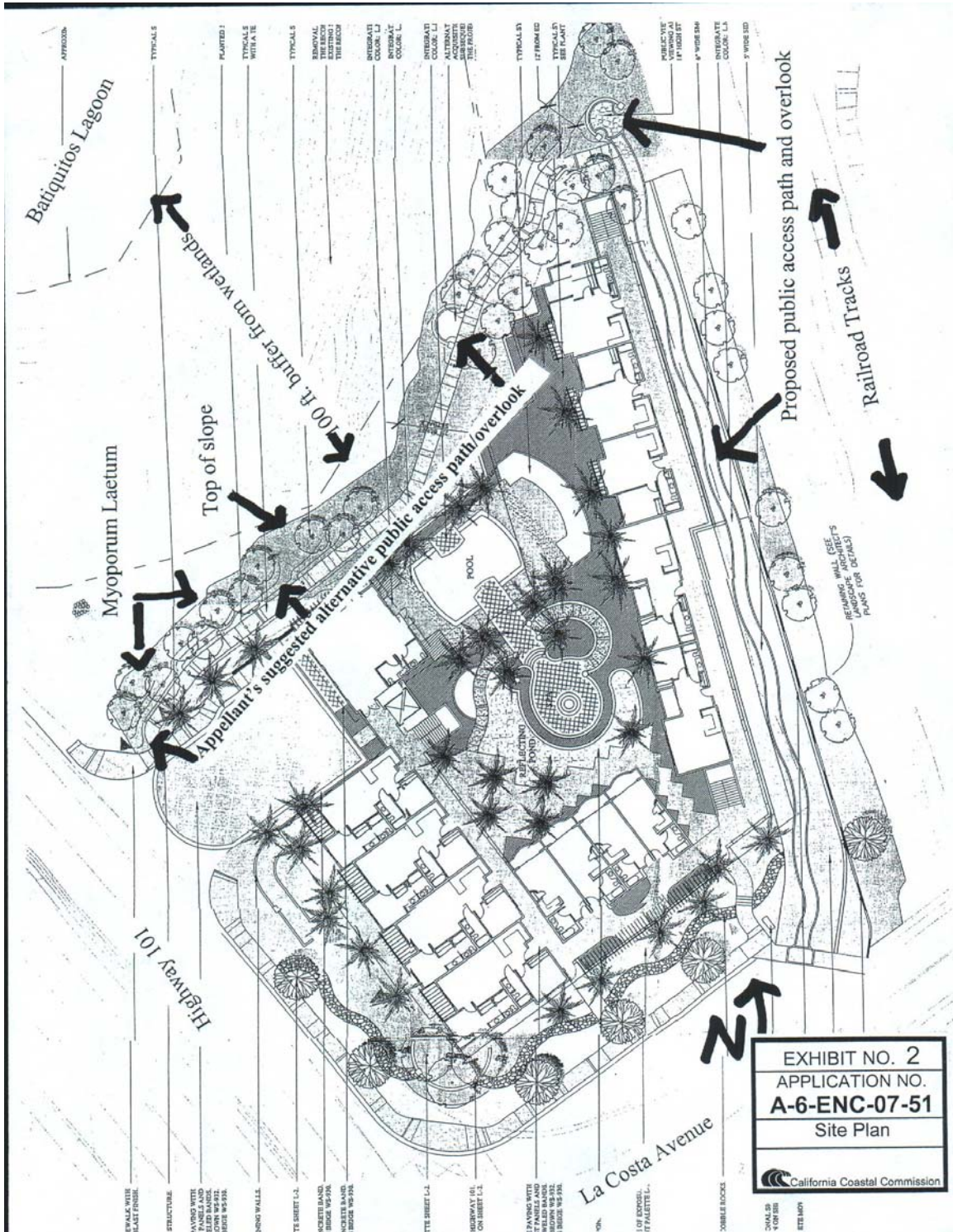
In summary, the development approved by the City is inconsistent with several provisions of the certified LCP as well as the public access and recreation policies of the Coastal Act in that ESHA may be impacted, historic use of the site by the public for access and viewing has not been adequately addressed and public views have not be protected. Therefore, the City's action raises a substantial issue regarding consistency with the requirements of the LCP and the public access and recreation policies of the Coastal Act as asserted by the appellants.



BASE MAP SOURCE: USGS 7.5 Minute Series Topo Map

EXHIBIT NO. 1
APPLICATION NO.
A-6-ENC-07-51
Location Map
RE
California Coastal Commission

Encinitas Timeshare Hotel - Wetland D



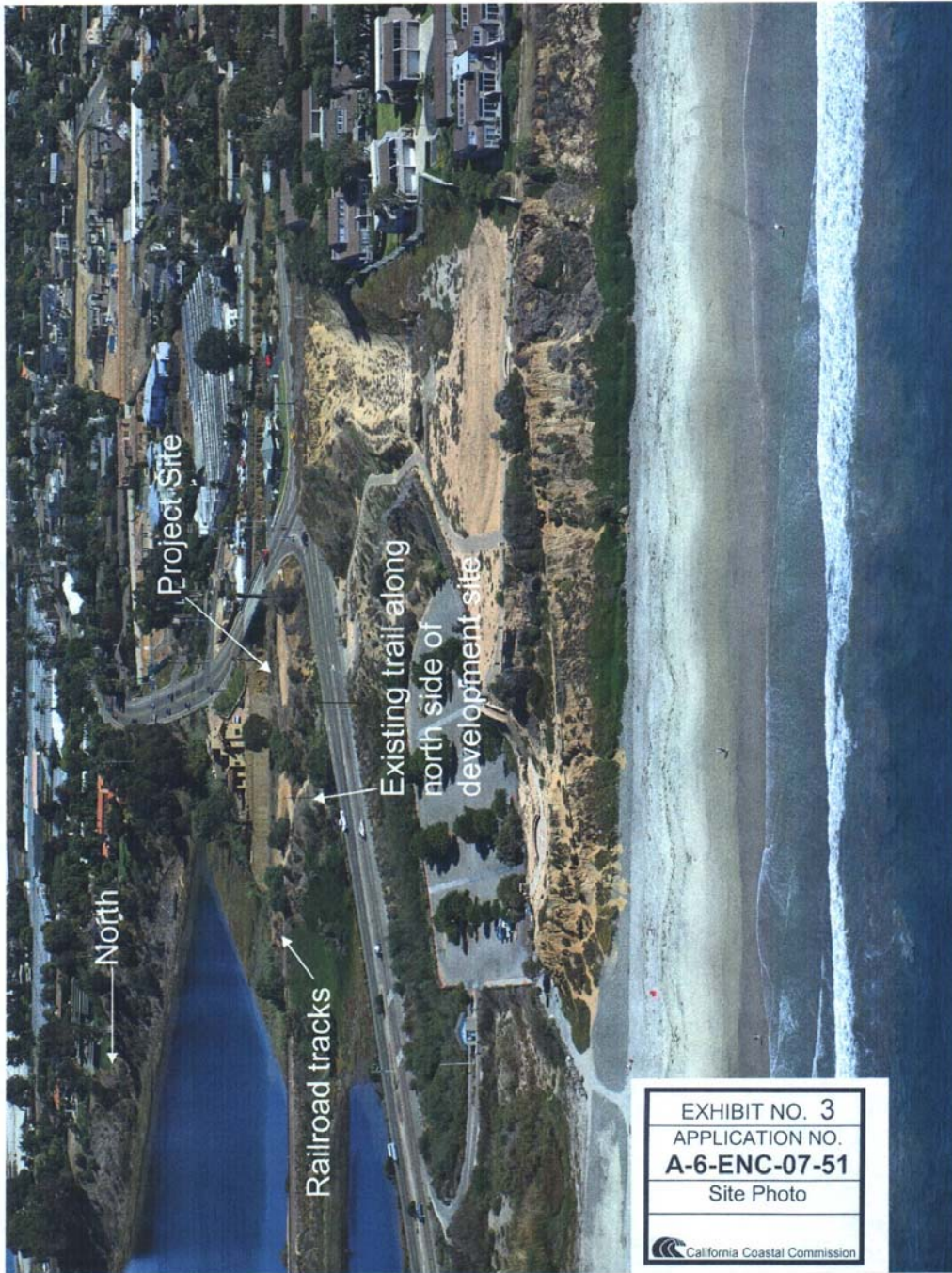


EXHIBIT NO. 3
APPLICATION NO.
A-6-ENC-07-51
Site Photo
 California Coastal Commission