

**CALIFORNIA COASTAL COMMISSION**

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# Th22a

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## **STAFF REPORT: RECOMMENDATION ON APPEAL** **SUBSTANTIAL ISSUE & DE NOVO**

|                              |   |
|------------------------------|---|
| <b>Local Government:</b>     | <b>City of Encinitas</b>  |
| <b>Decision:</b>             | <b>Approved with Conditions</b>   |
| <b>Appeal Number:</b>        | <b>A-6-ENC-11-073</b>   |
| <b>Applicant:</b>            | <b>Matthew Gordon</b>   |
| <b>Location:</b>             | On the bluff face below 876 and 878 Neptune Avenue, Encinitas<br>(San Diego County) (258-311-07)  |
| <b>Project Description:</b>  | Removal of portions of an unpermitted private stairway leading from a blufftop single family residence to the beach, retention of portions of the unpermitted private stairway, retention of unpermitted retaining walls, authorization for replacement of unpermitted railroad ties on the bluff face, and construction of a retractable staircase on the upper bluff. |
| <b>Appellants:</b>           | Commissioner Brian Brennan and Commissioner Wendy Mitchell  |
| <b>Staff Recommendation:</b> | Substantial Issue and Partial Approval with Conditions and Partial Denial on De Novo  |

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## **SUMMARY OF STAFF RECOMMENDATION**

The staff recommends that the Commission, after public hearing, determine that **substantial issue** exists with respect to the grounds on which the appeal has been filed. The locally approved project includes the removal, retention, and replacement of portions of a private stairway on a coastal bluff installed after implementation of the Coastal Act, that to date does not have any permit history. Therefore, the entire private stairway is an unpermitted structure and must be reviewed as a proposal for new development. Based on a review of aerial photographs of the bluff face at the subject site, the earliest recorded evidence of any type of pathway from the bluff top home to the beach is 1989. However, it is unclear if that pathway followed the alignment of the current private stairway or if railroad ties had been installed or if it was merely a dirt trail. At some point between 1989 and 2002 a small raised staircase was installed to connect the subject bluff top home's lower patio to the upper bluff and in 2002, a railroad tie pathway is visible. Then in 2004, the applicant constructed major improvements to the railroad tie pathway. The unpermitted improvements included construction of a larger raised stairway connecting the applicant's patio to the top of the bluff, three upper bluff retaining walls to support the new raised stairway, and numerous smaller retaining walls along the pathway, treads, risers, and stringers within the same alignment as the existing railroad ties along the majority of the pathway, railings and a privacy gate.

The City of Encinitas approved coastal development permit #10-069 for removal of portions of the unpermitted private stairway and retention and replacement of portions of the stairway. The applicant and the City of Encinitas assert that a railroad tie stairway was constructed on the subject bluff face prior to the implementation of the Coastal Act. However, due to the fact that convincing evidence has not been submitted to support the contention that the existing stairway is pre-coastal, it must be reviewed as a proposal to construct a new private stairway on the coastal bluff. The City of Encinitas certified Local Coastal Program prohibits construction of new private stairways on the coastal bluffs and requires that even permitted private stairways be phased out over time. In addition, the City approved the construction of a retractable raised stairway to connect the lower patio of the bluff top home to the upper bluff, which is inconsistent with Local Coastal Program regulations that require all structures to be located a minimum of five feet landward of the bluff edge. Approval of a new private stairway on the bluff is also inconsistent with Local Coastal Program policies that relate to protection of scenic qualities of the bluffs and retention of require that new development be compatible with the character the surrounding development. Finally, approval of a new private stairway is inconsistent with Local Coastal Program policies to retain bluffs in their natural states in order to minimize the geologic hazard.

Staff recommends that, on de novo, the Commission take one vote adopting a two-part resolution, which would approve portions of the development and deny other portions of the development.

Staff recommends the Commission **approve** the applicant's request for removal of unpermitted improvements from the bluff face, which include above-grade wooden stairs, treads, risers, stringers, handrails, and landings in sections 1-8 and removal of portions of the wooden retaining walls that are not retaining soil and all posts and handrails down to grade and a wooden gate in

sections 9-17 (Exhibit 3). Special Condition 1 has been included to require that the applicant submit final plans that consist solely of removal of portions of the unpermitted stairway and do not include any additions to or retention of the unpermitted private stairway. Special Condition 2 requires that the applicant record a deed restriction to ensure that the Special Conditions of this permit run with the subject property. Special Conditions 3 and 4 have been included to ensure that the unpermitted development proposed to be removed is done so in a timely manner. As conditioned, removal of portions of the unpermitted private stairway can be found consistent with the certified City of Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act.

Staff recommends that the Commission **deny** the applicant's request for retention of the three upper bluff wooden retaining walls, replacement of at-grade railroad ties, and construction of an upper bluff retractable stair access in sections 1-8, retention of wooden treads, risers, and stringers in sections 9-15, removal of a wooden gate in section 16, and retention of railroad ties in sections 9-17 (Exhibit 3). As stated above, the private stairway is unpermitted and must be reviewed as new development. Therefore, retention or replacement of any portion of the stairway is inconsistent with City of Encinitas certified Local Coastal Program policies that prohibit construction of new private stairways on coastal bluffs or within five ft. of the coastal bluff edge, policies that relate to protection of scenic qualities of the bluffs require that new development be compatible with the character the surrounding development. Finally, approval of a new private stairway is inconsistent with Local Coastal Program policies to retain bluffs in their natural states in order to minimize the geologic hazard.

Therefore, staff recommends that the Commission determine that substantial issue exists and that the Commission, on de novo, **partially approve as conditioned and partially deny** coastal development permit application A-6-ENC-11-073.

Standard of Review: certified City of Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act.

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## **APPENDICES**

### **Appendix A – Substantive File Documents**

## **EXHIBITS**

Exhibit 1 – Project Location

Exhibit 2 – Stairway Ownership

Exhibit 3 – Site Plan

Exhibit 4 – 1972 Aerial Photograph

Exhibit 5 – 1979 Aerial Photograph

Exhibit 6 – 1987 Aerial Photograph

Exhibit 7 – 1989 Aerial Photograph

Exhibit 8 – 2002 Aerial Photograph

Exhibit 9 – 2004 Aerial Photograph

Exhibit 10 – 2006 Aerial Photograph

Exhibit 11 – 2012 Aerial Photograph

Exhibit 12 – Letter from Neighbor to the South

Exhibit 13 – Private Railroad Tie Accessway to the South

Exhibit 14 – Mislabel Stairway Photograph

Exhibit 15 – Appeals

Exhibit 16 – City of Encinitas Planning Commission Agenda Report

Exhibit 16 – City of Encinitas Planning Commission Resolution

## HEARING PROCEDURES

The Commission will not take public testimony during this phase of the appeal hearing unless at least three Commissioners request it. The only persons qualified to testify before the Commission at the “substantial issue” stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. If the Commission finds that the appeal raises a substantial issue, it will proceed directly to the de novo portion of the hearing during which it will take public testimony and any person may testify. Written comments may be submitted to the Commission during either phase of the hearing.

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### **I. APPELLANTS CONTEND THAT**

The appellants contend that the City of Encinitas’ (City) decision is inconsistent with several provisions of the City's Local Coastal Program related to protection coastal bluffs and public views. In particular, the appellants allege that the applicant has not provided evidence to prove that the existing private stairway or existing railroad ties are pre-coastal and the City’s decision did not address the lower bluff portion of the railroad ties on State Parks property. In addition, appellants contend that the subject development is inconsistent with the Local Coastal Program provisions that (1) encourage the retention of coastal bluffs in their natural state, (2) require that appearance of structures visible from public vantage points be protective of the natural scenic qualities of the bluffs, (3) discourage and phase out private access to the beach over the bluffs and prohibit new private accessways, (4) discourage structures that are not consistent with the established pattern of development.

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### **II. LOCAL GOVERNMENT ACTION**

The Encinitas Planning Commission approved the coastal development permit No. 10-069 on August 4, 2011. Specific conditions were attached to the CDP that, among other things, required an open space easement from the bluff edge to the western property line that prohibits alteration of landforms, removal of vegetation, and removal/erection of structures except as permitted within the CDP and future permitted emergency measures, and that the removal and alterations of portions of the private stairway must be consistent with the recommendations provided by the applicant’s geotechnical engineer consultant.

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### **III. APPEAL PROCEDURES**

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits.

Section 30603(b)(1) of the Coastal Act states:

*The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.*

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

*With respect to appeals to the commission after certification of a local coastal program that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.*

If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to the de novo portion of the hearing on the merits of the project, then, or at a later date. If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project then, or at a later date, reviewing the project de novo in accordance with sections 13057-13096 of the Commission's regulations. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program (LCP).

In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3. In other words, in regard to public access questions, the Commission is required to consider not only the certified LCP, but also applicable Chapter 3 policies when reviewing a project on appeal.

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

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question as to conformity with the certified local coastal program" or, if applicable, the public access and public recreation policies of Chapter 3 of the Coastal Act (Cal. Code Regs. titl. 14 section 13155(b)). In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing petition for a writ of mandate pursuant to the Code of Civil Procedure, section 1094.5.

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#### **IV. STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE**

The staff recommends the Commission adopt the following resolution:

**MOTION:**      *I move that the Commission determine that Appeal No. 6-ENC-11-073 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

#### **STAFF RECOMMENDATION:**

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

#### **RESOLUTION TO FIND SUBSTANTIAL ISSUE:**

The Commission hereby finds that Appeal No. **A-6-ENC-11-073** presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

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## V. FINDINGS AND DECLARATION

### A. PROJECT DESCRIPTION/PERMIT HISTORY

The proposed project is located on the bluff face fronting a blufftop lot currently developed with a single family residence<sup>1</sup>. The project site is located in the City of Encinitas directly adjacent to the south side of the Beacons public beach access path (Exhibit 1). The proposed project involves the removal, replacement, and retention of portions of an unpermitted private stairway and three unpermitted upper bluff retaining walls associated with the stairway on a coastal bluff. The retaining walls and the majority of the private stairway are located on the applicant's property, while the lower bluff portion of the private stairway is located on land owned by California State Parks (Exhibit 2). The City's approval only covered the portion of the private stairway located on the applicant's property and did not address the portion of the private stairway located on State Parks' property. The portion of the unpermitted private stairway on State Parks' property is not a part of the subject appeal and will be addressed through a separate enforcement action.

Sometime between 1989 and 2002, a small, raised unpermitted staircase was installed to connect the lower patio with the upper bluff (Exhibits 7 & 8). In 2004, the applicant constructed major improvements to an existing unpermitted private railroad tie pathway. The unpermitted improvements included the construction of a large raised stairway connecting the applicant's patio to the top of the bluff, three upper bluff retaining walls, and numerous smaller retaining walls along the pathway, treads, risers, and stringers within the same alignment as the existing railroad ties along the majority of the pathway, railings and a privacy gate. An aerial photograph from 2006 shows the improvements that were added to the railroad ties (Exhibits 9 & 10). On September 19, 2005, the City issued a stop work order for the work on the face of the bluff. In a letter from the City to the applicant dated June 16, 2008, the City states:

*"A review of aerial photos taken of the area together with a series of historical photos (attached) has been done and it is evident that work has taken place on the bluff behind your residence. This work has changed what were dirt paths into improved stairs, landings and other improvements without benefit of a coastal development permit..."[emphasis added]*

In a letter from the City to the Applicant dated July 9, 2009, the City states:

*"...improvement and enhancement of the existing dirt path from the house to the beach, has taken place on the bluff behind your residence. This work has modified what were dirt paths into improved stairs, landings, hand rails and other improvements without the benefit of coastal development permit and that this work*

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<sup>1</sup> In 1974, the San Diego Regional Commission issued a CDP for an addition to the structure and referred to it as a single family residence (CDP F1763). The CDP issued by the City for this property, which is subject to this appeal, also referred to the structure as a single family residence (CDP 10-069). However, the applicant states that the property is actually a duplex. At this time the entire structure is used as a single family residence, thus this report will refer to it as a single family residence. Staff has not received any permit history or documentation showing that the property was converted to a duplex, thus this issue remains unresolved.

*occurred after the 1973 cutoff which would allow the work to be “grandfathered” as pre-existing conditions...all elements constructed after 1973 within the coastal bluff zone must be removed.” [emphasis added]*

On August 4, 2011, the City subsequently approved a coastal development permit for removal of portions of the unpermitted private stairway and retention and replacement of portions of the stairway. The City also stated the following on the Planning Commission Agenda Report:

*“...The bluff face contains a pre-1972 on-grade access path consisting of railroad ties extending from the upper portion of the bluff face underneath an existing wooden deck leading down to the beach below...”*

The findings of the City approval did not contain any discussion as to why what was previously described as “dirt paths” was now described as “a pre-1972 on-grade access path consisting of railroad ties.” However, a prior owner of the property submitted a letter to the City stating that the railroad tie stairway had been installed in 1962 and various members of the public stated to the City that the railroad ties existed prior to 1972.

The applicant’s geotechnical engineer prepared an evaluation to determine how much of each unpermitted retaining wall along the stairway could be removed without causing sloughing and surficial failures, primarily leaving in place walls currently retaining soil. The geotechnical engineer also concurred with applicant’s plan to remove the raised upper bluff stairway that connects the lower patio to the blufftop and to cut all railings and the gate down to grade. The removal, replacement, and retention plan approved by the City classifies the private stairway in 17 sections, which will be used to describe what the City’s approval authorizes. Additionally, the plan depicts three unpermitted upper bluff wooden retaining walls which the City is also authorizing the applicant to retain (Exhibit 3). It appears that the applicant has already removed some of the posts and handrails down to grade in sections 9-17 (Exhibit 11).

- 3 Upper Bluff Wooden Retaining Walls
  - Retain in entirety
- Sections 1-8
  - Remove above-grade wooden stairs, treads, risers, stringers, handrails and landings
  - Replace at-grade, wooden railroad ties or wooden (steps) with new at-grade wooden railroad ties in a like for like manner and maintain in the future
  - Construct a “non-permanent, removable, retractable stair access” from the existing home patio (deck) down to the upper bluff trail
- Sections 9-13
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain wood treads, risers, and stringers
  - Retain railroad ties

- Sections 14-15
  - Retain wood treads, risers, and stringers
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 16
  - Remove wooden gate
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 17
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain railroad ties

The existing 2-story 1,974 sq. ft. blufftop single family residence is located on a 0.16 acre bluff top lot and was constructed in 1961. Thus, the existing single family residence is a pre-Coastal Act structure. One previous coastal development permit was issued for the subject site by the San Diego Regional Commission (predecessor to the Coastal Commission). CDP No. F1763 was issued on 7/26/1974 for the addition of a room, a bathroom, and a closet to the existing single family residence. The property located two houses to the south of the subject property (downcoast) also has a private railroad tie staircase that connects to the subject private stairway at section 17 of the site plan approved by the City (Exhibit 13). The property owner of the home two houses to the south previously submitted a letter to the City of Encinitas stating that he installed the railroad ties on his property and on the State Parks' property below the subject property in 1977, thus it is possible that these railroad ties are also unpermitted (Exhibit 12). However, the neighbor's private railroad tie accessway is not a part of the subject appeal and will be address through a separate enforcement action. The property directly north of the subject property is the Beacons public beach access and consists of a dirt switchback trail supported primarily by sand bags.

The standard of review is the certified Encinitas Local Coastal Program and the public access and recreation policies of the Coastal Act.

## **B. UNPERMITTED DEVELOPMENT**

California voters passed Proposition 20 (Prop 20) in 1972, with the effective date being February 1, 1973. Prop 20 regulated development along the coast if the development took place from the mean high tide line inland 1000 yards. (Former Pub. Res. Code, §§ 27001, 27104.) However, if a city or county issued a building permit and the applicant commenced development before November 8, 1972, then that established a presumption of a vested right (so long as there were no substantial changes made to the development) in that development such that that person did not have to comply with the development regulations under Prop. 20 for that particular development. (Former Pub. Res. Code, § 27404.) The subject site is within 1000 yards of the mean high tide line and, thus, was subject to Prop 20 jurisdiction. The appellants contend that there is no evidence that the private railroad tie pathway or any of the subsequent improvements were built or approved prior to November 8, 1972. When an applicant seeks approval of unpermitted development, the Commission reviews the application in a manner where it

considers the physical characteristics of the site as though the unpermitted development has not occurred on the subject property. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) In doing so, a proposal to retain any portion of the existing unpermitted development is reviewed as a proposal for new development. Thus, in this case, the Commission must view the subject site as though the unpermitted development has not occurred on the site and determine whether or not the proposed retention of the unpermitted development (“new development”) is consistent with the relevant Local Coastal Program policies and the Coastal Act access and recreation policies.

Section 30608 of the Coastal Act states:

*(a) No person who has obtained a vested right in a development prior to the effective date of this division [the Coastal Act] or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Act of 1972 (former Division 18 (commenting with Section 27000)) shall be required to secure approval for the development pursuant to this division. However, that no substantial change may be made in any such development without prior approval having been obtained under this division.*

Based on review of historic aerial photographs, it appears that an unpermitted private wooden railroad tie staircase, beginning at the top of the approximately 85 ft. high bluff and continuing down to the beach, was installed some time after the passage of Proposition 20. The applicant has submitted a letter from a prior owner of the residence that contends that a private railroad tie pathway was installed from the existing single family residence down to the beach in 1962. However, aerial photographs dated 1972, 1979, and 1987 (Exhibits 4, 5, & 6) do not show a private railroad tie pathway from the applicant’s home to the beach.

The applicant submitted a photograph, dated 1971, that clearly shows the existence of subject railroad tie private pathway. However, the photograph is mislabeled and was actually taken some time after 1980. The photograph includes a house two doors to the south with a second story addition, 870 Neptune Avenue. The second story addition was approved for that house by the San Diego Coast Regional Commission on September 19, 1980 (Reference CDP F9288). Historic aerial photographs further support this fact, as photographs from 1972 and 1979 clearly show that 870 Neptune Avenue is only a one story structure. While the next available aerial photograph from 1987 shows the 2<sup>nd</sup> story addition (Exhibit 14). The applicant subsequently agreed that the photo was mistakenly mislabeled without his knowledge.

The earliest available photograph showing a private access path from the applicant’s home to the beach is dated 1989. In that photograph only a very light trail can be seen, and it is not clear if railroad ties are present or if the photograph merely depicts an unimproved dirt path. In addition, it is also not clear if the visible dirt path follows the same alignment as the existing private stairway (Exhibit 7). The applicant has submitted documentation showing that in 1990, Commission staff sent a short memo to the City of Encinitas in which Commission staff referred, for investigation and enforcement, a complaint from a member of the public that alleges the property owner of the subject property was constructing an illegal stairway without a permit at the subject property. The documentation also shows that the City issued a stop work order, but

subsequently closed the violation and made the finding that the property owner was only replacing his steps. It does not appear that Commission staff followed up with the report of the violation at that time. Based on the submitted documentation, a private railroad tie pathway may have been installed prior to 1990.

The effective date of the Coastal Act is January 1, 1976. As noted above, the subject site was also subject to the permitting requirements of the Coastal Act's predecessor statute, the Coastal Zone Conservation Act of 1972 (aka Proposition 20, "the Coastal Initiative"), which went into effect on February 1, 1973. The Coastal Zone Conservation Act required a coastal development permit for new development on this site occurring after February 1, 1973 and this will be referred to as the effective date of the Coastal Act for this site. Neither the railroad ties nor the additional bluff improvements were permitted prior to passage of Proposition 20. Therefore, the proposal is treated as new development on the bluff face.

This report references historic aerial photographs of the subject property taken periodically between 1972 and 2010, which are a part of the California Coastal Records Project. The subject property can be found in the photos by first locating the Beacon's Beach public access path and then finding the house directly to the south (downcoast) of the access area. Clicking on a photo will open a much larger version of the photo. The photos can be viewed at the following link:

<http://www.californiacoastline.org/cgi-bin/timecompare.cgi?image=7241023&latdeg=33.067336&longdeg=117.309751&flags=0&year=1972&hidden=0&oneimage=current/201003723-2008/200804336-2006/200604265-2004/200407557-2002/9176-1989/8920204-1987/8702111-1979/7954132-1972/7241023->

### **C. PRIVATE STAIRWAY/CONSERVATION OF THE BLUFFS**

The appellants contend that the retention, maintenance, and replacement of the unpermitted bluff private stairway is inconsistent with the City's Local Coastal Program which specifically prohibits private stairways on the bluff face and promotes the retention of coastal bluffs in a natural state.

The City's certified Local Coastal Program includes provisions that not only prohibit the construction of private stairways on the bluff but also provide for the "phase out" of existing private stairs. Public Safety Element (PS) Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

*The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*

- a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ ... ]*

*f. . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [emphasis added]*

The CDP issued by the City raises a substantial issue with regard to its consistency with the certified Local Coastal Program as it permits the retention and substantial replacement of portions of an unpermitted private stairway on the bluff. Because the bluffs in this area are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private access stairways and even provides for existing stairways to be phased out.

The City's approval, which allows for the retention and replacement of the various aspects of the unpermitted private stairway, is inconsistent with the Local Coastal Program policy that prohibits new private stairways on coastal bluffs and calls for the phase out of existing private access to the beach over the bluffs. The City's approval allows substantial improvements to the existing unpermitted railroad tie pathway in the form of new railroad ties, retention of numerous retaining walls, and the retention of new treads, risers, and stringers which essentially results in the construction of a brand new private bluff stairway. Based on Commission Staff site visits, it does not appear that the new treads, risers, and stringers are even flush with the existing unpermitted railroad ties. Thus, while the improvements may follow the same path as the railroad ties, they are not merely a minor repair or improvement. Regardless, all the development on the bluff face including the railroad ties is unpermitted and retention of any part of the staircase raises a significant issue with respect to the consistency of such development with Local Coastal Program policies that prohibit construction of private access stairways on coastal bluffs.

Additionally, the Local Coastal Program clearly states that no structures are allowed within 5 ft. of the bluff top edge. The "retractable" stair access from the lower patio to the upper bluff approved by the City is inconsistent with this policy, as it is a structure within 5 ft. of the bluff edge. The certified Local Coastal Program also discourages climbing upon and defacement of the bluff face which would be the result if this unpermitted private stairway is allowed to remain or be replaced. Development on coastal bluffs can result in impacts such as degradation and instability of the bluff.

As stated previously, there is no permit history for the original development of a stairway on the face of the bluff and it was not constructed prior to implementation of the Coastal Act, and as such it is considered to be unpermitted development. Thus, the current proposal must be treated as new development on the bluff face as opposed to maintenance or improvements to existing permitted or pre-coastal development. Therefore the project raises substantial issues both because it impacts the bluff as it is a permanent structure on the bluff face and because it consists of a private accessway, and public accessways are the only development allowed on the face of a coastal bluff. The project therefore raises a substantial issue with respect to the grounds on which the appeal was filed.

#### **D. PROTECTION OF SCENIC QUALITIES/GEOLOGIC CONDITIONS AND HAZARDS**

The appellants contend that that the private staircase is inconsistent with Local Coastal Program policies that protect the natural scenic qualities of the bluff faces, that discourage structures not consistent with the established pattern of development, and that minimize geologic hazards on the bluffs.

The following Local Coastal Program policies relate to the proposed development:

Resource Management (RM) Goal 8 of the LUP states the following:

*The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.*

Resource Management (RM) Policy 8.5 of the certified Encinitas LUP states, in part:

*The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible...*

In addition Resource Management (RM) Policy 8.7 of the certified Encinitas LUP states that:

*The City will establish, as primary objectives, the preservation of natural beaches and visual quality as guides to the establishment of shoreline structures. All fishing piers, new boat launch ramps, and shoreline structures along the seaward shoreline of Encinitas will be discouraged.*

The certified Implementation Plan (IP) also requires that shoreline protective structures be designed to be protective of natural scenic qualities of the bluffs and not cause a significant alteration of the bluff face. In particular, Section 30.34.020(B)(8) states:

*The design and exterior appearance of buildings and other structures visible from public vantage points shall be compatible with the scale and character of the surrounding development and protective of the natural scenic qualities of the bluffs.*

Finally, Section 30.34.020.C.2.b.(4) states:

*The proposed measure in design and appearance must be found to be visually compatible with the character of the surrounding area; where feasible, to restore and enhance visual quality in visually degraded areas; and not cause a significant alteration of the natural character of the bluff face.*

### Visual Impacts

Neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Public views of the site are primarily from the beach looking landward and while using the Beacon's public access trail. The bluffs in the immediate vicinity of the site are characterized by varying degrees of vegetation and some lower seawalls and some upper bluff retaining walls (the subject site is not protected by a seawall). Any permanent retention of bluff face development, such as the subject private stairway, will cause adverse impacts to public views. In addition, unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. In fact, aside from the railroad tie pathway located two properties to the south, the subject site contains the only private improved stairway for approximately 20 houses to the south of the Beacon's accessway. Local Coastal Program policies assert that the visual quality of bluffs should be restored and enhanced. A private bluff staircase in this area is not the established pattern of development and thus raises a substantial issue with regard to its consistency with the certified Local Coastal Program.

### Geologic Impacts

The Division of Mines and Geology has mapped the entire Encinitas shoreline as an area susceptible to landslides and mapped the area as either "Generally Susceptible" or "Most Susceptible Areas" for geologic susceptibility. Because the bluffs are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private stairways and provides for existing private stairways to be phased out.

Because the bluff at this location has been determined to be highly unstable, the Local Coastal Program recognizes the inherent scenic values of the natural shoreline, the construction of a new private stairway is prohibited by PS Policy 1.6 of the City's Local Coastal Program, and the phasing out over time of other existing private stairways is required by Circulation Policy 6.7, the Commission finds that the construction or retention of any portion of a private stairway on the bluff face is inconsistent with the certified Local Coastal Program and that the unpermitted development on the coastal bluff should not be retained. An active landslide exists at the Beacon's public access path to the north of the subject property. This landslide is deeply seated, while the private stairway is surficial and does not contribute to the stability of the bluff or prevent the Beacon's landslide from spreading further south. Lastly, private stairways encourage



people to walk on the bluff face and in turn lead to increased erosion. Allowing the construction or retention of the retaining walls, treads, risers, and railroad ties raises a substantial issue with regard to their consistency with the visual or geologic protection policies of the certified Local Coastal Program.

## **E. CONCLUSION**

Based upon a review of all of the information provided to the Commission regarding this project, the Commission finds that the proposed development is incompatible in design and scale with the overall character of the surrounding area and does not meet the requirements of the certified Local Coastal Program which prohibits the construction of private stairways and calls for the phase out of existing private stairways. Therefore, the Commission finds that the appeal raises a substantial issue regarding the proposed development's conformity with the certified Local Coastal Program.

## **F. SUBSTANTIAL ISSUE FACTORS**

As discussed above, there is strong factual and legal evidence that the City-issued CDP raises a substantial issue with regard to its consistency with the certified Local Coastal Program. The other factors that the Commission normally considers when evaluating whether a local government's action raises a substantial issue also support a finding of substantial issue. The locally-issued CDP will create an adverse precedent for interpretation of the City's Local Coastal Program. Finally, the objections to the project suggested by the appellant raise substantial issues of regional or statewide significance.

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## STAFF RECOMMENDATION ON THE COASTAL PERMIT

### VI. MOTION AND RESOLUTION ON DE NOVO

#### Motion:

*I move that the Commission adopt the staff recommendation to approve in part and deny in part coastal development permit No. A-6-ENC-11-073, with the approval subject to the conditions recommended by staff, by adopting the two-part resolution set forth in the staff report.*

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit 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:

##### **Part 1: Approval with Conditions of a Portion of the Development**

The Commission hereby **GRANTS, as conditioned**, a coastal development permit for the portion of the project consisting of removal of the unpermitted improvements from the bluff face, which include above-grade wooden stairs, treads, risers, stringers, handrails, and landings in sections 1-8 and removal of portions of the wooden retaining walls that are not retaining soil and all posts and handrails down to grade and a wooden gate in sections 9-17 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the certified Local Coastal Program and the public access policies of the Coastal Act, and will not have any significant adverse effects on the environment within the meaning of the California Environmental Quality Act.

##### **Part 2: Denial of the Remainder of the Development**

The Commission hereby **DENIES** a coastal development permit for the portion of the project consisting of retention of the three upper bluff wooden retaining walls, replacement of at-grade railroad ties, and construction of an upper bluff retractable stair access in sections 1-8, retention of wooden treads, risers, and stringers in sections 9-15, and retention of railroad ties in sections 9-17 and adopts the findings set forth below, on the grounds that the development would not be in conformity with the provisions of the certified Local Coastal Program and the public access policies of the Coastal Act, and would result in significant adverse impact on the environment within the meaning of the California Environmental Quality Act that are avoidable through feasible mitigation measures and/or alternatives to the proposal.

## VII. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

## VIII. SPECIAL CONDITIONS

The permit is subject to the following conditions:

1. **Final Revised Plans.** PRIOR TO THE ISSUANCE OF THIS PERMIT, the applicant shall submit to the Executive Director for review and written approval, final project plans consistent with the Stair and Retaining Wall Removal plan by the Shackelton Design Group dated 12/14/2010, except that they shall be revised to include the following:

- a. New construction, retention, or replacement of any aspect of the private unpermitted stairway is prohibited.

The applicant shall undertake the development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the final 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.

2. **Deed Restriction.** PRIOR TO ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has 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, as amended, 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.

3. **Prior to Issuance Condition Compliance.** WITHIN 60 DAYS OF APPROVAL OF THIS CDP, 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 applicant is 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.
4. **Condition Compliance.** WITHIN 90 DAYS OF APPROVAL OF THIS CDP, the applicant shall have completed removal of the portions of the unpermitted private stairway as detailed in the revised final plan for 876/878 Neptune Avenue. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

## IX. FINDINGS AND DECLARATIONS

### THE COMMISSION FINDS AND DECLARES AS FOLLOWS:

#### GENERAL FINDINGS APPLICABLE TO BOTH APPROVAL IN PART AND DENIAL IN PART

##### A. PROJECT DESCRIPTION/PERMIT HISTORY

The proposed project is located on the bluff face fronting a blufftop lot currently developed with a single family residence<sup>2</sup>. The project site is located in the City of Encinitas directly adjacent to the south side of the Beacons public beach access path (Exhibit 1). The proposed project involves the removal, replacement, and retention of portions of an unpermitted private stairway and three unpermitted upper bluff retaining walls on a coastal bluff. The retaining walls and the majority of the private stairway are located on the applicant's property, while the lower bluff portion of the private stairway is on land owned by California State Parks (Exhibit 2). The City's approval only covered the portion of the private stairway on the applicant's property and did not address the portion of the private stairway located on State Parks' property. The portion of the private stairway on State Parks' property will be addressed through a separate enforcement.

Sometime between 1989 and 2002, a small, raised unpermitted staircase was installed to connect the lower patio with the upper bluff (Exhibits 7 & 8). In 2004, the applicant constructed major improvements to an existing unpermitted private railroad tie pathway. The unpermitted improvements included the construction of a large, raised stairway connecting the applicant's patio to the top of the bluff, three upper bluff retaining walls, and numerous smaller retaining walls along the pathway, treads, risers, and stringers within the same alignment as the existing railroad ties along the majority of the pathway, railings and a wooden privacy gate. An aerial photograph from 2006 shows the improvements that were added to the railroad ties (Exhibit 9 & 10). On September 19, 2005, the City issued a stop work order for the work on the face of the bluff. In a letter from the City to the applicant dated June 16, 2008, the City states:

*"A review of aerial photos taken of the area together with a series of historical photos (attached) has been done and it is evident that work has taken place on the bluff behind your residence. This work has changed what were dirt paths into improved stairs, landings and other improvements without benefit of a coastal development permit..."[emphasis added]*

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<sup>2</sup> In 1974, the San Diego Regional Commission issued a CDP for an addition to the structure and referred to it as a single family residence (CDP F1763). The CDP issued by the City for this property, which is subject to this appeal, also refers to the structure as a single family residence (CDP 10-069). However, the applicant states that the property is actually a duplex. At this time the entire structure is used as a single family residence, thus this report will refer to as a single family residence. Staff has not received any permit history or documentation showing that the property was converted to a duplex, thus this issue remains unresolved.

In a letter from the City to the Applicant dated July 9, 2009, the City states:

*“...improvement and enhancement of the existing dirt path from the house to the beach, has taken place on the bluff behind your residence. This work has modified what were dirt paths into improved stairs, landings, hand rails and other improvements without the benefit of coastal development permit and that this work occurred after the 1973 cutoff which would allow the work to be “grandfathered” as pre-existing conditions...all elements constructed after 1973 within the coastal bluff zone must be removed.” [emphasis added]*

On August 4, 2011, the City subsequently approved coastal development permit #10-069 for removal of portions of the unpermitted private stairway and retention and replacement of portions of the stairway. The City also stated the following on the Planning Commission Agenda Report:

*“...The bluff face contains a pre-1972 on-grade access path consisting of railroad ties extending from the upper portion of the bluff face underneath an existing wooden deck leading down to the beach below...”*

The findings of the City approval did not contain any discussion as to why what was previously described as “dirt paths” was now described as “a pre-1972 on-grade access path consisting of railroad ties.” However, a prior owner of the property submitted a letter to the City stating that the railroad tie stairway had been installed in 1962 and various members of the public stated to the City that the railroad ties existed prior to 1972.

The applicant’s geotechnical engineer prepared an evaluation to determine how much of each unpermitted retaining wall along the stairway could be removed without causing sloughing and surficial failures, primarily leaving in place walls currently retaining soil. The geotechnical engineer also concurred with applicant’s plan to remove the raised upper bluff stairway that connects the lower patio to the blufftop and to cut all posts and handrails and the gate down to grade. The removal, replacement, and retention plan approved by the City classifies the private stairway in 17 sections, which will be used to describe what the City’s approval authorizes. Additionally, the plan depicts three unpermitted upper bluff wooden retaining walls which the City is also authorizing the applicant to retain (Exhibit 3). It appears that the applicant has already removed some of the posts and handrails down to grade in sections 9-17 (Exhibit 11).

- 3 Upper Bluff Wooden Retaining Walls
  - Retain in entirety
- Sections 1-8
  - Remove above-grade wooden stairs, treads, risers, stringers, handrails and landings
  - Replace at-grade, wooden railroad ties or wooden (steps) with new at-grade wooden railroad ties in a like for like manner and maintain in the future
  - Construct a “non-permanent, removable, retractable stair access” from the existing home patio (deck) down to the upper bluff trail

- Sections 9-13
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain wood treads, risers, and stringers
  - Retain railroad ties
- Sections 14-15
  - Retain wood treads, risers, and stringers
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 16
  - Remove wooden gate
  - Remove all posts and handrails down to grade
  - Retain railroad ties
- Section 17
  - Remove portions of the 2 x 12 wood retaining walls that are not retaining soil
  - Remove all posts and handrails down to grade
  - Retain railroad ties

The existing 2-story 1,974 sq. ft. blufftop single family residence is located on a 0.16 acre bluff top lot and was constructed in 1961. Thus, the existing single family residence is a pre-Coastal Act structure. One previous coastal development permit has been issued for the subject site by the San Diego Regional Commission (predecessor to the Coastal Commission). The CDP was issued on 7/26/1974 for the addition of a room, a bathroom, and a closet to the existing single family residence (F1763). The property two houses to the south of the subject property also has a private railroad tie staircase that connects to the subject private stairway at section 17 of the site plan approved by the City ([Exhibit 13](#)). The property owner of the home two houses to the south previously submitted a letter to the City of Encinitas stating that he installed the railroad ties on his property and on the State Parks' property below the subject property in 1977, thus it is possible that these railroad ties are also unpermitted (Exhibit 12). However, this will be addressed through a separate enforcement action. The property directly north of the subject property is the Beacons public beach access and consists of a dirt switchback trail supported primarily by sand bags.

The standard of review is the certified City of Encinitas Local Coastal Program and the public access policies of the Coastal Act.

## **B. APPROVAL FINDINGS AND DECLARATIONS**

Except as otherwise indicated, the findings in this section apply only to that portion of the application that is described in Part 1 of the Commission's resolution on this permit application, which portion is therefore being conditionally approved.

### **1. UNPERMITTED DEVELOPMENT**

Although development including, but not limited to, the construction of a private stairway/accessway down a coastal bluff has been completed without the benefit of a coastal development permit, and there is no evidence that shows it was built prior to passage of Prop 20, consideration of the application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act and the certified City of Encinitas Local Coastal Program. Approval of the permit does not constitute a waiver of any legal action with regard to any violation of the Coastal Act or the City's Local Coastal Program that may have occurred, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit. Removal of the any additional unpermitted development will be addressed through a separate enforcement action. Special Conditions 3 and 4 have been included to ensure that the unpermitted development proposed to be removed is done so in a timely manner.

### **2. PRIVATE STAIRWAY/CONSERVATION OF BLUFF**

The City's certified Local Coastal Program includes provisions that not only prohibit the construction of private stairways on the bluff but also provide for the "phase out" of existing private stairs. Public Safety Element (PS) Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

*The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [emphasis added]*



In 2003, a geotechnical investigation was undertaken for the Beacon's beach access adjacent to the subject property. The investigation documented three landslides that have previously taken place in the near vicinity. First, a landslide occurred some time in the 20<sup>th</sup> century approximately 1,000 ft. south of the Beacon's accessway. Second, in 1982, a landslide occurred at the Beacon's beach access. The 2003 investigation states that the Beacon's landslide "... is strongly influenced by wave erosion that undercuts the weak claystones along the toe of the bluff..." The northern limit of this active landslide extends beyond the State beach boundary, while the southern limit is within the State beach boundary. Thus, as of 2003, the Beacon's landslide was north and west of the applicant's property and did not encroach within it. The investigation also states that the landslide has progressed upslope toward the parking lot since a previous 1990 investigation and will likely continue to progress upslope and could impact properties north and south of State beach. Most recently, in 1996, a separate landslide occurred just south of the subject property in the 800 block of Neptune Avenue. The geotechnical investigation states that this landslide "...probably resulted from a combination of weak bedding planes in the seacliff, extensive groundwater seepage, and wave erosion resulting in loss of lateral support and a weakened condition...The landslide involved relatively deep-seated translational movement along weak bedding planes at or near the seacliff toe."

The three landslides discussed above are deeply seated. Any influence that the subject stairway, its pilings, and the railroad ties have on bluff stability is only surficial in nature. The stairway components do not affect global bluff stability and their removal will not lead to the Beacon's landslide spreading further south. In fact, removal of the stairway will cause a decrease in the amount of impervious surface area on the bluff, which will decrease the amount and concentration of runoff, which may actually decrease bluff erosion. The Commission's staff geologist is very familiar with this area of the Encinitas coast and has reviewed the evaluation by the applicant's geotechnical engineer and concurs that the retention of the raised stairway in sections 1-8 is not necessary for bluff stability and that the retaining walls identified by the applicant's geotechnical engineer and proposed to be removed can be removed without adversely impacting bluff stability. In addition, cutting the identified posts and handrails at-grade will not impact bluff stability. Thus, based on the bluff characteristics in this area described above, the Commission's staff geologist does not believe that the stairway is necessary for bluff stability.

Special Condition 1 has been included to ensure that the final plans consist solely of removal of portions of the unpermitted private stairway and do not include any additions to or retention of the unpermitted private stairway. Special Condition 2 requires that the applicant record a deed restriction to ensure that the Special Conditions of this permit run with the subject property.

As stated previously, neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as new development on the bluff face. All development on the bluff face including the railroad ties is unpermitted and retention of any part of the staircase is inconsistent with Local Coastal Program policies that prohibit construction of private access stairways on coastal bluffs. Because the bluffs in this area are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability through climbing upon or defacement of the bluff.

### 3. PROTECTION OF SCENIC QUALITIES/GEOLOGIC CONDITIONS AND HAZARDS

The following Local Coastal Program relate to the proposed development:

Resource Management (RM) Goal 8 of the LUP states the following:

*The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.*

Resource Management (RM) Policy 8.5 of the certified Encinitas LUP states, in part:

*The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible...*

In addition Resource Management (RM) Policy of the certified Encinitas LUP 8.7 states that:

*The City will establish, as primary objectives, the preservation of natural beaches and visual quality as guides to the establishment of shoreline structures. All fishing piers, new boat launch ramps, and shoreline structures along the seaward shoreline of Encinitas will be discouraged.*

Public Safety Element (PS) Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

*The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [emphasis added]*

The certified IP also requires that shoreline protective structures be designed to be protective of natural scenic qualities of the bluffs and not cause a significant alteration of the bluff face. In particular, Section 30.34.020(B)(8) states:

*The design and exterior appearance of buildings and other structures visible from public vantage points shall be compatible with the scale and character of the surrounding development and protective of the natural scenic qualities of the bluffs.*

Finally, Section 30.34.020.C.2.b.(4) states:

*The proposed measure in design and appearance must be found to be visually compatible with the character of the surrounding area; where feasible, to restore and enhance visual quality in visually degraded areas; and not cause a significant alteration of the natural character of the bluff face.*

### Visual Impacts

Neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Public views of the site are primarily from the beach looking landward and while using the Beacon's public access trail. The bluffs in the immediate vicinity of the site are characterized by varying degrees of vegetation and some lower seawalls and some upper bluff retaining walls (the subject site is not protected by a seawall). Any permanent retention of bluff face development, such as the subject private stairway will cause adverse impacts to public views. In addition, unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. In fact, aside from the railroad tie pathway located two properties to the south, the subject site contains the only private improved stairway for approximately 20 houses to the south of the Beacon's accessway. Removal of the identified portions of the private stairway is consistent with Local Coastal Program policies that assert that the visual quality of bluffs should be restored and enhanced.

### Geologic Impacts

The Division of Mines and Geology has mapped the entire Encinitas shoreline as an area susceptible to landslides and mapped the area as either "Generally Susceptible" or "Most Susceptible Areas" for geologic susceptibility. Because the bluffs are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private stairways and provides for existing private stairways to be phased out.

Because the bluff at this location has been determined to be highly unstable and the Local Coastal Program recognizes the inherent scenic values of the natural shoreline, the construction of a new private stairway is prohibited by PS Policy 1.6 of the City's Local Coastal Program and the phasing out over time of other existing private stairways is required by Circulation Policy

6.7. The Commission finds that removal of the subject unpermitted private stairway on the bluff face is consistent with the certified Local Coastal Program and that the unpermitted development on the coastal bluff should not be retained. An active landslide exists at the Beacon's public access path to the north of the subject property. This landslide is deeply seated, while the private stairway is surficial and does not contribute to the stability of the bluff or prevent the Beacon's landslide from spreading further south. Lastly, private stairways encourage people to walk on the bluff face and in turn lead to increased erosion. Allowing removal of the walls, treads, risers, and railroad ties is consistent with the visual and geologic protection policies of the certified Local Coastal Program. Therefore, the Commission finds that the removal of the identified portions of the unpermitted private stairway is consistent with the certified Local Coastal Program.

On April 23, 2010, the applicant's geotechnical engineer prepared an evaluation to determine how much of each unpermitted retaining wall along the stairway could be removed without causing sloughing and surficial failures; primarily leaving in place walls currently retaining soil (this evaluation did not consider removal of any portion of the three unpermitted upper bluff retaining walls). Subsequently, on May 10, 2011, the applicant's geotechnical engineer provided a letter to the City of Encinitas recommending that the raised stairway in sections 1-8 not be removed. The applicant's geotechnical engineer based this recommendation on his opinion that the stairway has allowed vegetation establishment and protection from rainfall, which provides a more stabilized surficial bluff face. However, on July 8, 2011, the applicant's geotechnical engineer submitted a third letter to the City in which he agreed that the raised stairway in section 1-8 can be cut off at-grade, provided that the existing railroad ties and shallow bluff stability be inspected to determine whether or not the existing ties should be secured or replaced with new railroad ties, and that erosion reduction geofabric products may be required. No discussion was provided, as to why the applicant's geotechnical engineer changed his recommendation.

As stated previously, the Commission's staff geologist has reviewed the evaluation by the applicant's geotechnical engineer and concurs that the retention of the raised stairway in sections 1-8 is not necessary for bluff stability and that the retaining walls identified by the applicant's geotechnical engineer and proposed to be removed can be removed without adversely impacting bluff stability. In addition, cutting the remaining posts and handrails at-grade will not impact bluff stability. Removal of the stairway will cause a decrease in the amount of impervious surface area on the bluff, which will decrease the amount and concentration of runoff, which may actually decrease bluff erosion. Thus, based on the bluff characteristics in this area described above, the Commission's staff geologist does not believe that the stairway is necessary for bluff stability.

#### **4. PUBLIC ACCESS**

The project parcel is located between the sea and the first public roadway. Pursuant to Section 30.80.090 of the City's Local Coastal Program, a public access finding must be made that such development is in conformity with the public access and public recreation policies of the Coastal Act.

Section 30210 of the Coastal Act states:

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

In addition, Section 30212 of the Act is applicable and states:

(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....

As approved by the City, the proposed development includes the removal of portions of an unpermitted private stairway down the coastal bluff. A public beach access path exists at Beacon's beach (less than 200 ft. from the property owner's residence), thereby making a private accessway unnecessary, especially given that new private accessways are prohibited and are required to be phased out by the City's certified Local Coastal Program. In the case of the private stairway, it is only used by the private property owner and as such it is not open to the public. Therefore, since it is not open to the public, the approval of removal of portions of the private stairway will not have a negative impact on the public's ability to access the coast. The proposed development is consistent with the applicable public access policies of the Coastal Act and the City of Encinitas' Local Coastal Program.

## **5. LOCAL COASTAL PLANNING**

The project is located within the City of Encinitas, which has a certified Local Coastal Program. Based on the preceding discussion in this report, the Commission finds that the proposed development, as conditioned, is consistent with all applicable provisions of the certified Local Coastal Program. The Commission also finds, that based on the above, the proposed development, as conditioned, would not prejudice the ability of the City of Encinitas to continue to implement its Local Coastal Program.

## **6. CEQA**

Section 13096 of the California Code of Regulations requires Commission approval of a coastal development permit to be supported by a finding showing the permit 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.

As described above, the proposed project has been conditioned to avoid adverse environmental impacts. Mitigation measures include a final plans condition that requires the removal of all plan notes that allow retention or replacement of any portion of the private stairway, a deed restriction that recognizes that all conditions of this permit run with the subject property, and timing requirements to ensure that the after-the-fact removal of portions of the stairway are undertaken in a timely manner. 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.

## C. DENIAL FINDINGS AND DECLARATIONS

Except as otherwise indicated, the findings in this section apply only to that portion of the application that is described in Part 2 of the Commission’s resolution on this permit application, which portion is therefore being denied.

### 1. UNPERMITTED DEVELOPMENT

Although development including, but not limited to, the construction of a private stairway/accessway down a coastal bluff has been completed without the benefit of a coastal development permit, and there is no evidence that shows it was built prior to passage of Prop 20, consideration of the application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act and the certified City of Encinitas Local Coastal Program. Approval of the permit does not constitute a waiver of any legal action with regard to any violation of the Coastal Act or the City’s Local Coastal Program that may have occurred, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit. Removal of the any additional unpermitted development will be addressed through a separate enforcement action.

### 2. PRIVATE STAIRWAY/CONSERVATION OF BLUFF

The City’s certified Local Coastal Program includes provisions that not only prohibit the construction of private stairways on the bluff, but also provide for the “phase out” of existing private stairs. Public Safety Element (PS) Policy 1.6 of the City’s Land Use Plan (LUP) states, in part:

*The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [emphasis added]*

The proposed project to retain portions of the private access stairway is not consistent with the certified Local Coastal Program as it permits the retention and substantial replacement of portions of an unpermitted private stairway on the bluff. Because the bluffs in this area are hazardous and susceptible to failure, the Local Coastal Program includes policies that are designed to reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private access stairways and provides for existing stairways to be phased out.

The applicant is proposing the retention and replacement of various aspects of an unpermitted private stairway, which is inconsistent with the Local Coastal Program policies that prohibit new private stairways and call for the phase out private access to the beach over the bluffs. Since the subject stairway is unpermitted, then the retention of any portion of the stairway is viewed as a new development. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) The applicant is proposing substantial improvement to the existing unpermitted railroad tie pathway in the form of new railroad ties, retention of numerous retaining walls, and the retention of treads, risers, and stringers which essentially results in the construction of a brand new private bluff stairway. All the development on the bluff face including the railroad ties is unpermitted and retention of any part of the staircase is inconsistent with Local Coastal Program policies that prohibit construction of private access stairways on coastal bluffs.

Additionally, the Local Coastal Program clearly states that no structures are allowed within 5 ft. of the bluff edge. The “retractable” stair access from the lower patio to the upper bluff, that is proposed, is inconsistent with this policy, as it is a structure within 5 ft. of the bluff edge. The certified Local Coastal Program also discourages climbing upon and defacement of the bluff face which would be the result if this unpermitted private stairway is allowed to remain or be replaced.

As stated previously, there is no permit history for the original development of a stairway on the face of the bluff and it was not constructed prior to passage of Prop 20, and as such, it is considered unpermitted. Thus, the proposed development is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Therefore the proposed project is inconsistent with the certified Local Coastal Program because it consists of a new private accessway located on a bluff face which is prohibited. Even if the railroad ties had pre-existed Proposition 20, the certified Local Coastal Program mandates phasing out of private stairways and the unpermitted improvements to the pathway would be inconsistent with the policies of the Local Coastal Program. Thus, retention of any portion of the private access stairway is not consistent with the certified Local Coastal Program, and therefore, must be denied.



### 3. PROTECTION OF SCENIC QUALITIES/GEOLOGIC CONDITIONS AND HAZARDS

The following Local Coastal Program policies relate to the proposed development:

Resource Management (RM) Goal 8 of the LUP states the following:

*The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.*

Resource Management (RM) Policy 8.5 of the certified Encinitas LUP states, in part:

*The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible...*

In addition Resource Management (RM) Policy 8.7 of the certified Encinitas LUP states that:

*The City will establish, as primary objectives, the preservation of natural beaches and visual quality as guides to the establishment of shoreline structures. All fishing piers, new boat launch ramps, and shoreline structures along the seaward shoreline of Encinitas will be discouraged.*

Public Safety Element (PS) Policy 1.6 of the City's LUP states, in part:

*The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*

*a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;*

*[ . . . ]*

*f. . . . no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge; . . .*

*g. Permanently conserving the bluff face within an open space easement or other suitable instrument. . . .*

In addition, Circulation Policy 6.7 states, as follows:

*Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. [emphasis added]*

The certified IP also requires that shoreline protective structures be designed to be protective of natural scenic qualities of the bluffs and not cause a significant alteration of the bluff face. In particular, Section 30.34.020(B)(8) states:

*The design and exterior appearance of buildings and other structures visible from public vantage points shall be compatible with the scale and character of the surrounding development and protective of the natural scenic qualities of the bluffs.*

Finally, Section 30.34.020.C.2.b.(4) states:

*The proposed measure in design and appearance must be found to be visually compatible with the character of the surrounding area; where feasible, to restore and enhance visual quality in visually degraded areas; and not cause a significant alteration of the natural character of the bluff face.*

### Visual Impacts

Neither the railroad ties nor the additional bluff improvements were permitted prior to Proposition 20. Therefore, the proposal is treated as new development on the bluff face. (LT-WR v. CCC (2007) 152 Cal.App.4<sup>th</sup> 770, 796-797.) Public views of the site are primarily from the beach looking landward and while using the Beacon's public access trail. The bluffs in the immediate vicinity of the site are characterized by varying degrees of vegetation and some lower seawalls and some upper bluff retaining walls (the subject site is not protected by a seawall). Any permanent retention of bluff face development, such as the subject private stairway will cause adverse impacts to public views. In addition, unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. In fact, aside from the railroad tie pathway located two properties to the south, the subject site contains the only private improved stairway for approximately 20 houses to the south of the Beacon's accessway. Local Coastal Program policies assert that the visual quality of bluffs should be restored and enhanced. A private bluff staircase in this area is not the established pattern of development and does not protect the natural scenic qualities of the bluff face, and thus, is inconsistent with the certified Local Coastal Program.

### Geologic Impacts

The Division of Mines and Geology has mapped the entire Encinitas shoreline as an area susceptible to landslides and mapped the area as either "Generally Susceptible" or "Most Susceptible Areas" for geologic susceptibility. Because the bluffs are hazardous and susceptible to failure, the Local Coastal Program includes policies that reduce and eliminate activities or structures that could adversely affect bluff stability. As cited above, the Local Coastal Program specifically prohibits the construction of new private stairways and provides for existing private stairways to be phased out.

Since the bluff at this location has been determined to be highly unstable and the Local Coastal Program recognizes the inherent scenic values of the natural shoreline; the construction of new private stairways are prohibited by PS Policy 1.6 of the City's Local Coastal Program and

phasing out over time of other existing private stairways is required by Circulation Policy 6.7, the Commission finds that the construction or retention of any portion of a private stairway on the bluff face is inconsistent with the certified Local Coastal Program and that the unpermitted development on the coastal bluff should not be retained. An active landslide exists at the Beacon's public access path to the north of the subject property. This landslide is deeply seated, while the private stairway is surficial and does not contribute to the stability of the bluff or prevent the Beacon's landslide from spreading further south. Lastly, private stairways encourage people to walk on the bluff face and in turn lead to increased erosion. Allowing the construction or retention of the retaining walls, treads, risers, and railroad ties is not consistent with the visual or geologic protection policies of the certified Local Coastal Program.

Neither the railroad ties nor the additional bluff improvements were permitted prior to the effective date of Proposition 20. Therefore, the proposal is treated as new stairway on the bluff face. Even if the railroad ties had been installed prior to the effective date of Proposition 20, the substantial bluff improvements constructed in 2004, which included a raised stairway to connect the patio to the bluff, three upper bluff retaining walls, landings on the bluff face, treads, risers, and stringers, additional retaining walls and railings, would not be consistent with the certified Local Coastal Program and cannot be retained.

The applicant contends that the treads and risers are holding back soil and the retained soil has allowed thick vegetation to establish on the bluff face and that removing the private stairway will thus destabilize the bluff. In addition, the applicant contends that if the treads and risers are removed, any rainfall will fall directly on the bluff face and increase erosion.

However, as stated above, an active landslide exists at the Beacon's public access path to the north of the subject property. This landslide is deeply seated, as are the other aforementioned landslides in the vicinity of the subject site. Any influence that the stairway, its pilings, and the railroad ties have on bluff stability is only surficial in nature. They will not affect global bluff stability and their removal will not lead to the Beacon's landslide from spreading further south. . Thus, the Commission's staff geologist does not believe that the stairway is necessary for bluff stability. In fact, removal of the stairway will cause a decrease in the amount of impervious surface area on the bluff, which will decrease the amount and concentration of runoff, which may actually decrease bluff erosion. Development on coastal bluffs can result in impacts such as degradation and instability of the bluff. Additionally, removing the private stairway will stop people from walking on the bluff face and will in turn lead to less surficial erosion. Allowing the retention and/or replacement of the retaining walls, treads, risers, and railroad ties is not consistent with the visual or geologic protection policies of the certified Local Coastal Program, and therefore, must be denied.

#### **4. PUBLIC ACCESS**

The project parcel is located between the sea and the first public roadway. Pursuant to Section 30.80.090 of the City's Local Coastal Program, a public access finding must be made that such development is in conformity with the public access and public recreation policies of the Coastal Act.

Section 30210 of the Coastal Act states:

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

In addition, Section 30212 of the Act is applicable and states:

(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....

The Commission has historically discouraged the development of private access stairs from residential development to the beach, as it can deter public access. In some case, development such as private access stairs can create a perception that the beach fronting these sites is also private, leading to a decrease in public access. The proposed development includes the replacement and maintenance of portions of an unpermitted private stairway down the coastal bluff. The continued approval of development would therefore not only be inconsistent with the policies protecting development on a coastal bluff, but may also result in the perpetuation of development directly adjacent to a public beach, thus potentially impacting public access. Aside from the perception that portions of the beach fronting private stairways may not be public, there are no additional identified public access impacts of the subject unpermitted private stairway. A public beach access path exists at Beacon's beach (less than 200 ft. from the property owner's residence), thereby making a private accessway unnecessary, especially given that new private accessways are prohibited, and even legally non-conforming private accessways are required to be phased out by the City's certified Local Coastal Program. In the case of the unpermitted private stairway, it is used by the private property owner and as such it is not open to the public. The proposed development is inconsistent with the applicable public access policies of the Coastal Act and the City of Encinitas' Local Coastal Program and therefore must be denied.

## **5. LOCAL COASTAL PLANNING**

The City of Encinitas received approval of its Local Coastal Program in November of 1994 and began issuing coastal development permits on May 15, 1995. The City of Encinitas Planning Commission approved the subject development on August 4, 2011. The local decision was not appealed to the City Council. Because the development is located between the sea and the first coastal roadway, it falls within the Commission's appeals jurisdiction. On September 16, 2011, the development approval was appealed to the Coastal Commission. The standard of review is the policies and ordinances of the certified Local Coastal Program and the public access and recreation policies of the Coastal Act.

As noted previously, the proposed development is inconsistent with several policies of the City's certified Local Coastal Program. The project is inconsistent with many coastal bluff protection policies of the Local Coastal Program. The proposed retention and replacement of portions of the unpermitted stairway on the bluff is inconsistent with Local Coastal Program policies that prohibit new private stairways and discourage and phase out existing private stairways. The retention and reconstruction of portions of the private stairway does not discourage climbing upon and defacement of the bluff face, the placement of a new 'retractable' staircase to connect the patio to the bluff top is not consistent with the policy requiring all structures be a minimum of 5 ft. from the bluff edge. The proposed retention or portions of the private stairway and the 3 upper bluff retaining walls does not protect the natural scenic qualities of the coastal bluffs and is not consistent with the character of the surrounding areas. Because each of these impacts is inconsistent with the previously cited Local Coastal Program policies, the proposed development must be denied. The Commission finds that approval of the subject proposal would prejudice the City's ability to continue to implement its certified Local Coastal Program.

## **6. CEQA**

Section 13096 of the California Code of Regulations requires Commission approval of a coastal development permit to be supported by a finding showing the permit 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.

As stated previously, the development as proposed would result in visual and geologic impacts to the coastal bluff. In addition, there are feasible alternatives to the proposed development which would lessen its adverse effect. Thus, the proposed development is not the least environmentally damaging alternative and cannot be found consistent with the requirements of the City of Encinitas Local Coastal Program, nor with the applicable CEQA requirements. Thus, the proposed project must be denied.

## **7. CONCLUSION**

In conclusion, given the unpermitted nature of the private stairway and the 3 upper bluff retaining walls; the prohibition in the Local Coastal Program of private stairways on the bluff face and the requirement to phase out existing private stairways, the replacement or maintenance of any portion of the unpermitted stairway or the upper bluff walls raises multiple significant concerns. As such, approval of this project represents a development that the Commission has determined to be inconsistent with the certified policies of the City's Local Coastal Program. The project, therefore, shall be denied as submitted.

## **APPENDIX A**

### **SUBSTANTIVE FILE DOCUMENTS**

- Certified City of Encinitas Local Coastal Program (LCP)
- Appeal by Commissioner Brian Brennan dated 9/16/2011
- Appeal by Commissioner Wendy Mitchell dated 9/16/2011
- Notice of Final Action received 9/1/2011
- Planning Commission Resolution No. PC 2011-21 received 9/1/2011
- Video archive of City of Encinitas Planning Commission Meetings on 6/2/2011 and 8/4/2011
- Geotechnical Evaluation by Geotechnical Exploration, Inc. dated 4/23/2010
- Geotechnical Review Documents dated 9/1/2012, 7/8/2011, 6/23/2011, and 5/10/2011;
- Site Plans dated 12/14/2010; 6/2/2011 and 8/4/2011
- Planning Commission Agenda Packet
- Letters from the City of Encinitas to Matthew Gordon and Slowikowska Rober dated 7/9/2009, 6/16/2008, and 5/28/2008
- Memo from Syd Willard to Bud Getty dated 12/14/1982
- Letter from John G. Wigmore to the City of Encinitas Planning Commission dated 5/27/2011 and 6/8/2008
- Letter from Stephen Ostrow to the City of Encinitas dated 5/17/2004 and 1/12/2004;
- Binder from the applicant to Commission staff including numerous documents, letters, emails and photos related to the subject property received 11/17/2011
- California Coastal Records Project historic aerial photographs dated 1972, 1979, 1987, 1989, 2002, 2004, 2006, 2008, and 2010
- San Diego County Regional Coastline Photographs Volume III dated 6/25/1972
- Email submittal from the applicant to Commission staff including numerous documents and photos related to the subject property received 10/15/2012
- In person submittal from the applicant to Commission staff including numerous documents and photos related to the subject property received 10/15/2012
- F1763 (Gazdik), F9288 (Wigmore)

## PROJECT LOCATION



EXHIBIT NO. 1

APPLICATION NO.

**A-6-ENC-11-073**

## Project Location

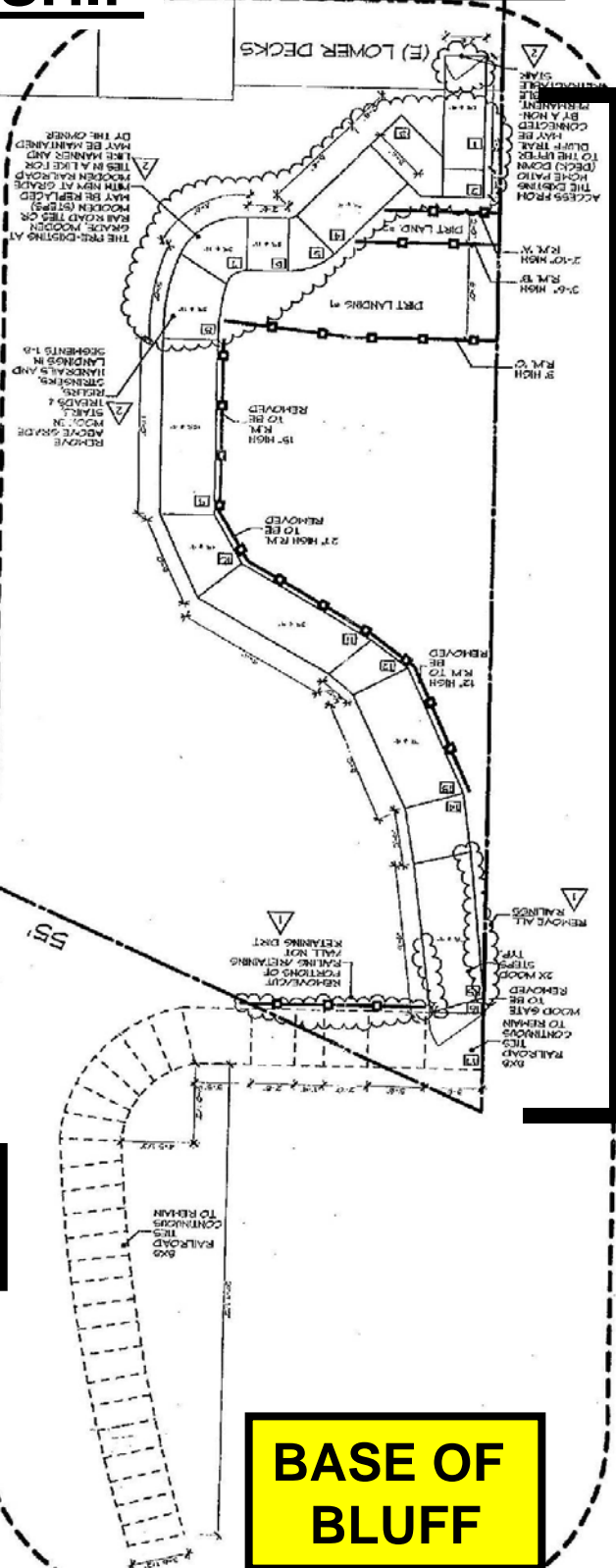


California Coastal Commission

Google Maps



**TOP OF  
BLUFF**



## Applicant's Property

## State Park's Property

# BASE OF BLUFF

EXHIBIT NO. 2

APPLICATION NO.

**A-6-ENC-11-073**

## Ownership



California Coastal Commission



# SITE PLAN

TOP OF BLUFF

3 Upper Bluff  
Wooden  
Retaining Walls

BASE OF BLUFF

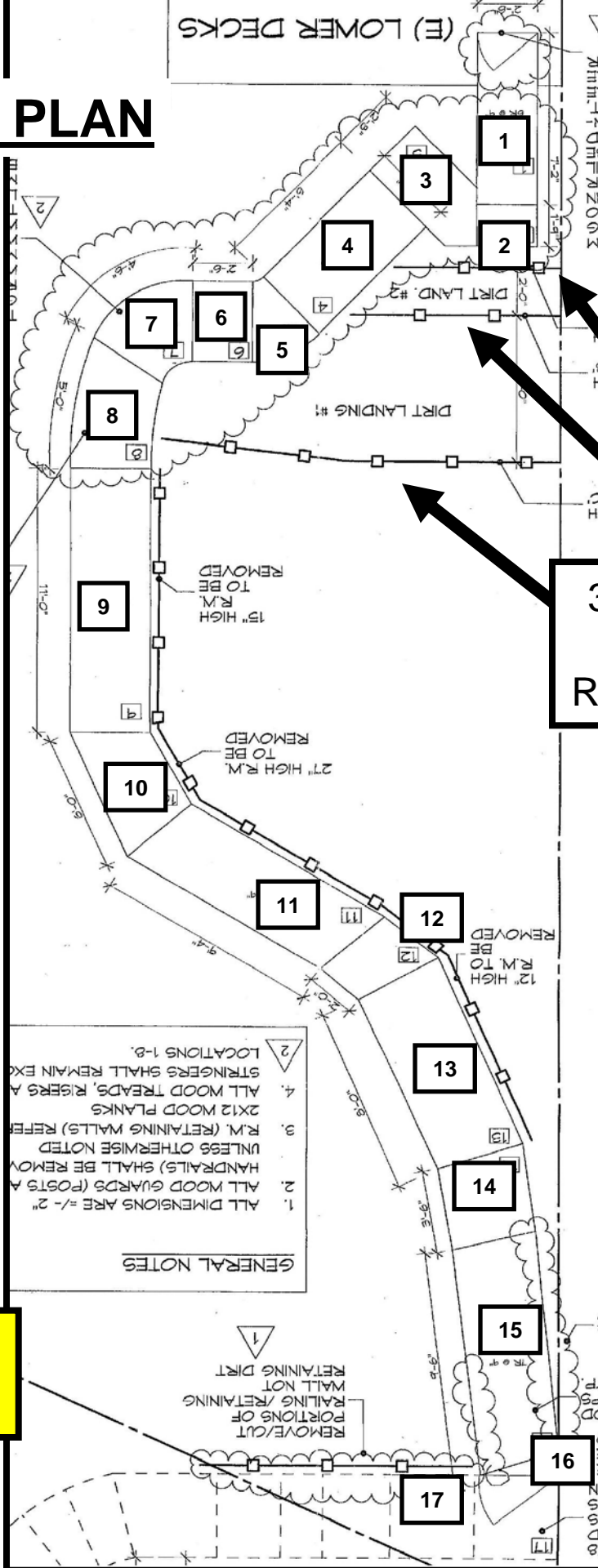


EXHIBIT NO. 3  
APPLICATION NO.  
**A-6-ENC-11-073**

Site Plan



California Coastal Commission

1972

No Railroad Ties Visible



EXHIBIT NO. 4

APPLICATION NO.

**A-6-ENC-11-073**

1972 Photo



California Coastal Commission

**1979**



EXHIBIT NO. 5

APPLICATION NO.

**A-6-ENC-11-073**

1979 Photo



California Coastal Commission

**1987**

No Railroad Ties Visible

EXHIBIT NO. 6

APPLICATION NO.

**A-6-ENC-11-073**

1987 Photo



California Coastal Commission

**1989**

No Railroad Ties Visible, Path Visible

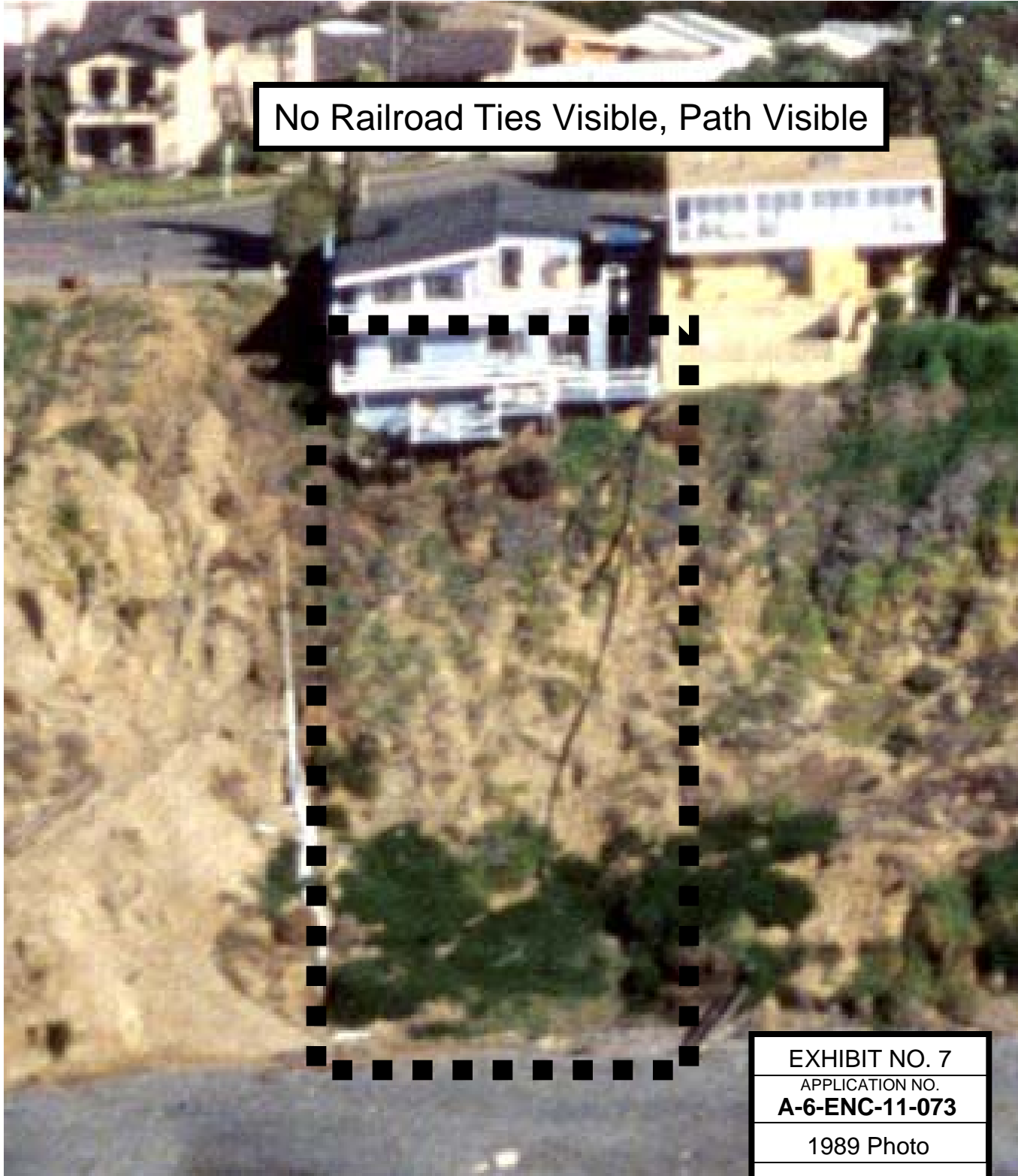


EXHIBIT NO. 7

APPLICATION NO.

**A-6-ENC-11-073**

1989 Photo



California Coastal Commission



**2002**

Railroad Ties Visible and Raised Staircase from Patio



EXHIBIT NO. 8

APPLICATION NO.

**A-6-ENC-11-073**

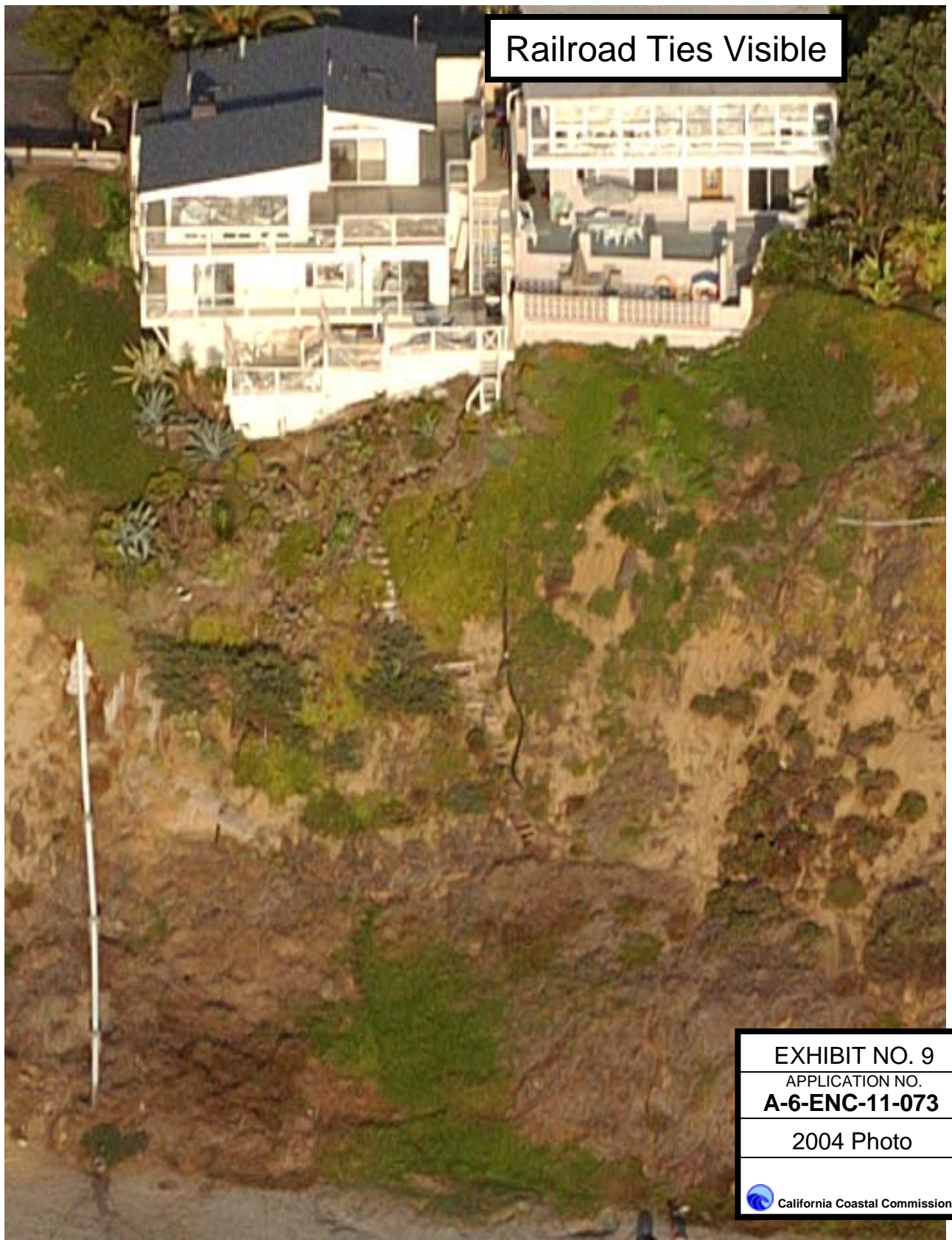
2002 Photo



California Coastal Commission



**2004**



Railroad Ties Visible

EXHIBIT NO. 9

APPLICATION NO.

**A-6-ENC-11-073**

2004 Photo



California Coastal Commission



**2006**

**Extensive Unpermitted Improvements**



**EXHIBIT NO. 10**

APPLICATION NO.

**A-6-ENC-11-073**

2006 Photo

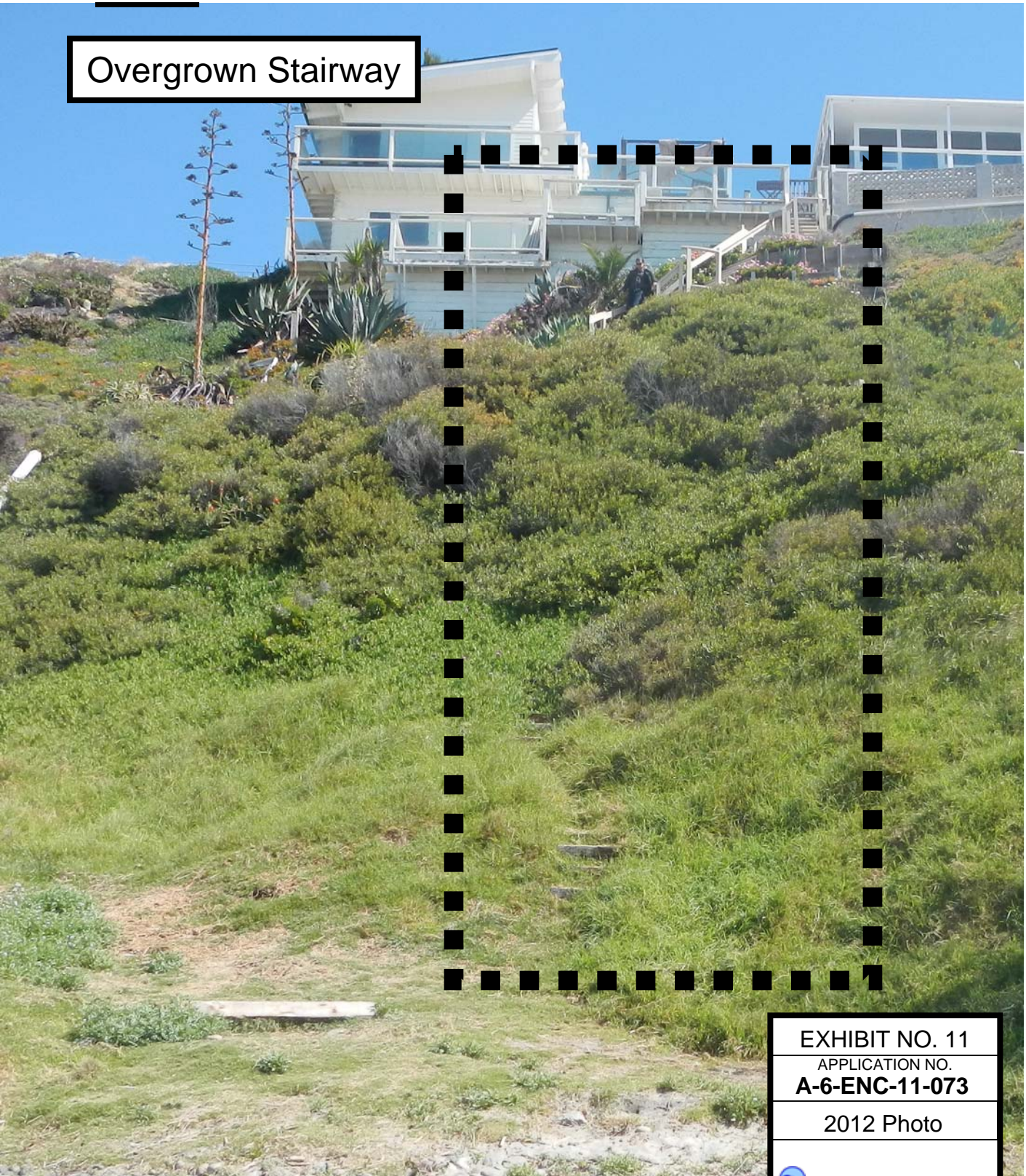


California Coastal Commission



**2012**

**Overgrown Stairway**



**EXHIBIT NO. 11**

**APPLICATION NO.**

**A-6-ENC-11-073**

**2012 Photo**



**California Coastal Commission**



# LETTER FROM NEIGHBOR

W. J. Knowlton

JOHN G. WIGMORE  
870 Neptune Avenue  
Encinitas, CA 92024  
T. (760)942-1430  
[jgwigmore@yahoo.com](mailto:jgwigmore@yahoo.com)

June 8, 2008

Mr. Phil Cotton  
City Manager  
City of Encinitas  
505 South Vulcan Ave.  
Encinitas, CA 92024

|   |
|---|
| EXHIBIT NO. 12  |
| APPLICATION NO.<br><b>A-6-ENC-11-073</b>  |
| Neighbor's Letter   |
|  California Coastal Commission |

Re: Beach Access and Stairway - 870 and 876- 878 Neptune Ave.

Dear Mr. Cotton:

Matthew and Robin Gordon who reside at 876-878 Neptune Avenue have asked me to write to you to relate the history of my family's use of the beach access and stairway from my home to Beacon's Beach.

In April 1977 I purchased the house at 870 Neptune Ave. as a second home and beach house. I have owned the property ever since. When I purchased the home, my family consisted of my wife, a life long beach goer and strong swimmer, my four children then aged 15, 13, 7 and 5. I bought the house because we all loved the ocean. I was an avid surfer and had spent the preceding 10 years surfing at Malibu, north of Santa Monica. We lived in West Los Angeles at that time. To me, it was critical that the Neptune beach house have beach access. It was the primary reason I purchased the house. When we moved in, in 1977, there was a path to the beach already in place. It switch- backed down from my bluff edge to the north boundary, then across the lower portion of the bluff fronting 872 Neptune (now the Bohans' house) and then across the south- western corner of 876-878 Neptune (now the Gordons' house) joining the existing access in front of the Gordons' house and then down the lower bluff path to Beacons beach. Immediately following my acquisition of 870 Neptune, using two foot X "8" X "8" rail road ties, I personally built a stairway down the bluff to the beach on the existing path already in place. The railroad ties were embedded into the face

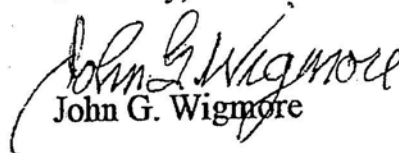
of the path on the bluff. The stair way was and is unobtrusive. From the bottom of the bluff, the stairway is not visible in places. It is low impact; there has never been an erosion problem. However, from time to time, the lower portion of the path leading down the bluff below the Gordons' house was covered over by sand moving down from above burying the railroad ties. Further, bluff growth would grow over and obscure the lower stairway. Nonetheless, we used the stairway continuously. I renewed the railroad ties on the lower path below the Gordons' in 2004. Subsequently, the Gordons fastened a new wood fascia over the lower stairway railroad ties, as it now exists.

In September 1991 we moved into 870 Neptune as our permanent, full time residence. My wife died in 1994.

Every year in the spring after the winter rains and before Memorial Day, I clear the stairway using hand shears, a lopper and a broom. I did so this spring of 2008. Below the Gordons' house, where the grass is thick, I used a weed whacker that I had rented from Rebel Rents on Pacific Coast Highway.

Since we purchased the house at 870 Neptune in 1977, over all those years, the stairway has been used continuously without interruption by me, my children and our friends, to go to and from the beach and our house on the bluff. Since the Gordons purchased their house at 876-878 Neptune, the Gordons and Wigmores have shared the use of the stairs below their home.

Sincerely,

  
John G. Wigmore

Cc: Matthew and Robin Gordon

# **PRIVATE RAILROAD TIE ACCESSWAY TO THE SOUTH**

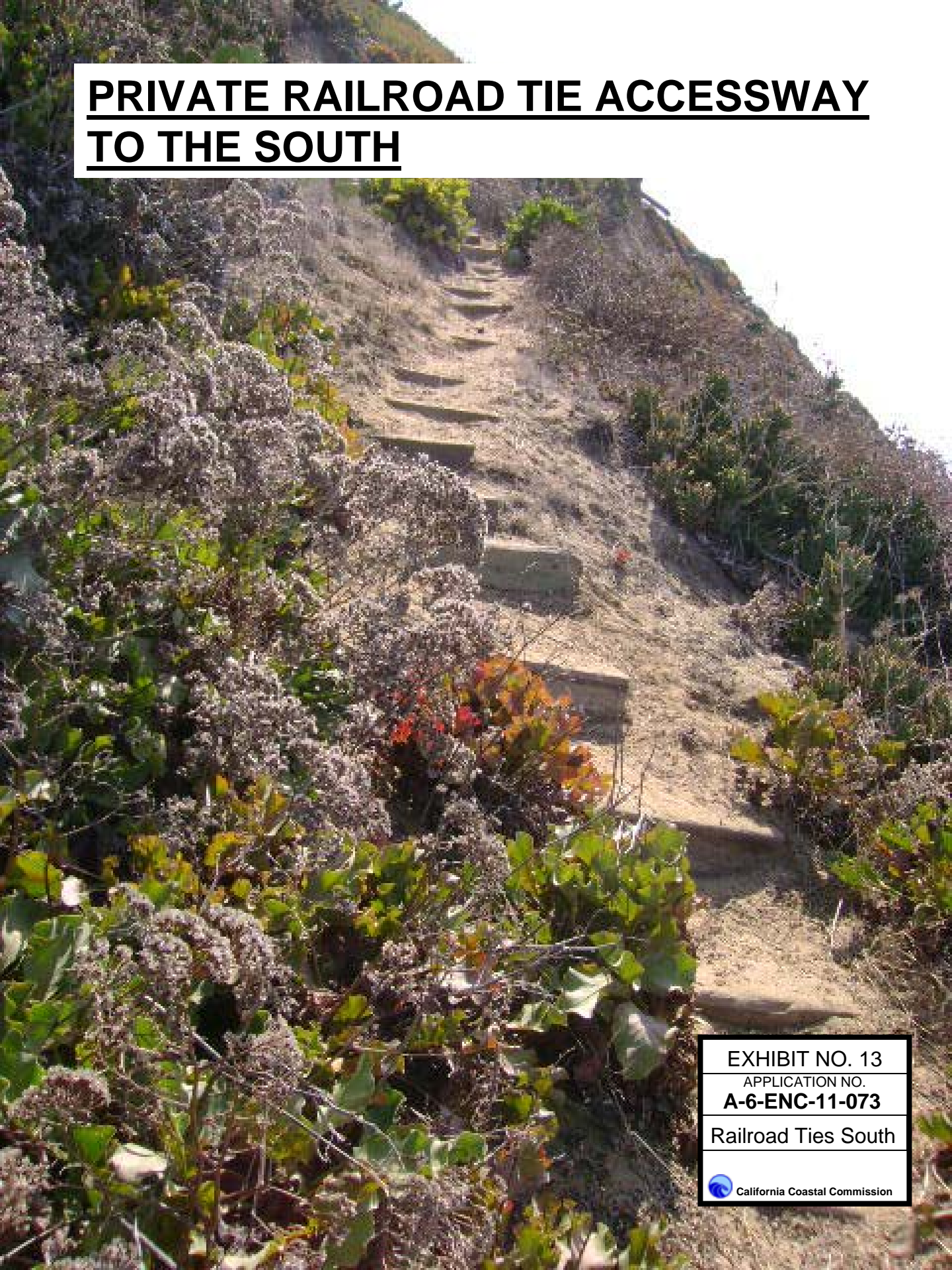


EXHIBIT NO. 13

APPLICATION NO.

**A-6-ENC-11-073**

Railroad Ties South

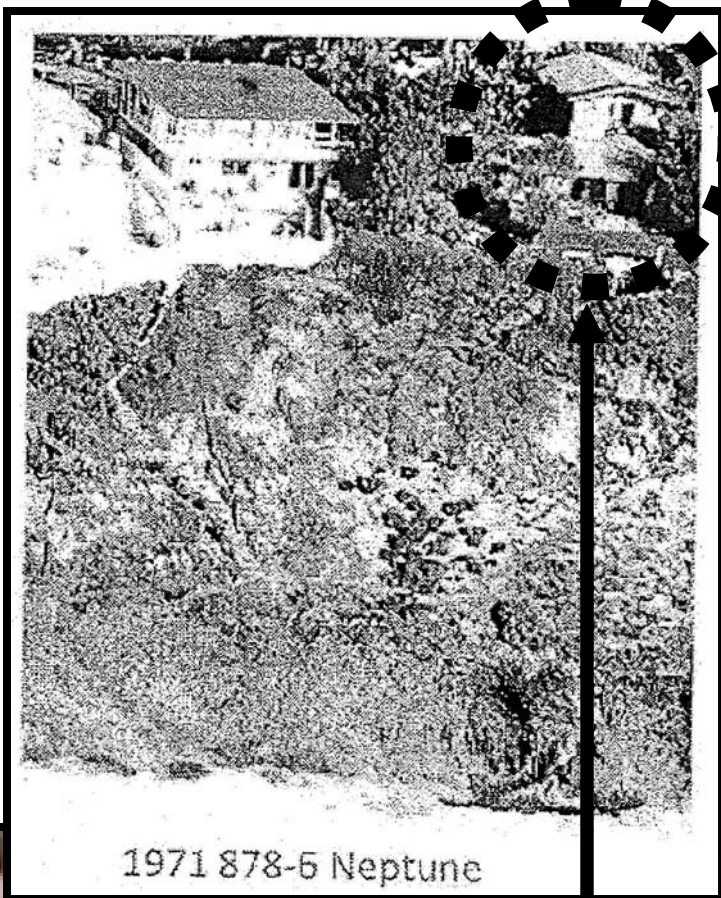


California Coastal Commission



**MISLABELED**  
**STAIRWAY**  
**PHOTO**

No 2<sup>nd</sup> Story  
in 1979



1971 878-5 Neptune

2<sup>nd</sup> Story  
Construction  
after 1980

1979 Photograph



EXHIBIT NO. 14

APPLICATION NO.

**A-6-ENC-11-073**

Mislabeled Photo



California Coastal Commission

## CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA

METROPOLITAN DRIVE, SUITE 103

SAN DIEGO, CA 92108-4402

767-2370

APPEAL FROM COASTAL PERMIT  
DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: Commissioner Brian Brennan  
Mailing Address: 45 Fremont St.  
Suite 2000  
San Francisco, CA 94105  
Phone Number: (415) 904-5200

SECTION II. Decision Being Appealed

1. Name of local/port government: City of Encinitas
2. Brief description of development being appealed: Removal of portions of a private, unpermitted access stairway constructed on the bluff face leading from the blufftop to the beach, allow retention of portions of the unpermitted stairway and retaining walls, and authorize construction of a replacement stairway of railroad ties and a retractable staircase element on the upper bluff.
3. Development's location (street address, assessor's parcel no., cross street, etc.):  
876 & 878 Neptune Avenue, Encinitas, San Diego County. APN 258-311-07
4. Description of decision being appealed:  
a. Approval; no special conditions: ☐      b. Approval with special conditions: ☒  
c. Denial: ☐

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:APPEAL NO: A-6-ENC-11-073DATE FILED: 9/16/11DISTRICT: San Diego

RECEIVED

SEP 16 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

|  |
|--|
| EXHIBIT NO. 15                           |
| APPLICATION NO.<br><b>A-6-ENC-11-073</b> |
| Appeals                                  |
| California Coastal Commission            |

5. Decision being appealed was made by (check one):

- a. ☐ Planning Director/Zoning Administrator      c. ☒ Planning Commission
- b. ☐ City Council/Board of Supervisors      d. ☐ Other

Date of local government's decision: 8/4/11

Local government's file number (if any): 10-069 CDP

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

Name and mailing address of permit applicant:

Matthew Gordon  
878 Neptune Avenue  
Encinitas, CA 92024

---

Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

---

SECTION IV. Reasons Supporting This Appeal

Note: Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section, which continues on the next page.



State briefly your reasons for this appeal. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)

*See Attachment "A" Dated 9/16/11*

Note: The above description need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Signed: *Signature on File* \_\_\_\_\_  
Appellant or Agent

Date: 9/16/11

Agent Authorization: I designate the above identified person(s) to act as my agent in all matters pertaining to this appeal.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_



Attachment "A"  
A-6-ENC-11-073  
876 and 878 Neptune Ave., Encinitas  
9/16/11

The project approved by the City of Encinitas at 876 & 878 Neptune Avenue (APN# 256-011-04) would authorize removal of portions of a private, unpermitted access stairway constructed on the bluff face, allow retention of portions of the unpermitted stairway and retaining walls, and authorize construction of a replacement stairway of railroad ties and a retractable staircase element on the upper bluff. The development on the bluff face currently consists of numerous retaining walls and a stairway leading from the blufftop to the beach made of railroad ties and wooden treads, railings, and a privacy gate.

The City's LCP specifically prohibits private access stairways on the bluff face because such structures on the bluff face result in visual impact to the natural landform of the bluff, and also can result in impacts on geologic stability. The LCP provisions are intended to retain the bluffs as natural open space and limit the proliferation of private access stairways by phasing out of existing private access stairways over time. Therefore, authorizing any portions of the unpermitted private access stairway and construction of new stairway elements is not consistent with the certified LCP.

The subject property is located on the west side of Neptune Avenue, directly adjacent to the south of the Beacon's Beach Public Access. A multi-story duplex is located on the blufftop; the duplex and its beach facing decks appear to be seaward of the bluff edge. There are currently no seawalls on the bluff or beach fronting the project site.

Specifically the City's action requires removal of the raised section of stairs leading from a deck on the blufftop to bluff face, removal of all railings and a privacy gate on the midbluff portion of the staircase, and removal of sections of retaining walls that are not retaining soil. However, the City's action authorizes retention of all railroad ties and treads on top of the railroad ties and retention of numerous portions of retaining walls that are retaining soil. Additionally, the City approval authorizes the applicant to replace the raised staircase on the upper bluff with a 'non-permanent, removable, retractable stair' and to install a railroad tie staircase on the upper bluff.

According to the City, the unpermitted stairway was installed in approximately 2004. A historic aerial photograph from October 23, 2004 shows only railroad ties on the midbluff and a small staircase from the deck to the bluff. Approximately  $\frac{3}{4}$  of the bluff is owned by the blufftop property owner, while the lower  $\frac{1}{4}$  of the bluff is owned by California State Parks. The City did not address the portion of the unpermitted stairway that is in State Parks property.

#### Issues:

- Based on analysis of historic photos, it does not appear that the railroad tie staircase existed prior to the Coastal Act. A historic aerial photo from January 1989 does not appear to show any railroad ties on the subject bluff face. There is some evidence of a foot trail, but no stairway. Thus, the stairway is unpermitted.

- The stairs are placed directly on the bluff face in an area that has been described as an active landslide area (Beacon's Beach Access has been described as an active landslide and a large landslide occurred in the mid 1990s just a few lots south of the subject site). LCP policies encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards; a stairway placed directly on a coastal bluff has the potential to cause increased erosion and instability to the bluff.
- Unlike areas further to the north, the surrounding area is not characterized by numerous private stairways on the bluff face. There are very few private staircases on the bluff face in this area. In fact, the subject site contains the only private stairway for approximately 20 houses to the south of the Beacon's accessway. LCP policies assert that the visual quality of bluffs should be restored and enhanced. A bluff staircase in this area is not the established pattern of development.
- If in fact, portions of the stairway/retaining walls cannot be removed without potentially impacting bluff stability (which must be verified through independent analysis), alternatives to phase out the stairway, rather than authorize it as consistent with the LCP must be considered.
- The section of the stairway on the lower portion of the bluff located on State lands was not addressed by the City permit.

#### LCP Policies:

Public Safety Element Policy 1.6 of the City's Land Use Plan (LUP) states, in part:

The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:

- a. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;

[...]

- e: Permitting pursuant to the Coastal Bluff Overlay Zone, bluff repair and erosion control measures on the face and at the top of the bluff that are necessary to repair human-caused damage to the bluff, and to retard erosion which may be caused or accelerated by land-based forces such as surface drainage or ground water seepage, providing that no alteration of the natural character of the bluff shall result from such measures, where such measures are designed to minimize encroachment onto beach areas through an alignment at and parallel to the toe of the coastal bluff, where such measures receive coloring and other exterior treatments and provided that such measures shall be permitted only when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply;

- f. ...no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet of the bluff top edge;...
- g. Permanently conserving the bluff face within an open space easement or other suitable instrument...(emphasis added)

In addition, Circulation Policy 6.7 states as follows:

Discourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited. (emphasis added)

Resource Management Goal 8 of the LUP: The City will undertake programs to ensure that the Coastal Areas are maintained and remain safe and scenic for both residents and wildlife.

Resource Management Policy 8.5 states, in part: The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards and as a scenic resource...(emphasis added)



## CALIFORNIA COASTAL COMMISSION

DIEGO AREA  
METROPOLITAN DRIVE, SUITE 103  
DIEGO, CA 92108-4402  
767-2370



APPEAL FROM COASTAL PERMIT  
DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: Commissioner Wendy Mitchell

Mailing Address: 12949 Blairwood Dr.  
Studio City, CA 91604

Phone Number: (415) 904-5200

SECTION II. Decision Being Appealed

1. Name of local/port government: City of Encinitas
2. Brief description of development being appealed: Removal of portions of a private, unpermitted access stairway constructed on the bluff face leading from the blufftop to the beach, allow retention of portions of the unpermitted stairway and retaining walls, and authorize construction of a replacement stairway of railroad ties and a retractable staircase element on the upper bluff.
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  - a. Approval; no special conditions: ☐
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TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-6-ENC-11-073

DATE FILED: 9/16/11

DISTRICT: San Diego

**RECEIVED**

SEP 16 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

5. Decision being appealed was made by (check one):

- a. ☐ Planning Director/Zoning Administrator      c. ☒ Planning Commission
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Date of local government's decision: 8/4/11

Local government's file number (if any): 10-069 CDP

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Matthew Gordon  
868 Neptune Avenue  
Encinitas, CA 92024

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## APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Page 3

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See Attachment "A" dated 9/16/11

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## SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Signed: 1 Signature on File 1  
Appellant 1

Dated: 9/16/11

Agent Authorization: I designate the above identified person(s) to act as my agent in all matters pertaining to this appeal.

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_



Attachment "A"  
A-6-ENC-11-073  
876 and 878 Neptune Ave., Encinitas  
9/16/11

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- e: Permitting pursuant to the Coastal Bluff Overlay Zone, bluff repair and erosion control measures on the face and at the top of the bluff that are necessary to repair human-caused damage to the bluff, and to retard erosion which may be caused or accelerated by land-based forces such as surface drainage or ground water seepage, providing that no alteration of the natural character of the bluff shall result from such measures, where such measures are designed to minimize encroachment onto beach areas through an alignment at and parallel to the toe of the coastal bluff, where such measures receive coloring and other exterior treatments and provided that such measures shall be permitted only when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply;



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**CITY OF ENCINITAS  
PLANNING COMMISSION  
AGENDA REPORT  
Meeting Date: August 4, 2011**

TO: Planning Commission

VIA: *TC* Tom Curriden, City Planner

FROM: Planning and Building Department  
*R* Roy Sapa'u, Senior Planner

|   |
|---|
| EXHIBIT NO. 16  |
| APPLICATION NO.<br><b>A-6-ENC-11-073</b>  |
| Agenda Report   |
|  California Coastal Commission |

**RECEIVED**  
AUG 01 2011  
CALIFORNIA  
COASTAL COMMISSION  
30 COAST DISTRICT

**SUBJECT:** Continued public hearing to consider an application requesting a Coastal Development Permit to remove existing wooden stairs, treads, risers, railings and retaining walls installed on the face of the coastal bluff. The subject property is located in the R-11 (Residential 11) zone, the Coastal Bluff Overlay Zone, the Ecological Resource/Open Space/Parks (ER/OS/P) Zone and within the California Coastal Commission Appeal Jurisdiction of the Coastal Zone.  
**CASE NUMBER:** 10-069 CDP; **APPLICANT:** Steve Shackelton; **LOCATION:** 876 & 878 Neptune Avenue (APN: 258-311-07).

**BACKGROUND:** The Planning Commission considered the subject application on June 2, 2011. At the hearing, the Planning Commission heard testimony from the property owner, the project geotechnical engineer and three (3) members of the public. The property owner and project geotechnical engineer expressed concerns including objections to the requirements and recommendations made by staff regarding Sections 1 thru 8 of the stairway as depicted on the attached project drawing (**Exhibit PC-6**). Both were concerned that the removal of the structures in Sections 1 thru 8 as recommended by staff (and depicted on the project drawings) would create erosion problems that could lead to soil sloughing. The three members of the public who spoke at the hearing echoed the same concern. The project planner and City's Geotechnical expert were not present at the hearing to address the concerns. Therefore, after hearing public testimony, the Planning Commission continued the public hearing to the August 4, 2011 Planning Commission meeting to allow staff and the property owner and project geotechnical engineer to resolve issues raised at the hearing.

On June 16, 2011, staff (including Jim Knowlton of GeoPacifica, City's Third Party Geotechnical Consultant) met with Matthew Gordon (property owner), Les Reed (project geotechnical engineer) and Steve Shackelton (project architect) on the project site to discuss the concerns and issues raised at the June 2, 2011 Planning Commission hearing. Staff indicated to the owner and owner's representatives that all structures that were installed on the face of the coastal bluff without proper permits must be removed. All wooden risers, treads, stairs, stringers, handrails and landings in Sections 1 thru 8 that are above grade must be removed in their entirety. Any structures (i.e. posts



footings) that are physically embedded into the bluff face must be cut at grade. Furthermore, all existing railroad ties underneath the wooden stairs to be removed in Sections 1 thru 8 can remain and be replaced subject to review and approval by the City Planning and Engineering Departments. The owner agreed in letter correspondences from the project architect and geotechnical engineer attached hereto as **Exhibit PC-3**. Both letters stated that the project remains as previously proposed and depicted on the project drawings presented to the Planning Commission on June 2, 2011 and attached hereto as **Exhibit PC-6**. Furthermore, both express support of staff's previous recommendation made in the June 2, 2011 staff report. Therefore, no changes are proposed to the project design and staff's recommendations as presented to the Planning Commission on June 2, 2011.

The subject property is developed with a single-family residence and is bordered on the west by a coastal bluff overlooking the Pacific Ocean. The bluff face contains a pre-1972 on-grade access path consisting of railroad ties extending from the upper portion of the bluff face underneath an existing wooden deck leading down to the beach below. In 2004, the property owner installed new wooden stairs, treads, risers and railings placed over existing railroad ties without obtaining necessary permits from the City of Encinitas and/or California Coastal Commission. In addition, the owner constructed a stairway access with wooden railings and steps from the lower deck on the bluff top to the on-grade path on the bluff face directly below it without permits. In 2008, the City of Encinitas recorded a notice of violation on the subject property for the unpermitted improvements. The applicant was required to obtain necessary permit from the City for the removal of the unpermitted structures. The applicant is proposing to remove the unpermitted structures as delineated on the project drawings attached hereto as **Exhibit PC-6**.

**REQUIRED PERMITS AND FINDINGS:** Because site-specific analysis indicates the presence of a coastal bluff, the regulations contained in Municipal Code Section 30.34.020 (Coastal Bluff Overlay Zone (CBOZ)) apply and the Planning Commission is the authorized agency for reviewing and granting discretionary approval for any proposed development within the Coastal Bluff Overlay Zone. Pursuant to Section 30.34.020B.2 of the Municipal Code, no structure, facility, improvements or activity shall be allowed on the face or at the base of a coastal bluff except for public beach access facilities, preemptive measures and landscape maintenance including removal of nonnative vegetations when accomplished by hands. In addition, Section 13252 of Title 14 of the California Code of Regulations requires that any repair or maintenance to structures including placement or removal of any solid materials within 50 feet of the edge of a coastal bluff or within 20 feet of coastal waters requires a coastal development permit. The applicant requests approval of a Coastal Development Permit to remove existing wooden stairs, treads, risers, and railings on the bluff face starting at the top edge of the bluff leading down to the beach below. The proposed project will comply with all applicable provisions of Section 30.34.020 (Coastal Bluff Overlay Zone) of the Municipal Code.

A site specific geotechnical review is required for coastal bluff development to address the standards contained in Section 30.34.020 D of the Municipal Code. A geotechnical evaluation prepared by Leslie D. Reed of Geotechnical Exploration, Inc included as part of attached **Exhibit PC-3** was submitted as part of the application. The evaluation was prepared to determine, based on a visual evaluation and probing of soils behind the stairway plank retaining walls, how much



retaining wall heights could safely be reduced (only removing portions of walls not retaining any earth) without causing any sloughing and surficial failures up the slope face. The evaluation presented recommendations in lowering of existing wall heights to the degree appropriate without adversely impacting bluff face stability. The evaluation concluded that implementing the proposed removal methodology of existing retaining walls, vertical supports, hand rails, stringers, and treads and risers as noted and described on the attached project drawing (**Exhibit PC-6**) prepared by Mr. Steve Shackelton, dated December 14, 2011, will not adversely impact the stability of the bluff face and will not compromise the existing levels of erosion protection. The geotechnical evaluation, as required by the City, was subject to a Third Party Geotechnical Review by the City's Geotechnical Consultant, Geopacifica. The Third Party Review concurred with the proposed recommendations and concluded that the geotechnical evaluation adequately addressed the site conditions and provided information to adequately meet the standards of the City of Encinitas Municipal Code Section 30.34.020B, C and D.

The proposed project requires approval of a Coastal Development Permit in accordance with Chapter 30.80 (Coastal Development Permit) of the Encinitas Municipal Code. The required findings to approve a Coastal Development Permit application can be found in Section 30.80.090 of the Municipal Code. The findings contained in Attachment "A" of the attached draft Resolution of Approval (**Exhibit PC-1**) reflect that the project complies with the General Plan and Encinitas Municipal Code.

**Citizen's Participation Plan (CPP):** The applicant prepared a Citizen's Participation Plan (CPP) newsletter in accordance with Chapter 23.06 of the Municipal Code. The newsletter was mailed out on April 8, 2011 to property owners and occupants within 500 feet of the subject property. The newsletter allowed for a two week comment period. The applicant states in the CPP final report (**Exhibit PC-2**) that one email correspondence was received during the comment period. The email is included with the CPP final report. As stated in the CPP final report, all concerns were addressed at the CPP meeting.

**ENVIRONMENTAL REVIEW:** The project has been determined to be exempt from environmental review as per California Environmental Quality Act (CEQA) Guidelines Sections 15301(1)(4), which categorically exempts demolition and removal of accessory structures.

**ALTERNATIVE ACTIONS:** Alternative actions available to the Commission include: (1) Make the required findings and adopt the attached Resolution approving the Coastal Development Permit; (2) Continue the hearing for further information and review; or (3) Close the public hearing, discuss the findings, vote to deny the application and direct staff to return on a date certain with a resolution of denial reflecting the findings of the Commission.

**RECOMMENDATION:** Before public comment is received, disclose all information and contacts received outside the hearing of this matter upon which the decision will be based, receive public testimony and consider the facts and findings necessary to make a decision on the application. Staff recommends that the Planning Commission approve Case No. 10-069 CDP based upon the findings and conditions contained in the draft resolution of approval (**Exhibit PC-1**) for the project provided to the Commission.

**LIST OF ATTACHMENTS:**

- Exhibit PC-1 Draft Resolution of Approval with Attachments "A", "B" and "C"
- Exhibit PC-2 Citizen's Participation Plan Final Report
- Exhibit PC-3 Geotechnical Letter Reports prepared by Leslie D. Reed of Geotechnical Exploration, Inc dated July 8, 2011, June 23, 2010 and April 23, 2010; and Letter correspondence from Stephen Shackelton dated June 22, 2011
- Exhibit PC-4 Application and Related Materials
- Exhibit PC-5 Color photos of project site
- Exhibit PC-6 Project drawings

\*\*\* The entire Administrative Record for this Coastal Development Permit application including the June 2, 2011 Agenda Report and Geotechnical Evaluation are available for review in the Planning and Building Department.



RECEIVED

SEP 01 2011

RESOLUTION NO. PC 2011-21

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

**A RESOLUTION OF THE CITY OF ENCINITAS PLANNING COMMISSION  
APPROVING A COASTAL DEVELOPMENT PERMIT FOR REMOVAL OF  
EXISTING WOODEN STAIRS, TREADS, RISERS, RAILINGS AND RETAINING  
WALLS ON THE BLUFF FACE FOR THE PROPERTY LOCATED AT 876 & 878  
NEPTUNE AVENUE.**

(CASE NO. 10-069 CDP; APN: 258-311-07)

WHEREAS, a request for consideration of a Coastal Development Permit was filed by Steve Shackelton on behalf of the property owner to allow the removal of existing wooden stairs, treads, risers, railings and retaining walls, in accordance with Chapters 30.34 (Special Purpose Overlay Zones) and 30.80 (Coastal Development Permit) of the Encinitas Municipal Code, for the property located within the R-11 (Residential 11) zone, the Ecological Resource/Open Space/Parks (ER/OS/P) Zone, the Coastal Bluff Overlay Zone and the California Coastal Commission Appeal Jurisdiction of the Coastal Zone, legally described as:

(SEE ATTACHMENT "A")

WHEREAS, the Planning Commission conducted noticed public hearings on the application on June 2, 2011 and August 4, 2011, at which time all those desiring to be heard were heard; and


WHEREAS, the Planning Commission considered, without limitation:

1. The June 2, 2011 and August 4, 2011 agenda reports to the Planning Commission with attachments;
2. The General Plan, Local Coastal Program, Municipal Code and associated Land Use Maps;
3. Oral evidence submitted at the hearings;
4. Written evidence submitted at the hearings;
5. Project drawing consisting of 1 sheet Site Plan stamped received by the City of Encinitas on December 15, 2010; and

WHEREAS, the Planning Commission made the following findings pursuant to Chapter 30.80 (Coastal Development Permit) of the Encinitas Municipal Code:

(SEE ATTACHMENT "B")

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission of the City of Encinitas hereby approves application No. 10-069 CDP subject to the following conditions:

|   |
|---|
| EXHIBIT NO. 17  |
| APPLICATION NO.<br><b>A-6-ENC-11-073</b>  |
| Resolution  |
|  California Coastal Commission |

(SEE ATTACHMENT "C")

**BE IT FURTHER RESOLVED** that the Planning Commission, in its independent judgment, finds that this project is categorically exempt from environmental review pursuant to Section 15301(1)(4), which categorically exempts demolition and removal of accessory structures.

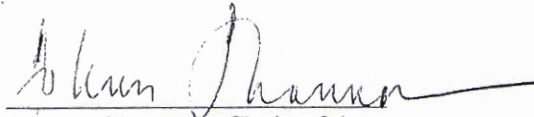
**PASSED AND ADOPTED** this 4<sup>th</sup> day of August, 2011, by the following vote, to wit:

AYES: Brandenburg, Felker, O'Grady, Shannon

NAYS: None

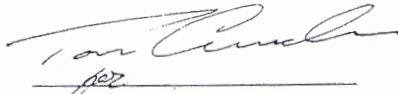
ABSENT: Groseclose

ABSTAIN: None



Jo Ann Shannon, Chair of the  
Encinitas Planning Commission

ATTEST:



Patrick Murphy  
Secretary

**NOTE:** This action is subject to Chapter 1.04 of the Municipal Code, which specifies time limits for legal challenges.

ATTACHMENT "A"  
Resolution No. PC 2011-21  
Case No. 10-069 CDP

LEGAL DESCRIPTION

THOSE PORTIONS OF BLOCKS "B" AND "D" OF SOUTH COAST PARK NO.2, IN THE CITY OF ENCINITAS, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 1859, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, SEPTEMBER 21. 1925, DESCRIBED AS FOLLOWS;

COMMENCING AT A CONCRETE MONUMENT MARKING THE INTERSECTION OF THE CENTER LINE OF FULVIA STREET AND NEPTUNE AVENUE AS SHOWN ON SAID MAP NO. 1859; THENCE SOUTH 69 DEGREES 51'30" WEST A DISTANCE OF 20.04 FEET TO AN ANGLE POINT IN THE WESTERLY LINE OF SAID NEPTUNE AVENUE; THENCE ALONG THE SAID WESTERLY LINE OF NEPTUNE AVENUE, SOUTH 23 DEGREES 34'45" EAST (RECORD SOUTH 23 DEGREES 35'33" EAST) A DISTANCE OF 15 FEET TO THE TRUE POINT OF BEGINNING, SAID POINT BEING A CORNER TO THAT PORTION OF SAID BLOCKS "B" AND "D" AS CONVEYED BY THE SOUTH COAST LAND COMPANY, TO THE COUNTY OF SAN DIEGO BY DEED DATED JANUARY 10, 1930, AND RECORDED IN BOOK 1731 PAGE 258 OF DEEDS; THENCE CONTINUING ALONG THE SAID WESTERLY LINE OF NEPTUNE AVENUE, SOUTH 23 DEGREES 34'45" EAST A DISTANCE OF 278.89 FEET (RECORD SOUTH 23 DEGREES 35'33" EAST A DISTANCE OF 278.28 FEET) TO THE SOUTHEASTERLY CORNER OF SAID BLOCK "B"; THENCE ALONG THE SOUTHERLY LINE OF SAID BLOCK "B" AND ITS WESTERLY PROLONGATION SOUTH 74 DEGREES 16'30" WEST A DISTANT OF 236.41 FEET TO A POINT ON THE EASTERLY LINE OF SAID SAN DIEGO COUNTY LAND; THENCE ALONG THE EASTERLY AND SOUTHEASTERLY LINE OF SAID COUNTY LAND THE FOLLOWING COURSES AND DISTANCES; NORTH 23 DEGREES 09'50" WEST A DISTANCE OF 68.7 FEET TO AN ANGLE POINT THEREIN; THENCE NORTH 7 DEGREES 14' EAST A DISTANCE OF 218.88 FEET TO AN ANGLE POINT THEREIN; THENCE NORTH 71 DEGREES 10'15" EAST A DISTANCE OF 122 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION LYING SOUTHERLY OF A LINE THAT IS PARALLEL WITH AND 50.00 FEET SOUTHERLY OF THE NORTHERLY LIMIT OF THE ABOVE DESCRIBED PROPERTY. SAID 50.00 FEET BEING MEASURED ALONG THE WESTERLY LINE OF SAID NEPTUNE STREET.

ALSO EXCEPTING THEREFROM ANY PORTION HERETOFORE OR NOW LYING BELOW THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN.

APN: 258-311-07-00



ATTACHMENT "B"  
Resolution No. PC 2011-21  
Case No. 10-069 CDP

FINDINGS FOR A COASTAL DEVELOPMENT PERMIT

**STANDARD:** Section 30.80.090 of the Municipal Code provides that the authorized agency must make the following findings of fact, based upon the information presented in the application and during the Public Hearing, in order to approve a coastal development permit:

1. The project is consistent with the certified Local Coastal Program of the City of Encinitas; and
2. The proposed development conforms with Public Resources Code Section 21000 and following (CEQA) in that there are no feasible mitigation measures or feasible alternatives available which would substantially lessen any significant adverse impact that the activity may have on the environment; and
3. For projects involving development between the sea or other body of water and the nearest public road, approval shall include a specific finding that such development is in conformity with the public access and public recreation policies of Section 30200 et. seq. of the Coastal Act.

**Facts:** The project proposes to remove existing wooden stairs, treads, risers, railings and retaining walls installed on the bluff face by the property owner without proper permits. The structures are being removed as recommended by the project Geotechnical Consultant Geotechnical Exploration Inc. in their evaluation report dated July 8, 2011 and April 23, 2010 and as delineated on the project drawings stamped received by the City on December 15, 2010. The site is located within the Ecological Resource/Open Space/Parks (ER/OS/P) Zone, Coast Bluff Overlay Zone, Coastal Appeal Zone and the R-11 zoning district of the City of Encinitas. The Coastal Development Permit for the proposed improvements is subject to review by the City and the action of the City can be appealed to the Coastal Commission.

**Discussion:** As to the findings above, the proposed project is to bring the project site in to conformance with the development standards and findings set forth in Chapter 30.34 (Coastal Bluff Overlay Zone) of the Municipal Code, the General Plan and the Local Coastal Program. The project, with the implementation of the recommended removal methodology of the wooden structures on the bluff face by Geotechnical Exploration Inc. and implementation of conditions of approval required as part of this resolution will not cause significant negative impacts to the coastal bluff and surrounding area. Additionally, the project will not adversely impact public coastal access. Public access or public recreational facilities are not feasible given the project site's condition as a blufftop residential property. Therefore, no condition requiring public access is imposed with this approval. Public access to the shore is available immediately adjacent to the north at Beacon's State Beach access. Since there was no public access through the property prior to this application, the ability of the public to access the shore is not adversely impacted with this application.

**Conclusion:** The Planning Commission finds that 1) the project is consistent with the certified Local Coastal program of the City of Encinitas; 2) the project as proposed will not have a significant effect on the environment, and 3) providing public access or recreational facilities is not feasible or appropriate for a project of this type or scale and given its close proximity to existing public beach access.

**ATTACHMENT "C"**  
**Resolution No. PC 2011-21**  
**Case No. 10-069 CDP**

Applicant: Steve Shackelton

Location: 876 & 878 Neptune Avenue (APN: 258-311-07).

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**SPECIFIC CONDITIONS:**

- SC2 At any time after two years from the date of this approval, on August 4, 2013 at 5:00 pm, or the expiration date of any extension granted in accordance with the Municipal Code, the City may require a noticed public hearing to be scheduled before the authorized agency to determine if there has been demonstrated a good faith intent to proceed in reliance on this approval. If the authorized agency finds that a good faith intent to proceed has not been demonstrated, the application shall be deemed expired as of the above date (or the expiration date of any extension). The determination of the authorized agency may be appealed to the City Council within 15 days of the date of the determination.
- SC5 This project is conditionally approved as set forth on the application dated received by the City on May 4, 2010 and project drawing stamped received by the City on December 15, 2010, consisting of a 1 sheet Site Plan, all designated as approved by the Planning Commission on August 4, 2011, and shall not be altered without express authorization by the Planning and Building Department.
- SCA Prior to the performance of any work on the bluff face, the applicant shall obtain a Temporary Beach Encroachment Permit from the Engineering Department.
- SCB An open space easement shall be executed and recorded to the satisfaction of the Planning and Building Department to conserve the coastal bluff face between the coastal bluff edge and the most westerly property line. Said coastal bluff conservation action shall prohibit the alteration of land forms, removal of vegetation, or the removal/erection of structures of any type except as permitted herein and/or by written authorization by the City of Encinitas Planning and Building Department. This does not preclude the exercise of emergency measures as directed and authorized by the City of Encinitas Planning and Building Department in accordance with Section 30.34.020B2 of the Encinitas Municipal Code. Said open space easement shall be clearly depicted on the plans submitted for temporary beach encroachment permit issuance in reliance on this approval to the satisfaction of the Planning and Building Department and Engineering Services Department and shall be recorded prior to issuance of said temporary beach encroachment permit.
- SCC Stairway removal and alteration methodology shall be implemented and performed as recommended by the Geotechnical Exploration Inc. in their evaluation dated July 8, 2011 and as depicted on the project drawings dated received by the City on December 15,



2010. All wooden posts, railings, treads and risers depicted as Section 1 thru 8 on the project drawing shall be removed as recommended by Geotechnical Exploration Inc. to the satisfaction of the Planning and Building Department and Engineering Services Department. All wooden posts shall be cut at grade above tread elevations.

**STANDARD CONDITIONS:**

**CONTACT THE PLANNING AND BUILDING DEPARTMENT REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):**

- G2 This approval may be appealed to the City Council within 15 calendar days from the date of this approval in accordance with Chapter 1.12 of the Municipal Code.
- G3 This project is located within the Coastal Appeal Zone and may be appealed to the California Coastal Commission pursuant to Coastal Act Section 30603 and Chapter 30.04 of the City of Encinitas Municipal Code. An appeal of the Planning Commission's decision must be filed with the Coastal Commission within 10 days following the Coastal Commission's receipt of the Notice of Final Action. Applicants will be notified by the Coastal Commission as to the date the Commission's appeal period will conclude. Appeals must be in writing to the Coastal Commission, San Diego Coast District office.
- G4 Prior to **issuance of temporary beach encroachment permit**, the owner shall cause a covenant regarding real property to be recorded. Said covenant shall set forth the terms and conditions of this grant of approval and shall be of a form and content satisfactory to the Planning and Building Director. The Owner(s) agree, in acceptance of the conditions of this approval, to waive any claims of liability against the City and agrees to indemnify, hold harmless and defend the City and City's employees relative to the action to approve the project.
- G5 Approval of this request shall not waive compliance with any sections of the Municipal Code and all other applicable City regulations in effect at the time of Building Permit issuance unless specifically waived herein.
- G12 Prior to any use of the project site pursuant to this permit, all conditions of approval contained herein shall be completed or secured to the satisfaction of the Planning and Building Department.
- BL1 Owner(s) shall enter into and record a covenant satisfactory to the City Attorney waiving any claims of liability against the City and agreeing to indemnify and hold harmless the City and City's employees relative to the approved project. This covenant is applicable to any bluff failure and erosion resulting from the development project.

**ENGINEERING CONDITIONS:**

**CONTACT THE ENGINEERING SERVICES DEPARTMENT REGARDING COMPLIANCE WITH THE FOLLOWING CONDITION(S):**

- E2 All City Codes, regulations, and policies in effect at the time of building/grading permit issuance shall apply.
- E3 All drawings submitted for Engineering permits are required to reference the NAVD 88 datum; the NGVD 29 datum will not be accepted.