

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
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F13a & b

Addendum

November 1, 2011

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to the original staff report.](#)

To: Commissioners and Interested Persons

From: California Coastal Commission
San Diego Staff

Subject: Addendum to **Item Nos. F13a & b**, Coastal Commission Permit Application #**A-133-79-A5/F6760-A6 Revised Findings (Kretowicz)**, for the Commission Meeting of November 4, 2011.

On October 28, 2011, the attached letter was received from the applicant's agent regarding the above cited Revised Findings staff report. In the letter, the applicant's representative is suggesting revisions to the staff report. However, based on staff's review of the record, the proposed revisions do not reflect the Commission's action and discussion regarding this matter at the July 14, 2011 Coastal Commission hearing, but instead, attempt to present new information and facts into the record.

Pursuant to Section 13096 of the Commission's Code of Regulations, the purpose of adopting revised findings is to reflect the Commission's decision at the original hearing on a matter and the basis for that decision when the Commission's action is substantially different than that recommended in the staff report. The Commission's final action on this permit occurred at the July 14, 2011, after which the Commission cannot add any further submittals from the applicant, or anyone else, into the record. The proposed revisions by the applicant's representative does not include information discussed by the Commission as the basis for their decision, but is merely restating facts already in the record or presenting new information that is neither in the record nor discussed by the Commission at the July 14, 2011 hearing. Again, the purpose of adopting the Revised Findings is to reflect the Commission's previous action and not for the purpose of adding new facts or information to the record.

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October 28, 2011

F13a & b

BY MAIL AND EMAIL

Mr. Lee McEachern
California Coastal Commission
San Diego Regional Office
7575 Metropolitan Drive, #103
San Diego, CA 92108

Re: Proposed Revised Findings
Permit Amendment No. A-133-79-A5/F6760-A6 (Kretowicz)
7957 Princess Street, La Jolla

Dear Lee:

On behalf of Ure & Dianne Kretowicz, I have attached proposed revisions to the Revised Findings that have been recommended by the staff on the Commission decision on July 14, 2011 on Permit Amendment No. A-133-79-A5/F6760-A6 (Kretowicz). The changes which I have requested are limited to the portions of the Revised Findings under the following headings:

1. Amendment Description.
2. Detailed Project History.
3. Public Access.

Although the changes which I have requested may appear to be extensive, the majority can be classed within the following facts, most of which I do not believe are in dispute.

1. After the Commission decision on September 20, 1979 to impose a special condition for dedication of vertical access on CDP A-133-79, the applicant (Jane Baker) did not agree to the special condition, did not execute, acknowledge, deliver or record any irrevocable offer to dedicate.
2. The Commission's certification that the San Diego LCP was consistent with the

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Chapter 3 policies of the Coastal Act included a designation for the cul-de-sac at Princess Street as a location for "emergency lifeguard access only".

3. The Commission took no action to enforce or even to communicate with the property owner concerning the special condition for vertical access on the applicants' property for the 22 year period from 1979 to 2001. The Commission has no explanation for this inaction.
4. Any alleged public access claimed to exist by implied dedication has not occurred for 32 years, from 1979 to 2011, and continues to be closed to public use.
5. There has been no judicial determination that any public right of access exists anywhere on the applicants' property.
6. The period of time from the denial of Permit Amendment A-133-79-A1/F6760-A2 in 2005 to the July 14, 2011 final decision of the Commission on A-133-79-A5/F6760-A6 was not the responsibility of the applicants. The Commission twice did not approve revised special conditions, which had been negotiated in two separate Settlement Agreements which the Commission freely entered into. After the 2007 Settlement Agreement, no staff recommendation was made during the 270 days following the filing of Permit Amendment A-133-79-A3/F6760-A4. The applicants were required to withdraw and reapply because the permit streamlining act would have applied. After the applicants on March 15, 2010 filed Permit Amendment A-133-79-A4/F6760-A5, the Staff did not schedule it for hearing for 7 months. When the applicants wished to exercise their right to continue the hearing because they received the staff report only a few days before the hearing, the permit streamlining act again forced the applicant to formally withdraw and reapply.
7. The Commission recognizes that the Commission has no authority to find the existence of property rights for the public based upon evidence of use and act to restrict property based upon its own findings.
8. California Civil Code §1107 provides that a purchaser of real property takes free and clear of all claimed interests not in the public record prior to the date of recording of the purchaser's deed. The Commission claims that a purchaser also takes subject to any restriction, whether agreed to or not by a previous property owner, which may be contained in a Coastal Commission file even if the purchaser has no actual knowledge of the restriction.

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I believe that the Commission should revise the findings to include the above facts that are not in dispute. I have attempted to place these facts within the Revised Findings recommended by the Staff where they would be relevant.

Thank you for your consideration.

Sincerely

Signature on file

SHERMAN L. STACEY

SLS/sh

cc: (by email)
Dianne Kretowicz
Claude Margeno

III. Findings and Declarations.

The Commission finds and declares as follows:

1. Amendment Description. The proposed project represents an amendment to a coastal development permit approved by the Commission for the construction of a 3,693 sq. ft. addition to an existing 2,970 sq. ft. single-family residence in 1979. The proposal is to revise the terms of the requirement to record an offer to dedicate vertical public access easement and approval of various other improvements, both new and after-the-fact. Specifically, the amendment request includes:

(1) The applicants propose to revise the terms of the existing requirement for recordation of an offer to dedicate vertical public access easement as follows:

(a) Vertical Public Access: The applicant will record an irrevocable offer to dedicate to a public agency or private association approved by the Executive Director, an easement for public pedestrian access to the shoreline which shall be 4-5 ft. wide and run within a 10 ft. area generally along the southern property boundary as depicted generally on Exhibit #12. However, the easement will not be opened and made available to the public until the first of the following occurs: 1) the applicants sell the property to a third party; 2) neither applicants nor their children occupies the home as their primary residence; or 3) 15 years following the death of both the applicants.

(b) Emergency Lifeguard Access. Upon issuance of the permit amendment, the applicants propose to grant to the City of San Diego an easement for emergency lifeguard access to the beach which shall be 4-5 ft. wide and run along the southern property boundary.

The following components have already been constructed and are proposed to remain and be approved after-the-fact:

- (2) Construct concrete stairways along the south and eastern property boundaries.
- (3) Construct wall and fence across south side yard area (to be lifeguard emergency access).
- (4) Install decorative paving in City Right-of-Way leading up the house.
- (5) Construct new planter walls, entry trellis and 4 ft. high planter in public Right-of-Way.
- (6) Construct new fountain adjacent to eastern exterior stairway.
- (7) Replace second-story deck and add partial roof.
- (8) Construct new second-story cantilevered balcony.

- (9) Construct a 28 ft. long, 6 ft. high masonry wall in public right-of-way.
- (10) Extend height of existing retaining wall from 3 ft. 6-inches to 7 ft. 6-inches.
- (11) Construct modifications to non-conforming accessory structure (Casita) located partially within public right-of-way to include 52 sq. ft. bathroom addition, new doors, windows and expansion of existing walls.
- (12) Add approximately 844 sq. ft. to existing home (bedrooms, music and exercise room) by converting unimproved area beneath main home to living area, portions of which are located within 25 ft. of the bluff edge.
- (13) Remove wooden timber stairs and portion of retaining wall on bluff face.

The following components are new:

- (14) Interior garage improvements to include excavation and removal of approx. 130 cy. of uncompacted fill material to allow an additional parking space, a car lift and storage.
- (15) Remove floodlights from bluff face.
- (16) Remove or cap irrigation on bluff face.
- (17) Construct new trellis over second story deck
- (18) Install a new jacuzzi spa/water feature in rear yard adjacent to the coastal canyon.
- (19) Install a photovoltaic system on the roof.

The 1.31 acre site is situated atop a 55-ft. high coastal bluff located off a cul-de-sac at the northern terminus of Princess Street in the La Jolla community of the City of San Diego. The existing residence is situated on the flatter portion of the site, directly adjacent to Princess Street, with the site sloping steeply down from the home to the north and west. There is no existing shoreline or bluff protection on the subject site. Surrounding development includes single family homes to the east and south and the Pacific Ocean to the north and west.

The City of San Diego has a certified LCP, and the subject site is within the City's permit jurisdiction. However, since the subject application represents an amendment to a Commission-approved coastal development permit and requires modification of prior conditions of approval, the Commission has jurisdiction over this application. Nevertheless, the standard of review is the certified LCP (the La Jolla Land Use Plan and the City's Land Development Code) and, because the subject site is between the sea and the first public road, the public access and recreation policies of the Coastal Act. The certified La Jolla Land Use Plan identifies the cul-de-sac on Princess Street as a location for emergency lifeguard access only.

2. Detailed Project History. The home on the site was originally constructed around 1915. Over the years, the home was added to and remodeled several times. In June of 1977, the

Regional Commission denied an application (#F5265) by Ms. Baker for a substantial addition (3,300 sq. ft.) to the existing home on the site, finding that the development would have a significant adverse impact on scenic resources in the area as it would significantly encroach onto the visually prominent bluff seaward of the existing home. In June of 1978, the Regional Commission approved Ms. Baker's CDP #F6760 for construction of a 3,693 sq. ft. addition to the existing 2,970 sq. ft. single-family residence, finding that the project did not project further seaward than the existing line of development, thereby reducing its impact on visual resources (there is a discrepancy with the square footages called out in this permit and the subsequent actions. After review of the final plans approved for the original project, the actual size of the addition and of the existing home is greater). The permit was approved with special conditions requiring that the development comply with the recommendations of the geology report, that the southwest corner of the proposed addition (15 ft. x 15 ft.) be cantilevered to "ensure the integrity of the slope", and that the final drainage plans be submitted. The decision on this matter was subsequently appealed to the State Commission (A-221-78), but the State Commission found that the appeal raised no substantial issues on July 18, 1978. The grounds for the appeal were that inadequate public access findings were made.

A lawsuit was then filed against the Commission for, among other things, not having made adequate findings regarding public access and recreation as required by Section 30604 of the Coastal Act for development located between the first public road and the sea. The court subsequently found that the development was located between the first public road and the sea and that the finding on public access and recreation was not sufficiently specific to comply with the requirements of Section 30604(c) of the Act. The court ordered that the matter be remanded back to the Regional Commission for a specific finding on only the issue of public access and recreation. The Court did not order the Regional Commission to set aside its decision. In addition, the court allowed the development to go forward in the interim because the petitioners failed to post the necessary bond either for an injunction or for a stay. The Regional Commission subsequently adopted more specific findings regarding public access and recreation but did not impose any special requirements for the provision of public access at the site. This decision was then also appealed to the State Commission (A-133-79).

On September 20, 1979, the State Commission found that additional public access provisions should be required. Specifically, the Commission found:

...access to this pocket beach is only available at low tide due to the promontories which impede access to the beach from the nearest accessway to the shoreline which is located ¼ mile up coast. The Commission concludes, therefore, that adequate access does not exist nearby. Although the public has historically had access over the project site, construction of the project has preceded the use of this accessway, thereby diminishing the public's right of access to the state owned tidelands. An alternative accessway must, therefore, be provided to offset the burdens this development has placed on the public's constitutional right of access and to assure the conformity of the project with the provisions of Section 30212 of the Act.

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The Commission imposed a special condition on the permit requiring the applicant to record offers to dedicate both lateral (across the ocean frontage of the parcel from the toe of the bluff to the mean high tide line) and vertical (5 ft. in width extending from Princess Street along the southern edge of the property next to the garage and then in a northwesterly direction along the top of slope and then back in a southwesterly direction, traversing down the face of the bluff to the beach) public access easements (ref. Exhibit #6 - Original Staff Report). By the time the Commission imposed the access conditions, however, the applicant had already completed construction of the proposed addition in compliance with the permit as previously issued and had closed off the location where the public access was alleged to have taken place. Therefore, the State Commission required that the vertical access be located in a slightly different location than the historic trail in order to accommodate the addition. The then-owner, Ms. Baker, did not agree to the conditions, did not execute or deliver any offer to dedicate to the Commission and therefore, no offers to dedicate access were ever recorded.

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Because the permit for the addition issued during the litigation and appeal, the remand not having set the decision aside, it retained the original application number F6760. However, because the State Commission heard a second appeal, it gave the permit a new number - A-133-79. Therefore, the permit for the addition is identified by both numbers: A-133-79/F6760.

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Then, in 1980, the applicant (Ms. Baker) requested and received approval of an amendment to the permit to authorize drainage structures which had already been constructed without authorization (ref. CDP #F6760-A1). That is, the applicant implemented the drainage improvements without authorization and subsequently received approval through an after-the-fact permit amendment for the revised drainage plans. The Commission approved the amendment without requiring Ms. Baker to comply with the conditions which the Commission had imposed on CDP A-133-79. From and after at least 1980, Baker and all subsequent owners of the Applicant's property have prevented any public entry to the property from Princess Street and no public access from the road to the shoreline has existed.

In 1988, the Commission certified the City of San Diego's Local Coastal Program and the City began issuing coastal development permits for development within its jurisdiction, including La Jolla where the subject site is located. In the portion of the certified LCP relating to the Applicant's property, the City proposed, and the Commission certified, the designation of the Applicant's property for emergency lifeguard purposes only. Although earlier drafts of the LCP had identified the Princess Street cul-de-sac as a public access location, this was not included in the LCP which the Commission certified and the Commission did not make a suggested modification under Pub. Res. Code §30512 to include language that would designate the Princess Street cul-de-sac as a location for general public access.

In 1989, Baker sold the property to McKellar Development of La Jolla, Inc. In 1991, McKellar Development sold the property to Hugues Belzidsky. In 1994, the property became bank-owned through a foreclosure and the bank sold to Mr. and Mrs. Kretowicz, the now current owners and applicants. As noted above, the offers to dedicate lateral and vertical access had not been executed, delivered or recorded.

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In 1999, the City of San Diego approved a coastal development permit for construction of a pool with spa, a concrete deck, barbecue counter, retaining walls, drains and landscaping in the rear yard of the blufftop site that contains the existing single-family residence. The proposal also included removal of a number of existing unpermitted improvements (wooden timber stairs, retaining walls and palm trees) on the face of the coastal bluff. No changes to the existing single-family residential structure were proposed. The City's decision to approve the development was appealed by the Commission on June 25, 2001 (ref. Appeal #A-6-LJS-01-95). The basis of the appeal was that the proposed development was allegedly inconsistent with the certified LCP as it related to blufftop setbacks, geologic hazards, protection of public views and public access. In particular, a swimming pool was proposed projecting beyond the bluff edge of the subject site. The certified LCP requires such structures to be sited a minimum distance of 25 feet from the edge of the bluff. A second major issue raised with the project was that it was inconsistent with the conditions of approval of Coastal Development Permit #A-133-79/F6760, which required recordation of an offer for a public vertical access easement across the subject site. June 25, 2001 was the first time since 1979 that the Commission had made any written communication with any owner of the subject property that there were conditions imposed in 1979 which the property owner (Baker) had refused to fulfill.

The appeal was thus scheduled for Commission review. On August 6, 2001, the Commission found that a Substantial Issue existed with respect to the grounds on which the appeal was filed. The de novo review of the permit application was subsequently scheduled for the Commission's October, 2001 meeting and then again at its June, 2002 meeting. Both times the project was postponed by the applicants, because the Commission insisted on reimposing the 1979 vertical access condition. Subsequently, on May 14, 2002, the project was withdrawn by the applicants, which resulted in no permit for the development at the City or the Coastal Commission. The City subsequently sued the applicants over the unpermitted development that was present on the site (excavation in the garage). At this time, the applicants worked with both the Coastal Commission's enforcement staff as well as the City's code enforcement staff to resolve the outstanding violations.

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As part of the resolution of the outstanding violations on the subject site (and the related litigation that the City had instituted against the applicants), the applicants entered into a "Stipulated Judgment" with the City of San Diego, dated April 4, 2004, and, as agreed upon by the City and the applicants, the applicants then proceeded to seek an amendment to the previous Coastal Development Permit with the Coastal Commission, concurrent with the City's Site Development Permit, to address all the unpermitted development. As explained above, the State Commission revised CDP #F6760 to include the requirements for public access, although the structure approved in CDP F6760 had already been completed prior to the Commission action on September 20, 1979. As noted above, some of the development proposed by the applicants would block access to the area of the unfulfilled special condition requiring the owner to offer to dedicate a public access easement that was required in CDP A-133-79/F6760.

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Then in 2004, the applicants requested an amendment to the State/Regional Commission permit to: (1) replace the requirement for recordation of an offer to dedicate a vertical public access

easement with a) an easement solely for emergency lifeguard access and, b) a contribution of \$10,000 to enhance coastal access or other coastal improvements in the La Jolla area; 2) after-the-fact approval for the removal of unpermitted improvements on the subject site consisting of rear wood timber stairs, a portion of a retaining wall within the five foot coastal bluff setback, palm trees and the irrigation system; 3) construct an at-grade concrete patio, barbeque counter, area drains, staircase and landscaping; and 4) construct interior garage improvements to include excavation and removal of approx. 130 cy. of uncompacted fill material to allow an additional parking space and a car lift and storage (ref. CDP #A-133-79-A1/F6760-A2/Kretowicz). On June 14, 2005, the Commission denied the applicants' request to replace/modify the previously required vertical public access easement; however, it approved all other proposed improvements with a requirement that they be modified such that no improvements occur within the alignment of the required access easement.

On August 5, 2005, the applicants filed litigation against the Commission regarding its decision to deny the modification to the previously required public access easement (ref. SDSC Case No. GIC 851915). The Commission subsequently filed a Cross-Complaint, claiming, among other things, violations of the Coastal Act. Subsequently, in early 2007 a Settlement Agreement was entered into between the applicants and the Commission. In accordance with the Settlement Agreement the applicants submitted an amendment request to modify the terms of the access easement (such that it would not be available for public access until 2081), pay \$200,000 towards the reconstruction of a nearby failed public access stair and install a public viewing platform pursuant to the terms of the settlement agreement (ref. CDP #A133-79-A2/F6760-A3/Kretowicz).

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At the June 14, 2007 hearing on this item, the Commission Staff recommended approval consistent with the Settlement Agreement approved by the Commission. However, at the conclusion of the public hearing, Commissioners raised objections to the conditions stipulated in the Settlement Agreement. After Commissioners made clear that the Commission would not approve the 2007 Staff Recommendation, the Commission suspended the public hearing to hold an executive session to discuss the matter. When the Commission reopened the hearing, the applicant was asked to immediately commit to a payment of \$1,700,000 and other conditions entirely inconsistent with the Settlement Agreement. Since the applicant was unwilling to agree to Commission demands, the Commission continued the hearing with the applicant's consent.

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Subsequent to the June 14, 2007 hearing it remained clear that the Commission would not approve a permit consistent with the Settlement Agreement. The applicants withdrew the application on November 20, 2007. On July 14, 2008, the applicants and the Commission entered into a second Settlement Agreement. The second Settlement Agreement provided that the applicants would pay \$3,300,000 toward the improvement of an existing access location in the same cove that access on the applicants' property would provide. On December 2, 2008, the applicants received approval from the City of San Diego for Neighborhood and Site Development Permits for the development and then, pursuant to the Settlement Agreement, submitted a new amendment application to the Commission (ref. A-133-79-A3/F6769-A4). However, no staff report was prepared within the 270 days provided by the Permit Streamlining Act deadlines. Therefore, this application was subsequently withdrawn.

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The applicants then submitted another amendment request on March 15, 2010 for the same project. A staff report was not prepared until the October 2010 Commission hearing (ref. A-133-79-A4/F6760A5). As provided by Commission Regulation §13073, the applicants requested the hearing postponed. However, since the staff report was not prepared until 7 months after the application was made, Permit Streamlining Act deadlines again obligated the applicant to withdraw the amendment request and then submit another request (A-133-79-A5/F6760-A6).

This matter was scheduled for review by the Commission at the February 2011 Commission hearing in San Diego. However, at the applicants' request, the item was postponed. Since the last report was prepared and circulated for the October 2010 Commission hearing, Commission staff have received many calls and a number of letters from members of the public opposed to the proposed amendment (see Exhibit #10 attached). The concerns identified are many, but almost all request that the requirement to record the OTD on the subject site remain as it was originally required by the Commission in 1979.

The project was again scheduled for review by the Commission at its June 15, 2011 hearing. The Commission Staff recommended approval consistent with the second Settlement Agreement. After opening the hearing and discussing the project, Commissioners again expressed objection to the Staff Recommendation even though it incorporated the terms contained in the Settlement Agreement. At the conclusion of the hearing, the Commission continued the matter in order to have the applicants and staff try to work on an agreeable proposal to have the easement remain on the subject site, but have its opening deferred to a later date. Staff has met with the applicants and the subject amendment is the result of those discussions which no longer includes the request to pay \$3.3 Million to remove the easement. The Commission rejected the Staff Recommendation again and voted to require that the applicants immediate dedicate an easement for public access from the Princess Street cul-de-sac to the shoreline along the southerly boundary of the applicants' property.

3. Public Access. Because this site is between the sea and the first public road parallel to the sea, pursuant to California Public Resources Code section 30604(c), any development must comply with the public access and recreation policies of the Coastal Act. Several policies of the Coastal Act require that new development protect or enhance public access and recreational opportunities to and along the shoreline. These policies include:

Section 30210

In carrying out the requirements 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

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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. [emphasis added]

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,

Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Section 30223

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

In addition, the certified La Jolla Community Plan and Local Coastal Program Land Use Plan (which was not adopted until 1988, 8 years after Baker closed the claimed access to the shoreline, states the following:

The City should ensure that new development does not restrict or prevent lateral vertical or visual access (as identified in Figure 9 and Appendix G) to the beach on property that lies between the shoreline and first public roadway, or to and from recreational areas and designated public open space easements. Further, in areas where physical vertical access to the shoreline does not exist within 500 feet of a private development project on the shoreline, consideration of a new accessway across private property should be analyzed. (p. 52)

Maintain, and where feasible, enhance and restore existing facilities including streets, public easements, stairways, pathways and parking areas to provide adequate public access to the shoreline. Detailed maps and specific subarea recommendations are provided in Appendix G. (p.57)

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The project site is located between the ocean and the first public roadway (Princess Street/Spindrift Drive). The subject site is at the terminus of Princess Street in the La Jolla

community of the City of San Diego. The site is a natural promontory overlooking the La Jolla Underwater Park and Ecological Reserve and is bounded on the north and west by the ocean. The beach below the subject site (and to the south) is a small rock/cobble beach bounded by steep bluffs that is only accessible from surrounding beaches, and then only at very low tides and only from the north (the nearest public access point is adjacent to the Marine Room, approximately ¼ mile to the north). There is no formal access to this beach from the south due to the existence of steep coastal bluffs and rocky shorelines.

As described above in the "Detailed Project History" section, the Commission previously required execution, delivery and recordation of an offer to dedicate (OTD) a public vertical access easement from the street to the beach as mitigation for impacts of a substantial home addition on a trail on the site that the Commission found had historically been used by the public to access the beach in this location. The OTD has never been executed, delivered or recorded, in violation of the terms of the coastal development permit. The Commission took no action for 22 years to enforce the special condition and certified the LCP omitting the designation of Princess Street for public access to the shoreline. However, due to the inaccessibility of the beach below the subject site, the need to provide access to the beach at this location is just as important today as it was when the Commission originally required it in 1979. The public access requirement has ultimately resulted in litigation filed against the Commission by the property owner. As a means to resolve the litigation, the applicants have proposed two previous amendments in accordance with Settlement Agreements entered into by the Commission which were subsequently rejected by the Commission. Now the applicant has proposed the subject amendment in an effort to settle the differences between the Commission and the applicants.

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The subject amendment is to revise the requirements pertaining to recordation of a vertical public access OTD such that the OTD be recorded, but that the access not be opened and made available to the public (except for emergency lifeguard access) until a later date. There are many other components to the proposed amendment, but no others that affect public access.

In the original appeal (#A-133-79), the Commission found that there is evidence of historical public access on this site. The Commission found substantial evidence that the public had obtained rights of access through that use – i.e., that there has been such use as would support the conclusion that an area has been impliedly dedicated to public use. The Court in WT-LR, LLC v. California Coastal Commission (2007) 152 Cal.App.4th 770, held that the Commission exceeded its jurisdiction in making determinations of property rights which were within the jurisdiction of the judiciary and in acting upon the Commission's own determinations to limit uses of property. The intent of the Commission's action on Appeal No. 133-79 was to preserve public access at this site. However, the Commission failed to carry out that intent by its inaction for 22 years and its certification of the LCP finding emergency lifeguard access only to be consistent with Chapter 3 of the Coastal Act. Despite the Commission's lack of diligence and contrary findings in the LCP, the Commission finds that it may still require the dedication of access to the shoreline.

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Although the Commission cannot determine whether public prescriptive rights actually do exist, as that determination is made by a court of law, Section 30211 requires the Commission to

prevent development from interfering with the public's right of access to the sea where acquired through use. As a result, where there is substantial evidence that such rights may exist, the Commission must ensure that proposed development would not interfere with any prescriptive rights which may exist. ~~The Commission is not required to have or seek a judicial determination of any such rights prior to limiting the use of property or exacting easement rights from the property owner without such judicial determination.~~ The Commission concluded in 1979 that there is substantial evidence of such rights, and that the development approved under that permit did interfere with the exercise of those rights.

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The Commission, in its review of the 1979 appeal, found that because access to the small pocket beach that exists below the subject property and to the south is only available at the lowest of tides due to the protrusion of several promontories, and because there are no other vertical access points to this beach, that adequate access does not exist nearby. The Commission further found that although the public had historically had access over the project site, construction of the residential addition precluded the public from using the historic access, thereby diminishing the public's right to access the beach and as such, an alternative access must be provided to offset the burden the development placed on the public's constitutional right of access and assure consistency with 30212 of the Coastal Act. Therefore, the Commission required the applicant (Baker) to execute, deliver and record an OTD easement for public vertical access to the beach. ~~The Commission cannot explain why it took no action to enforce the condition which it imposed.~~

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Although many years have passed since the original permit was approved and the property has changed hands several times, the essential facts remain the same--the site was previously used for public access to the beach and this access ~~has been blocked for 32 years~~ as a result of the addition to the home by the former owner of the property. Further, while the access easement will extend over a steep hillside area, the Coastal Commission's staff Coastal Engineer has reviewed the project site and a concept stairway plan and has determined that it would be feasible to construct improvements to facilitate access to the beach on the subject site if a 5 ft. wide access easement and a 5 ft. wide construction/maintenance area were provided.

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The applicants have proposed at this time to record an OTD for public vertical access on the subject site consistent with the requirement of the original Commission decision on the appeal. However, the applicants are also proposing that the OTD not be opened or made available for use by the public until sometime in the future. Specifically, the applicants have proposed that once accepted, the easement could be opened upon either, (1) the sale of the property (not including transfer of title to their children); (2) if the applicants or their children no longer occupy the home as their primary residence; or (3) 15 years following the death of both applicants. What this would mean is that the OTD would be recorded prior to issuance of the permit and could then be accepted by an appropriate agency/entity (subject to the approval of the Executive Director), but could not be opened to the public until an unknown date, which could be as late as 15 years following the death of both the applicants.

One of the applicants has suggested that he was not aware of the public access requirement when he purchased the home with his wife some years ago and therefore, should not be

responsible for the access now. While it is true that the OTD ~~never existed~~ and thus, would not show up on a title report. If, prior to purchasing the home, the applicant had checked with the Commission's San Diego District office, he could have been provided with permit files for the subject site and be made aware of the permit history and the requirements for public access on the site, although he would not have found an executed OTD. However, Civil Code §1107 provides that a purchaser for value cannot be bound by an unrecorded instrument (much less a non-existent instrument) of which he has no knowledge. No duty is imposed by California law to conduct any particular research beyond the public record and the observation of the property itself. By 1994, the public access path had been closed for 15 years, there was no observable evidence that it ever existed. Despite this, the Commission finds that the applicant should not be relieved of the public access requirement simply because he did not know of the Commission's September 20, 1979 action (there being no OTD to be found) prior to his purchase. Even though the research by which the applicant may have discovered the Commission's action is not required by law, the Commission finds that the applicant should have researched the Commission's files and should be bound by what he would have found there, even if he lacked actual knowledge of it.

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Although the applicant claims that he reviewed the certified LCP prior to the purchase in 1994 and that the certified LCP denominated the location at the end of the Princess Street cul-de-sac for emergency lifeguard access only, the Commission finds that it was not reasonable for the applicants to have relied upon the content of the certified LCP to conclude that public access other than emergency lifeguard access was not required by the Coastal Act. The Commission now finds that the Commission's 1988 findings that the designation for emergency lifeguard access only was consistent with the Coastal Act policies for public access and recreation was inaccurate and misleading. Despite the inaccurate and misleading statement in the certified LCP, the Commission should not be bound by it, nor should the public (including the applicants) be allowed to rely upon it.

In this particular case, the Commission has found previously that there was historic public use of the site for beach access and as such, access across the site must be protected. While the applicants' proposal has merit and will assure public access is eventually provided, deferring such access for as long as 15 years from the death of both applicants is too long, especially given that access has not been available on the site since 1979 due to the Commission's failure to take any action to enforce the claims which the Commission has made about historic public access. The public has already waited over 30 years for the Commission to fulfill its function and require this access and to be asked to wait an additional time period is not acceptable. To continue to deny public access at this site is to deny the public a constitutional right as cited in Section 30210 of the Coastal Act. The Commission previously required a public access easement on this site and the Commission finds that requirement is still valid today, and no statute of limitations applies to any action by the Commission or to any claim of a prescriptive right in the public. Therefore, Special Condition #2 is imposed. Special Condition #2, reflects the change to the OTD from the applicants' proposal and the requirements that must be included in the OTD. The condition details when the easement will be opened, its general alignment and the type(s) of improvements that could occur within the easement to facilitate public

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access. Specifically, Special Condition #2 requires that prior to issuance of the permit, the OTD be recorded and that upon its acceptance by a suitable entity, it be opened to the public.

The applicants are also proposing to immediately grant an easement to the City of San Diego for emergency lifeguard access across the site and down to the beach. This was the only form of access identified in the certified LCP for this location. While this measure is good and does help somewhat with public access, this was previously required by the Commission with the original permit. However, it too, was never recorded and remains a violation, although the applicant has always maintained a willingness to comply with this condition. Thus, the applicants' proposal to grant emergency lifeguard access will help facilitate public access such that lifeguards would be able to use the site for rescues should they be necessary, as current access to the beach in this location is very limited. Special Condition #1 reflects the applicants proposal and details the requirement for the emergency lifeguard access.

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In summary, the applicants have proposed this amendment to change the previously required public access provisions on a blufftop property in La Jolla where the Commission has previously found that historic public access exists and that public access should be provided. However, the Commission finds that despite its own failure to act to protect the access for 32 years, deferring the opening of this important public access even one more year is not consistent with the public access requirements of the Coastal Commission. Therefore, the Commission has required through Special Condition #2 that the public vertical access OTD be recorded prior to issuance of the permit and then opened to the public once it is accepted and access improvements have been constructed. Only as conditioned can the Commission find that public access will be protected, consistent with the above cited provisions of the Coastal Act.

F132:b



COUNCILMEMBER SHERRI S. LIGHTNER

FIRST DISTRICT
CITY OF SAN DIEGO

October 25, 2011

Mr. Lee McEachern
California Coastal Commission
San Diego Area
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421

Re: Application No. A-133-79-A4/F6760-A6
Applicants: Ure and Diane Kretowicz

Dear Mr. McEachern:

Thank you for the opportunity to comment on the application for a Coastal Development Permit for improvements that have already been completed to the Kretowicz residence at 7957 Princess Street, La Jolla.

I support the Coastal Commission's previous action on this permit at the July 14, 2011 hearing. Numerous La Jolla constituents and community groups, including the La Jolla Shores Association, La Jolla Parks and Beaches Committee, and La Jolla Community Planning Association, all support a dedicated vertical public access at this location. We appreciate the Commission's strong stand to preserve this important historic coastal access point.

I urge the Commission to support the staff's recommendation and deny the applicant's request to modify the requirements for the offer to dedicate the vertical public access easement.

Thank you very much for your consideration. Please do not hesitate to contact my office at sherrilightner@sandiego.gov or (619) 236-6611 if I may provide any additional information.

Sincerely,

Signature on file

Sherri S. Lightner
Councilmember, City of San Diego, District One

- cc: Tony Crisafi, Chair, La Jolla Community Planning Association
- Audrey Keane, Chair, La Jolla Shores Association
- Patrick Ahern, Chair, La Jolla Parks and Beaches Committee

Letter in support of Staff Recommendation

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LJM

F132:b

RECEIVED
OCT 31 2011

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

2485 Hidden Valley Road
La Jolla, CA 92037-4021
October 26, 2011

California Coastal Commission
San Diego Coast District
7575 Metropolitan Drive # 103
San Diego, CA 92108-4421

Subj: Princess Street Hearing on November 4 (A-133-79-A5/F6760-A6.0)

To the California Coastal Commission:

Received your letter dated October 14. Request the entire agenda put forth by Ure and Dianne Kretowicz be denied. All actions stated by the requestor in this letter are illegal. Further, they smack of the wealthy thinking they are above the law. Do not reinforce that the wealthy can live by beyond the rules.

Our beach access is sacred. If one family can deny access to a public easement, why not the next?

City building codes are legally binding. Permits are required. Clearly this process is to benefit all citizens! Everyone must legally comply to keep the rich from simply doing as they please.

Do not reinforce this behavior. Please deny approval of A-133-79-A5/F6760-A6.0. Is that not your job?

Respectfully,

Signature on file s/c

Tamara Ribic
La Jolla Homeowner

Letters of Comment 39

LJK

2475 Hidden Valley Road
La Jolla, CA 92037-4021
October 27, 2011

RECEIVED

OCT 31 2011

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

California Coastal Commission
San Diego Coast District
7575 Metropolitan Drive, Suite 103
San Diego, CA

RE: Permit #A-133-79-A5/F6760-A6. (Applicant Ure and Dianne Kretowicz)

To Whom It May Concern:

I will not be able to attend the referenced hearing as I am recovering from knee-replacement surgery. Thus, my letter for the record.

First, I am livid that private property owners feel that they are entitled to usurp and close off a public easement for their personal gain. This sets a terrible precedent. I grew up in La Jolla and as a youth often used this access to explore the rocky beach below the location of the Princess Street home. This is outrageous. Further, the Kretowicas don't care if access is provided once they sell their home or they are dead. How generous of them to concede on this point. Does that not speak for itself?

ENOUGH! DENY! REOPEN THIS PUBLIC BEACH ACCESS!

Second, why are these "entitled" citizens allowed to build without a permit and not be held accountable? Is this the action of a poor, uneducated, and ignorant person, or is this the action of a wealthy person who feels wealth equals entitlement? Why are they allowed to be above the law?

Do I understand this correctly? Without a permit, Mr. and Mrs. Kretowicz did as they pleased by:

1. closing a legal public-beach access for personal gain,
2. making significant unpermitted improvements to their property,
3. feeling they are not subject to building codes or the permit process established by law,
4. and, asking for these illegal actions to remain permanent as long as they or their descendants live in the home.

With all due respect, I will be at a complete loss to understand how you can possibly even consider approval for any of this. Is it not the mission of the California Coastal Commission to protect our coast and ensure public access without doing harm?

Respectfully,

Signature on file

Daira Paulson
La Jolla resident since 1949

cc:
Oceanside City Council Chambers
300 North Coast Highway
Oceanside, CA

40

WM

JOEL FISLER M.D.

RECEIVED

OCT 31 2011

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

October 27, 2011

Mr. Lee McEacher
California Coastal Commission
San Diego Area
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421

Dear Mr McEacher:

This is to state that we, as well as our neighborhood, oppose Mr. Kretowicz's request for an allowance which would allow him to continue his use of public property until his demise.. The Commission's last decision on this property is the appropriate solution. Please deny his request. Thank you.

Sincerely

Signature on file

Joel Fisler

1531 COAST WALK, LA JOLLA, CA. 92037
PHONE (858)454-2209 * FAX (858)454-6999
EMAIL

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Lee McEachern

From: Anthony Ciani [aciani@cianiarchitecture.com]

Sent: Tuesday, November 01, 2011 2:27 PM

To: Lee McEachern

Subject: Kretowicz - RevisedFindings

November 1, 2011

TO: CALIFORNIA COASTAL COMMISSION,
HEARING DATE: 11/2-4/2011 ITEMS 13a&b

RE: KRETOWICZ CDP AMENDMENT A-133-79-A5/F6760-A6 REVISED FINDINGS

Dear Commissioners:

I am writing to support the California Coastal Commission's decisions to protect the public rights of access and coastal resources at the subject site. Since September 20, 1979, the Commission has conducted lengthy deliberations, and based upon the huge body of evidence in the record, it has voted 3 more times, in 2005, 2007 and 2011 -- to require an Offer to Dedicate an easement to protect those rights and resources.

Therefore, I request that you adopt Revised Findings conforming to your most recent decision on July 14, 2011.

Yours Truly,

Anthony Ciani
340 Dunemere Drive
La Jolla, CA 92037

11/1/2011

42

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4421
(619) 767-2370



F13a & b

Staff: L. McEachern- SD
Staff Report: 10/13/11
Hearing Date: 11/2-4/11

REVISED FINDINGS

Application No.: A-133-79-A5/F6760-A6

Applicant: Ure & Diane Kretowicz **Agent:** Sherman Stacey

Original Project

Description: Construction of a 3,693 sq. ft. first floor addition to an existing 2,970 sq. ft. two-story, single-family residence on a 1.3 acre blufftop site.

Proposed

Amendment: Modify the requirements pertaining to an offer to dedicate a vertical public access easement as follows: 1) Record an OTD for public vertical access on the subject site consistent with the requirement of the original Commission decision on the appeal, but the OTD will not be opened or made available for use by the public until sometime in the future. Specifically, the applicants are proposing that once accepted, the easement could not be opened until the first of the following occurs: (1) the sale of the property (not including transfer of title to their children); (2) neither permittee nor their children occupies the home as their primary residence; or, (3) 15 years following the death of both permittees. What this would mean is that the OTD would be recorded prior to issuance of the permit and could then be accepted by an appropriate agency/entity (subject to the approval of the Executive Director), but could not be opened to the public until an unknown date, not to exceed 15 years from the death of the current owners. In addition the applicants are proposing after-the-fact approval for improvements, modification and additions to the existing residence resulting in a 7,388 sq. ft. two-level home and installation of a spa/water feature in the southwestern rear yard area.

Site: 7957 Princess Street, La Jolla, San Diego, San Diego County.
APN 350-151-01 & -02

STAFF NOTES:

Staff recommends the Commission adopt the following revised findings in support of the Commission's action on July 14, 2011. In its action, the Commission approved the permit and required the applicant to record the vertical public access easement prior to issuance of the permit amendment, but did not approve the applicant's request to defer

the opening of the easement. Instead, the Commission required that the easement be opened to the public as soon as the easement is accepted and access improvements are constructed. Emergency lifeguard access will be made available immediately. The motion begins on Page 3. Findings to support the recommendation can be found starting on Page 13.

Date of Commission Action: July 14, 2011.

Commissioners on Prevailing Side: Blank, Bloom, Bochco, Brennan, Kinsey, McClure, Mitchell, Sanchez, Stone, Zimmer and Chairperson Shallenberger.

History

The Regional Coastal Commission's original approval of the application (F6760) for an addition to a single-family residence was appealed to the State Coastal Commission in 1978. The Commission found that the appeal raised no substantial issue. However, a lawsuit was filed against the Commission for, among other things, not having made adequate findings regarding public access pursuant to Section 30604 of the Act. The court ordered that the matter be remanded back to the Regional Commission for a specific finding on only the issue of public access and recreation. The court allowed the development to go forward in the interim because the petitioners failed to post the necessary bond for a stay. The Regional Commission adopted findings regarding public access but did not impose any requirement for provision of public access at the site. This decision was then again appealed to the State Commission (A-133-79) who found that the appeal raised a substantial issue. On de novo, the State Commission approved the project with an additional condition that required the applicant to record an offer to dedicate a vertical public access easement (5 ft. in width extending from Princess Street along the southern edge of the property next to the garage and then in a northwesterly direction along the top of the slope and then back in a southwesterly direction, traversing down the face of the bluff to the beach), as well as a lateral public access easement. The Commission found that without this condition, the addition would interfere with existing public access. The State Commission found that because the residential addition displaced a blufftop viewpoint and trail to the beach on the site, public access should be required elsewhere on the site. Thus, the State Commission required that the applicant record an offer-to-dedicate (OTD) easement for public access extending from Princess Street to the mean high tide line. However, as noted above, the court had allowed the applicant to continue with the development under the original permit because the petitioners failed to post the necessary bond for a stay while the Commission reviewed the proposal again on remand, and thus, the requirement for recordation of the OTD occurred after the development was already complete. The applicant never recorded the offer required by the State Commission and the property was subsequently sold. To date, the offer has not been recorded. For a more detailed history, see the Detailed Project History section of this report, beginning on Page 14.

Summary of Staff's Preliminary Recommendation:

~~Staff recommends that the Commission approve the proposed amendment subject to special conditions. Relative to public access, there is evidence of historic public access on the site and the Commission has previously found that public access should be provided on the subject site. However, given the unusual circumstances surrounding development on the site and property ownership, Staff recommends that the Commission accept the applicants' request to defer the opening until the property is sold or upon the non-occupancy or death of both the current applicants. However, staff recommends the Commission not accept such a deferment for 15 years after the death of the applicants, as proposed by the applicants. A deadline of 15 years after the death of the applicants is too long, especially given that public access has not been available on the subject site since 1979, and could result in opening of the accessway being delayed for many years into the future. Special Condition #1 details the revised OTD provisions.~~

~~The applicants are also seeking approval for a number of improvements to the blufftop home that have been completed without benefit of a CDP, including an addition to the home and decks. The City has reviewed and approved these improvements through both Neighborhood and Site Development permits. Staff has found that most of the proposed after the fact improvements are acceptable and consistent with the certified LCP. However, the project includes the construction of a new spa that partially extends over the canyon edge. Spas are specifically prohibited in steep hillside areas under the provisions of the certified LCP. However, the applicants have provided technical reports that suggest that the upper limits of the coastal canyon on the site are comprised of fill, and therefore are not natural. Given that the Steep Hillside provisions of the certified LCP only protect steep slopes with a **natural** gradient that exceeds 25%, if the upper limits of the slope are determined not to be a natural gradient, the steep hillside provisions would not apply in this area. Because we have only conceptual plans at this time, staff is recommending that final plans be submitted which document that the spa is sited outside of the natural steep hillside area. In addition, staff recommends that all "prior to issuance" special conditions be satisfied within 60 days of Commission action and that the removal of all improvements required to be removed occur with 90 days of issuance of the permit amendment. With the proposed conditions, the project is consistent with the certified LCP and public access provisions of the Coastal Act. Therefore, staff recommends the Commission approve the amendment request, subject to the special conditions detailed herein.~~

Standard of Review: The City of San Diego certified Local Coastal Program (LCP) and the public access and recreation policies of the Coastal Act.

I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution.

I. MOTION: ***I move that the Commission adopt the revised findings in support of the Commission's action on July 14, 2011 concerning***

approval of Coastal Development Permit Amendment No. A-133-79-A5/F6760-A6

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a YES vote on the motion. Passage of this motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings. The Commissioners eligible to vote are:

Commissioners Blank, Bloom, Bochco, Brennan, Kinsey, McClure, Mitchell, Sanchez, Stone, Zimmer and Chairperson Shallenberger.

RESOLUTION TO ADOPT REVISED FINDINGS:

The Commission hereby adopts the findings set forth below for *Coastal Development Permit Amendment No. A-133-79-A5/F6760-A6* on the ground that the findings support the Commission's decision made on July 14, 2011 and accurately reflect the reasons for it.

MOTION: ~~*I move that the Commission approve the proposed amendment to Coastal Development Permit No. A-133-79/F6760 pursuant to the staff recommendation.*~~

STAFF RECOMMENDATION OF APPROVAL:

~~Staff recommends a YES vote. Passage of this motion will result in approval of the amendment as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.~~

RESOLUTION TO APPROVE A PERMIT AMENDMENT:

~~The Commission hereby approves the coastal development permit amendment on the ground that the development, as amended and subject to conditions, will be in conformity with the provisions of the certified Local Coastal Program and the public access and recreation policies of the Coastal Act. Approval of the permit amendment 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 amended development on the environment, or 2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the amended development on the environment.~~

II. Special Conditions.

The permit amendment is subject to the following conditions:

1. Lifeguard Emergency Vertical Access.

- A. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT**, the applicants shall execute and record a document, in a form and content acceptable to the Executive Director, which grants to the City of San Diego an easement for emergency lifeguard access to the shoreline. The area of dedication shall be consistent with the final plans approved by the Executive Director pursuant to Special Condition #4a, which generally consists of a corridor 5 feet wide along the southern boundary of the property which shall extend from the Princess Street Right-of-Way to the mean high tide line, except that between the street and the along the house up to the western limit of the house, the vertical public easement shall extend 4 feet from the southern edge of the house to the southern boundary of the property (ref. revised Exhibit #12). The grant of easement shall require the permittee to provide the grantee with a key to the gate or other means to allow access by the lifeguards. The grant of easement shall include a formal legal description of the entire project site and a metes and bounds legal description and corresponding graphic depiction prepared by licensed surveyor of the easement area. The document shall be recorded free of prior liens and any other encumbrances which the Executive Director determines may affect the interest being conveyed and shall run with the land on behalf of the City of San Diego and the people of the State of California, binding all successors and assigns.
- ~~B. This emergency access easement shall remain valid until the first of the following occurs: 1) fee title of the property is transferred from the current fee title holder to any other person(s) or entity(ies), except to the applicants' children (Ravean Kretowicz and Alexandra Kretowicz); 2) neither permittee (Ure Kretowicz and Dianne Kretowicz) nor either of their children (Ravean Kretowicz and Alexandra Kretowicz) occupies the home as their primary residence; or upon the death of both permittees (Ure Kretowicz and Dianne Kretowicz). The offer to dedicate a public vertical access easement required in Special Condition #2 shall be recorded prior to the recordation of the offer to dedicate the emergency lifeguard access required by this condition.~~

The following shall replace Special Condition #1B of CDP #A-133-79/F6760 and is added as new Special Condition #2:

2. Public Vertical Access.

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall execute and record a document, in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private association approved by the Executive Director an easement for public pedestrian access to the shoreline. The document shall provide that the offer of dedication shall not be used or construed to allow anyone to interfere with any rights of public access acquired through use which may exist on the property.

~~B.~~ The document shall provide that upon acceptance of the offer, the easement shall not be opened and available for public use until the first of the following occurs: 1) fee title of the property is transferred from the current fee title holder to any other person(s) or entity(ies) except to the applicants' children (Ravean Kretowicz and Alexandra Kretowicz); 2) neither permittee (Ure Kretowicz and Dianne Kretowicz) nor either of their children (Ravean Kretowicz and Alexandra Kretowicz) occupies the home as their primary residence; or 3) upon the death of both permittees (Ure Kretowicz and Dianne Kretowicz).

~~B.~~ C. The entire easement area (described in Special Condition 2(~~ED~~)) shall be available for a footpath, stairway, or any combination of footpath and stairway, and an additional 5 feet of easement area shall be available for construction and maintenance activities related to a footpath and/or stairway and for open fencing and landscape screening as described in Special Condition 2(~~DC~~). Once a footpath has been delineated and/or a stairway built, public access shall not occur outside the alignment of the footpath or stairway except as necessary for repair and maintenance, or as necessary to relocate the accessway due to erosion or other geologic factors affecting the safety of public access.

~~C.~~ D. After acceptance of the easement and when available for public use, the grantee shall have the right to build a public access stairway down the bluff leading to the ocean pursuant to all required government approvals, and shall replace or modify the gate and fence across the entrance to the easement to allow for public use in an architectural style and materials consistent with the home at the time. Upon completion of construction of access improvements and prior to opening the accessway to the public, the grantee shall install open fencing and landscape screening consistent with the City of San Diego's standards and the existing landscaping and architecture of the residence along the boundary of the vertical public access area (within the construction easement area) to separate the easement area from the residential portion of the property, provided that such open fencing does not block or impede the public views from or the public's use of the vertical public access easement. The vertical public access easement shall

be open daily, from one half hour before sunrise to one half hour after sunset. The grantee accepting the easement shall assume responsibility for maintenance of the easement and liability for public use of the easement.

D. E The area of dedication shall be consistent with the final plans approved by the Executive Director pursuant to Special Condition #4a, and shall generally consist of: (1) an area 4 ft. wide measured from the southern edge of the house between Princess Street Right of Way and the western limit of the house; (2) two approximately 5 ft. wide easement areas: (a) a corridor 5 feet wide generally along the southern boundary of the property, extending from the western limit of the house to the coastal canyon floor, and (b) a 5 foot wide construction/maintenance easement that shall be provided adjacent to the access easement in order to facilitate construction of and any necessary maintenance for the accessway and to provide an area in which the grantee may establish fencing and landscape screening, as provided in Special Condition 2(~~EB~~) and 2(~~DC~~); and, (3) a 10 foot wide area within which a 5 foot wide accessway shall be established following the canyon floor's natural topography first northwest then southwest to the lateral access easement at the toe of the bluff, required by Special Condition #3. After construction of the accessway, the grantee may use the area of the construction/maintenance easement to perform maintenance on the accessway upon providing 3 business days written notice to the property owner prior to performing any such maintenance. A map identifying these areas is shown on revised Exhibit #12.

E. F The recorded document shall include a legal description of both the entire project site and a metes and bounds legal description and corresponding graphic depiction prepared by licensed surveyor of the easement area (including the 5 foot wide construction easement area). The document shall be recorded free of prior liens and any other encumbrances which the Executive Director determines may affect the interest being conveyed. The offer shall run with the land in favor of the People of the State of California, binding all successors and assignees and shall be irrevocable for a period of 21 years, such period running from date of recordation. This easement shall not be removed or changed without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

The following shall replace Special Condition #1A of CDP #A-133-79 and is added as new Special Condition #3:

3. Public Lateral Access. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicants shall execute and record a document, in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private association approved by the Executive Director an easement for lateral public access and passive recreational use along the shoreline. The document shall provide that the offer of dedication shall not be used or construed to allow anyone to interfere with any rights of public access acquired through

use which may exist on the property. The area of dedication shall consist of the entire width of the property from the mean high tide line to the toe of the bluff. The recorded document shall include a legal description of the entire project site and a meets and bounds legal description and corresponding graphic depiction prepared by a licensed surveyor of the area of dedication. The document shall be recorded free of prior liens and any other encumbrances which the Executive Director determines may affect the interest being conveyed. The offer shall run with the land in favor of the People of the State of California, binding all successors and assignees, and shall be irrevocable for a period of 21 years, such period running from the date of recording.

4. Revised Final Plans. WITHIN 60 DAYS OF COMMISSION APPROVAL OF THIS COASTAL DEVELOPMENT PERMIT AMENDMENT, or within such additional time as the Executive Director may grant for good cause, the applicants shall submit to the Executive Director for review and written approval, final plans for the proposed development, including a site plan that has been approved by the City of San Diego. Said plans shall be in substantial conformance with the plans prepared by Marengo Morton Architects, dated 3/15/10, except the plans shall be revised as follows:

- a. The location of the offer to dedicate a vertical public access easement, as described in greater detail in Special Condition #2, shall be clearly delineated on the site plan. The easement shall be 10 ft. in width, with approximately 5 ft. depicted as an access easement and an additional 5 ft. wide construction/maintenance easement. The easement area shall commence at the street along the southern side yard in the area where there are steps. Beyond the existing steps/stairway, the access easement shall extend in a westerly direction along the southern property boundary until approximately the 25 ft. MSL elevation contour (Coastal Canyon floor) where it shall then extend in a northwesterly direction for approximately 45 ft. following the canyon floor's natural topography, then southwesterly traversing down the face of the bluff to the beach (ref. revised Exhibit #12).
- b. The proposed spa/water feature located in the rear yard shall not extend into the LCP identified steep hillside area (as depicted on Exhibit #2). The location of the steep hillside area identified on Exhibit #2 may be revised, subject to review and approval of the Executive Director, based on further review of existing or additional geotechnical information documenting the extent of fill on the hillside area. In addition, the spa cannot be sited any closer than 25 ft. from the edge of the coastal bluff. A spa protection plan, prepared by a licensed professional, must also be prepared to mitigate for potential geologic instability caused by leakage of the proposed spa. The protection plan must include, at a minimum, the following measures: 1) installation of a spa leak detection system such as, but not limited to, leak detection system/moisture sensor with alarm and/or a separate water meter for the spa which is separate from the water meter for the house to allow for the monitoring of water usage for the spa; 2) use of materials and spa design features, such as, but not limited to, double linings, plastic linings or specially treated cement, to be used to waterproof the undersides of the spa to prevent leakage, along with information regarding the past and/or anticipated success of these materials in preventing leakage;

and, where feasible 3) installation of a sub drain or other equivalent drainage system under the spa that conveys any water leakage to an appropriate drainage outlet. The design and improvement of the spa shall comply with the final spa plan approved by the Executive Director.

c. The proposed fencing/gate in the south yard area shall be revised such that it does not extend beyond the southern property boundary onto the adjacent property, shall be no higher than 92 inches tall, shall not obstruct public views toward the ocean and shall have at least the upper 75 percent of its surface area open to light.

d. All existing and proposed accessory improvements shall be identified. All accessory improvements (including, but not limited to, patios, decks, walkways, and open shade structures) proposed within the rear yard (seaward of the residence adjacent to the coastal bluff) area must be "at-grade" and located no closer than 5 ft. from the top edge of the existing bluff. Accessory improvements in the rear yard west of the home and adjacent to the coastal canyon area shall also be identified and shall be consistent with the accessory improvements shown on the plan approved pursuant to Special Condition #4b.

e. The following shall be added as a note on the project plans:

"Other than those improvements approved herein, no development within 25 ft. of the identified bluff edge shall be allowed except for at-grade accessory improvements that are at least 5 ft. from the identified bluff edge."

The applicants shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

5. Revised Landscape/Yard Area Plans. WITHIN 60 DAYS OF COMMISSION APPROVAL OF THIS COASTAL DEVELOPMENT PERMIT AMENDMENT, or within such additional time as the Executive Director may grant for good cause, the applicants shall submit to the Executive Director for review and written approval, revised landscaping plans approved by the City of San Diego. The plans shall be in substantial conformance with the plans as submitted by Marengo Morton Architects dated 3/15/10, except for the revisions cited below. The plans shall be revised to keep the side yard (south of the residence) clear to enhance public views toward the ocean. Specifically, the plans shall be revised to incorporate the following:

a. A view corridor a minimum of 4 ft. wide shall be preserved along the southern side yard. All new landscape materials within the southern yard area (adjacent to the home) shall be species with a growth potential not expected to exceed a height of three feet above the elevation of the adjacent street as depicted on the plans by Marengo

Morton Architects dated 6/13/11. In addition, all landscaping in the southern yard area shall be maintained at a height that preserves views toward the ocean.

- b. The landscape palette for all proposed new plants shall emphasize the use of drought-tolerant native species, but use of drought-tolerant, non-invasive ornamental species and lawn area, is allowed as a small component. 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 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized.
- c. No permanent irrigation shall be permitted on the site closer than 25 ft. from the bluff edge (except for the planter area adjacent to the north side of the home).
- d. A written commitment by the applicants that all required plants on this site shall be maintained in good growing condition and whenever necessary, shall be replaced with new plant materials to ensure compliance with the approved landscape requirements shall be included.
- e. Rodenticides containing any anticoagulant compounds (including, but not limited to, Warfarin, Brodifacoum, Bromadiolone or Diphacinone) shall not be used.
- f. Five years from the date of issuance of the coastal development permit, the applicants shall submit for review and written approval of the Executive Director, a landscape monitoring report, prepared by a licensed Landscape Architect or qualified Resource Specialist, that certifies the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

If the landscape monitoring report indicates the landscaping is not in conformance with or has failed to meet the performance standards specified in the landscaping plan approved pursuant to this permit, the applicants, or successors in interest, shall submit a revised or supplemental landscape plan for the review and written approval of the Executive Director. The revised landscaping plan must be prepared by a licensed Landscape Architect or Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

The applicants shall undertake the development in accordance with the approved landscape and fence plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is legally required.

6. No Future Bluff or Shoreline Protective Device.

- A(1) By acceptance of this permit, the applicant agrees, on behalf of itself and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-133-79-A5/F6760-A6, in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. By acceptance of this Permit, the applicant hereby waives, on behalf of itself and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235.
- A(2) By acceptance of this Permit, the applicant further agrees, on behalf of itself and all successors and assigns, that the landowner shall remove the development authorized by this Permit, if any government agency has ordered that the structures are 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 landowner 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.

7. Assumption of Risk, Waiver of Liability and Indemnity. By acceptance of this permit amendment, the applicants acknowledge and agree (i) that the site may be subject to hazards from waves, storm waves, bluff retreat and erosion; (ii) to assume the risks to the applicants and the property that is the subject of this permit amendment 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.

8. Deed Restriction. **WITHIN 60 DAYS OF COMMISSION APPROVAL OF THIS COASTAL DEVELOPMENT PERMIT AMENDMENT**, the applicants shall submit to the Executive Director for review and approval documentation demonstrating that the applicants 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.

9. Future Development. This permit is only for the development described in coastal development permit No. A-133-79/F6760, as amended. 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. Accordingly, any future improvements to the proposed single family residence, including, but not limited, to repair and maintenance identified as requiring a permit in Public Resources Code section 30610(d) and Title 14 California Code of Regulations section 13252(a)-(b), shall require an amendment to permit No. A-133-79/F6760, as amended, from the California Coastal Commission.

10. Open Space Restriction. No development (except for removal of flood lights, capping or removal of irrigation, replacement of dead vegetation to prevent erosion, construction of public access improvements (including open privacy fencing and landscape screening), as defined in section 30106 of the Coastal Act shall occur on that portion of the bluff face seaward of the bluff edge and the steep hillside area in the southwestern portion of the site (as depicted on the plan approved pursuant to Special Condition #4b documenting the location of the steep hillside area. This prohibition on development shall apply to the bluff face as the location of the bluff edge changes over time, due to erosion or other disturbances. The current location of the bluff face and steep hillside area shall be described and depicted in an Exhibit attached to the Notice of Intent to Issue Permit (NOI) that the Executive Director issues for this permit.

WITHIN 30 DAYS OF COMMISSION APPROVAL OF THIS COASTAL DEVELOPMENT PERMIT AMENDMENT AND PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOI FOR THIS PERMIT

AMENDMENT, the applicants shall submit for the review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a meets and bounds legal description and coresponding graphic depiction by a licensed surveyor of the easement area of the current location of the portion of the subject property affected by this condition, as generally described above and shown on Exhibit #9 attached to this staff report.

11. Prior Conditions of Approval. The conditions of this amendment shall supersede and replace all others prior special conditions of Coastal Development Permit No. A-133-79/F6760, as amended.

12. Condition Compliance. Within the specified times required in each condition or within such additional time as the Executive Director may grant for good cause, the applicants shall satisfy all requirements specified in the conditions hereto that the applicants are required to satisfy prior to issuance of this permit. Failure to comply with

this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

13. Implementation of Removal of Improvements. WITHIN 90 DAYS OF EXECUTIVE DIRECTOR APPROVAL OF REVISED PLANS REQUIRED IN SPECIAL CONDITION NOS. 4 AND 5 OF AMENDED COASTAL DEVELOPMENT PERMIT NO. A-133-79-A5/F6760-A6, or within such additional time as the Executive Director may grant for good cause, the applicants shall remove and/or modify the existing wall and gate located at the south side yard setback area and replace the wall and gate consistent with the plans approved pursuant to Special Condition #4 of this permit amendment. The applicants shall also remove the floodlights on the bluff face and cap or remove all irrigation on the site within 25 ft. of the bluff edge (except for the planter area adjacent to the northern portion of the home). Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

~~—14. Memorandum of Agreement. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT~~, the property owner(s) shall enter into a Memorandum of Agreement (MOA) with the Commission, agreeing to provide notice to the District Manager of the Commission's San Diego District Office if any of the following occur:

- ~~• fee title of the property is transferred from the current fee title holder to any other person(s) or entity(ies) except to the applicants' children (Ravean Kretowicz and Alexandra Kretowicz).~~
- ~~• neither permittee (Ure Kretowicz and Dianne Kretowicz) nor either of their children (Ravean Kretowicz and Alexandra Kretowicz) occupies the home as their primary residence.~~
- ~~• upon the death of both permittees (Ure Kretowicz and Dianne Kretowicz).~~

~~The applicant shall record the MOA as a deed restriction on the parcel(s) governed by this permit. The deed restriction shall be in a form and content acceptable to the Executive Director. The document shall be recorded free of prior liens and other encumbrances.~~

III. Findings and Declarations.

The Commission finds and declares as follows:

1. Amendment Description. The proposed project represents an amendment to a coastal development permit approved by the Commission for the construction of a 3,693 sq. ft. addition to an existing 2,970 sq. ft. single-family residence in 1979. The proposal is to revise the terms of the requirement to record an offer to dedicate vertical public access easement and approval of various other improvements, both new and after-the-fact. Specifically, the amendment request includes:

(1) The applicants propose to revise the terms of the existing requirement for recordation of an offer to dedicate vertical public access easement as follows:

- (a) Vertical Public Access: The applicant will record an irrevocable offer to dedicate to a public agency or private association approved by the Executive Director, an easement for public pedestrian access to the shoreline which shall be 4-5 ft. wide and run within a 10 ft. area generally along the southern property boundary as depicted generally on Exhibit #12. However, the easement will not be opened and made available to the public until the first of the following occurs: 1) the applicants sell the property to a third party; 2) neither applicants nor their children occupies the home as their primary residence; or 3) 15 years following the death of both the applicants.
- (b) Emergency Lifeguard Access. Upon issuance of the permit amendment, the applicants propose to grant to the City of San Diego an easement for emergency lifeguard access to the beach which shall be 4-5 ft. wide and run along the southern property boundary.

The following components have already been constructed and are proposed to remain and be approved after-the-fact:

- (2) Construct concrete stairways along the south and eastern property boundaries.
- (3) Construct wall and fence across south side yard area (to be lifeguard emergency access).
- (4) Install decorative paving in City Right-of-Way leading up the house.
- (5) Construct new planter walls, entry trellis and 4 ft. high planter in public Right-of-Way.
- (6) Construct new fountain adjacent to eastern exterior stairway.
- (7) Replace second-story deck and add partial roof.
- (8) Construct new second-story cantilevered balcony.
- (9) Construct a 28 ft. long, 6 ft. high masonry wall in public right-of-way.
- (10) Extend height of existing retaining wall from 3 ft. 6-inches to 7 ft. 6-inches.
- (11) Construct modifications to non-conforming accessory structure (Casita) located partially within public right-of-way to include 52 sq. ft. bathroom addition, new doors, windows and expansion of existing walls.

(12) Add approximately 844 sq. ft. to existing home (bedrooms, music and exercise room) by converting unimproved area beneath main home to living area, portions of which are located within 25 ft. of the bluff edge.

(13) Remove wooden timber stairs and portion of retaining wall on bluff face.

The following components are new:

(14) Interior garage improvements to include excavation and removal of approx. 130 cy. of uncompacted fill material to allow an additional parking space, a car lift and storage.

(15) Remove floodlights from bluff face.

(16) Remove or cap irrigation on bluff face.

(17) Construct new trellis over second story deck

(18) Install a new jacuzzi spa/water feature in rear yard adjacent to the coastal canyon.

(19) Install a photovoltaic system on the roof.

The 1.31 acre site is situated atop a 55-ft. high coastal bluff located off a cul-de-sac at the northern terminus of Princess Street in the La Jolla community of the City of San Diego. The existing residence is situated on the flatter portion of the site, directly adjacent to Princess Street, with the site sloping steeply down from the home to the north and west. There is no existing shoreline or bluff protection on the subject site. Surrounding development includes single family homes to the east and south and the Pacific Ocean to the north and west.

The City of San Diego has a certified LCP, and the subject site is within the City's permit jurisdiction. However, since the subject application represents an amendment to a Commission-approved coastal development permit and requires modification of prior conditions of approval, the Commission has jurisdiction over this application. Nevertheless, the standard of review is the certified LCP (the La Jolla Land Use Plan and the City's Land Development Code) and, because the subject site is between the sea and the first public road, the public access and recreation policies of the Coastal Act.

2. Detailed Project History. The home on the site was originally constructed around 1915. Over the years, the home was added to and remodeled several times. In June of 1977, the Regional Commission denied an application (#F5265) by Ms. Baker for a substantial addition (3,300 sq. ft.) to the existing home on the site, finding that the development would have a significant adverse impact on scenic resources in the area as it would significantly encroach onto the visually prominent bluff seaward of the existing home.

In June of 1978, the Regional Commission approved Ms. Baker's CDP #F6760 for construction of a 3,693 sq. ft. addition to the existing 2,970 sq. ft. single-family residence, finding that the project did not project further seaward than the existing line of development, thereby reducing its impact on visual resources (there is a discrepancy with the square footages called out in this permit and the subsequent actions. After review of the final plans approved for the original project, the actual size of the addition and of the existing home is greater). The permit was approved with special conditions requiring that the development comply with the recommendations of the geology report, that the southwest corner of the proposed addition (15 ft. x 15 ft.) be cantilevered to "ensure the integrity of the slope", and that the final drainage plans be submitted. The decision on this matter was subsequently appealed to the State Commission (A-221-78), but the State Commission found that the appeal raised no substantial issues on July 18, 1978. The grounds for the appeal were that inadequate public access findings were made.

A lawsuit was then filed against the Commission for, among other things, not having made adequate findings regarding public access and recreation as required by Section 30604 of the Coastal Act for development located between the first public road and the sea. The court subsequently found that the development was located between the first public road and the sea and that the finding on public access and recreation was not sufficiently specific to comply with the requirements of Section 30604(c) of the Act. The court ordered that the matter be remanded back to the Regional Commission for a specific finding on only the issue of public access and recreation. In addition, the court allowed the development to go forward in the interim because the petitioners failed to post the necessary bond for a stay. The Regional Commission subsequently adopted more specific findings regarding public access and recreation but did not impose any special requirements for the provision of public access at the site. This decision was then also appealed to the State Commission (A-133-79).

On September 20, 1979, the State Commission found that additional public access provisions should be required. Specifically, the Commission found:

... access to this pocket beach is only available at low tide due to the promontories which impede access to the beach from the nearest accessway to the shoreline which is located ¼ mile up coast. The Commission concludes, therefore, that adequate access does not exist nearby. Although the public has historically had access over the project site, construction of the project has preceded the use of this accessway, thereby diminishing the public's right of access to the state owned tidelands. An alternative accessway must, therefore, be provided to offset the burdens this development has placed on the public's constitutional right of access and to assure the conformity of the project with the provisions of Section 30212 of the Act.

The Commission imposed a special condition on the permit requiring the applicant to record offers to dedicate both lateral (across the ocean frontage of the parcel from the toe of the bluff to the mean high tide line) and vertical (5 ft. in width extending from Princess Street along the southern edge of the property next to the garage and then in a northwesterly direction along the top of slope and then back in a southwesterly direction ,

traversing down the face of the bluff to the beach) public access easements (ref. Exhibit #6 - Original Staff Report). By the time the Commission imposed the access conditions, however, the applicant had already completed construction of the proposed addition in compliance with the permit as previously issued. Therefore, the State Commission required that the vertical access be located in a slightly different location than the historic trail in order to accommodate the addition. The then-owner, Ms. Baker, did not record the offers to dedicate access.

Because the permit for the addition was remanded, and subsequently issued during the litigation and appeal, it retained the original application number F6760. However, because the State Commission heard a second appeal, it gave the permit a new number – A-133-79. Therefore, the permit for the addition is identified by both numbers: A-133-79/F6760.

Then, in 1980, the applicant (Ms. Baker) requested and received approval of an amendment to the permit to authorize drainage structures which had already been constructed without authorization (ref. CDP #F6760-A1). That is, the applicant implemented the drainage improvements without authorization and subsequently received approval through an after-the-fact permit amendment for the revised drainage plans.

In 1988, the Commission certified the City of San Diego's Local Coastal Program and the City began issuing coastal development permits for development within its jurisdiction, including La Jolla where the subject site is located.

In 1994, the property became bank-owned through a foreclosure and the bank sold to Mr. and Mrs. Kretowicz, the now current owners and applicants. As noted above, the offers to dedicate lateral and vertical access had not been recorded.

In 1999, the City of San Diego approved a coastal development permit for construction of a pool with spa, a concrete deck, barbecue counter, retaining walls, drains and landscaping in the rear yard of the blufftop site that contains the existing single-family residence. The proposal also included removal of a number of existing unpermitted improvements (wooden timber stairs, retaining walls and palm trees) on the face of the coastal bluff. No changes to the existing single-family residential structure were proposed. The City's decision to approve the development was appealed by the Commission on June 25, 2001 (ref. Appeal #A-6-LJS-01-95). The basis of the appeal was that the proposed development was allegedly inconsistent with the certified LCP as it related to blufftop setbacks, geologic hazards, protection of public views and public access. In particular, a swimming pool was proposed projecting beyond the bluff edge of the subject site. The certified LCP requires such structures to be sited a minimum distance of 25 feet from the edge of the bluff. A second major issue raised with the project was that it was inconsistent with the conditions of approval of Coastal Development Permit #A-133-79/F6760, which required recordation of an offer for a public vertical access easement across the subject site.

The appeal was thus scheduled for Commission review. On August 6, 2001, the Commission found that a Substantial Issue existed with respect to the grounds on which

the appeal was filed. The de novo review of the permit application was subsequently scheduled for the Commission's October, 2001 meeting and then again at its June, 2002 meeting. Both times the project was postponed by the applicants. Subsequently, on May 14, 2002, the project was withdrawn by the applicants, which resulted in no permit for the development at the City or the Coastal Commission. The City subsequently sued the applicants over the unpermitted development that was present on the site (excavation in the garage). At this time, the applicants worked with both the Coastal Commission's enforcement staff as well as the City's code enforcement staff to resolve the outstanding violations.

As part of the resolution of the outstanding violations on the subject site (and the related litigation that the City had instituted against the applicants), the applicants entered into a "Stipulated Judgment" with the City of San Diego, dated April 4, 2004, and, as agreed upon by the City and the applicants, the applicants then proceeded to seek an amendment to the previous Coastal Development Permit with the Coastal Commission, concurrent with the City's Site Development Permit, to address all the unpermitted development. As explained above, the State Commission revised CDP #F6760 to include the requirements for public access. As noted above, some of the development proposed by the applicants would block access to the area of the offer to dedicate a public access easement that was required in CDP A-133-79/F6760.

Then in 2004, the applicants requested an amendment to the State/Regional Commission permit to: (1) replace the requirement for recordation of an offer to dedicate a vertical public access easement with a) an easement solely for emergency lifeguard access and, b) a contribution of \$10,000 to enhance coastal access or other coastal improvements in the La Jolla area; 2) after-the-fact approval for the removal of unpermitted improvements on the subject site consisting of rear wood timber stairs, a portion of a retaining wall within the five foot coastal bluff setback, palm trees and the irrigation system; 3) construct an at-grade concrete patio, barbeque counter, area drains, staircase and landscaping; and 4) construct interior garage improvements to include excavation and removal of approx. 130 cy. of uncompacted fill material to allow an additional parking space and a car lift and storage (ref. CDP #A-133-79-A1/F6760-A2/Kretowicz). On June 14, 2005, the Commission denied the applicants' request to replace/modify the previously required vertical public access easement; however, it approved all other proposed improvements with a requirement that they be modified such that no improvements occur within the alignment of the required access easement.

On August 5, 2005, the applicants filed litigation against the Commission regarding its decision to deny the modification to the previously required public access easement (ref. SDSC Case No. GIC 851915). The Commission subsequently filed a Cross-Complaint, claiming, among other things, violations of the Coastal Act. Subsequently, a settlement was reached and the applicants submitted an amendment request to modify the terms of the access easement (such that it would not be available for public access until 2081), pay \$200,000 towards the reconstruction of a nearby failed public access stair and install a public viewing platform pursuant to the terms of the settlement agreement (ref. CDP #A-133-79-A2/F6760-A3/Kretowicz). However, at the June 14, 2007 hearing on this item,

the Commission raised concerns with the applicants' request and the matter was postponed by the applicants and subsequently withdrawn on November 20, 2007. The applicants and the Commission then negotiated an amended settlement agreement and the applicants applied to the City for approval. On December 2, 2008, the applicants received approval from the City of San Diego for Neighborhood and Site Development Permits for the development and then submitted a new amendment application to the Commission (ref. A-133-79-A3/F6769-A4). However, due to Permit Streamlining Act deadlines, this application was subsequently withdrawn.

The applicants then submitted another amendment request for the same project and a staff report was prepared for the October 2010 Commission hearing (ref. A-133-79-A4/F6760-A5). At the applicants' request the matter was postponed from the October 2010 hearing. However, due to Permit Streamlining Act deadlines, the applicant again withdrew the amendment request and then submitted another request.

This matter was scheduled for review by the Commission at the February 2011 Commission hearing in San Diego. However, at the applicants' request, the item was postponed. Since the last report was prepared and circulated for the October 2010 Commission hearing, Commission staff have received many calls and a number of letters from members of the public opposed to the proposed amendment (see Exhibit #10 attached). The concerns identified are many, but almost all request that the requirement to record the OTD on the subject site remain as it was originally required by the Commission in 1979.

The project was again scheduled for review by the Commission at its June 15, 2011 hearing. After opening the hearing and discussing the project, the Commission continued the matter in order to have the applicants and staff try to work on an agreeable proposal to have the easement remain on the subject site, but have its opening deferred to a later date. Staff has met with the applicants and the subject amendment is the result of those discussions which no longer includes the request to pay \$3.3 Million to remove the easement.

3. Public Access. Because this site is between the sea and the first public road parallel to the sea, pursuant to California Public Resources Code section 30604(c), any development must comply with the public access and recreation policies of the Coastal Act. Several policies of the Coastal Act require that new development protect or enhance public access and recreational opportunities to and along the shoreline. These policies include:

Section 30210

In carrying out the requirements 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. [emphasis added]

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,

Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Section 30223

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

In addition, the certified La Jolla Community Plan and Local Coastal Program Land Use Plan states the following:

The City should ensure that new development does not restrict or prevent lateral vertical or visual access (as identified in Figure 9 and Appendix G) to the beach on property that lies between the shoreline and first public roadway, or to and from recreational areas and designated public open space easements. Further, in areas where physical vertical access to the shoreline does not exist within 500 feet of a private development project on the shoreline, consideration of a new accessway across private property should be analyzed. (p. 52)

Maintain, and where feasible, enhance and restore existing facilities including streets, public easements, stairways, pathways and parking areas to provide adequate public access to the shoreline. Detailed maps and specific subarea recommendations are provided in Appendix G. (p.57)

The project site is located between the ocean and the first public roadway (Princess Street/Spindrift Drive). The subject site is at the terminus of Princess Street in the La Jolla community of the City of San Diego. The site is a natural promontory overlooking the La Jolla Underwater Park and Ecological Reserve and is bounded on the north and west by the ocean. The beach below the subject site (and to the south) is a small rock/cobble beach bounded by steep bluffs that is only accessible from surrounding beaches, and then only at very low tides and only from the north (the nearest public access point is adjacent to the Marine Room, approximately ¼ mile to the north). There is no formal access to this beach from the south due to the existence of steep coastal bluffs and rocky shorelines.

As described above in the “Detailed Project History” section, the Commission previously required recordation of an offer to dedicate (OTD) a public vertical access easement from the street to the beach as mitigation for impacts of a substantial home addition on a trail on the site that had historically been used by the public to access the beach in this location. While the OTD has never been recorded, in violation of the terms of the coastal development permit, due to the inaccessibility of the beach below the subject site, the need to provide access to the beach at this location is just as important today as it was when the Commission originally required it in 1979. The public access requirement has ultimately resulted in litigation filed against the Commission by the property owner. As a means to resolve the litigation, the applicants have proposed the subject amendment.

The subject amendment is to revise the requirements pertaining to recordation of a vertical public access OTD such that the OTD be recorded, but that the access not be opened and made available to the public (except for emergency lifeguard access) until a later date. There are many other components to the proposed amendment, but no others that affect public access.

In the original appeal (#A-133-79), the Commission found that there is evidence of historical public access on this site. The Commission found substantial evidence that the public had obtained rights of access through that use – i.e., that there has been such use as would support the conclusion that an area has been impliedly dedicated to public use. The intent of the Commission’s action on that appeal was to preserve public access at this site.

Although the Commission cannot determine whether public prescriptive rights actually do exist, as that determination is made by a court of law, Section 30211 requires the Commission to prevent development from interfering with the public’s right of access to the sea where acquired through use. As a result, where there is substantial evidence that such rights may exist, the Commission must ensure that proposed development would not interfere with any prescriptive rights which may exist. As such, the Commission concluded in 1979 that there is substantial evidence of such rights, and that the development approved under that permit did interfere with the exercise of those rights.

The Commission, in its review of the 1979 appeal, found that because access to the small pocket beach that exists below the subject property and to the south is only available at

the lowest of tides due to the protrusion of several promontories, and because there are no other vertical access points to this beach, that adequate access does not exist nearby. The Commission further found that although the public had historically had access over the project site, construction of the residential addition precluded the public from using the historic access, thereby diminishing the public's right to access the beach and as such, an alternative access must be provided to offset the burden the development placed on the public's constitutional right of access and assure consistency with 30212 of the Coastal Act. Therefore, the Commission required the applicant to record an OTD easement for public vertical access to the beach.

Although many years have passed since the original permit was approved and the property has changed hands several times, the essential facts remain the same--the site was previously used for public access to the beach and this access was blocked as a result of the addition to the home by the former owner of the property. Further, while the access easement will extend over a steep hillside area, the Coastal Commission's staff Coastal Engineer has reviewed the project site and a concept stairway plan and has determined that it would be feasible to construct improvements to facilitate access to the beach on the subject site if a 5 ft. wide access easement and a 5 ft. wide construction/maintenance area were provided.

The applicants have proposed at this time to record an OTD for public vertical access on the subject site consistent with the requirement of the original Commission decision on the appeal. However, the applicants are also proposing that the OTD not be opened or made available for use by the public until sometime in the future. Specifically, the applicants have proposed that once accepted, the easement could be opened upon either, (1) the sale of the property (not including transfer of title to their children); (2) if the applicants or their children no longer occupy the home as their primary residence; or (3) 15 years following the death of both applicants. What this would mean is that the OTD would be recorded prior to issuance of the permit and could then be accepted by an appropriate agency/entity (subject to the approval of the Executive Director), but could not be opened to the public until an unknown date, which could be as late as 15 years following the death of both the applicants.

One of the applicants has suggested that he was not aware of the public access requirement when he purchased the home with his wife some years ago and therefore, should not be responsible for the access now. While it is true that the OTD was never recorded and thus, would not show up on a title report, the applicant is a sophisticated developer and knows about the requirements to obtain permits for development. If, prior to purchasing the home, he had checked with the Commission's San Diego District office, he could have been provided with permit files for the subject site and be made aware of the permit history and the requirements for public access on the site. However, apparently this was not done and to now suggest that he be relieved of this requirement simply because he chose to not do research prior to his purchase is not a valid argument.

In this particular case, the Commission has found previously that there was historic public use of the site for beach access and as such, access across the site must be

protected. While the applicants' proposal has merit and will assure public access is eventually provided, deferring such access for as long as 15 years from the death of both applicants is too long, especially given that access has not been available on the site since 1979. The public has already waited over 30 years for this access and to be asked to wait an additional time period is not acceptable. To continue to deny public access at this site is to deny the public a constitutional right as cited in Section 30210 of the Coastal Act. The Commission previously required a public access easement on this site and the Commission finds that requirement is still valid today. Therefore, Special Condition #2 is imposed. However, given the unusual circumstances associated with the subject site and the fact that the current property owner was not the owner when the original access easement was required (but is several times removed), the Commission finds that it can accept the applicants' request only if the provision to wait up to 15 years from the death of both applicants is deleted. Without this provision, the access could be opened and made available to the public upon the earlier of the transfer of the property, or upon non occupancy by the permittees or their children, or the death of the current property owners. Special Condition #2 is proposed to reflect the change to the OTD from the applicants' proposal and the requirements that must be included in the OTD. The condition details when the easement will be opened, its general alignment and the type(s) of improvements that could occur within the easement to facilitate public access. Specifically, Special Condition #2 requires that prior to issuance of the permit, the OTD be recorded and that upon its acceptance by a suitable entity, it be opened to the public. Special Condition #14 addresses how the Commission office is to be notified when one of the triggers is met in the future to allow the access to be open. This condition requires a Memorandum of Agreement (MOA) between the applicants and the Commission be drafted and recorded. The MOA requires that the property owner(s) notify the local Commission office when there is a transfer of the property, non-occupancy by a family member and/or upon the death of either of the applicants.

The applicants are also proposing to immediately grant an easement to the City of San Diego for emergency lifeguard access across the site and down to the beach. While this measure is good and does help somewhat with public access, this was previously required by the Commission with the original permit. However, it too, was never recorded and remains a violation. Thus, the applicants' proposal to grant emergency lifeguard access will help facilitate public access such that lifeguards would be able to use the site for rescues should they be necessary, as current access to the beach in this location is very limited. Special Condition #1 reflects the applicants proposal and details the requirement for the emergency lifeguard access.

In summary, the applicants have proposed this amendment will result in to changes to the previously required public access provisions on a blufftop property in La Jolla where the Commission has previously found that historic public access exists and that public access should be provided. However, the Commission finds that deferring the opening of this important public access even one more year is not consistent with the public access requirements of the Coastal Commission. Therefore, the Commission has required through Special Condition #2 that the public vertical access OTD be recorded prior to issuance of the permit and then opened to the public once it is accepted and access

~~improvements have been constructed. While the proposal will not get the access easement opened immediately, once accepted, it will be opened and made available to the public once the property is sold or the applicants move or die. Again, while this is not ideal, in this particular case, given the unusual circumstances regarding the history of the site, Only as conditioned can the Commission finds that public access will be protected, consistent with the above cited provisions of the Coastal Act.~~

4. Blufftop Setbacks/Geologic Safety. The subject site is located on a blufftop lot located at the north end of the cul-de-sac of Princess Street where it meets Spindrift Drive in La Jolla. The proposed project includes various accessory improvements close to the bluff edge as well as additions to the home within 40 ft. of the bluff edge and some closer than 25 ft. from the bluff edge. The bluffs are steep and exist on both the north and west sides of the subject site. The existing residence is located on the flat part of the site close to the street frontage. From the street frontage, access to the rear yard is gained from the south side of the residence where there is a gate. Beyond the gate, there is a concrete walkway and steps which lead down in elevation to the back yard. As one turns the corner of the house in the back yard, there is a small flat lawn area immediately adjacent to the house. Grass and other vegetation then cascades down the north-facing bluff face of the subject site. Also in the rear yard, on the north side of the residence, there is an improved at-grade concrete patio and a deck at the upper story of the residence. The shoreline below the site is a rocky shoreline and there is no existing improved physical access to this area due to the steepness of the bluffs. There are no existing seawalls or bluff retaining walls on the subject site and none are proposed with the subject amendment request.

The proposed development raises several concerns related to the shoreline hazards provisions of the certified LCP as they relate to blufftop setbacks. Pursuant to the City's certified LCP, all proposed development on a coastal bluff must observe a required setback of 40 feet from the bluff edge, unless a site-specific geology report is completed which makes findings that a lesser setback can be permitted. Specifically, Section 143.0143 addressing Development Regulations for Sensitive Coastal Bluffs states the following:

- (f) All *development* including buildings, *accessory structures*, and any addition to existing *structures* shall be set back at least 40 feet from the *coastal bluff edge*, except as follows:
 - (1) The City Manager may permit *structures* to be located between 25 and 40 feet from the bluff edge where the evidence contained in a geology report indicates that the site is stable enough to support the *development* at the proposed distance from the *coastal bluff edge* and the project can be designed so that it will not be subject to or contribute to significant geologic instability throughout the anticipated life span of the primary *structures*, and no shoreline protection is required. Reductions from the 40-foot setback shall be approved only if the geology report concludes the *structure* will not be subject to significant geologic instability, and not require construction of

shoreline protection measures throughout the economic life span of the *structure*. In addition, the applicants shall accept a deed restriction to waive all rights to protective devices associated with the subject property. The geology report shall contain:

- (A) An analysis of bluff retreat and coastal stability for the project site, according to accepted professional standards;
 - (B) An analysis of the potential effects on bluff stability of rising sea levels, using latest scientific information;
 - (C) An analysis of the potential effects of past and projected El Nino events on bluff stability;
 - (D) An analysis of whether this section of coastline is under a process of retreat.
- (2) Accessory *structures* and landscape features customary and incidental to residential uses shall not be closer than 5 feet to the *coastal bluff edge* provided, however, that these shall be located at *grade*. *Accessory structures* and features may be landscaping, walkways, unenclosed patios, open shade *structures*, decks that are less than 3 feet above grade, lighting standards, *fences* and wall, seating benches, *signs*, or similar *structures* and features, excluding garages, carports, building, pools, spas, and upper *floor* decks with load-bearing support *structures*.

In addition, the policies and guidelines of the certified La Jolla-La Jolla Shores LCP also contain the following related provisions:

“The shoreline bluffs are one of La Jolla’s most scenic natural resources...Over time, as the bluffs continue to recede, existing developments will become increasingly susceptible to bluff hazards. In many cases, seawalls, revetments, and other types of erosion control structures will be required to stabilize the bluff. Such structures, while necessary to protect private property, are poor substitutes for adequate site planning....”

The LCP then goes on to cite the following guidelines:

[...]

“The geotechnical report...should document that the “area of demonstration” is stable enough to support the proposed development and that the project can be designed so that it will neither be subject to nor contribute to significant geologic instability throughout the estimated lifespan of the project structures....”

To find the proposed project consistent with the above-cited provisions of the LCP, the Commission must find that the proposed improvements will be safe and not require a seawall or other shoreline protective device to protect them into the future. To determine an appropriate safe setback for new development, the LCP requires the submission of an analysis of the stability of the bluff be completed according to accepted professional standards, which includes that not only the long-term erosion rate be adequately identified but also that the geotechnical report demonstrate an adequate factor of safety against slope failure (i.e., landsliding), of 1.5 or greater will be maintained throughout its economic life.

To that end, the applicants' geotechnical representatives have prepared quantitative slope stability analyses for the site. The analyses show that the factor of safety for the most critical failure surfaces varied from 1.73 to 1.99 seaward of the existing residence after 75 years. Thus, the geotechnical reports completed for the project conclude that the new development will not be affected by bluff instability, will not contribute to significant geologic instability and will not require any shoreline protection measures, throughout the anticipated 75 year economic life span of the structure(s). The Commission's staff geologist has reviewed the applicants' technical reports and has concurred that the proposed residential improvements/additions will be safe for their anticipated 75-year expected life, consistent with the LCP requirements cited above.

The proposed improvements include accessory improvements and various additions/revisions to walls and decks, the majority of which are located inland of the geologic setback area. However, as part of the after-the-fact improvements, the applicants are proposing to maintain an 844 sq. ft. addition to the home on the lower level that was constructed by enclosing existing non-habitable/unimproved areas and patios to create a gym and bedroom. When the major addition to the home was approved in 1978, the Commission allowed the newly added portions of the home to extend, in some locations, up to 5 ft. from the bluff edge. Since that time, the City has adopted ordinances, as cited above, which prohibit residential structures any closer than 25 ft. from the bluff edge. While the entire addition proposed for approval with this amendment is located below and within the footprint (albeit non-conforming) of the existing home, portions of this addition extend beyond the 25 ft. bluff edge setback. There are two areas of the proposed addition that extend into the 25 ft. setback area (ref. Exhibit #3). One is located on the northern most portion of the site. This area was expanded to create a bedroom and extends approximately 3 ft. into the 25 ft. setback area (total area of 7.35 sq. ft.). The other area is located on the northwestern portion of the site. It was expanded to create a gym and extends approximately 7 ft. into the 25 ft. setback area (total area of 65.6 sq. ft.).

In addition, the applicants are proposing to install a new spa in the rear yard area, but outside the 25 ft. blufftop setback area. As noted above, the applicants' technical consultants and the Commission's staff geologist both conclude that the proposed improvements are safe and will not be subject to threat for their estimated life. The City found, in its review of the project (Site Development Permit) for the additions, that because the addition areas would be located below and within the footprint of the existing

home and no new grading or ground disturbance was necessary, the project could be found consistent with the City regulations.

While the LCP does not contain any specific provisions to allow such an exception, in this particular case, the Commission finds the proposal acceptable. One of the reasons for the minimum 25 ft. bluff edge setback in the LCP on ocean fronting properties such as this one is to acknowledge that estimating the safety of structures and determining safe geologic setbacks is not an exact science. There have been many instances in San Diego County where a geologic report states a certain bluff edge setback is adequate and then some years later, the bluff fails and the property owners are requesting emergency permits to construct seawalls. Thus, the minimum 25 ft. setback provides a “buffer” area should the bluff sustain an unexpected failure in the future. In addition, the minimum 25 ft. setback area also serves to keep structures back from the edge to reduce their visibility from the beach and other off-site public locations. However, in the case of the proposed development, the Commission’s staff geologist concurs with the provided analysis that they are not expected to be subject to threat. In addition, the residential addition area is below and within the footprint of the existing approved home and is not visible from offsite locations. Thus, the proposed improvements are expected to be safe and therefore should not cause any adverse impacts to coastal visual resources.

Additionally, pools and spas, due to their weight and potential for leakage, are also treated as principal structures and must also maintain a minimum 25 ft. bluff edge setback. In the case of the proposed spa, it will be located at least 25 ft. from the bluff edge and the Commission’s staff geologist has found that, from a geologic standpoint, it is expected to be safe from threat in its proposed location. In addition, Special Condition #4b requires that the spa include special design provisions to assure it will not leak and result in impacts on the bluff. The spa is proposed to encroach into a steep hillside area and that impact is addressed in a subsequent section of this report.

The subject amendment also includes a request for after-the-fact authorization for removal of several unpermitted improvements beyond the bluff edge and on the face of the coastal bluff. These improvements included several wooden timber stairs, retaining walls and palm trees. However, as noted, all of these improvements have been removed. The applicants are also proposing with this application to remove some additional improvements that are also on the face of the bluff. These include a couple of flood lights and capping or removing existing irrigation on the face of the bluff. All of these improvements can be removed without disturbing the bluff and do not raise any coastal resource issues. Again, as these improvements already exist, Special Condition #13 requires that they be removed within 90 days of issuance of the amended permit.

All other existing or proposed accessory improvements will observe a minimum 5 ft. setback from the bluff edge and are at-grade, consistent with the certified LCP. Given that the accessory improvements are closest to the bluff edge, there is the potential for these improvements to be subject to threat from erosion in the future leading to a request for shore/bluff protection. However, the certified LCP does not allow for shoreline protection devices to protect accessory improvements. In addition, since the applicant

has assured the Commission that the proposed improvements can be constructed without requiring shoreline protection in the future, pursuant to the certified LCP cited above, Special Condition #6 requires the applicant to waive all rights to future protection for the improvement approved pursuant to this permit. Such a condition will assure that the bluff will be protected to the maximum extent possible from unnatural alteration of the bluff, consistent with the certified LCP.

Although the Commission finds that the proposed improvements to the home have been designed to minimize the risks associated with their construction, the Commission also recognizes the inherent risk of blufftop development. There is a risk of damage to the proposed improvements as a result of erosion and sea level rise over time. Given that the applicants have chosen to construct these improvements despite these risks, the applicants must assume the risks. Accordingly, Special Condition #7 requires the applicants to acknowledge the risks associated with this development, waiving any claims against the Commission for injury or damage that may result from such hazards, and agreeing to indemnify the Commission against claims for damages that may be brought by third parties against the Commission as a result of its approval of this permit. Special Condition #8 requires the permit and findings be recorded to assure future property owners are aware of the permit conditions.

Special Condition #9 has been attached to require that an amendment be approved before any future additions to the residence or other developments as defined by the Coastal Act, is constructed on the subject site. Requiring an amendment for all future development allows the Commission to insure that such development will not create or lead to the instability of the coastal bluffs, impacts to public access, adverse visual impacts or result in the construction or enlargement of the existing structure in a high risk area. To further protect the geologic integrity of the coastal bluff seaward of the residence, Special Condition #10 requires that an open space deed restriction be placed over the bluff face to prohibit construction or the placement of any structures on it (with the exception of the removal of the unpermitted improvements, irrigation piping, the construction and maintenance of the public accessway and privacy fencing and landscape screening) and to protect it in perpetuity.

In summary, the applicants have documented and the Commission's technical staff has concurred that the proposed improvements can be sited safely on the site without the need for shoreline protection in the future. Therefore, the proposed development, as conditioned, is consistent with the provisions of the certified LCP addressing geologic hazards and blufftop setbacks.

5. Protection of Steep Hillsides/Coastal Canyons. The project site also contains a steep hillside area that is also referred to as a coastal canyon. Steep Hillsides are defined in the City's certified implementation plan (Land Development Code) as follows:

Steep hillsides means all lands that have a slope with a natural gradient of 25 percent (4 feet of horizontal distance for every 1 foot of vertical distance) or greater and a minimum elevation differential of 50 feet, or a natural gradient of

200 percent (1 foot of horizontal distance for every 2 feet of vertical distance) or greater and a minimum elevation differential of 10 feet.

The City's certified LUP contains provisions addressing steep hillsides. Policy 4 (Page 51/52) of the Natural Resources and Open Space Element of the certified La Jolla LUP states, in part:

4. Steep Hillsides

- a. The City shall apply the Environmentally Sensitive Lands regulations to all new development on property in La Jolla having slopes with a natural gradient of 25 percent or greater and a minimum differential of 50 feet. The Environmentally Sensitive Lands regulations provide supplementary development regulations to underlying zones such as development encroachment limits for natural steep slopes, erosion control measures and compliance with design standards identified in the Steep Hillside Guidelines. Development on steep hillsides shall avoid encroachment into such hillsides to the maximum extent possible. When encroachment is unavoidable, it shall be minimized and in accordance with the encroachment limitations standards contained in the plan....

Plan Recommendation 5 (Pages 61-64) of the Natural Resources and Open Space Element of the certified La Jolla LUP states, in part:

5. Steep Hillsides

In addition to the recommendations contained in the Residential Element of this plan and the requirements of the Land Development Code, including the Environmentally Sensitive Lands regulations and the Steep Hillside Guidelines of the Land Development Manual, the following Hillside Development Guidelines shall be used as requirements in evaluating new development on all properties containing slopes in La Jolla which equal or exceed 25 percent:

- a. Keep driveways, parking areas, tennis courts, swimming pools, and other accessory uses to a minimum, and locate them on more level portions of the site in slopes below 25 percent.

[...]

- k. Set back large residential structures from the top of steep hillsides so that the design and site placement of a proposed project respect the existing natural landform and steep hillside character of the site. This is especially important for those locations that are visible from natural open space systems, parklands, major coastal access routes and the seashore. The reservation of the natural character of these areas depends upon minimizing visual intrusions.

The Environmentally Sensitive Lands (ESL) Regulations of the City's Land Development Code address development on steep hillsides. The following provisions of the ESL Regulations are applicable to the proposed development.

Section 143.0142 Development Regulations for Steep Hillsides

Development that proposes encroachment into steep hillsides or that does not qualify for an exemption pursuant to Section 143.0110(c) [not applicable here] is subject to the following regulations and the Steep Hillside Guidelines in the Land Development Manual.

- (a) Allowable Development Area

[...]

- (4) Within the Coastal Overlay Zone, steep hillsides shall be preserved in their natural state....

[...]

- (D) for the purposes of Section 143.0142, encroachment shall be defined as any areas of twenty-five percent (25%) or greater slope in which the natural landform is altered by grading, is rendered incapable of supporting vegetation due to displacement required for the building, accessory structures or paving...

[...]

In order to help the City interpret the development regulations for steep hillsides, the City of San Diego has developed the Steep Hillside Guidelines (which are included as a component of the City's certified LCP). The following provisions of the guidelines are applicable to the proposed development.

DESCRIPTION OF REGULATIONS

[...]

(B) 143.0113 Determination of Location of Environmentally Sensitive Lands, Applicability of Division and Decision Process

[...]

- (4)(a) Within the Coastal Overlay Zone, projects proposing to encroach into steep hillsides shall be subject to the discretionary regulation identified in Section 143.0142(a)(4) of the Environmentally Sensitive Lands regulations. Projects

shall be evaluated on a case-by-case basis to determine if encroachment, as defined in Section 143.0142(a)(4)(D) of the Environmentally Sensitive Lands regulations, can be permitted. It is the intent of the regulations and the Steep Hillside Guidelines that development be located on the least sensitive portions of a site and that encroachment into areas containing steep hillsides, sensitive biological resources, geologic hazards, view corridors identified in adopted land use plans or viewsheds designated on Map C-720, be avoided or minimized if unavoidable. Projects proposing to encroach into steep hillsides shall demonstrate conformance with the Environmentally Sensitive Lands regulations and the Design Standards in Section II of the Steep Hillside Guidelines and result in the most sensitive design possible.

Encroachment shall not be permitted for the following:

- Projects where the encroachment is solely for purpose of achieving the maximum allowable development area;
- **Accessory uses or accessory structures including, but not limited to patios, decks, swimming pools, spas, tennis courts, other recreational areas or facilities, and detached garages, ...**
[emphasis added]

As noted in the project description, the subject site contains an existing single-family residence. While the project site is bordered by the ocean to the north and west, the southwestern portion of the site is considered a steep hillside in the LCP as it is part of a small coastal canyon area that intersects the bluff at this location. Based on the LCP definition of a coastal canyon, the sloping area on the southwestern portion of the site is defined as being part of a coastal canyon and as such is considered a steep hillside, rather than a coastal bluff under the LCP. The Commission's staff geologist has reviewed the project and concurs that the southwestern slope area meets the definition of a coastal canyon (ref. Exhibit #7 attached).

The above cited LCP definition of a steep hillside indicates that to be considered a steep hillside, the area must have a slope with a natural gradient of 25% or greater and a minimum elevation differential of 50 feet. In the case of the subject site, the Commission's staff geologist has looked at the topographic survey prepared by the applicant's consultant (ref. Topographic Survey by SB&O Planning and Surveying dated March 15, 2010), and determined that the coastal canyon area on the southwestern portion of the site is entirely comprised of slopes that exceed 25% grade. In addition, in looking at the topographic survey, the elevational differential in this area exceeds 50 feet. Thus, the coastal canyon area meets the definition of a steep hillside pursuant to the LCP.

The purpose and intent of the Steep Hillside Regulations is to assure that development occurs in a manner that protects the overall quality of the resources and the natural and topographic character of the area. The reservation of the natural character of these areas depends upon minimizing visual intrusions. The applicant is proposing to install a

Jacuzzi spa in the rear yard of the home, partially extending into steep slopes of 25% grade or more. The above-cited steep hillside regulations require that development on steep hillsides be avoided and that if unavoidable, development be minimized. The LCP provisions allow for some encroachment into steep hillsides, but only in those circumstances where such an encroachment cannot be avoided due to a predominance of steep slopes rendering the site otherwise undevelopable. For the proposed development, such is not the case. The applicants already have achieved reasonable use of the site with the existing single-family residence and its associated yard and patio areas, which were constructed on the flat, non-steep portions of the site. As such, based on the above-cited LCP provisions, there is no requirement that encroachment onto steep hillsides be permitted.

More importantly, as cited above, the steep hillside guidelines specifically prohibit encroachment into steep hillsides for accessory improvements such as spas. Thus, if the proposed spa encroaches onto steep hillsides, it is not consistent with the certified LCP. However, at this time, the exact extent and location of the steep hillside area has not been determined due to the applicant's assertion that the upper limits of the canyon area has been filled in the past and is thus not a natural gradient. The applicant has presented geotechnical information supporting that fill exists in this area. The Commission's Staff Geologist has reviewed the presented information and confirms that fill is present in this location. However, he cannot, based on his review of the information, identify the extent of the fill at this time and thus, the location of the steep hillside area cannot be specifically identified. After further review of the information and possibly some additional soil borings, the Commission's staff geologist could better identify the extent of the fill. Therefore, Special Condition #4b allows for the submittal of additional information for review and approval of the Executive Director, documenting the extent of the fill and the location of the steep hillside area and also requires that the applicants submit final plans that show the spa does not encroach into the LCP defined steep hillside area of the site as determined by the Executive Director. In order to reduce the potential for impacts to the adjacent natural hillside and bluff area resulting from a leaking spa, Special Condition #4b also requires that a spa protection plan be prepared and, that the applicants include such plan in the design and improvement of the spa.

To protect the LCP defined steep hillside area from development in the future as required under the LCP, Special Condition #10 requires that an open space deed restriction be placed over the steep hillside portions of the site (and the coastal bluff area as described in the previous section of this report) to prohibit construction or the placement of any structures on it (with the exception of the removal of the unpermitted improvements and irrigation piping, the construction and maintenance of the public access way, and privacy fencing and landscape screening) and to protect it in perpetuity. With these special conditions, the steep natural hillside area will be protected, consistent with the above cited LCP provisions.

6. Public Views. In terms of protection of scenic quality and the visual resources of the subject site, the certified LCP and the La Jolla Community Plan contain numerous policies addressing the protection of public views to the ocean. Some of these include:

Public views from identified vantage points, to and from La Jolla's community landmarks and scenic vistas of the ocean, beach and bluff areas, hillsides and canyons shall be retained and enhanced for public use....

Public views to the ocean from the first public roadway adjacent to the ocean shall be preserved and enhanced, including visual access across private coastal properties at yards and setbacks....

Protect public views to and along the shoreline as well as to all designated open space areas and scenic resources from public vantage points...Design and site proposed development that may affect an existing or potential public view to be protected...in such a manner as to preserve, enhance or restore the designated public view....

Implement the regulation of the building envelope to preserve public views through the height, setback, landscaping and fence transparency regulation of the Land Development Code that limit the building profile and maximize view opportunities....

View corridors utilizing side yard setbacks, should be encouraged along shoreline and blufftop areas, in order to avoid a continuous wall effect. Even narrow corridors create visual interest and allow for sea breezes to refresh passersby....

- Setbacks and view corridors should be kept clear of trash receptacles, utility boxes, storage materials, untrimmed landscaping or any other obstructions which may interfere with visual access.

In addition, the certified Land Development Code contains similar provisions. Section 132.0403 of the Land Development Code states the following:

- (a) If there is an existing or potential public view and the site is designated in the applicable *land use plan* as a public view to be protected,
 - (1) The applicant shall design and site the *coastal development* in such a manner as to preserve, enhance or restore the designated public view, and
 - (2) The decision maker shall condition the project to ensure that critical public views to the ocean and shoreline are maintained or enhanced.
- (b) A visual corridor of not less than the side *yard* setbacks or more than 10 feet in width, and running the full depth of the *premises*, shall be preserved as a deed restriction as condition of Coastal Development permit approval whenever the following conditions exist [emphasis added]:
 - (1) The proposed *development* is located on *premises* that lies between the shoreline and the first public roadway, as designated on Map Drawing No. C-731; and

- (2) The requirement for a visual corridor is feasible and will serve to preserve, enhance or restore public views of the ocean or shoreline identified in the applicable *land use plan*.
- (c) If there is an existing or potential public view between the ocean and the first public roadway, but the site is not designated in a land use plan as a view to be protected, it is intended that views to the ocean shall be preserved, enhanced or restored by deed restricting required side yard setback areas to cumulatively form functional view corridors and preventing a walled off effect from authorized development.

[...]

- (e) *Open fencing* and landscaping may be permitted within the view corridors and visual accessways, provided such improvements do not significantly obstruct public views of the ocean. Landscaping shall be planted and maintained to preserve public views.

In addition, the City's certified implementation plan defines open fencing as "a fence designed to permit public views that has at least 75 percent of its surface area open to light." The intent of the above-cited language in the certified LCP is to enhance or maintain any potential public views across a property between the first coastal road and sea.

The subject site is located at the northwest corner of Princess Street and Spindrift Drive in La Jolla on a coastal blufftop lot. The site is located within a major scenic viewshed, as identified in the certified Land Use Plan and between the first public road and the sea. The proposed amendment raises a couple of issues with regard to protection of public views. First, the proposed fence/wall and gate at the entrance to the vertical access easement may impact public views from the public right-of-way as well as from an existing informal viewing area on Spindrift Drive. The second relates to the existing and proposed landscaping in the view corridor along the southern property boundary.

Relative to the fence/wall and gate, as noted above, on properties located between the first public road and the sea and/or on properties that contain designated view sheds, the LCP requires that public views be protected by, among other things, requiring that the side yard setback area(s) be deed restricted to assure structures and landscaping do not interfere with public views. In the case of the subject site, public views of the ocean are available along the south side yard area from Princess Street as well as from an informal viewing area adjacent to Spindrift Drive over the residence. There is an existing concrete stairway in the southern side yard. However, beyond the stairway further south along the side yard, there is an existing hedge which could impede public views to the ocean. While no new landscaping is proposed, there is the potential that in the future, trees or other tall shrubs could be planted within this side yard area. For this reason, Special Condition #5 requires that all new landscape materials within the southern yard area (adjacent to the home) shall be species with a growth potential not expected to exceed a

height of three feet above the elevation of the adjacent street as depicted on the plans by Marengo Morton Architects dated 6/13/11. In addition, currently there is existing landscaping within the south side yard setback area that could obstructs views to the ocean from not only the existing informal public viewing area, but also from the end of Princess Street looking towards the ocean through the south side yard. While this landscaping need not be removed, Special Condition #5 requires that it be maintained such that ocean views are not affected. This condition also requires that any new plant materials be mostly drought-tolerant native species (no invasive species) and that in 5 years a landscape monitoring report be submitted documenting that the landscaping is consistent with the landscape plans approved with this action.

However, the fence/wall and gate proposed to be retained will affect public views along this view corridor and are not consistent with the provisions of the certified LCP cited above in that neither the wall nor the fence have been designed such that 75% of their surface area is open. The existing fence/wall and gate extend across the south side yard adjacent to Princess Street. As proposed, the gate is 92 inches tall and 48 inches wide and is constructed with a wood frame (approximately 6 inches wide on either side and approximately 9 inches wide on the top and bottom) with a wire mesh middle section. One side is attached to the home and other to a free standing solid stucco wall that is 92 inches tall and approximately 32 inches wide that extends beyond the property line onto the adjacent property to the south. Based on the plans submitted with this application, the proposed gate only retains approximately 50% of its surface area as open and the stucco wall is solid, with no open area. Thus, both the gate and the wall are inconsistent with the certified LCP.

The south side yard area is the only area on the property where public views are available to the ocean. Thus, maintaining these existing public views is important. To assure public views are maintained, Special Condition #4c requires that the fence/wall and gate be revised such that the upper 75% of the surface area of each is open and that no portion extends onto the adjacent property to the south. This condition also requires that revised plans first be approved by the City of San Diego. Because the fence/wall and gate are currently existing, Special Condition Nos. 12 and 13 require that the revised plans, approved by the City of San Diego, be submitted within 60 days of Commission action and that the fence/wall and gate be removed within 90 days of issuance of the amended permit.

Currently, ocean views are available over the existing home and between the existing home and the home to the south from an informal public viewing area along Spindrift Drive. None of the proposed improvements will result in public view impediments from this viewing area. While the project does include the installation of photovoltaic panels on the roof of the home, the roof is flat and surrounded by a small parapet wall, which will screen the panels from offsite views. With the requirement that landscaping be trimmed to maintain views and the fence/gate be modified in the south yard area, the Commission can be assured public views will be maintained into the future.

In summary, there are existing public views of the ocean that will be affected by the subject development. The existing wall and gate proposed to be retained result in public

view impacts and are inconsistent with the certified LCP. As conditioned to revise these structures and to assure all landscaping in the south side yard setback area is low level, not to exceed three feet in height, public views will be protected, consistent with the above-cited provisions of the certified LCP.

7. **Unpermitted Development.** Unpermitted development has been carried out on the subject site without the required coastal development permit. The applicants are requesting after-the-fact authorization for numerous improvements to the existing home to include construction of concrete stairways, walls and fences, garage improvements, decorative paving in the public Right-of-Way, new planters and trellises, second story-deck and roof and balcony and modifications to a non-conforming structure located partially in the public Right-of-Way. Also, requested are after-the-fact additions to the home.

To ensure that the matter of unpermitted development is resolved in a timely manner, Special Condition #12 requires that the applicants satisfy all conditions of this permit amendment within the specified times required in each condition, or within such additional time as the Executive Director may grant for good cause. In addition, because many components of the amendment have already been constructed and through this amendment are required to be revised, Special Condition #13 requires that within 90 days of Executive Director approval of the required revised plans pursuant to Special Condition Nos. 4 and 5, the applicants shall remove the existing improvements consistent with the plans approved pursuant to Special Condition Nos. 3 and 4 of this permit amendment.

Although development has taken place prior to the submission of this amendment request, consideration of the request by the Commission has been based solely upon the certified City of San Diego LCP and the public access and recreation policies of the Coastal Act. Commission action upon the permit amendment does not constitute a waiver of any legal action with regard to the alleged violations of the Coastal Act that may have occurred; nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal development permit.

8. **Local Coastal Planning.** The subject site is zoned RS-1-7 and is designated for residential use in the certified La Jolla Land Use Plan. The proposed project is consistent with that zone and designation. The subject site consists of a sensitive coastal bluff as identified in the City's certified LCP. The Environmentally Sensitive Lands (ESL overlay) regulations of the City's implementation plan are thus applicable to the subject site. The proposed improvements, as conditioned, are consistent with the ESL overlay.

The certified La Jolla Community Plan and Local Coastal Program Land Use Plan contain policies that address shoreline protective devices, protection and improvement of existing visual access to the shoreline, and policies stating that ocean views should be maintained in future development and redevelopment. In addition, the certified LUP requires that structures be set back adequately from the coastal bluff to protect the geologic integrity and visual resources of the coastal bluffs and shoreline areas. As conditioned, the proposed development is consistent with the shoreline hazards provisions and all other relevant provisions of the certified LUP. It is also consistent with

the public access and recreation policies of the Coastal Act. Therefore, the proposed development, as conditioned, is consistent with the certified LCP and the relevant policies of the Coastal Act and can be approved.

9. Consistency with the California Environmental Quality Act (CEQA).

The Commission incorporates its findings above in sections 1 through 7 regarding Coastal Act consistency and LCP consistency at this point in support of its CEQA findings. Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project has been conditioned in order to be found consistent with the certified LCP and the public access and recreation policies of the Coastal Act. Mitigation measures, including conditions addressing the recordation of public access OTD, revised plans and open space on the bluff face and steep hillside area will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and is consistent with the requirements of the Coastal Act to conform to CEQA.

OCEAN

SAN DIEGO

LA JOLLA

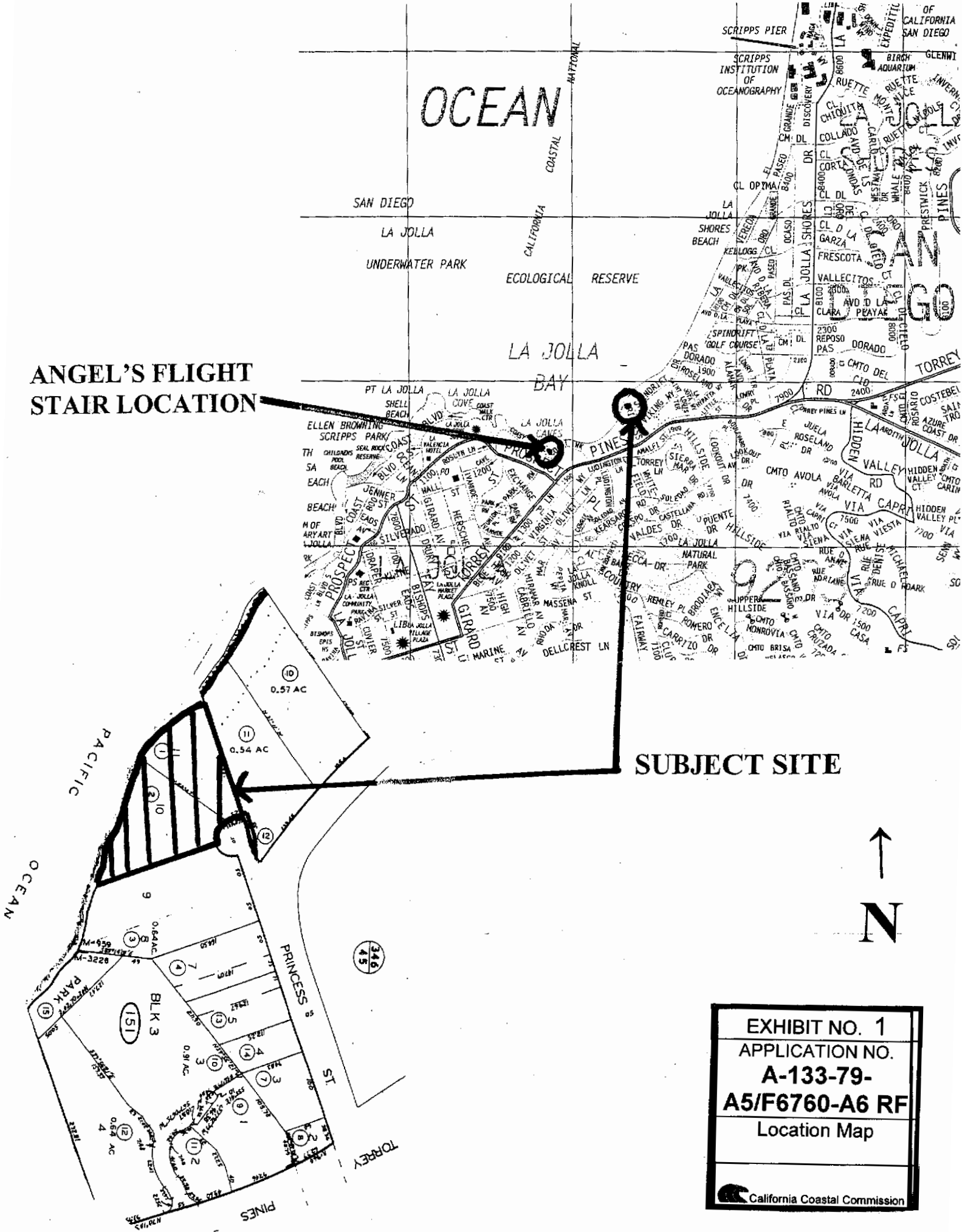
UNDERWATER PARK

ECOLOGICAL RESERVE

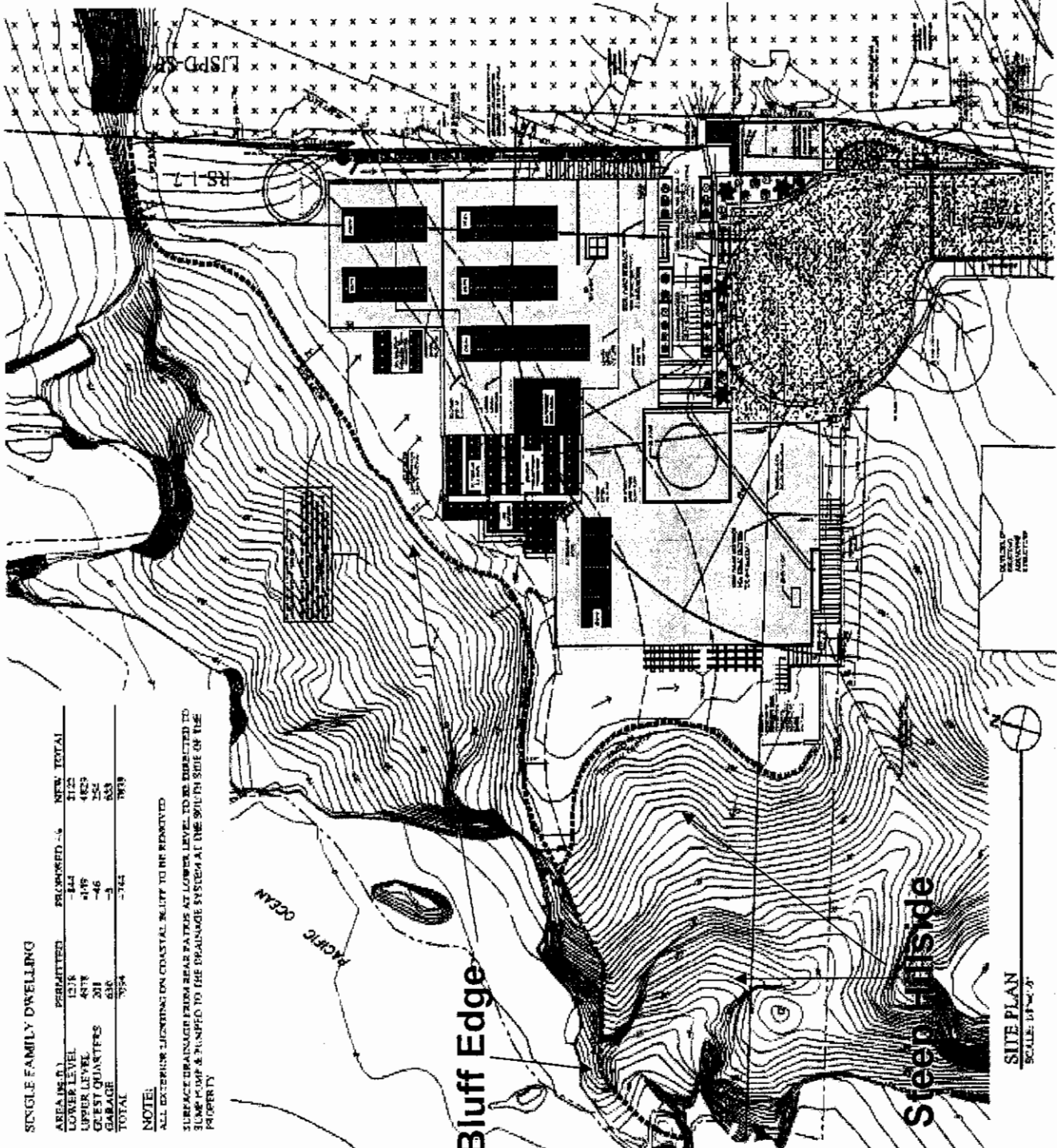
LA JOLLA BAY

ANGEL'S FLIGHT STAIR LOCATION

SUBJECT SITE



| |
|-------------------------------|
| EXHIBIT NO. 1 |
| APPLICATION NO. |
| A-133-79- |
| A5/F6760-A6 RF |
| Location Map |
| California Coastal Commission |



SINGLE FAMILY DWELLING

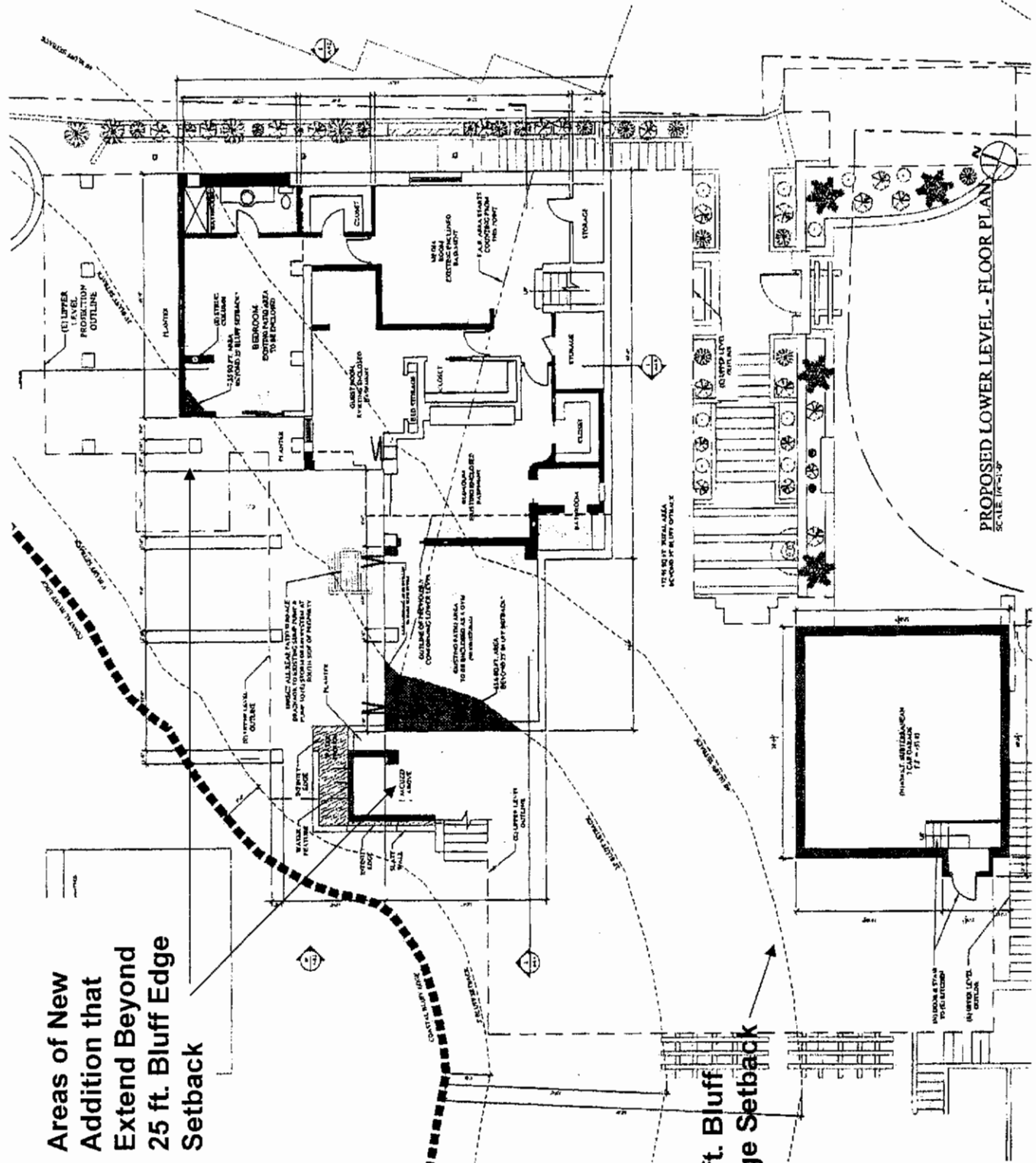
| AREA (SQ. FT.) | PERMITTED | PROPOSED | NEW TOTAL |
|----------------|-----------|----------|-----------|
| LOWER LEVEL | 1218 | -844 | 374 |
| UPPER LEVEL | 4878 | 4199 | 9077 |
| GUEST QUARTERS | 201 | -46 | 155 |
| GARAGE | 636 | -3 | 633 |
| TOTAL | 7954 | -744 | 7210 |

NOTE:

ALL EXISTING LIGHTING ON COASTAL BLUFF TO BE REMOVED.
 SURFACE DRAINAGE FROM REAR PATIOS AT LOWER LEVEL TO BE REDIRECTED TO
 SLUMP POND & PUMPED TO THE DRAINAGE SYSTEM AT THE SOUTH SIDE OF THE
 PROPERTY.

SITE PLAN
 SCALE: 1/8" = 1'-0"

EXHIBIT NO. 2
 APPLICATION NO.
A-133-79-
A5/F6760-A6 RF
 Site Plan



PROPOSED LOWER LEVEL - FLOOR PLAN
SCALE 1/4"=1'-0"

Areas of New Addition that Extend Beyond 25 ft. Bluff Edge Setback

25 ft. Bluff Edge Setback

40 ft. Bluff Edge Setback



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| EXHIBIT NO. 3 |
| APPLICATION NO. |
| A-133-79- |
| A5/F6760-A6 RF |
| Floor Plan - Lower Level |
|  California Coastal Commission |

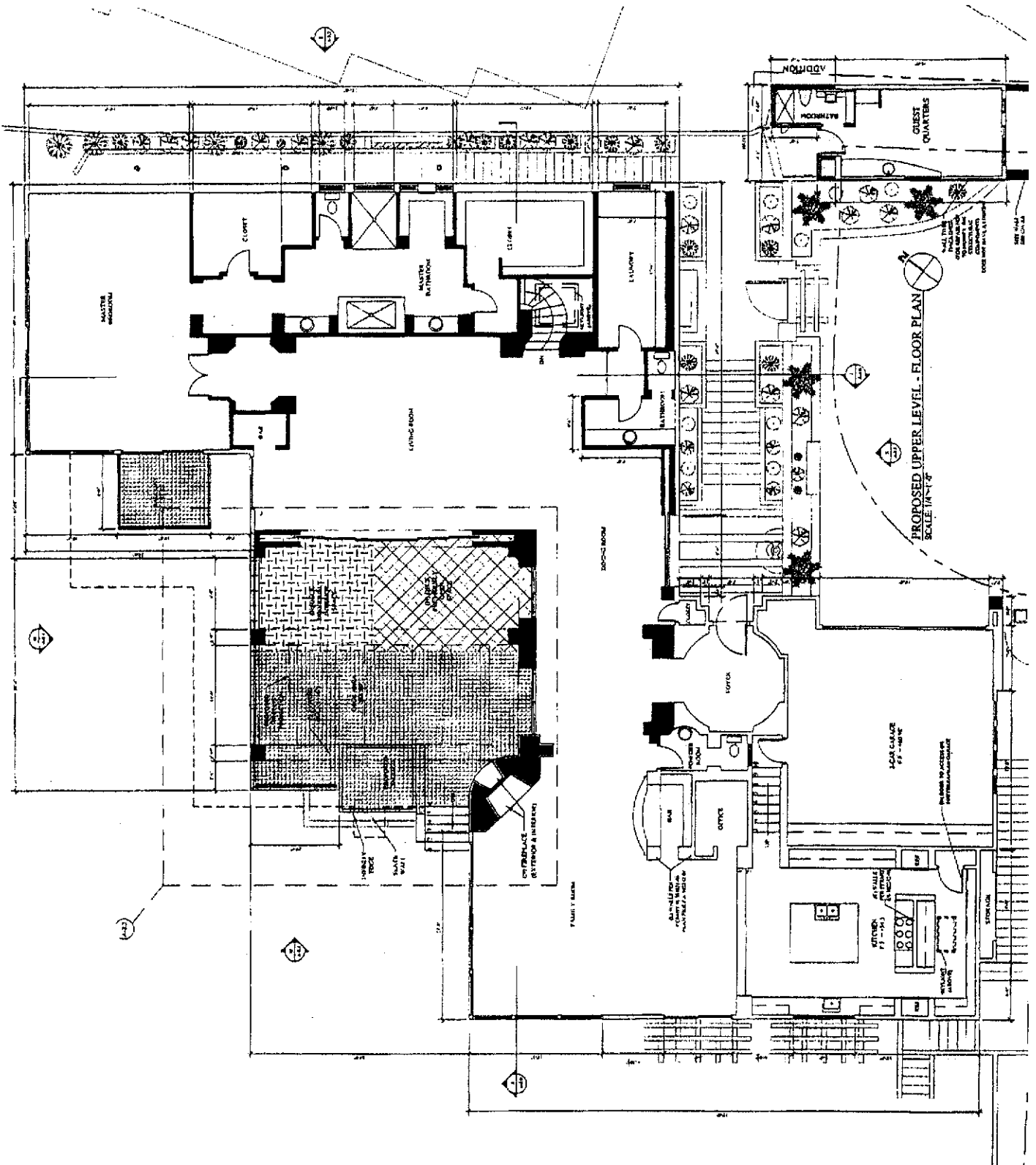
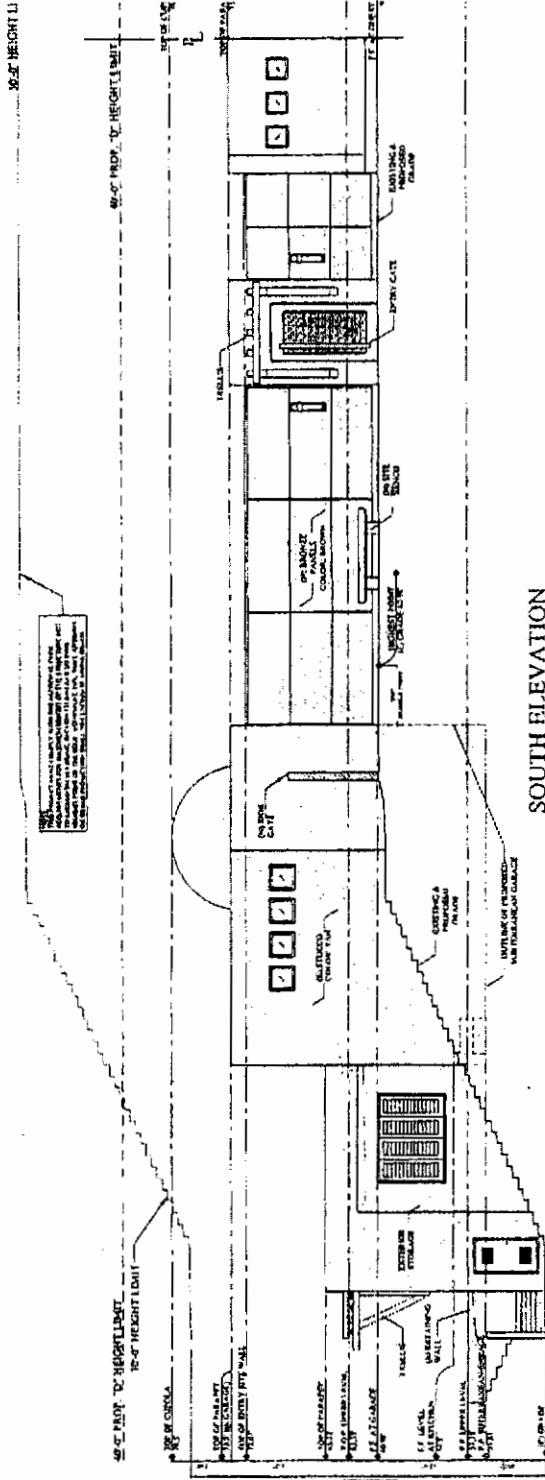
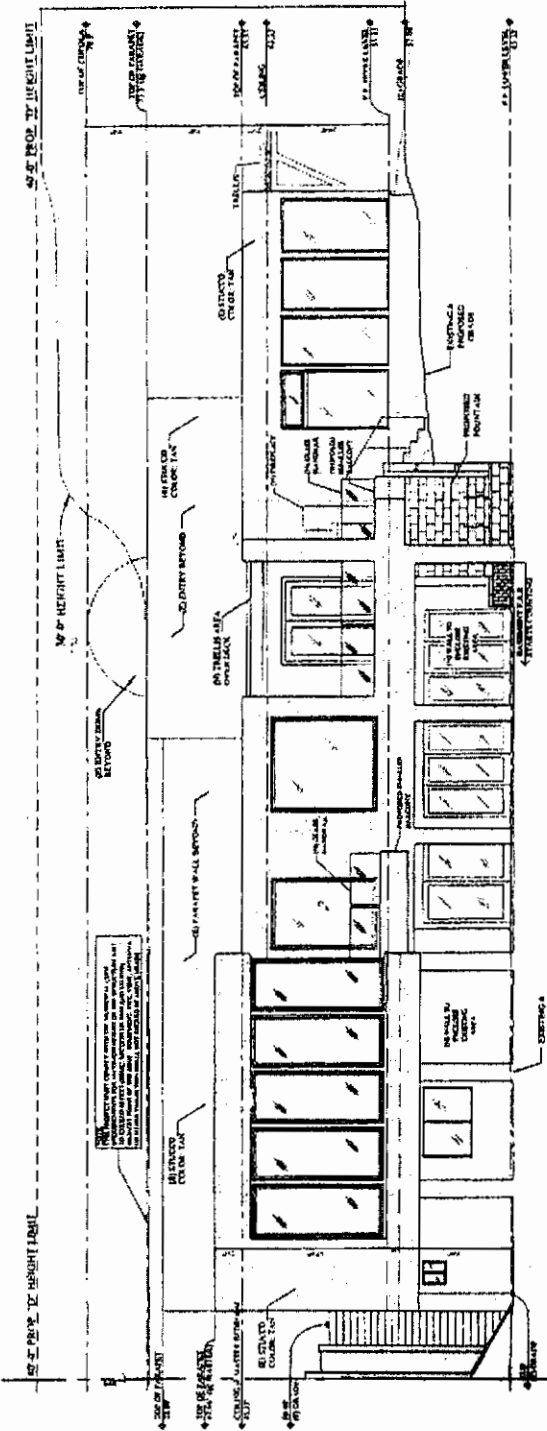


EXHIBIT NO. 4
APPLICATION NO.
A-133-79-
A5/F6760-A6 RF
 Floor Plan – Upper
 Level

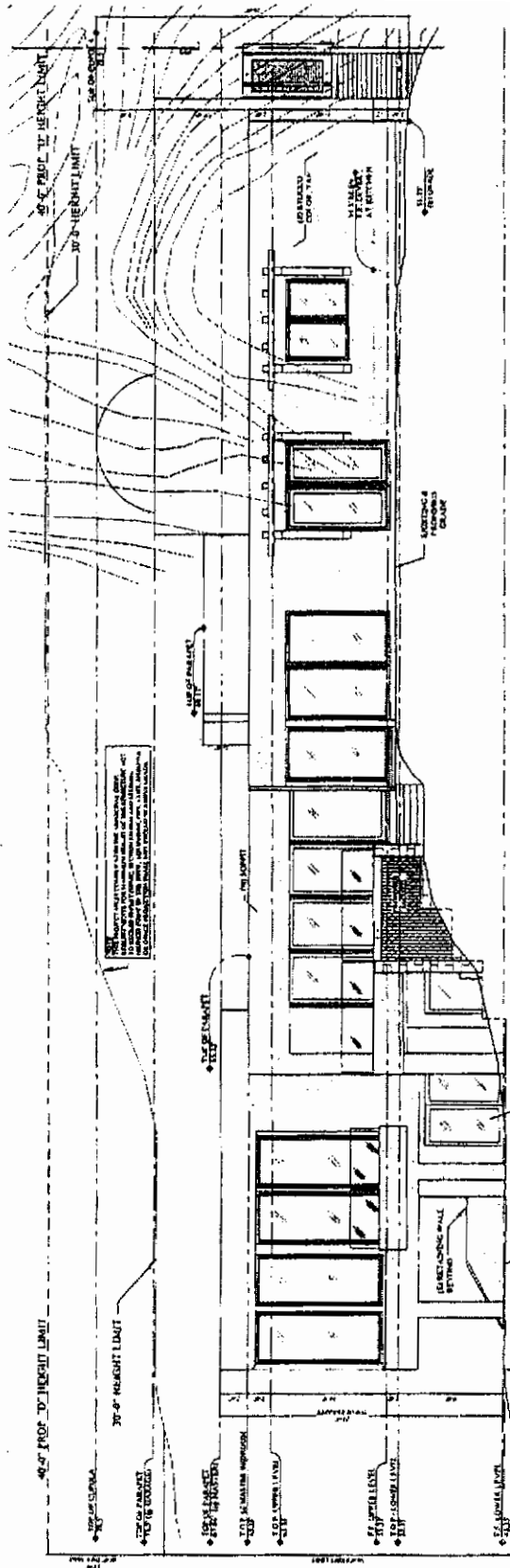


SOUTH ELEVATION
SCALE: 1/4" = 1'-0"

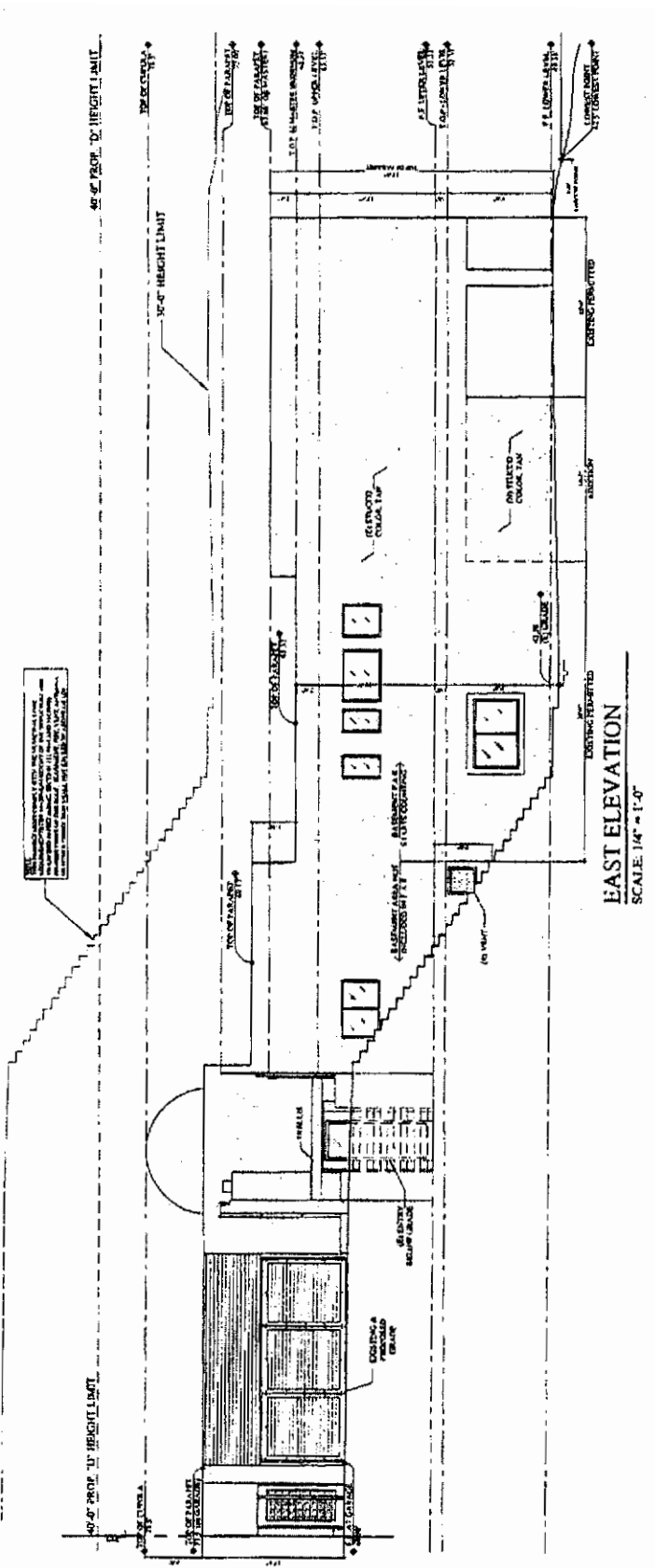


NORTH ELEVATION
SCALE: 1/4" = 1'-0"

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|---|
| <p>EXHIBIT NO. 5 APPLICATION NO. A-133-79- A5/F6760-A6 RF Elevations</p> |
| <p>1 of 2</p> |
| <p>California Coastal Commission</p> |

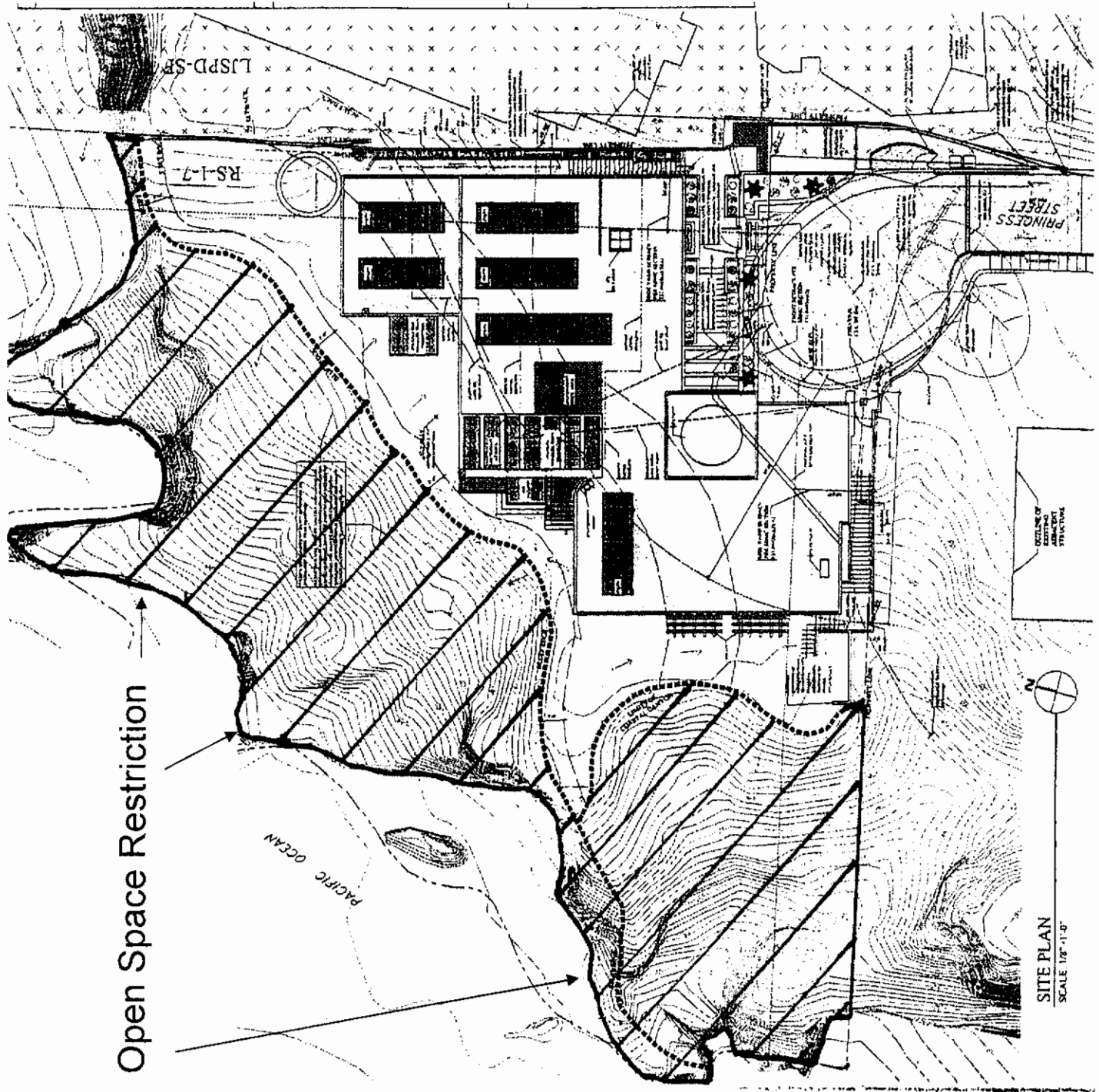


WEST ELEVATION
SCALE: 1/4" = 1'-0"



EAST ELEVATION
SCALE: 1/4" = 1'-0"

EXISTING ELEVATION TO BE MAINTAINED AS SHOWN. ALL NEW WORK TO BE SHOWN IN DASHED LINES. ALL DIMENSIONS TO FACE UNLESS OTHERWISE NOTED.



Open Space Restriction

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|---|
| EXHIBIT NO. 6 |
| APPLICATION NO. |
| A-133-79- |
| A5/F6760-A6 RF |
| Open Space Restriction |
|  California Coastal Commission |



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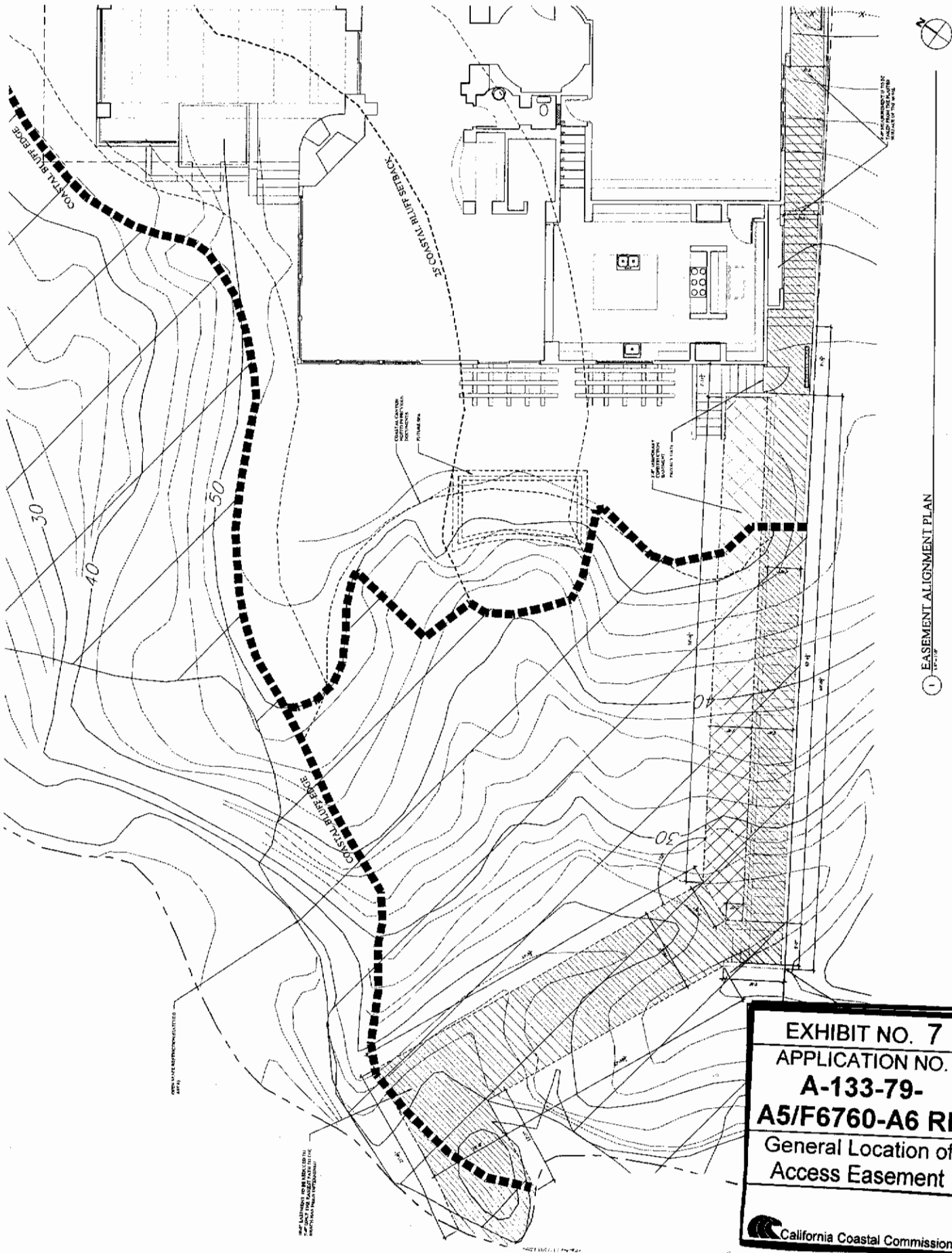
PROJECT NO. 2009-13
 DATE: 07/11/2009
 DRAWN BY: CAM
 CHECKED BY: JLR
 PROJECT: CAM

CONSTRUCTION PERMITS
 COUNTY OF SAN DIEGO
 DIVISION OF PERMITS
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PROJECT NO. 2009-13
 DATE: 07/11/2009
 DRAWN BY: CAM
 CHECKED BY: JLR
 PROJECT: CAM

PROJECT NO. 2009-13
 DATE: 07/11/2009
 DRAWN BY: CAM
 CHECKED BY: JLR
 PROJECT: CAM

A-1.2
 SHEET OF 22



① EASEMENT ALIGNMENT PLAN
 1/2" = 1'-0"

EXHIBIT NO. 7
APPLICATION NO.
A-133-79-
A5/F6760-A6 RF
 General Location of
 Access Easement