

**CALIFORNIA COASTAL COMMISSION**

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**Th 13b**

Filed: March 7, 2007  
49th Day: April 25, 2007  
180th Day: September 3, 2007  
Staff: Ryan Todaro-LB  
Staff Report: May 24, 2007  
Hearing Date: June 13-15, 2007  
Commission Action:

**STAFF REPORT: CONSENT CALENDAR**

**APPLICATION NUMBER:** 5-07-005

**APPLICANTS:** Thomas and Sarah McElroy

**AGENT:** Michael Coon

**PROJECT LOCATION:** 5709 Seashore Drive, City of Newport Beach, County of Orange

**PROJECT DESCRIPTION:** Demolition of an existing single-family residence and construction of a new ocean-fronting, 24-foot high, 2,523 square-foot, two-story, single-family residence with an attached 485 square-foot two-car garage.

**LOCAL APPROVALS RECEIVED:** City of Newport Beach Approval-In-Concept (No. 2729-2006) dated January 2, 2007

**SUMMARY OF STAFF RECOMMENDATION:**

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

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

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

**SUBSTANTIVE FILE DOCUMENTS:** City of Newport Beach certified Land Use Plan; *Coastal Hazard and Wave Runup Study, 5709 Seashore Drive, Newport Beach, CA* prepared by *Geosoils, Inc.* dated February 2007.

## **LIST OF EXHIBITS**

1. Location Map
  2. Assessor's Parcel Map
  3. Site Plan
  4. Elevations
- 

## **STAFF RECOMMENDATION:**

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

## **MOTION:**

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

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

## **RESOLUTION:**

### **I. APPROVAL WITH CONDITIONS**

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

### **II. STANDARD CONDITIONS**

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

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

### **III. SPECIAL CONDITIONS**

#### **1. Assumption of Risk, Waiver of Liability and Indemnity**

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

#### **2. No Future Shoreline Protective Device**

- A. By acceptance of this permit, the applicants agree, on behalf of themselves and all other successors and assigns, that no shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 5-07-005 including, but not limited to, the residence, garage, foundations, and patio, and any future improvements, in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions or other natural hazards in the future. By acceptance of this permit, the applicants hereby waive, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235.
- B. By acceptance of this permit, the applicants further agree, on behalf of themselves and all successors and assigns, that the landowners shall remove the development authorized by this permit, including the residence, garage, foundations, and patio, if any government agency has ordered that the structure is not to be occupied due to any of the hazards identified above. In the event that portions of the development fall to the beach before they are removed, the landowners shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit.

#### **3. Future Development**

This permit is only for the development described in Coastal Development Permit No.

5-07-005. Pursuant to Title 14 California Code of Regulations Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) shall not apply to the development governed by Coastal Development Permit No. 5-07-005. Accordingly, any future improvements to the single-family house authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Section 30610(d) and Title 14 California Code of Regulations Sections 13252(a)-(b), shall require an amendment to Permit No. 5-07-005 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

**4. Deviation from Approved Encroachments.**

- A. The only encroachment onto the City of Newport Beach Oceanfront public right-of-way allowed by this coastal development permit is a wood deck, all within the 15' deep by 30'-wide encroachment area designated in the City of Newport Beach certified Land Use Plan. Any development in the public right-of-way, including improvements, repairs, and maintenance, cannot occur without an amendment to this coastal development permit or a new coastal development permit from the Coastal Commission, unless the Executive Director determines that no amendment or new permit is required.
- B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit evidence, for the review and approval of the Executive Director, that the encroachment fee required by the City for the proposed encroachments has been paid and that the property is enrolled in the City's annual encroachment permit/fee system.

**5. City's Right to Revoke Encroachment Permit**

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

**6. Drainage and Run-Off Control Plan**

The applicants shall conform with the drainage and run-off control plan received on January 5, 2007 showing roof drainage and runoff from all impervious areas directed to filtered catch basins and drains. Vegetated landscaped areas shall only consist of native plants or non-native drought tolerant plants, which are non-invasive. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property. Any proposed changes to the approved plan shall be reported to the Executive Director. No changes to the approved plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

**7. Deed Restriction**

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit to the Executive Director for review and approval documentation demonstrating that the landowners have executed and recorded against the parcel(s) governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

**IV. FINDINGS AND DECLARATIONS:**

The Commission hereby finds and declares:

**A. PROJECT LOCATION AND DESCRIPTION**

The subject site is located at 5709 Seashore Drive within the City of Newport Beach, Orange County (Exhibits #1-2). The lot size is 2,513 square feet and the City of Newport Beach Land Use Plan (LUP) designates use of the site for Medium Density Residential and the proposed project adheres to this designation. The project is located within an existing urban residential area, located generally north of the Newport Pier. The applicants are proposing to demolish an existing single-family residence and construct a new ocean-fronting, 24-foot high, 2,523 square-foot, two-story, single-family residence with an attached 485 square-foot two-car garage and a 216 square-foot 2<sup>nd</sup> floor balcony.

The subject site is located on a beach fronting lot on the Balboa Peninsula at the northern end of Newport Beach near the mouth of the Santa Ana River. Due to its location by the ocean, the project site may be potentially exposed to the hazard of wave uprush during a severe storm event. Presently, there is a wide sandy public beach between the subject development and the ocean. According to the Coastal Hazard and Wave Runup Study prepared by GeoSoils, Inc., dated February 2007, the beach is approximately 350 feet wide. This wide sandy beach presently provides homes and other structures in the area some protection against wave uprush and flooding hazards.

The hazards analysis concludes that: *“...[W]ave runup and overtopping will not significantly impact this property over the life of the proposed improvement. The proposed development will neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or adjacent area. There are no recommendations necessary for wave runup protection and it is very unlikely that any form of shore protection will be needed in the next 75 years.”*

The proposed project will not have an adverse effect on public access. The project site is located north of the portion of Oceanfront fronted by the City’s paved beachfront public lateral accessway (boardwalk). The proposed development is located in an area where a 15-foot encroachment onto

the City of Newport Beach Oceanfront public right-of-way on the seaward side of the home is allowed under the Commission certified Land Use Plan. The applicant proposes a wood deck, which would be approximately 6 inches in height and would be located within this 15' deep by 30' wide encroachment zone. Vertical public access to this beach is available approximately 30 feet west (upcoast) of the project site at the 58<sup>th</sup> St. street end and approximately 120 feet East (downcoast) of the project site at the 57<sup>th</sup> St. street end (Exhibit #2).

The proposed development includes demolition of an existing concrete patio development that encroaches onto the City of Newport Beach Oceanfront public right-of-way at the seaward side of the home (see Exhibit #3). The City holds the public right-of-way for street/walkway/bikeway purposes. The portions of Oceanfront in the central part of the Balboa Peninsula near the City's two municipal piers are developed with a public walkway/bikeway. In the vicinity of the subject site, however, the City has never constructed any part of the Oceanfront street, but it has at times addressed the possibility of constructing a bike path and pedestrian walkway in the right-of-way in this area. The development now pending proposes to replace a concrete patio with a wood deck within the 15' deep by 30' wide encroachment area.

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

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

The LUP encroachment policies allow encroachment onto the Oceanfront right-of-way in the area of the subject site which is between 52<sup>nd</sup> Street to the Santa Ana River. Encroachments in this area may encroach up to 15 feet. The LUP policies allow encroachments only if they do not interfere with access to the beach or ocean, when no building permit is required, and subject to payment of a mitigation fee. Except for an absence of evidence that the mitigation fee has been paid, the proposed encroachment at the subject site complies with these standards.

In this case, the Commission finds that the proposed encroachment is consistent with the certified LUP encroachment policies and the Chapter 3 public access policies of the Coastal Act. The findings for which are found in the Newport Beach LUP Amendment 90-1 approved by the Commission on June 11, 1991 and which are incorporated here by reference. In addition, the City is continuing to carry out the public access improvements required by the LUP mitigation plan to offset any adverse impacts of the encroachments. However, in order to assure that the encroachments are consistent with the Land Use Plan policies addressing Oceanfront encroachments as certified by the Commission, and so are consistent with the public access policies of the Coastal Act, evidence that the required encroachment fee has been paid must be

submitted. Therefore, as a condition of approval the applicant is required to submit, for the review and approval of the Executive Director, evidence that the current encroachment permit fee has been paid.

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

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

The applicants are proposing water quality improvements as part of the proposed project, including downspouts and on-site drainage directed to filtered catch basins and drains. Any vegetated landscaped areas shall only consist of native plants or non-native drought tolerant plants, which are non-invasive. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property.

The placement of vegetation that is considered to be invasive which could supplant native vegetation should not be allowed. Invasive plants have the potential to overcome native plants and spread quickly. Invasive plants are generally those identified by the California Invasive Plant Council (<http://www.cal-ipc.org/>) and California Native Plant Society ([www.CNPS.org](http://www.CNPS.org)) in their publications.

Furthermore, any plants in the landscaping plan should be drought tolerant to minimize the use of water. The term drought tolerant is equivalent to the terms 'low water use' and 'ultra low water use' as defined and used by "A Guide to Estimating Irrigation Water Needs of Landscape Plantings in California" prepared by University of California Cooperative Extension and the California Department of Water Resources dated August 2000 available at <http://www.owue.water.ca.gov/landscape/pubs/pubs.cfm>.

## **B. HAZARDS**

Development adjacent to the ocean is inherently hazardous. Development which may require a protective device in the future cannot be allowed due to the adverse impacts such devices have upon, among other things, public access, visual resources and shoreline processes. To minimize the project's impact on shoreline processes, and to minimize risks to life and property, the

development has been conditioned to: require an appropriate set-back from the water; require a drainage and runoff control plan to direct, treat, and minimize the flow of water offsite; prohibit construction of protective devices (such as a seawall) in the future; and to require that the landowner and any successor-in-interest assume the risk of undertaking the development. As conditioned, the Commission finds that the development conforms to the requirements of Sections 30235 and 30253 of the Coastal Act regarding the siting of development in hazardous locations.

**C. DEVELOPMENT**

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

**D. PUBLIC ACCESS**

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

**E. WATER QUALITY**

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

**F. DEED RESTRICTION**

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

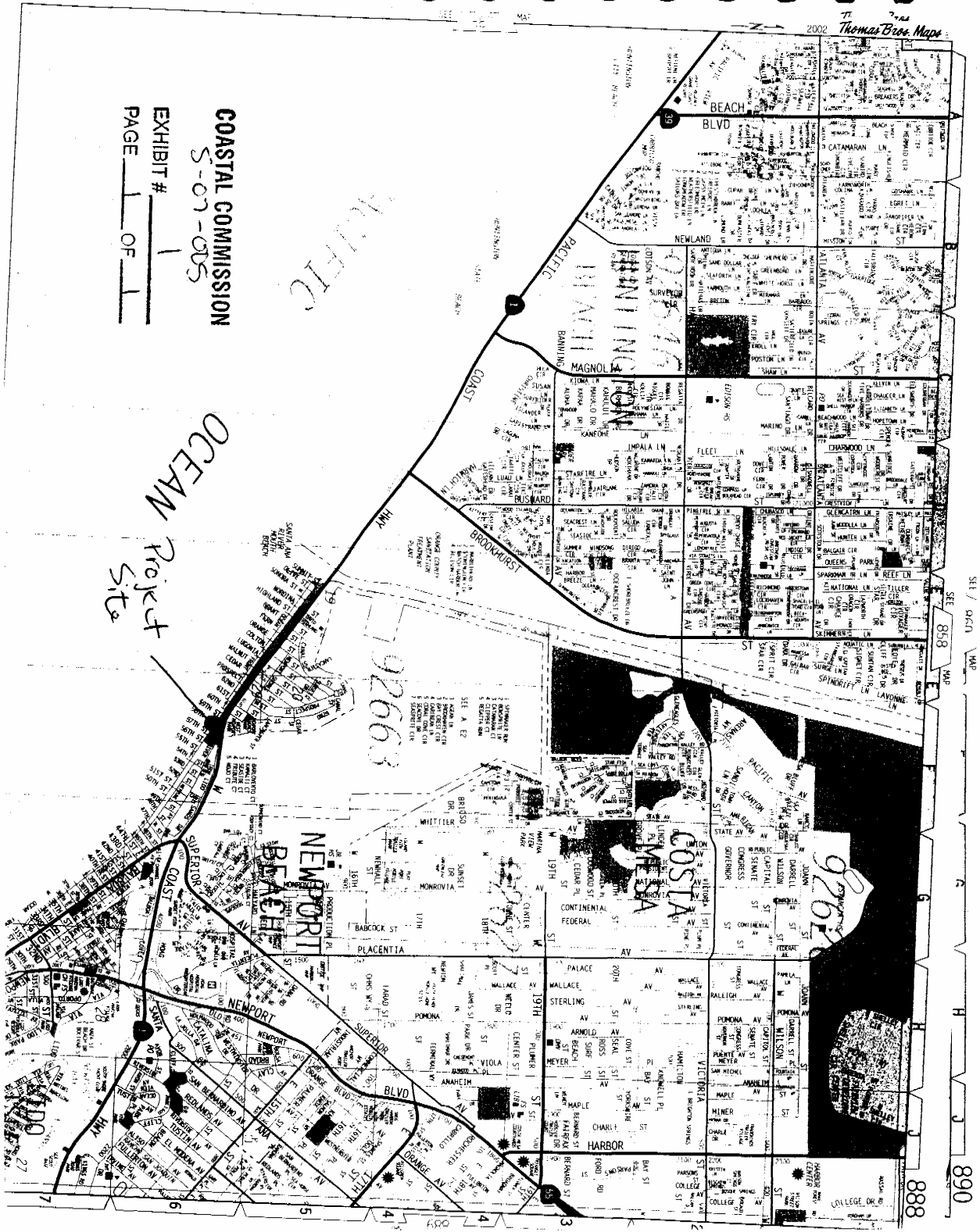


**G. LOCAL COASTAL PROGRAM**

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

**H. CALIFORNIA ENVIRONMENTAL QUALITY ACT**

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



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EXHIBIT # 1  
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OCEAN Project Site

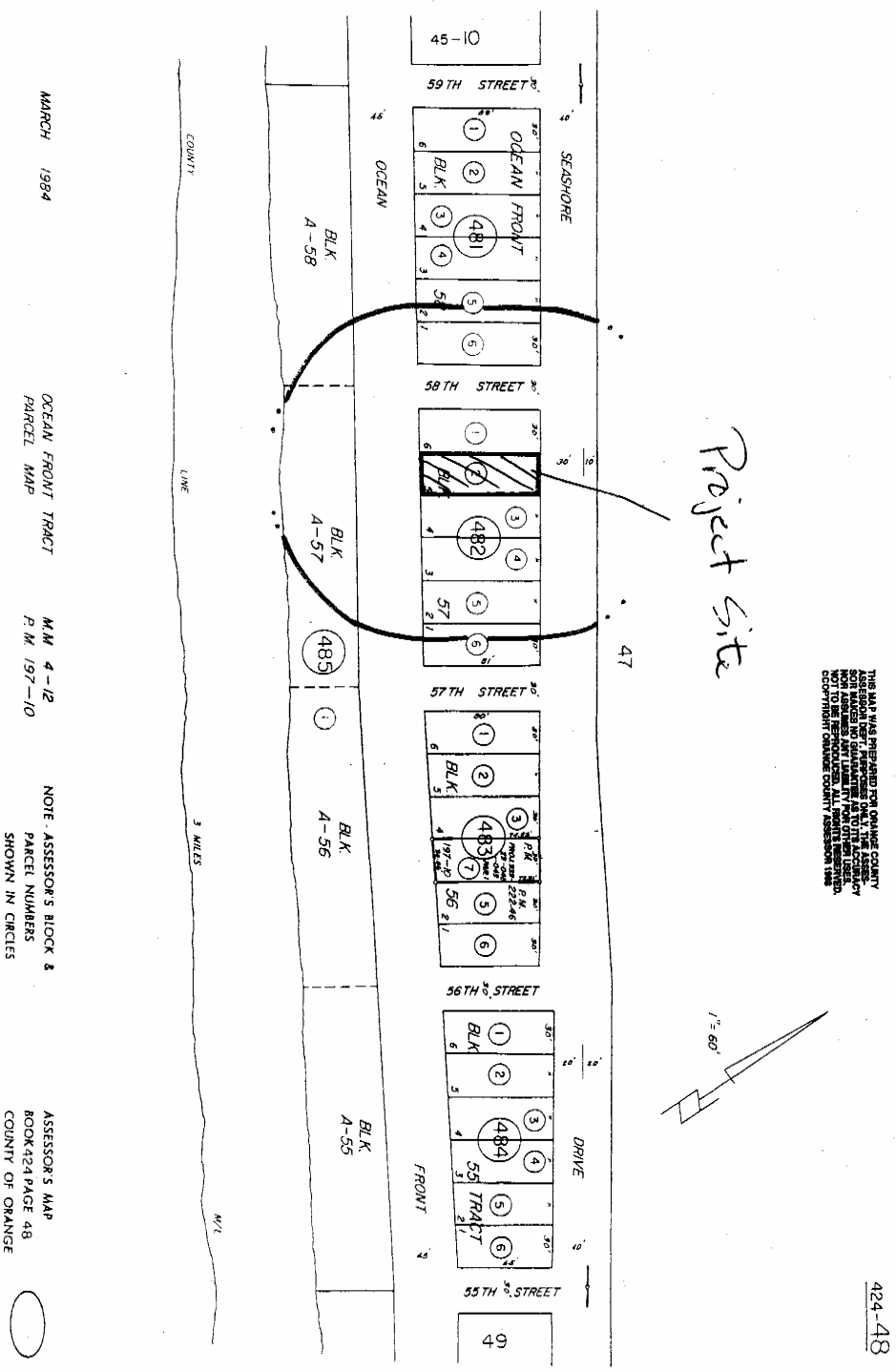
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Description: Orange, CA Assessor Map 424, 48 Page: 1 of 2  
 Order: 1 Comment:



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 AND IS NOT TO BE USED FOR ANY OTHER  
 PURPOSES WITHOUT THE WRITTEN  
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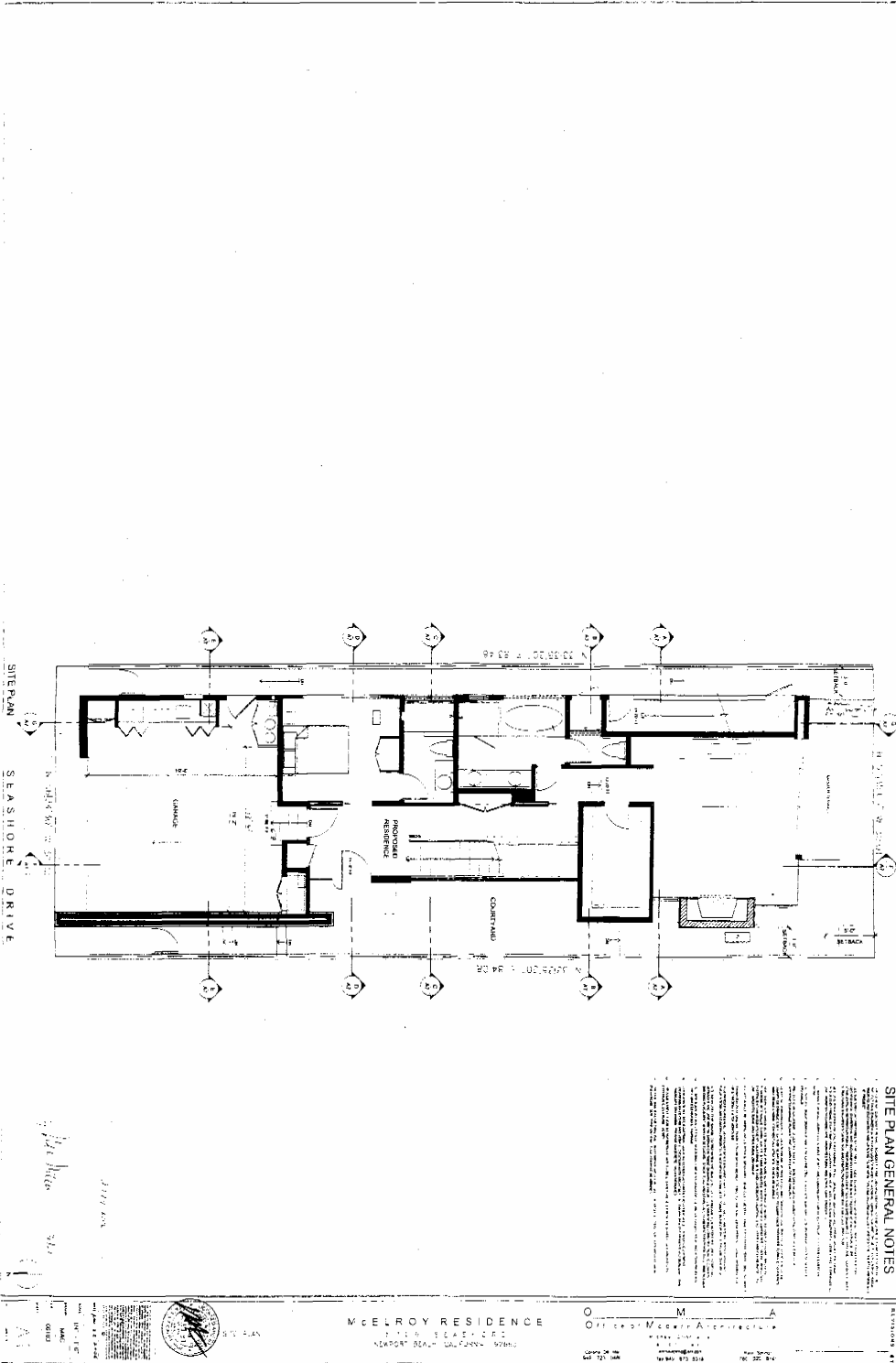
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MARCH 1984 OCEAN FRONT TRACT M.M. 4-12  
 PARCEL MAP P.M. 197-10

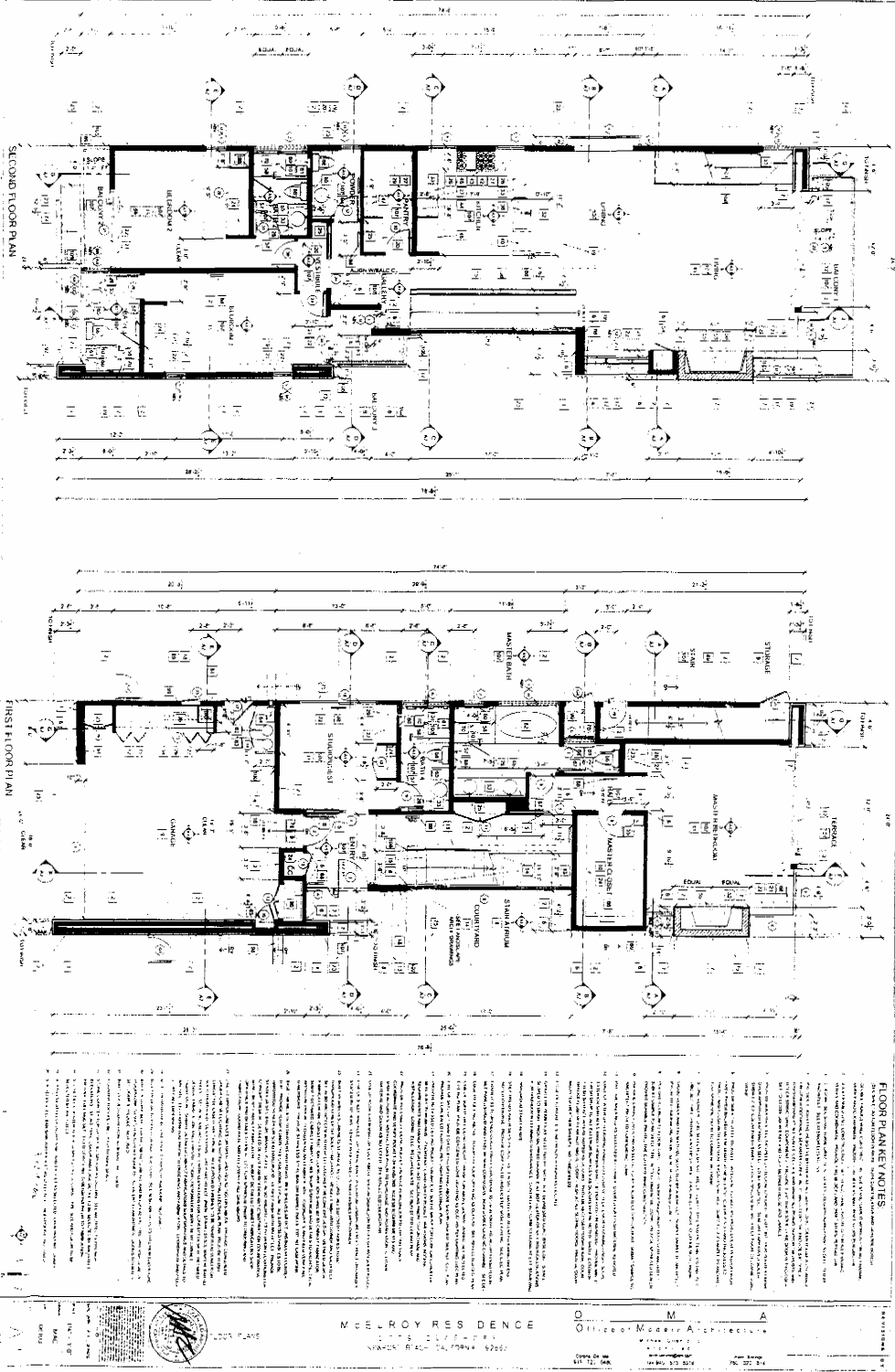
NOTE: ASSESSOR'S BLOCK &  
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ASSESSOR'S MAP  
 BOOK 424 PAGE 48  
 COUNTY OF ORANGE

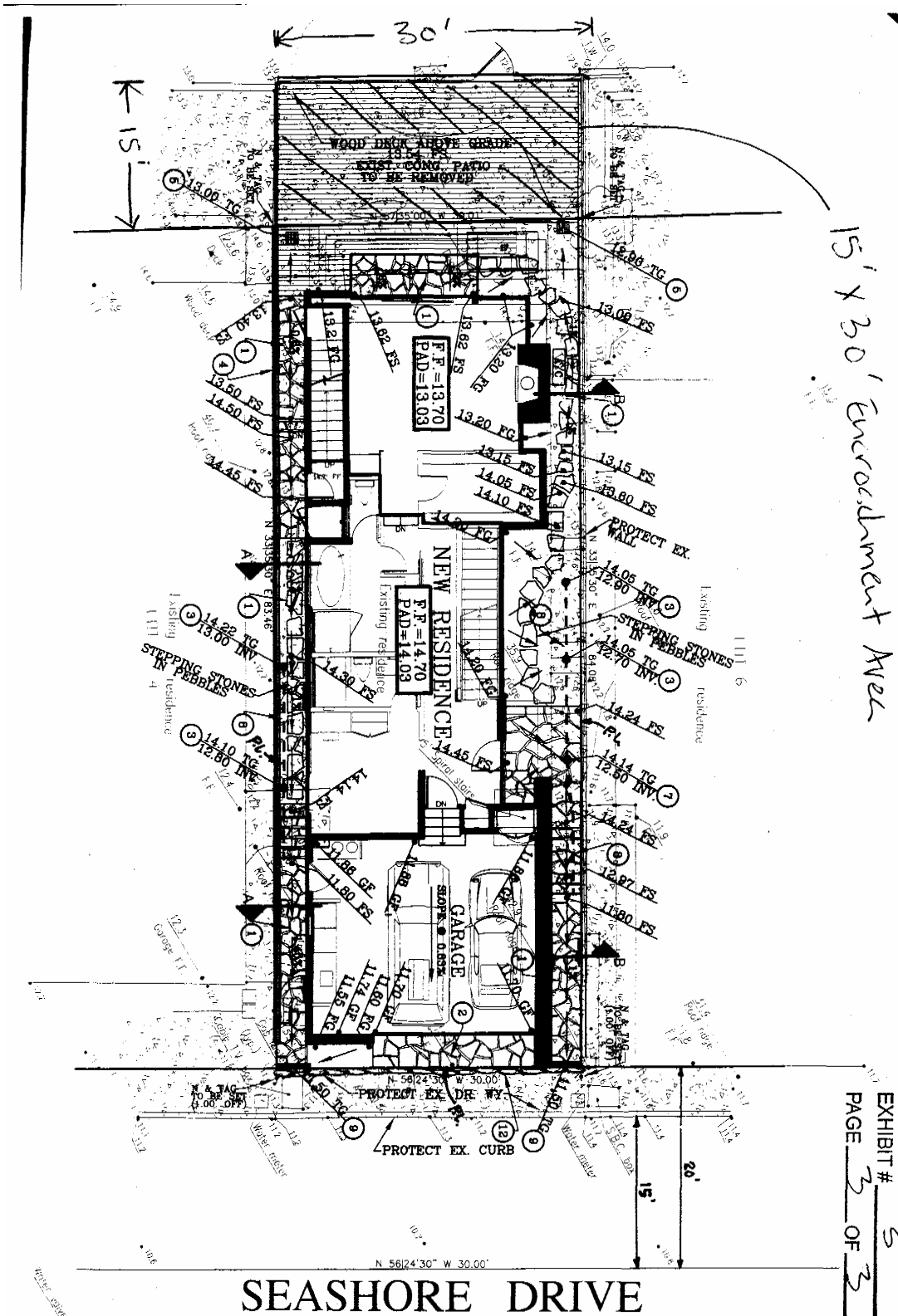
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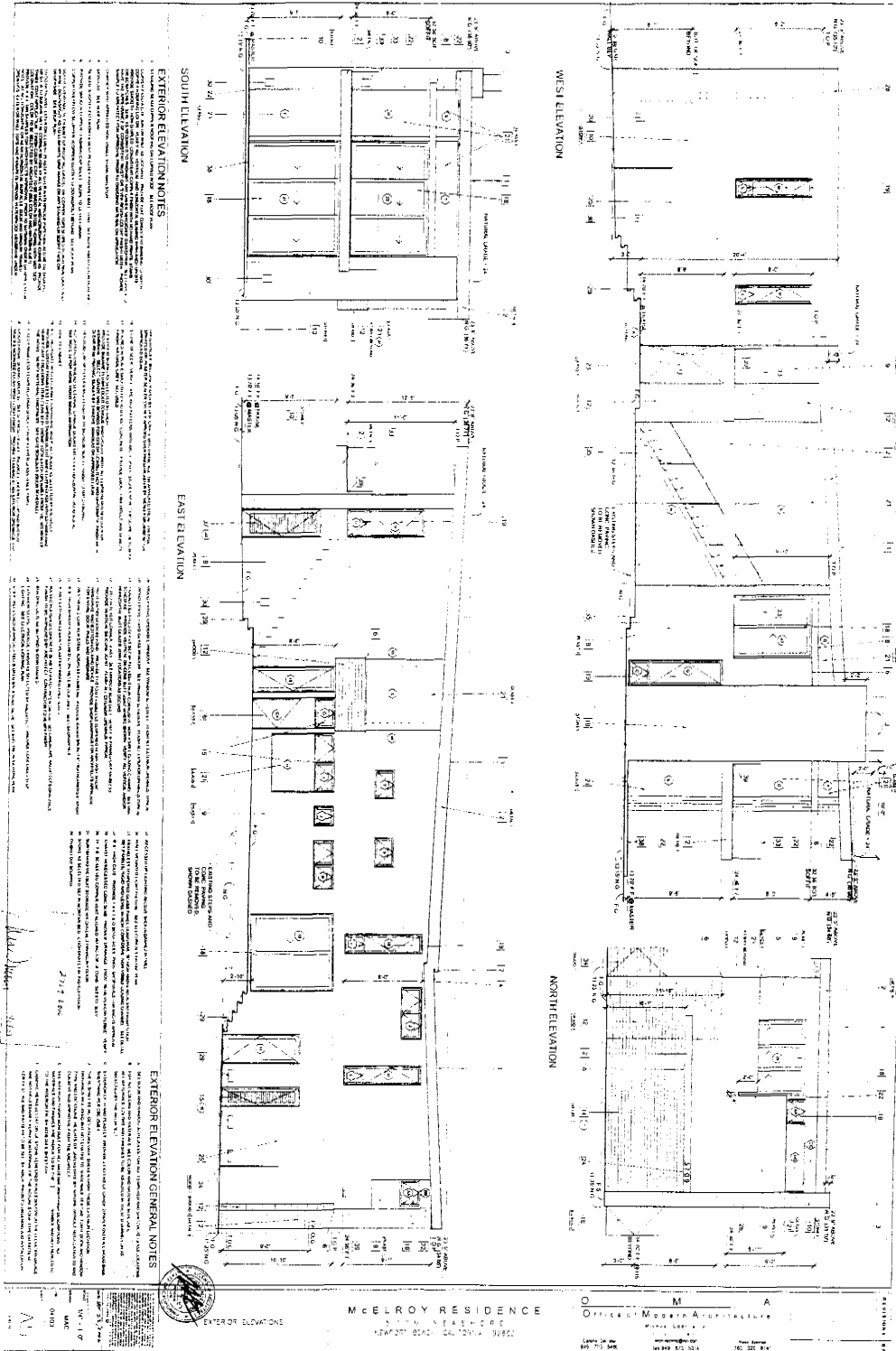
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