

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4402
(619) 767-2370



W10 a & b

Addendum

July 10, 2012

[Click here to go
to the original staff report.](#)

To: Commissioners and Interested Persons

From: California Coastal Commission
San Diego Staff

Subject: Addendum to **Item Wed 10a & b**, Coastal Commission Permit Application **#A-6-ENC-09-40/A-6-ENC-09-41 (Okun)**, for the Commission Meeting of July 11, 2012.

Staff recommends the following changes be made to the above-referenced staff report:

1. On Page 2 of the staff report, under the first paragraph of the “Summary of Staff Recommendation” the building envelope size of 3,780 sq. ft. and all further references in the staff report to the building envelope size shall be revised to approximately 2,145 sq. ft.
2. On Page 19 of the staff report, revise the third paragraph as follows:

In this particular case, the plans approved by the City identified the location of the bluff edge (ref. “Neptune Residence” by Cohn+Associates Architecture Planning dated 12/2/08), and after review of the plans and geotechnical information, the City staff and third party geotechnical reviewer determined the location of the “natural bluff edge” that existed prior to construction of the upper bluff wall, as depicted on the plans. The City’s permit file indicates the City staff found the retaining wall location was not the top of bluff edge for purposes of measuring the 40 ft. setback, and that the setback should be measured from the previous top of slope prior to the construction of the upper bluff wall. (ref. Letter from GeoPacific Inc. dated 8/21/08 attached as Exhibit #9) The City Planning Commission, however, in its approval of the project erroneously determined that the bluff edge for purposes of setback for the homes should be the edge of the upper bluff wall contrary to the typical interpretation of the bluff edge utilized by City and Commission staff.

3. On Page 24 of the staff report, the second complete paragraph shall be revised as follows:

Seawalls and bluff stabilization measures, while formidable, are not permanent structures and have a finite life. They are subject to erosion, wave scour and other forces that ultimately undermine and require repair and/or replacement of such

structures. There are numerous examples in San Diego County of seawalls and other bluff stabilization devices collapsing and failing. Some recent examples include one in July of 2008, where a bluff retaining structure failed on a site just a couple blocks north of the subject site (1086/1086 Neptune Avenue) resulting in the issuance of emergency permit to build new bluff retaining structures (ref. 6-08-039-G/Blue Curl). Another example occurred in December 2010 and January 2011 where a bluff retaining structure failed and then the seawall failed at 1500/1520 Neptune Avenue resulting in the issuance of an emergency permit and then follow-up regular permit for new shore and bluff protection (ref. 6-11-3-G/Frick & Lynch and 6-88-464-A2).

Moreover, in this case, at the time the seawall was permitted, the applicant indicated the design life of the existing seawall is 22 years; ~~and it~~ the seawall was constructed 12 years ago. The permit approving that seawall acknowledges the \$11,687 payment was for partial mitigation for the impacts of the project on local shoreline sand supply, in-lieu of providing the total amount of sand to replace the sand and beach area that will be lost due to the impacts of the proposed protective structure. The required in-lieu fee mitigation covers certain impacts only through the identified 22-year design life of the seawall. (ref. CDP #6-05-030 attached as Exhibit #8). The permit condition of approval requires the applicant or successor in interest to submit apply for and obtain an amendment that either requires removal of the seawall within its initial design life or requires mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life. ~~to remove it or pay additional mitigation in 10 years.~~ The seawall on this property will therefore be reevaluated and potentially removed in 10 years. The condition requiring reevaluation of seawalls approved with a beach sand mitigation fee, after the initial design life has passed, has been applied since the Commission has been administering the beach sand mitigation program, and is similar to the special condition requiring the beach sand mitigation fee applied for the seawall on the neighboring property to the south (ref. CDP #6-03-48/Sorich & Gault). The intent is to allow the Commission to reassess the seawall's condition, impacts and continued need, and to require additional mitigation if the seawall continues to be remain. In this particular case, the Commission could require removal of the seawall or allow it to remain as long as no reconstruction, additions or substantial alterations are required. Pursuant to Special Condition #2 of this permit for new development on the site, the Commission would not be required to approve reconstruction of the seawall to protect the proposed new development on the property. Thus, there are potential limits to the life of the existing seawall in its current condition. ~~+~~ To allow the proposed homes to be sited in reliance on either existing or future shore/bluff protection that will not necessarily be there for the 75-year life of the homes, is inconsistent with the LCP provisions cited above. Again, the LCP policies are designed to allow shoreline protection solely to protect existing principal structures in danger from erosion. The proposed new residences would be relying on a seawall to be present to stabilize this property for the life of the new development. To allow new structures to be sited and designed in reliance on existing or future shoreline protection would essentially allow applicants to use shoreline protection to protect new development and perpetuate the presence of shoreline armoring, inconsistent with the LCP. Thus, the Commission must consider

where to site the proposed development so that it will not need protection by shoreline protective devices.

4. On Page 25 of the staff report, add to the first full paragraph as follows:

In addition to the LCP provisions cited above, Policy 1.3 of the LUP also prohibits “future development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse.” The applicant has not demonstrated that the proposed new residences, set as close as 28 ft. from the natural bluff edge, will be safe over their estimated lifetime without reliance on structural measures to protect them. As explained above, the applicant’s geotechnical report finds just the opposite, that the proposed residences will not be safe for 75 years without reliance on structural measures, inconsistent with certified LCP standards. Thus, the proposed project is ~~also~~ inconsistent with LUP Policy 1.3 and Municipal Code sections 30.34.020 of the certified LCP because reliance on existing approved protective devices for new development is not permitted by the certified LCP. For purposes of these policies, requiring the presence of an existing seawall to assure stability is the same as proposing a future structure to provide protection for the life of the development. The proposed residences will not be safe in the future without a seawall. It is immaterial if the seawall currently exists and is required to protect the proposed residences or if a seawall is proposed in the future. The fact that the proposed residences require protection by a seawall is inconsistent with the above stated LCP policies and Section 30253 of the Coastal Act from which they were derived.

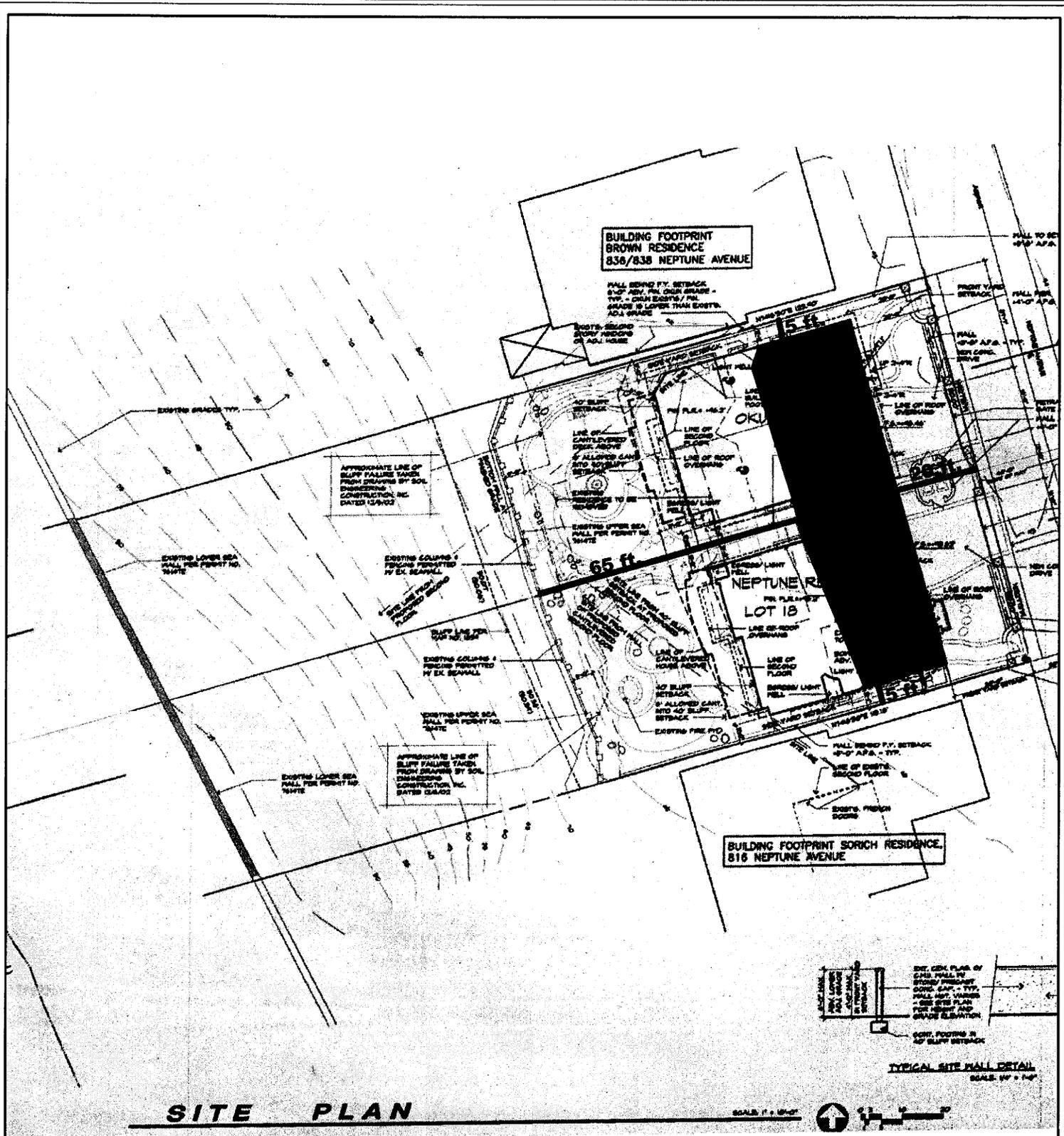
5. On Page 39 of the staff report, the first and second full paragraphs shall be revised as follows:

Given the typical bulk and scale of homes in this area of Encinitas, staff has determined that a setback of 65 feet landward of the artificial retaining wall would allow the applicant to construct a home similar to those in the surrounding area. This conclusion is based on identifying a building envelope that allows the applicant enough room and flexibility, taking into consideration the City’s required side yard setbacks, (but not a potential variance from the City to allow a reduction of the front yard setback which would result in an even larger building envelope), to design a home with reasonable articulation and design (rather than just a box) at similar bulk and scale to surrounding development.

This setback is therefore established to be as landward as possible while still allowing a residence that is consistent with community character and is similar in bulk and scale to those in the surrounding area. This setback would create a development envelope equal to an area of approximately ~~3,780~~ 2,145 sq. ft., due to the fact that the width of the two lots together is 100 feet. However, this approximately 2,145 sq. ft. building envelope does not take into consideration that the applicant could obtain a variance from the City to reduce the 20 ft. front yard setback, which would give the applicant an even larger building envelope. Within this ~~3,780~~ 2,145 square foot development envelope, the applicant could construct development that is consistent with the LCP,

with the exception of the geologic setback conditions with which it cannot be consistent. Under existing zoning, the principal structures that could be constructed are one or two reasonably sized residences or a duplex. Therefore, the Commission imposes **Special Condition 1**, which requires the applicant to survey the property to accurately identify, subject to the Executive Director's review and approval, the exact building envelope allowed in this approval. **Special Condition 1** also requires the applicant to submit to the Commission for Executive Director review and approval, final project plans for construction of one or two single family residences, or a duplex, sited at least 65 feet landward from the existing upper bluff retaining wall and demonstrating that the proposed development is: sited entirely within the surveyed building envelope; designed so that it can be easily removed once the approved location is no longer safe; and consistent with zoning requirements regarding height, size and bulk and that it is in keeping with the character of the area. As noted above, **Special Condition 1** allows the applicant to seek a reduction in the City's required front yard setback to achieve an even larger building envelope in which to construct the residential development. Finally, the revised final plans shall include details regarding any existing or proposed accessory improvements.

6. On Page 44 of the staff report, CDP #6-03-48/Sorich & Gault, shall be added as a substantive file document.
7. The attached revised Exhibit #6 entitled "Staff Recommended Development Envelope" shall replace Exhibit #6 attached to the staff report. The eastern property line was incorrectly located on the previous exhibit.
8. The attached revised Exhibit #7 entitled "Open Space Bluff Face Restriction" shall replace Exhibit #7 attached to the staff report.
9. The attached CDP #6-05-030 shall be added as new Exhibit #8 to the staff report.
10. The attached letter from GeoPacific, Inc. shall be added as new Exhibit #9 to the staff report.



SITE PLAN

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

Build Area ~2145 Sq. Ft.

For illustrative purposes only.

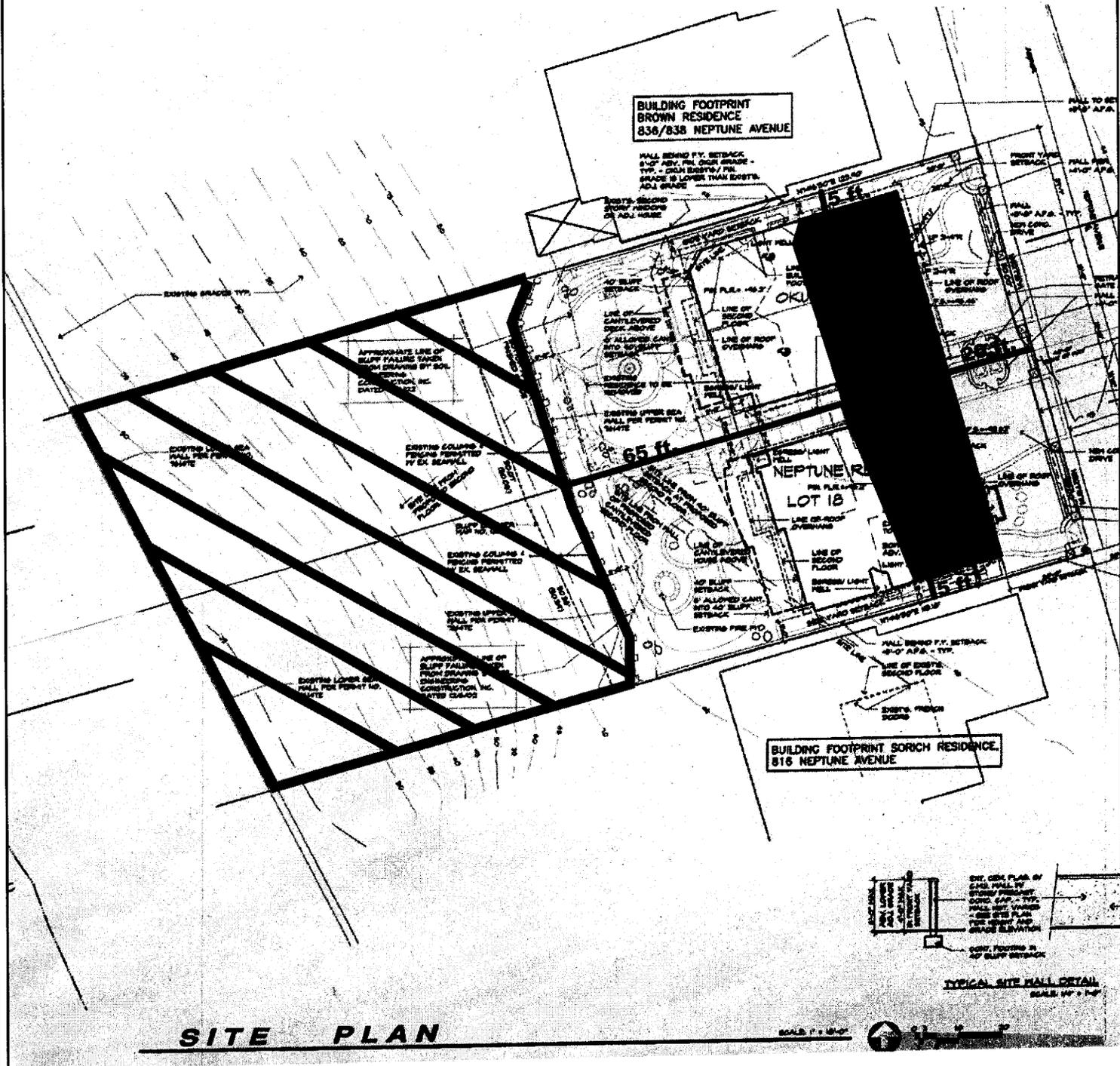
EXHIBIT NO. 6
APPLICATION NO.
A-6-ENC-09-040
A-6-ENC-09-041
 Staff Recommended
 Development Envelope

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California Coastal Commission



Open Space Bluff Face Restriction



Build Area ~2145 Sq. Ft.

For illustrative purposes only.

EXHIBIT NO. 7
APPLICATION NO.
A-6-ENC-09-040
A-6-ENC-09-041
Open Space Bluff
Face Restriction

California Coastal Commission

CALIFORNIA COASTAL COMMISSION

San Diego Coast Area Office
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421
(619) 767-2370



FILE COPY

Page: 1

Date: November 7, 2005

Permit Application No.: 6-05-030

COASTAL DEVELOPMENT PERMIT

On September 16, 2005, the California Coastal Commission granted to

Dr. Leonard Okun

this permit subject to the attached Standard and Special conditions, for development consisting of

Construction of an approx. 100 ft.- long, 20 to 27 ft.-high concrete tiedback seawall at the base of the bluff below an existing single-family residence as follow-up to an emergency permit, the removal of riprap from the public beach and payment of an in-lieu sand replenishment as mitigation for impacts of the seawall on sand supply

more specifically described in the application filed in the Commission offices.

The development is within the coastal zone at

On the public beach below 828 Neptune Avenue, Leucadia (San Diego County)

Issued on behalf of the California Coastal Commission by

PETER M. DOUGLAS

Executive Director

By: Gary Cannon

Coastal Program Analyst

ACKNOWLEDGMENT:

The undersigned permittee acknowledges receipt of this permit and agrees to abide by all terms and conditions thereof.

The undersigned permittee acknowledges that Government Code Section 818.4 which states in pertinent part that: "A Public entity is not liable for injury caused by the issuance. . . of any permit. . ." applies to the issuance of this permit.

IMPORTANT: THIS PERMIT IS NOT VALID UNLESS AND UNTIL A COPY OF THE PERMIT WITH THE SIGNED ACKNOWLEDGMENT HAS BEEN RETURNED TO THE COMMISSION OFFICE. 14 Cal. Admin. Code Section 13158(a).

_____ Date

_____ Signature of Permittee

EXHIBIT NO. 8
APPLICATION NO. A-6-ENC-09-040 A-6-ENC-09-041
CDP #6-05-030
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California Coastal Commission

COASTAL DEVELOPMENT PERMIT

Date: November 7, 2005

Permit Application No.: 6-05-030

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

SPECIAL CONDITIONS:

The permit is subject to the following conditions:

1. **As-Built Plans.** **WITHIN SIXTY (60) DAYS OF COMPLETION OF THE COLORING AND TEXTURING OF THE SEAWALL,** the permittee shall submit final plans of the approved seawall and submit certification by a registered civil engineer, acceptable to the Executive Director, verifying the color and texturing of the seawall has been constructed in conformance with the project plans submitted by Soil Engineering Construction, Inc. dated 11/30/04. These plans shall document that only non-invasive or native plants will be utilized in any landscaping and include photographs sufficient to document the color and texture of the seawall.
2. **Condition Compliance.** **WITHIN SIXTY (60) DAYS OF COMMISSION ACTION ON THIS COASTAL DEVELOPMENT PERMIT APPLICATION,** or within such additional time as the Executive Director may grant for good cause, the applicants shall satisfy all requirements specified in the conditions hereto that the applicants are required to satisfy prior to issuance of this permit. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.
3. **Mitigation for Impacts to Sand Supply.** **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the applicants shall provide evidence, in a form and content

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COASTAL DEVELOPMENT PERMIT

Date: November 7, 2005

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acceptable to the Executive Director, that a fee of \$11,687.20 has been deposited in an interest bearing account designated by the Executive Director as partial mitigation for the impacts of the project on local shoreline sand supply, and in-lieu of providing the total amount of sand to replace the sand and beach area that will be lost due to the impacts of the proposed protective structure. All interest earned by the account shall be payable to the account for the purposes stated below.

The required in-lieu fee mitigation covers certain impacts only through the identified 22-year design life of the seawall. The seawall was substantially completed by July 1, 2001 (the date Emergency Permit 6-01-85-G/Okun expired). Therefore, no later than 21 years after construction of the seawall, i.e., no later than July 1, 2022, the permittees or their successor in interest shall apply for and obtain an amendment to this permit that either requires the removal of the seawall within its initial design life or requires mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life. If within the initial design life of the seawall the permittees or their successor in interest obtain a coastal development permit or an amendment to this permit to enlarge or reconstruct the seawall or perform repair work that extends the expected life of the seawall, the permittee shall provide mitigation for the effects of the additional size of the seawall or the extended effects of the existing seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life.

The purpose of the account shall be to establish a beach sand replenishment fund to aid SANDAG, or a Commission-approved alternate entity, in the restoration of the beaches within San Diego County. The funds shall be used solely to implement projects which provide sand to the region's beaches, not to fund operations, maintenance or planning studies. The funds shall be released only upon approval of an appropriate project by the Executive Director of the Coastal Commission. The funds shall be released as provided for in a MOA between SANDAG, or a Commission-approved alternate entity, and the Commission, setting forth terms and conditions to assure that the in-lieu fee will be expended in the manner intended by the Commission. If the MOA is terminated, the Commission can appoint an alternative entity to administer the fund.

4. Removal of Unpermitted Riprap. **WITHIN SIXTY (60) DAYS OF ISSUANCE OF THE SUBJECT COASTAL DEVELOPMENT PERMIT**, or within such additional time as the Executive Director may grant for good cause, the applicants shall, as proposed, remove all visible rock riprap from the beach seaward of the seawall below 828 Neptune Avenue. If any additional rock riprap that currently is covered by sand seaward of the seawall below 828 Neptune Avenue should become visible in the future, the applicant is required to remove it within sixty (60) days of exposure, or within such additional time as the Executive Director may grant for good cause.

5. Monitoring Program. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit to the Executive Director for review and written approval, a monitoring program prepared by a licensed civil engineer or geotechnical engineer to monitor the performance of the seawall (and any future exposure of riprap seaward of the seawall) that includes the following:

- a. An annual evaluation of the condition and performance of the seawall addressing whether any significant weathering or damage has occurred that would adversely impact the future performance of the structure. This evaluation shall include an assessment of the color and texture of the seawall comparing the appearance of the structures to native bluffs.

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Date: November 7, 2005

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- b. Annual measurements of any differential retreat between the natural bluff face and the seawall face, at the north and south ends of the seawall and at 20-foot intervals (maximum) along the top of the seawall face/bluff face intersection. The program shall describe the method by which such measurements shall be taken.
- c. Provisions for submittal of a report as described in subsection d to the Executive Director of the Coastal Commission by May 1 of each year (beginning the first year after coloring and texturing of the seawall is completed) for a period of three years, and then each third year following the last annual report, for the life of the approved seawall. However, reports shall be submitted in the Spring immediately following either:
 1. A significant storm event – comparable to or greater than a 20-year storm.
 2. An earthquake of magnitude 5.5 or greater with an epicenter in San Diego County or offshore.

Thus reports may be submitted more frequently depending on the occurrence of the above events in any given year.

- d. Each report shall be prepared by a licensed civil, geotechnical engineer or geologist. The report shall contain the measurements and evaluation required in sections a and b above. The report shall also summarize all measurements and analyze trends such as erosion of the bluffs or changes in sea level and the stability of the overall bluff face, including the upper bluff area, and the impact of the seawall on the bluffs to either side of the wall. In addition, the report shall identify if any riprap has become exposed seaward of the seawall. Each report shall contain recommendations, if any, for necessary maintenance, repair, changes or modifications to the project and include measures to remove any riprap that becomes exposed in the future.
- e. An agreement that the permittee shall apply for a coastal development permit or an amendment to this permit within 90 days of submission of the report required in subsection c. above for any necessary maintenance, repair, changes or modifications to the project recommended by the report or removal of exposed riprap that require a coastal development permit and implement the repairs, changes, riprap removal, etc. approved in any such permit.

The permittee shall undertake monitoring and the other related activities described above in accordance with the approved monitoring program. Any proposed changes to the approved monitoring program shall be reported to the Executive Director. No changes to the monitoring program shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

6. Storage and Staging Areas/Access Corridors. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit to the Executive Director for review and written approval, final plans indicating the location of access corridors to the construction site and staging areas. The final plans shall indicate that:

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- a. No work shall occur on the beach on weekends, holidays or between Memorial Day weekend and Labor Day of any year.

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

7. Storm Design/Certified Plans. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit certification by a registered civil engineer that the proposed shoreline protective devices are designed to withstand storms comparable to the winter storms of 1982-83.

8. Future Response to Erosion. If in the future the permittees seek a coastal development permit to construct additional bluff or shoreline protective devices, the permittees will be required to include in the permit application information concerning alternatives to the proposed bluff or shoreline protection that will eliminate impacts to scenic visual resources, recreation and shoreline processes. Alternatives shall include but not be limited to: relocation of all or portions of the principle structure that is threatened, structural underpinning, and other remedial measures capable of protecting the principal structure and providing reasonable use of the property, without constructing bluff or shoreline stabilization devices. The information concerning these alternatives must be sufficiently detailed to enable the Coastal Commission or the applicable certified local government to evaluate the feasibility of each alternative, and whether each alternative is capable of protecting existing structures that are in danger from erosion. No additional bluff or shoreline protective devices shall be constructed on the adjacent bluff face above the approved seawall or on the beach in front of the proposed seawall unless the alternatives required above are demonstrated to be infeasible. No shoreline protective devices shall be constructed in order to protect ancillary improvements (patios, decks, fences, landscaping, etc.) located between the principal residential structures and the ocean.

9. Future Maintenance/Removal of Debris. The permittees shall maintain the permitted seawall in its approved state except to the extent necessary to comply with the requirements set forth below. Maintenance of the seawall shall include maintaining the color, texture and integrity. Any change in the design of the project or future additions/reinforcement of the seawall beyond minor regrouting or other exempt maintenance as defined in Section 13252 of the California Code of Regulations to restore the seawall to its original condition as approved herein, will require a coastal development permit. **However, in all cases, if after inspection it is apparent that repair and maintenance is necessary, including maintenance of the color of the wall to ensure a continued match with natural bluffs, the permittee shall contact the Commission office to determine whether a coastal development permit is necessary, and shall subsequently apply for any necessary coastal development permit for the required maintenance.** In addition, the permittees shall also be responsible for the removal of debris resulting from failure of, or damage to, the shoreline protective device in the future and the removal of any riprap seaward if the seawall that becomes visible in the future.

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Permit Application No.: 6-05-030

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10. Other Permits. **WITHIN SIXTY (60) DAYS OF COMMISSION ACTION ON THIS COASTAL DEVELOPMENT PERMIT APPLICATION**, the permittee shall provide to the Executive Director copies of all other required local, state or federal discretionary permits for the development authorized by CDP #6-05-030. The applicant shall inform the Executive Director of any changes to the project required by other local, state or federal agencies. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this permit, unless the Executive Director determines that no amendment is legally required.

11. State Lands Commission Approval. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit to the Executive Director for review and written approval, a written determination from either:

1. State Lands Commission documenting that:

- a) No state lands are involved in the development; or
- b) State lands are involved in the development, and all permits required by the State Lands Commission have been obtained; or
- c) State lands may be involved in the development, but pending a final determination of state lands involvement, an agreement has been made by the applicants with the State Lands Commission for the project to proceed without prejudice to the determination.

or

2. City of Encinitas documenting that:

- a) The City of Encinitas has amended or intends to amend its lease with State Lands for State Lands within the City of Encinitas so as to include the subject seawall site.

12. Public Rights. The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that exist or may exist on the property.

13. Assumption of Risk, Waiver of Liability and Indemnity Agreement. By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from erosion, landslides and coastal bluff collapse; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

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14. **Best Management Practices. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit for review and written approval of the Executive Director, a Best Management Plan that effectively assures no shotcrete or other construction byproduct will be allowed onto the sandy beach and/or allowed to enter into coastal waters. The Plan shall apply to both concrete pouring/pumping activities as well as shotcrete/concrete application activities. During shotcrete/concrete application specifically, the Plan shall at a minimum provide for all shotcrete/concrete to be contained through the use of tarps or similar barriers that completely enclose the application area and that prevent shotcrete/concrete contact with beach sands and/or coastal waters. All shotcrete and other construction byproduct shall be properly collected and disposed of off-site.

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

15. **Deed Restriction. PRIOR TO ISSUANCE OF THE 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 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.

GEOPACIFIC INC.

REVIEW MEMORANDUM

August 21, 2008

To: Mr. Roy Sapau, Project Planner
City of Encinitas, 505 South Vulcan Avenue
Encinitas, California 92024-3633

From: James Knowlton, Geotechnical Consultant

Subject: **Third Party Review**
08-073 CDP
828 Neptune Avenue
Encinitas, California
APN: 256-011-13 & -03
Applicant: Mr. Leonard Okun

I have reviewed the following documents:

1. Additional Geotechnical Recommendations, Proposed New Single-Family Residence, 828 Neptune Avenue, Encinitas, CA, by Soil Engineering Construction, dated May 21, 2008
2. Additional Geotechnical Recommendations, Proposed New Single-Family Residence, 828 Neptune Avenue, Encinitas, CA, by Soil Engineering Construction, dated May 21, 2008
3. Site Plan, Construction Plan and Grading Plan, Okun Residence Residence, Neptune Avenue, Encinitas, CA, by Cohn & Associates, dated May 20, 2008

My review has been performed to see if the submitted geotechnical documents and project plans provide data/information to meet the standards of practice within the City of Encinitas, and the requirements of the City of Encinitas Municipal Code and Local Coastal Plan. Even though our review is addressed to City staff, the following sections are specifically intended to be directed to and addressed by the consultant for the project. This is one of two homes proposed for this property, which presently only has one residence.

The project documents does not address the requirements of the City of Encinitas and **is not accepted and/or approved** for construction of a new structure. Although the geotechnical reports are adequate for the grading and foundation recommendations of the project, they do not address the issue of the correct top of bluff.

The architect calculates the 40' setback from the top of bluff as the top of the recently constructed upper bluff wall. This is not the top of bluff, as stated by the City of

EXHIBIT NO. 9
APPLICATION NO. A-6-ENC-09-040 A-6-ENC-09-041
GeoPacific, Inc. Letter 14
 California Coastal Commission

07-155 CDP
828 Neptune Avenue
P 2 of 2

Encinitas Planning Department and its geotechnical consultant in several meetings with the owner and his consultants. The top of bluff as previously stated is the top of the slope prior to the construction of the upper bluff wall. The top of bluff changed significantly after a landslide in the mid 1990's. The existing upper bluff wall has artificially created additional back yard area and is not to be used as the top of bluff designation.

The geotechnical will have to perform a blufftop history and evaluation report and meet with the City of Encinitas planner and the City's geotechnical consultant to agree of the legal top of bluff.

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FRED GAINES
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W 10a & 10b

July 5, 2012

Chairperson Mary Shallenberger
and Coastal Commissioners
California Coastal Commission
45 Fremont Street, #2000
San Francisco, CA 94105

Re: Appeal Nos. A-6-ENC-09-040 & A-6-ENC-09-041 (Okun)
820 and 828 Neptune Avenue, Encinitas

Dear Commissioners:

On Wednesday, July 11, 2012, I will appear before you on behalf of Dr. Leonard Okun to oppose the Staff Recommendation on Appeal Nos. A-6-ENC-09-040 and A-6-ENC-09-041. Each of these appeals is from the approval by the City of Encinitas of a single family residence on a legal parcel. One appeal is for property located at 820 Neptune Avenue and the other for 828 Neptune Avenue, Encinitas. Each of Dr. Okun's two parcels meet current zoning standards contained in Encinitas' Certified Local Coastal Program ("LCP"). Each residence is approximately 3,000 square feet in livable area. This size of each structure is consistent with the standards of the LCP and with the development on similarly situated property for more than a mile north and south of Dr. Okun's property.

The City approval required a 40 foot setback from the retaining wall approved by this Commission in CDP No. 6-05-030 (Okun). Although this is 20 feet behind the stringline, Dr. Okun accepted the City's condition. The Staff Recommendation is that the setback be 65 feet, 45 feet beyond the stringline. (See, Special Condition No. 1.) An illustration of the difference between the City approval and the Staff Recommendation are shown on Exhibit A hereto. This increased setback will reduce the depth of each house from 47-50 feet to 22-25 feet, and limit the livable size of each house to less than 1,500 square feet. (See letter from Architect Gary Cohn, Exhibit B hereto.) **Dr. Okun asks that the Commission delete Special Condition No. 1.**

The central defect in the Staff Recommendation is contained on pages 23 and 24. On these pages the Staff Report tries to explain how relying upon existing approved protective

APPLICANT'S RESPONSE TO
STAFF RECOMMENDATION

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devices for new homes is not permitted by the certified LCP. Before getting into detailed analysis, there are two facts that Commissioners should note. First, the certified LCP has specific requirements both as to geologic stability for new development (Municipal Code §30.34.020D) and geologic requirements for protective structures (Municipal Code §30.34.020C1b & §30.34.020E) (See, Exhibit C). Had the LCP intended to prohibit a property owner from relying upon lawfully erected protective structures for redevelopment, it would have been very simple for such language to be included. There is no such language. The Staff Report relies entirely upon unsupported inferences and implications to override stated policy in the certified LCP.

Second, since certification of its LCP in 1996, the City has consistently included the impacts of legally built protection systems in its required analysis of stability. In the City's view, the certified LCP requires that legally implemented protection systems be considered in any application. The language of the LCP supports this position as does the permit history for both new residences and for protective devices. The Staff Report calls for a complete reversal of City policy supported by the certified LCP without an amendment to the LCP. Under the Coastal Act, this is not an action that the Commission can take.

1. **ALL GEOTECHNICAL REVIEWERS HAVE AGREED THAT DR. OKUN'S HOUSES AS APPROVED BY THE CITY WILL BE SAFE.**

There is no dispute that Dr. Okun's proposed houses will be safe for 75 years. Seven separate geotechnical experts have examined the stability of Dr. Okun's property. Five of the experts have been employed by Dr. Okun and two of the experts have been employed by a public agency. All of these geotechnical experts have arrived at the same conclusion--the proposed houses will be stable for the period of 75 years required by the LCP. The finding required by the certified LCP is contained in Encinitas Municipal Code §30.34.020D (Exhibit C hereto) (The Municipal Code is a part of the Local Implementation Plan of the certified Local Coastal Program.)

"Development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime [75 years] without having to propose any shore or bluff stabilization to protect the structure in the future." [Emphasis added.]

Dr. Okun does not propose any shore or bluff stabilization. CDP No. 6-05-030 (Okun) authorizes the bluff stabilization that presently protects his property. Whether Dr. Okun builds new houses or not, this bluff stabilization will remain. Any impacts on shoreline resources were considered and mitigated upon the approval of CDP No. 6-05-030 (Okun).

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Licensed Civil Engineer John W. Niven and licensed Geologist and Engineering Geologist Robert D. Mahony (Soil Engineering Construction, Inc., "SEC") prepared the geotechnical report for submission to the City of Encinitas. As required by the LCP, the geotechnical report was submitted with Dr. Okun's application. On November 28, 2006 (See, Exhibit D-1), they wrote:

"SEC performed slope stability analyses using previously accepted soil strength parameters. The results of these analyses indicates that the bluff has an acceptable FS for both static (FS=1.57 and pseudo static (FS=1.1) conditions.

"Based on the results of these analyses, it is our opinion that future development, at and beyond the 40 foot setback, will be reasonably safe from failure for the life of the structure which has been accepted to be 75 years."

The City of Encinitas employed an independent third party reviewer to evaluate the SEC report and analyses. James Knowlton, licensed by the State of California as a civil engineer, geologist and engineering geologist, reviewed the SEC report and analyses and on August 21, 2008 agreed with the conclusion that the houses would be safe from failure. After the appeal to the Commission was filed, Niven and Mahony again examined the seawall. According to SEC's December 2009 Monitoring Report, and reviewed by Coastal Commission Geologist Johnsson, the following facts are true:

"[W]ith normal maintenance, the seawall, bluff reconstruction and upper bluff retention system will remain effective throughout the life of the existing residential structure (75 years) and the proposed residential structures (75 years from date of construction)." (Report of Soil Engineering Construction, Inc., December 2009, signed by John Niven, Civil Engineer, and Robert D. Mahony, Geologic Engineer, page 11.)

Coastal Commission Geologist Johnsson personally visited the site on several occasions. In Johnsson's memorandum dated 30 September 2010, Johnsson states as follows:

"Reference (1) [SEC Report] documents that the completed seawall, mid-bluff gravel fill, and upper bluff retaining wall together have a factor of safety exceeding 1.5 for static condition and 1.1 for the pseudostatic condition. Together with the recent monitoring report (Reference 5), these analyses demonstrate that any structure at the bluff top will be stable indefinitely, provided that the shoreline protection system is maintained adequately." [emphasis added]

In 2011, an independent review and analysis of the shoreline protection system was

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conducted by engineering geologist Robert G. Crisman and civil engineer David W. Skelly (GeoSoils, Inc.) GeoSoils reached the same opinion that the shoreline protection system was in excellent condition and could be expected to assure stability for the useful life of the houses with the 40 foot setback approved by the City of Encinitas.

“the proposed development, as currently designed, should be safe from bluff erosion hazards for the next 75 years provided that the existing, permitted shore protection devices are adequately maintained.”

Later in 2011, engineering geologist, geologist and hydrogeologist John P. Franklin, as a part of the GeoSoils team, added his agreement with Niven, Mahony, Knowlton, Johnsson, Skelly, and Crisman. The proposed houses will be stable. There is no contrary evidence.

Despite the unanimous opinion of seven experts, including the Commission geologist, that with normal maintenance the specific shoreline protection system at Dr. Okun's property will protect the proposed homes for 75 years, the Staff Report rejects that protection based upon the generalized, nonspecific statement that “[t]here are numerous examples in San Diego County of seawalls and other bluff stabilization devices failing and collapsing.” Staff offers no evidence of such failures or their causes. It can be inferred that many of these alleged failures likely occurred after storms in the winter of 1982-1983, since this is referenced in Special Condition No. 7. Special Condition No. 7 to CDP No. 6-05-030 (Okun) required that the design of Dr. Okun's protection system would “withstand storms comparable to the winter storms of 1982-1983.” (See, Exhibit E.) Okun's shoreline protection system was designed to withstand the forces that caused the alleged failures.

In the Summary of Staff Recommendation at Page 2 of the Staff Report, the Staff states: “the only way to find the new proposed homes will be safe for at least 75 years is to assume that existing shore and bluff protection will remain in its current stable condition or that new shore and bluff protection will be constructed in the future.” The Commission does not have to assume anything. The uncontested evidence from all experts, including Mark Johnsson, is that the existing shore and bluff protection will remain to protect the homes for 75 years.

2. **THE STAFF RECOMMENDATION DEPENDS UPON TREATING THE DEVELOPMENT AS THOUGH THE SHORELINE PROTECTION SYSTEM DID NOT EXIST.**

On page 24 of the Staff Report, it states: “the applicant's geotechnical consultants analyzed the site with existing shore and bluff protection in place and provided little analysis that considered the site without this protection.” This is accurate as to the review at the City because the LCP requires that the stability analysis take into account all “factors that might affect slope

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stability." (Municipal Code §30.34.020D.) All geotechnical experts agree that the existing shoreline protection affects slope stability.

The Staff Report incorrectly alleges that the certified LCP requires that the "factor" of existing shoreline protection be ignored. Nothing in the certified LCP requires this fictional analysis. In 16 years, the City has never required this fictional analysis. However, when the Commission Staff insisted that Dr. Okun undertake an analysis of stability assuming that the seawall, mid-bluff fill and upper bluff retaining wall did not exist, Dr. Okun complied. Not surprisingly, ignoring its own approved shoreline protection system (which Dr. Okun spent 10 years and \$2,000,000 to build), the Staff report concludes that the property would not be stable. If false assumptions are required, false results will follow.

The 17 October 2011 Memorandum from Commission geologist Mark Johnsson makes this assumed analysis quite clear when he states that the calculations on which the Staff Report relies in arguing for the 65 foot setback are "if the existing seawall, gravel backfill and slope and upper bluff retaining wall were not present." (See Exhibit F.)

The Staff Report relies upon this fictional analysis for its recommendation of a 65 foot setback. The Staff Report claims, without support, that the certified LCP requires that stability be assured without reference to any existing shoreline protection. In the middle of page 24 of the Staff Report, the finding is proposed:

"To allow new structures to be sited and designed in reliance on existing shoreline protection would essentially allow applicants to use shoreline protection to protect new development and perpetuate the presence of shoreline armoring, inconsistent with the LCP."

This finding is not supported by the language of the certified LCP. Municipal Code §30.34.020D requires geotechnical evidence to establish the following:

"[t]he review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future." [emphasis added]

The development proposed is two houses, not shoreline protection already approved by the Commission. The geotechnical experts agree that Dr. Okun does not and will not need to "propose" any shore or bluff stabilization. The use of the word "propose" combined with the language "in the future", makes clear that the LCP does not contemplate ignoring past

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stabilization or protection measures. The Oxford University dictionary defines "propose" as a verb meaning to "put forward". The Staff Report changes the meaning of the certified LCP to mean "rely" upon protection measures constructed "in the past". The plain meaning of the words of the LCP do not support this interpretation.

3. **THE CLAIM THAT THE USEFUL LIFE OF THE EXISTING SEAWALL IS 22 YEARS IS NOT SUPPORTED BY THE EVIDENCE.**

At page 24 of the Staff Report, the finding is proposed that "the design life of the existing seawall is 22 years". This statement is not true. The design life of the seawall is a minimum of 75 years. The 22 year figure is an engineering estimate of the minimum design life if (1) no required maintenance is performed on the seawall, and (2) the seawall is subjected to significant stresses. The Commission's Report on In-Lieu Fee Beach Sand Mitigation Program: San Diego County issued in January 1997 stated in the formula for Impact Analysis for Shoreline Protective Devices that the period of time for calculation of sand mitigation fee would be "[t]he length of time the back beach or bluff will be fixed or the design life of armoring **without maintenance** (yr.)" [Emphasis added] (Exhibit G-1).

If properly maintained, at the end of the initial 22 years, the seawall will still have a engineering design life of 75 years, just as it has a 75 year design life today, 11 years after its completion. As the Commission's geologist Mark Johnson stated in his 30 September 2010 memorandum, "any structure at the blufftop **will be stable indefinitely**, provided that the shoreline protection system is maintained adequately." [emphasis added] (See, Exhibit D-3.) Special Condition No. 9 to CDP No. 6-05-030 (Okun) approving the seawall requires that the shoreline protection system be maintained "in its approved state". (See, Exhibit E.)

The 22 year minimum design life was used solely to calculate the sand mitigation fee. The use of the 22 year figure arose from a compromise between the Commission and property owners in 1996. See, CDP No. 6-93-085 (Auerbach) and CDP No. 6-93-131 (Richards). The hypothetical mitigation fee from a 75 year life was so large that property owners disputed the fee. The dispute was settled by the Commission imposing a fee based upon the engineering minimum useful life, with the requirement that the useful life be reassessed at the end of the initial period, and an additional mitigation fee imposed.

Special Condition No. 3 to Dr. Okun's CDP No. 6-05-030 sets forth this requirement to pay additional sand mitigation fee if the expected life of the seawall extends beyond the 22 year period:

"The required in-lieu fee mitigation covers certain impacts only through the identified 22 year design life of the seawall. The seawall was substantially

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completed by July 1, 2001 (the date Emergency Permit 6-01-85-G/Okun expired.) Therefore, no later than 21 years after construction of the seawall, i.e., no later than July 1, 2022, the permittees or their successor in interest shall apply for and obtain an amendment to his permit that either requires the removal of the seawall within its initial design life or requires mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life." (See, Exhibit E.)

On page 24 of the Staff Report, it states: "[t]he seawall on this property will therefore be reevaluated and potentially removed in 10 years." This is not true. It is Dr. Okun's choice in 2022 to either seek to remove the seawall or to pay an additional sand mitigation fee "for the expected life of the seawall beyond the initial 22 year design life." In 2022, Dr. Okun will certainly keep his seawall which protects his property and pay an additional sand mitigation fee. It is unreasonable to assume that in 2022, Dr. Okun or other owners would seek to remove the seawall and protection for their homes.

Dr. Okun's shoreline protection system was unanimously approved in CDP 6-05-030 (Okun) over a staff recommendation of denial. Unfortunately, the Staff never returned to the Commission with revised findings as required by California Code of Adm. Regs., Title 14, §13096. The record is blank as to the useful life and sand mitigation fee. However, there are findings for the approval of the seawall immediately adjacent at 808-816 Neptune Avenue in CDP No. 6-03-048 (Sorich & Gault) approved by the Commission on January 16, 2004. CDP No. 6-03-048 had the same sand mitigation fee based on 22 years. These findings explain (i) that the sand mitigation fee is for loss of sand which would otherwise erode from the bluff, (ii) why 22 years is used for the calculation, and (iii) that the purpose of returning in 22 years is to pay additional sand mitigation fees if the useful life is longer than the initial estimate of 22 years.

"In addition, mitigation for impacts to sand supply are based on the estimated 22-year design life of the seawall and, therefore, the proposed in-lieu fee sand replenishment plan only mitigates for the initial design life of the structure. The seawall, however, might outlast its design life. To address the impacts of the seawall on shoreline sand supply that will occur if the seawall lasts for more than its design life, Special Condition #1 requires that the applicants or successors in interest apply for an amendment to the subject permit within 21 years of issuance in order to either remove the proposed seawall or to provide additional mitigation for the additional years of design life that occurs to the seawall." (Exhibit G-2)

The seawall cannot be removed without endangering the houses on either side of Dr. Okun at 816 and 836 Neptune Avenue. Dr. Okun's seawall is part of a continuous seawall which extends from 788 Neptune Avenue to 858 Neptune Avenue, protecting 9 houses in addition to

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Dr. Okun. As the drawings on Exhibit A hereto show clearly, the houses at 816 and 836 Neptune Avenue are only 20 feet from the upper retaining wall. Dr. Okun could not remove his seawall without causing instability on the adjoining properties.

The Staff Report states on page 24 that the Commission geologist Johnsson agrees that the adjoining houses would be in danger if Okun's seawall was removed.

"Furthermore, the report goes on to say that '[w]ithout the existing coastal bluff protective measures in the area encompassing the Okun property, and to the north and south of the Okun property, all of the residential structures on these lots would remain imminently threatened.' The Commission's staff geologist has reviewed this report and concurs with these findings."

The LCP and Public Resources Code §30235 require approval of protection of existing structures in danger from erosion. This does not mean that the protection is limited to the property on which the structure is located. Dr. Okun's seawall is as important to the neighboring properties as it is to Dr. Okun. It will be maintained and will not be removed.

4. **THE CITY APPROVAL WAS CONSISTENT WITH PAST CITY ACTIONS.**

On page 14 of the Staff Report, the Staff makes note of the City approval of two homes in similar circumstances at 566 and 560 Neptune Avenue (Encinitas CDP Nos. 01-196 and 01-197/Bradley). Each of these homes was on a 50 foot lot. Each of these lots was protected by a previously approved seawall, midbluff fill, and upper bluff retaining wall. Each of these homes was set back 40 feet from the wall. Each of these homes was analyzed by the City for stability with consideration of the shoreline protection, without which no stability could be established. (See, Report of Anthony-Taylor Consultants dated September 4, 2004.) No appeal of the City permits was initiated by the Commission Staff. (See Exhibit H)

There was no appeal because when approved on December 16, 2004, it would not have been considered unusual or inconsistent with the LCP. The idea that bluff protection systems cannot be considered is a new invention, not an application of the existing certified LCP. The City routinely considers the stabilization effects of existing approved shoreline protection in any application because that is what the certified LCP requires. The Staff Report asks the Commission to override the certified LCP.

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5. **THE PROPOSED HOMES CAN ALSO BE DEMONSTRATED TO BE STABLE WITHOUT THE SHORELINE PROTECTION THROUGH A CAISSON FOUNDATION.**

Although not necessary to the stability of the property or the proposed homes, the Applicant had a design prepared for a caisson system which would be similar to that approved by the Commission in CDP No. A-6-ENC-06-101 (Albani) at 629 Fourth Street, Encinitas. This was done in an effort to reach a compromise with the Staff. The caisson system is described in the GeoSoils report of May 2011. It was reviewed by Mark Johnsson and is referred to in his 17 October 2011 memorandum (Exhibit F) as follows:

"Reference (7) goes on to demonstrate, however, that placing the houses in the proposed locations but using caisson foundations 55 feet deep, with or without tiebacks, yields a factor of safety exceeding 1.5 (static) and 1.1 (pseudostatic)."

The 1.5 and 1.1 factors of safety are the standard for stability. Although Dr. Okun has no desire to spend hundreds of thousands of dollars on an unnecessary caisson foundation when he has already spent \$2,000,000 to make his property stable, the caisson system was proposed to the Staff as a compromise to allow the finding that the houses would not rely upon the existing shoreline protection. The Staff rejected that compromise and Dr. Okun would now simply ask the Commission to delete Special Condition No. 1 based upon the evidence.

6. **THE BLUFF SETBACK IS JUSTIFIED.**

The Staff Report notes that the bluff setback applied by the City was measured from the approved retaining wall. The Staff Report argues that City should have measured the setback from the "natural" bluff edge as if the retaining wall were not there. Dr. Okun disagrees that the LCP required the City to use a "natural" bluff edge. The definition of bluff edge in Municipal Code §30.34.020 requires the City to determine bluff edge based upon evaluation of a geologic and soil report. The City did so.

To Dr. Okun, the dispute is irrelevant. Dr. Okun has demonstrated stability and the setback based upon the "natural" bluff edge would diminish the usable area of the property in a manner substantially similar to the 65 foot bluff setback recommended in Special Condition No. 1. Therefore, the Commission is justified in removing Special Condition No. 1 and can make specific findings that base the decision on the specific facts of the case, without endorsing or rejecting either the City or the Staff.

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7. TIMING OF THE COMMISSION HEARING.

The Staff Report spends two pages (pages 15 & 16) discussing the three year period that has passed since the Appeals were filed. Although not directly relevant to the findings required for the permit, the Applicant has prepared a response which is attached as Exhibit I. The Applicant asks that the Commission act upon the evidence and not dwell upon the Applicant's concerns about how three years have passed. The years cannot be recaptured.

8. CONCLUSION.

Dr. Okun asks that the Commissioners modify the Staff Recommendation to delete Special Condition No. 1 and to approve coastal development permits for both appeals subject to the remaining conditions.

Sincerely,


SHERMAN L. STACEY

cc All Commissioners and Alternates
Ms. Sherilyn Sarb
Mr. Lee McEachern
Mr. Nick Dreher
Dr. Leonard Okun

Letter to Commissioners dated July 5, 2012
A-6-ENC-09-040 & A-6-ENC-09-041

EXHIBIT LIST

- A-1 City Approved Setbacks
- A-2 Staff Recommendation Setbacks
- A-3 Comparison of Setbacks Superimposed on Photograph
- B Architect's Letter and Perspective Drawings of City Approved Houses
- C Portions of Encinitas Municipal Code §30.34.020 (part of certified Local Implementation Plan)
- D-1 2006 Soil Engineering and Construction Report
- D-2 2009 Soil Engineering and Construction Report
- D-3 Geologist Mark Johnsson Memorandum, 30 September 2010
- D-4 2011 GeoSoils Report
- E Coastal Development Permit No. 6-05-030 (Okun)
- F Geologist Mark Johnsson Memorandum, 17 October 2011
- G-1 1997 Commission Report on In-Lieu Fee Beach Sand Mitigation Program: San Diego
- G-2 2004 Findings from CDP No. 6-03-048 (Sorich & Gault) for 808 & 816 Neptune Avenue
- H Photographs of 566 & 560 Neptune Avenue, Local CDP Nos. 01-196 & 01-197/Bradley
- I Discussion of Scheduling of Hearing

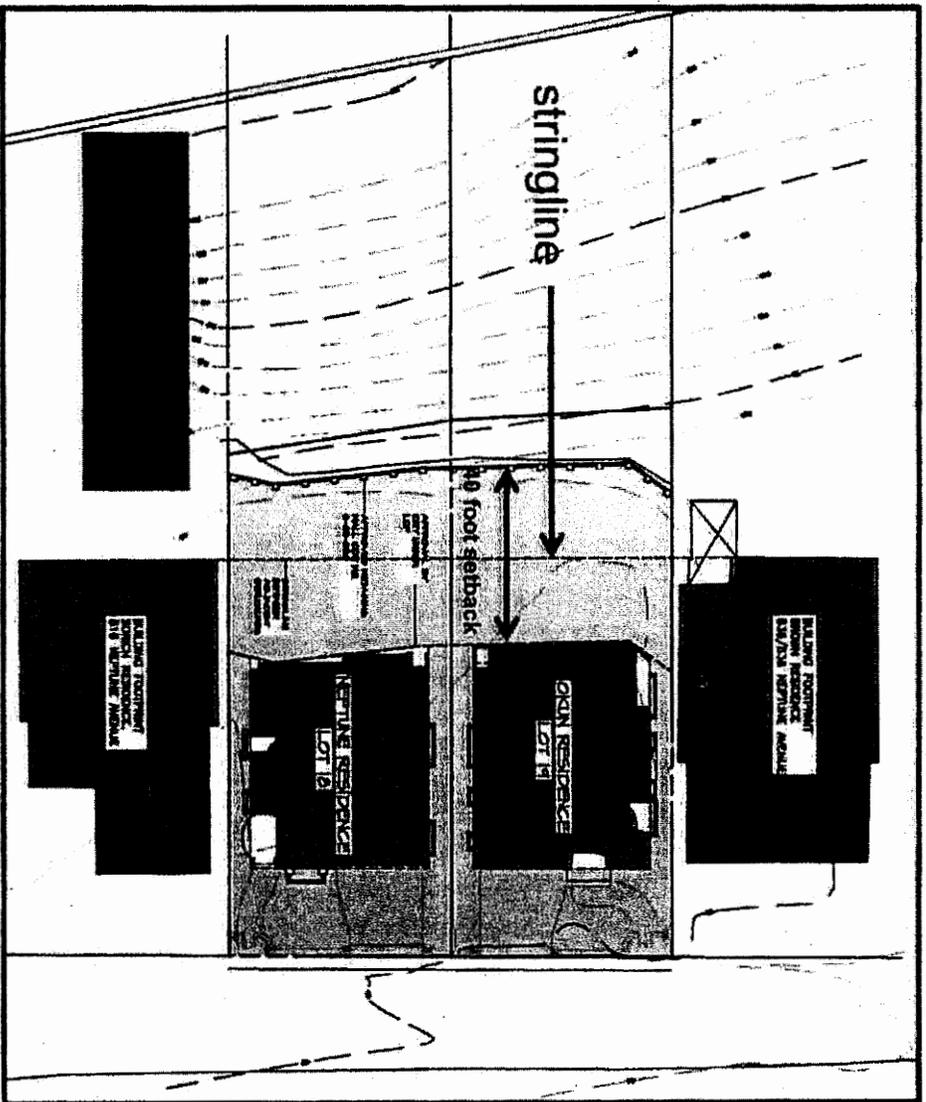
EXHIBIT A

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City Approved setback 40 feet from retention wall

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The City approved the construction of the two new homes with a setback of 40 feet from the retention wall. This is 30 feet greater setback than the existing home. This is far behind the stringline. According to Mark Johansson, stability will be assured "indefinitely".



Staff Recommendation Setback 65 feet from retention wall

The setback in Special Condition No. 1 would reduce the use of the property to such an extent as to leave unreasonably small building area. The area would be less than 1/3 of that enjoyed by other properties throughout the Encinitas bluffs.

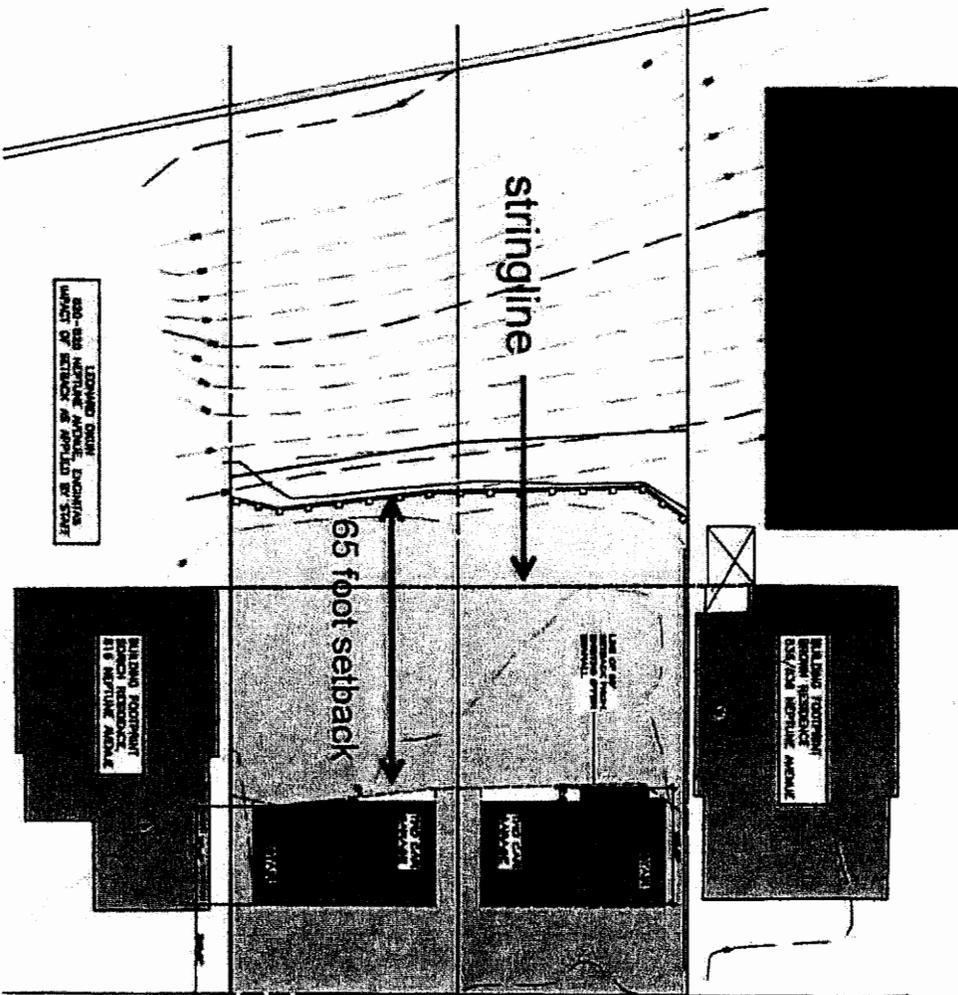
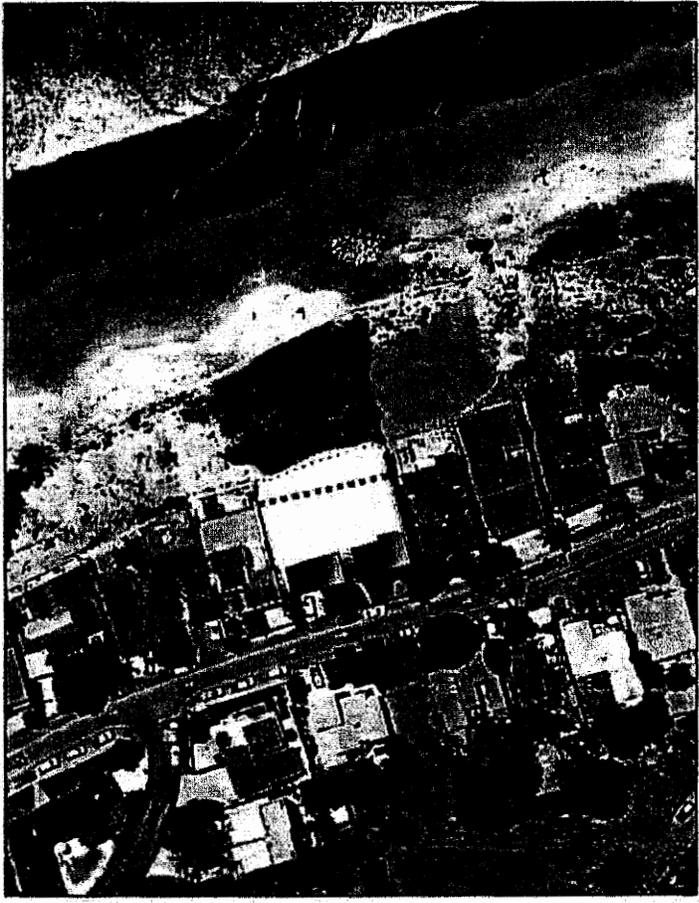


EXHIBIT A-2

The setback recommended by Staff is unreasonable



Homes as approved by City



Homes based on staff recommendation

EXHIBIT B

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California Coastal Commission
7575 Metropolitan Drive, #103
San Diego, CA 92108

Re: Appeal Nos. A-6-ENC-09-040 & 041 (Okun)
820 & 828 Neptune Avenue, Encinitas

Dear Commissioners:

I am an architect licensed to practice architecture in California. I have prepared designs for two homes for Dr. Leonard Okun at 820 and 828 Neptune Avenue approved by the City of Encinitas for a coastal development permit. I have reviewed the Staff Report and Recommendation of the Coastal Commission staff dated June 25, 2012. Special Condition No. 1(2)(a) requires a setback from the existing retaining wall of 65 feet. The City required a setback of 40 feet.

I have evaluated the impacts upon the design of a house on Dr. Okun's property with a 65 foot setback. Between the City's front yard setback of 20 feet and the 65 foot setback imposed under Special Condition No. 1(2)(a), there is only 22 feet of depth for a residence on the south lot and approximately 25 feet of depth on the north lot. The side yards are 5 feet each making a footprint of 40 feet x 22-25 feet for each residence. With a required two car garage, this only leaves about 300 square feet of usable space on the first floor at each level. The total livable space of both levels would only be about 1,500 square feet at the north lot and approximately 1,350 square feet at the south lot. Please keep in mind that this analysis assumes building a box out to the setback lines on all four sides at both levels. With the normal building articulation necessary to be compatible with the existing character of the neighborhood, the actual square footage would be 15-20 % less. With this distribution of space the first floor has no usable space with the exception of one small room which might be an office. All of the usable space would be forced to the second floor including living spaces and bedrooms. This type of configuration would create a very poorly designed home with limited livable area. Within this arrangement it is difficult to design any residence which would allow the use of Dr. Okun's property in the manner in which the other 188 lots along Neptune Avenue are used.

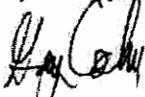
Special Condition No. 1(2) suggests that a single structure could be built across both 50 foot lots and used as a single residence or a duplex. This would be a structure approximately 23 feet deep and 90 feet wide. However, such a structure would not be in keeping with the character of the neighborhood since it would require a lot twice the width of the other lots in the area. In addition there are other problems. First, the duplex configuration would result in the same limitations as described above with only a slight increase in square footage. A single house built across both lots

in terms of living space would not even yield the 3,760 square foot building envelope that staff suggested could be created. In fact, when building articulation and second floor setbacks are considered, such a structure would be well under 3,000 square feet of usable space. Such an oddly shaped structure would bear no resemblance to the general development of the area and could not meet Special Condition No. 1(2)(c) which requires that the residence be compatible in character with the surrounding area.

I had designed a basement in Dr. Okun's houses. The basement is entirely below grade and has limited light wells for light or ventilation. Unlike the properties at 560 and 566 Neptune Avenue which are referenced in the Staff Report, I cannot place Dr. Okun's garage in a "basement" because the grade at Dr. Okun's property is essentially flat. The pre-existing grade at 560 and 566 Neptune Avenue sloped up from the street allowing the lowest level to qualify as a basement under the city of Encinitas' municipal code. This made it possible for the design of those houses to have the lowest floor act as a garage with limited living space and be defined as a basement because more than 50% of the perimeter of the floor above would be within 4 feet of the pre-existing grade surrounding the lowest level. Thereafter, two floors of residential use were constructed above this garage/basement. No similar configuration on Dr. Okun's property is possible. On a flat site such as this, it would take a straight ramp of 52 feet in length to get cars into a basement garage.

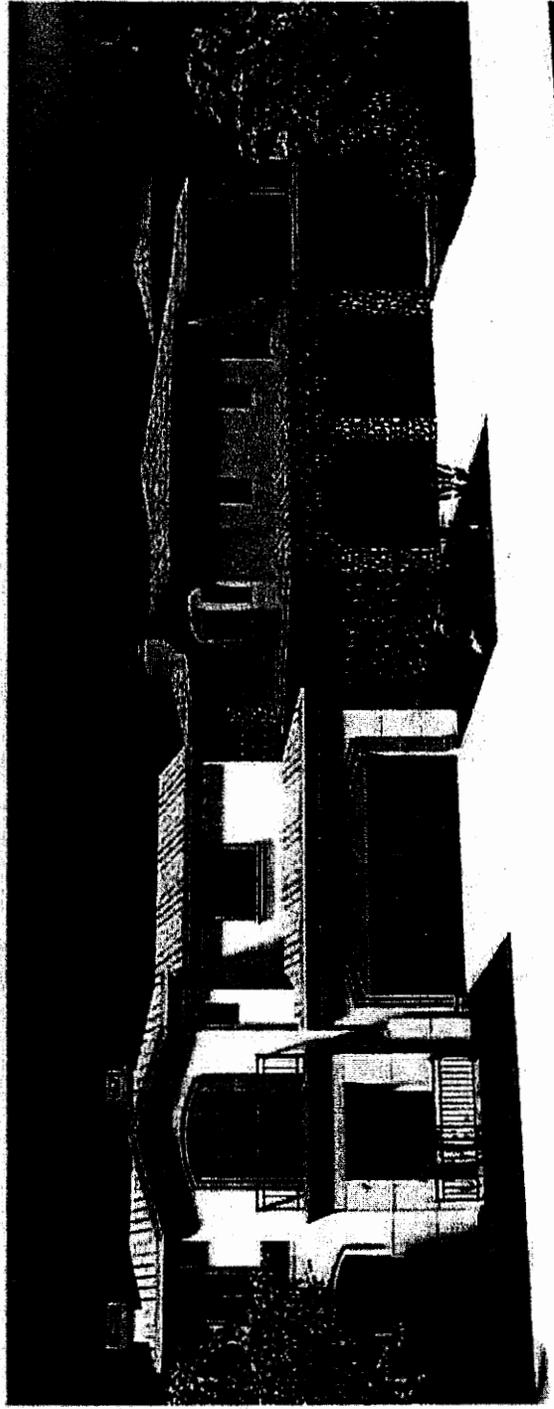
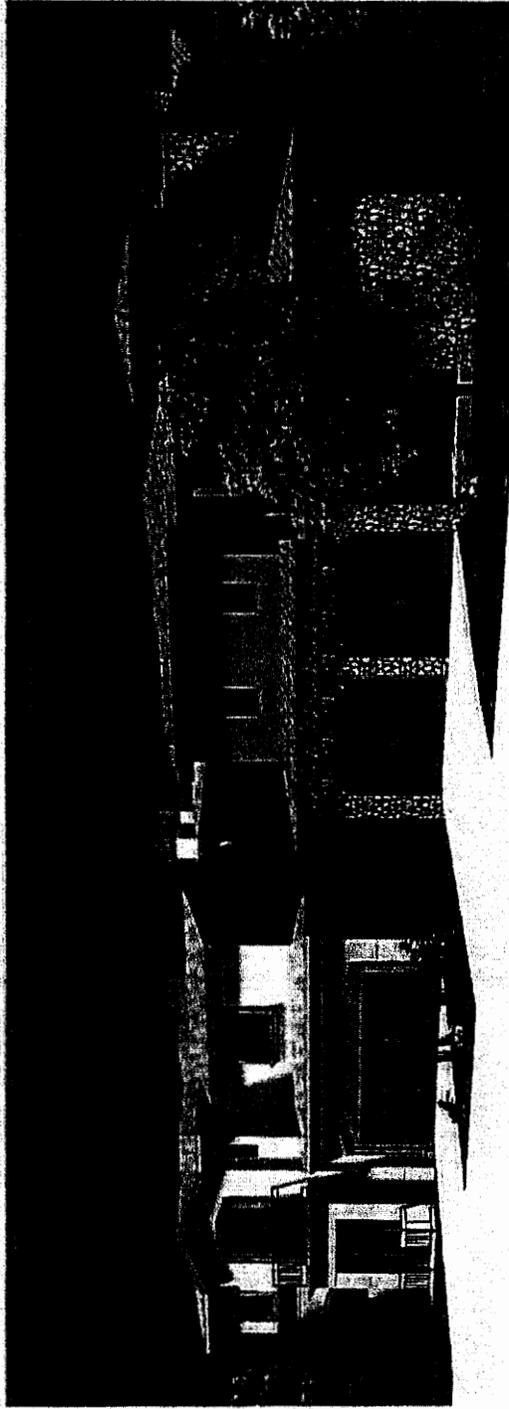
In summary, Special Condition No. 1(2)(a) requiring a setback of 65 feet leaves such a restricted building envelope that no feasible design solutions exist for the site.

Respectfully,



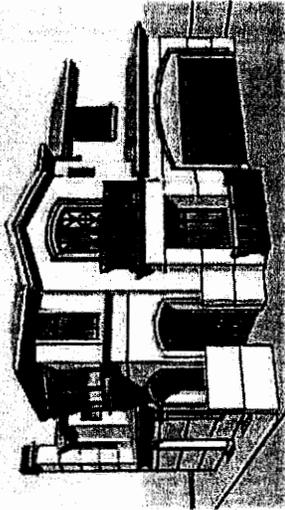
Gary Cohn Architect
Cohn + Associates

The homes are well designed for the neighborhood

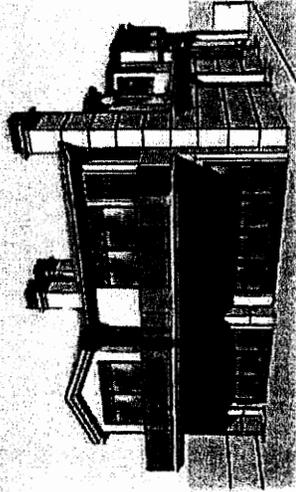


Each of the homes is well designed to fit into the neighborhood where 82% of all homes and duplexes are on lots 50 feet wide or less.

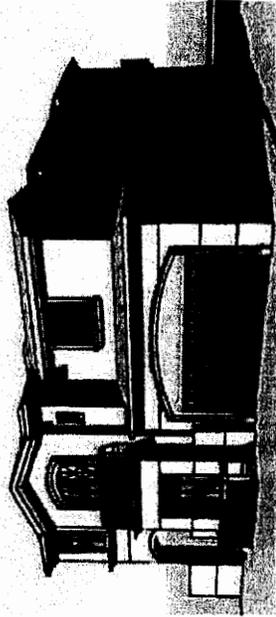
820 Neptune Avenue



VIEW TOWARDS THE NORTHWEST



VIEW TOWARDS THE NORTHEAST

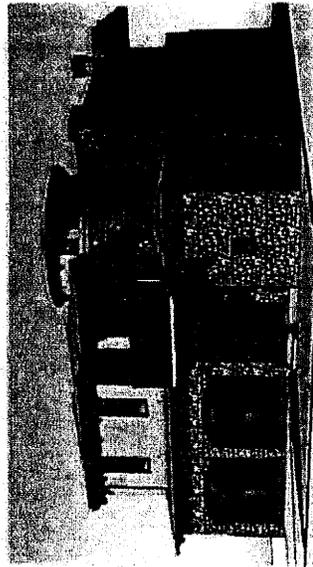


VIEW TOWARDS THE SOUTHWEST

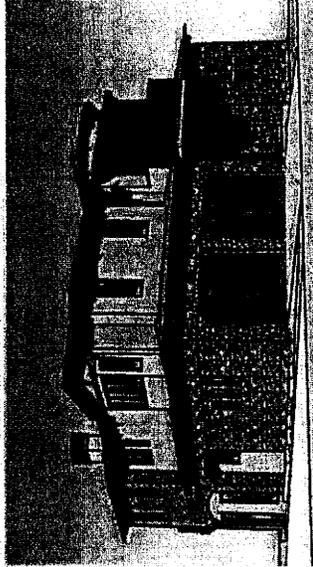
NEPTUNE RESIDENCE
ENCINITAS, CALIFORNIA

CONNOR ASSOCIATES
ARCHITECTURE PLANNING
INCORPORATED

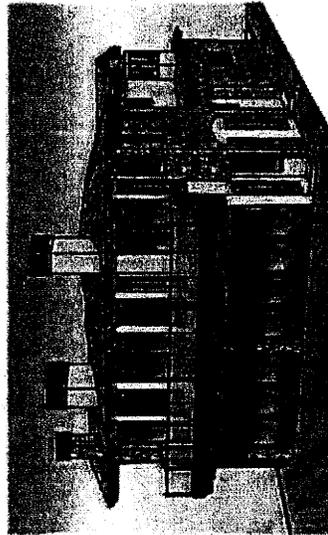
828 Neptune Avenue



V I E W T O W A R D S T H E S O U T H W E S T



V I E W T O W A R D S T H E N O R T H W E S T



V I E W T O W A R D S T H E N O R T H E A S T

OKUN RESIDENCE
ENCINITAS, CALIFORNIA

COHN + ASSOCIATES
ARCHITECTURE PLANNING
1000 AVENUE OF THE STARS
SUITE 100
LA JOLLA, CALIFORNIA 92037
TEL: 619 451-1000

EXHIBIT C

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a. Submittal and acceptance of a site-specific soils report and geotechnical report as required by paragraph D "Application Submittal Requirements" below. Any approval by the Planning Commission or, on *appeal, by the City Council must be able to make the findings below for the proposal based on the soils and geotechnical report. (Ord. 91-19). (*See Chapter 1.12.010 through 1.12.060).

b. When a preemptive measure is proposed, the following findings shall be made if the authorized agency determines to grant approval: (Ord. 91-19)

(1) The proposed measure must be demonstrated in the soils and geotechnical report to be substantially effective for the intended purpose of bluff erosion/failure protection, within the specific setting of the development site's coastal bluffs. The report must analyze specific site proposed for development. (Ord. 91-19)

(2) The proposed measure must be necessary for the protection of a principal structure on the blufftop to which there is a demonstrated threat as substantiated by the site specific geotechnical report. (Ord. 91-19)

(3) The proposed measure will not directly or indirectly cause, promote or encourage bluff erosion or failure, either on site or for an adjacent property, within the site-specific setting as demonstrated in the soils and geotechnical report. Protection devices at the bluff base shall be designed so that additional erosion will not occur at the ends because of the device.

(4) 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.

(5) The proposed device/activity will not serve to unnecessarily restrict or reduce the existing beach width for use or access.

- c. No preemptive measure at the base of the bluff or along the beach shall be approved until a comprehensive plan is adopted as Council policy for such preemptive treatment, for at least the corresponding contiguous portion of the coastal bluff. Preemptive measures approved thereafter shall be consistent with the adopted plan.

D. APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. The review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. Each review/report shall consider, describe and analyze the following: (Ord. 95-04)

1. Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;
2. Historic, current and foreseeable-cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;
3. Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features, such as bedding, joints and faults;
4. Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;
5. Impact of construction activity on the stability of the site and adjacent area;
6. Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);

7. Potential erodibility of site and mitigating measures to be used to ensure minimized erosion problems during and after construction (i.e., landscaping and drainage design);
8. Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data; (Ord. 95-04)
9. Potential effects of seismic forces resulting from a maximum credible earthquake;
10. Any other factors that might affect slope stability;
11. Mitigation measures and alternative solutions for any potential impacts.

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. The report shall use a current acceptable engineering stability analysis method and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project.

In addition to the above, each geotechnical report shall include identification of the daylight line behind the top of the bluff established by a bluff slope failure plane analysis. This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:

- Cover all types of slope failure.
- Demonstrate a safety factor against slope failure of 1.5.
- Address a time period of analysis of 75 years.

Any newly proposed structure, other than a minor accessory structure or improvement, or a preemptive measure, which is proposed closer than 40 feet to the edge of the bluff shall be demonstrated to be behind the identified daylight line. Analysis methods alternate to a slope failure plane analysis which predict an equivalent level of safety may be proposed, and must be accepted in the City's review of the geotechnical report.

Finally, each geotechnical report for a project including a proposed preemptive measure shall address those points specified in paragraph C above as well as the following: (Ord. 95-04)

1. Maximum expected wave height, design wave height, design constraints and frequency of overtopping;
2. Normal and maximum tidal ranges;
3. Estimated erosion rate with and without the proposed preemptive measure;
4. Percent of beach quality sand within the bluff;
5. Effect of the proposed structure on adjoining properties;
6. Potential/effect of scouring at base of proposed structure;
7. Design life of structure/maintenance provisions;
8. Alternatives to the project design. Project alternatives shall include, but not be limited to, no project, relocation/removal of threatened portions of or the entire home and beach nourishment;
9. Construction area and technique of construction;
10. Certification that the structure is designed to withstand storms comparable to the winter storms of 1982-83.

E. TEMPORARY EMERGENCY PROTECTION DEVICES. Notwithstanding other regulations of the City, the City Manager or his/her designee may permit the installation of temporary emergency protection / retention facilities (such as riprap, walls, erosion control devices, etc.) on or at the base of a coastal bluff if: (Ord. 91-19)

1. Enclosed or principal buildings at the top of an ocean bluff are threatened by a potential bluff failure/collapse. (Ord. 95-04)
2. The threat is imminent. A statement of a State-licensed engineer or engineering geologist establishing an imminent threat may be required if the City Engineer is not able to determine the imminent threat. (Ord. 91-19)

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3. The minimum size of rock rip-rap when placed as a temporary protective barrier, shall be three (3) tons. If recommended in writing by a certified engineering geologist, smaller filter rock may be permitted behind and beneath said armor rock rip-rap in order to further cushion the bluff against wave action and to assist in maintaining sand behind the barrier. For placement of rip-rap, a site plan showing the limits of rip-rap to the satisfaction of the City Engineer shall constitute a construction plan. Documentation shall be provided that the proposed temporary protection is the minimum necessary to address the emergency and to assure minimal encroachment onto the sandy beach area. In addition, construction access and staging plans shall be submitted which document that no public beach parking areas will be utilized for the interim storage of materials or equipment and that overnight storage of equipment of materials will not be permitted on the sandy beach. (Ord. 95-04)

4. Construction plans, prepared by a State-licensed civil engineer, are submitted to the City Engineer for review and approval, along with any supporting reports and design calculations as required by the City Engineer to verify the adequacy of the design. (Ord. 91-19)

5. A covenant is provided which includes an obligation by the property owner to the City that the property owner will comply with all coastal regulations and conditions imposed by the California Coastal Commission including submitting and processing an application in order to receive a grant of approval for a permanent protection facility as applicable under the Municipal Code and the California Coastal Act. The property owner shall execute the City's covenant prior to the installation of the protective facility, and submit it to the City Manager or his/her designee together with the following: (Ord. 91-19)

a. The covenant must have attached as Attachment "A" a legal description of the ocean bluff property owned by the property owner.

b. The covenant must have attached as Attachment "B" a description of the proposed, protective retention barrier; the description must be to the reasonable satisfaction of the City Engineer. (Ord. 91-19)

c. When the property owner executes the covenant, the property owner's signature must be notarized.

d. Security shall be provided by the owner in the form of a cash deposit, letter of credit or other deposit reasonably acceptable to the City Engineer, in order to guarantee the removal of any debris on the public beach when the debris is reasonably related to coastal bluff failure or construction to repair a bluff failure. The amount of security shall be fixed by the City in order to provide funding for removal of the debris if the applicant or applicant's agents do not remove the debris from the public beach within a reasonable time. (Ord. 91-19)

e. Following the property owner's compliance with the above requirements, the City Manager or designee shall, in accordance with the authority granted to the City Manager by this chapter, authorize the property owner access rights across public property under the control of the City of Encinitas in order to construct the protective facility. When requesting access, the property owner shall submit an access plan showing approximate times of access, frequency of access and type of equipment which will need to access the site. Said access plan shall be reviewed and approved by the designated official authorizing the access over public property. (Ord. 91-19)

f. The amount of the deposit required in Section 30.34.020(e) 5d shall be equal to 25% of the estimated construction cost of the temporary facility. This amount can be reduced by the City Engineer based upon an estimate of the costs to remove the debris furnished to the City Engineer by the property owner's engineer or contractor. If the engineer's estimate is not readily available, the City Engineer may estimate the cost of improvements and debris removal based upon regional construction costs or other data. (Ord. 91-19)

g. The City Engineer may release a portion of the security in conjunction with the acceptance of the performance of the act or work as it progresses upon application therefor by the property owner, provided, however, that no such release shall be for an amount more than twenty-five percent (25%) of the total security given for faithful performance of the act or work and that the security shall not be reduced to an amount less than fifty percent (50%) of the total security given for faithful performance until final completion and acceptance of the act or work. In no event shall the City Engineer authorize a release of the improvement security which would reduce such security to an amount less than that required to guarantee the completion of the act or work and any other obligation imposed by this ordinance or the agreement to remove the debris; nor shall the City Engineer be obligated to make a partial release of security. (Ord. 91-19)

h. Upon the failure of the property owner to complete the removal of the debris on the public beaches within the time specified, the City Council may, upon notice in writing of not less than ten days served upon the person responsible for the performance thereof, or upon notice in writing of not less than twenty (20) days served by registered mail addressed to the last known address of such person, determine that the property owner is in default and may cause the improvement security, or such portion thereof as is necessary to complete the work or act and any other obligations of the property owner secured thereby, to be forfeited to the City. (Ord. 91-19)

i. Upon completion of all obligations of the property owner under the provisions of this Section 30.34.020E, the City shall, upon request of property owner, cause to be recorded in the Office of the County Recorder the release of any covenants recorded against such property required by this section. (Ord. 91-19)

30.34.030 Hillside/Inland Bluff Overlay Zone.

A. **APPLICABILITY.** The Hillside/Inland Bluff Overlay Zone regulations shall apply to all areas within the Special Study Overlay Zone where site-specific analysis indicates that 10 percent or more of the area of a parcel of land exceeds 25 percent slope. The Planning Commission shall be the authorized agency for reviewing and granting discretionary approvals for proposed development within the Hillside/Inland Bluff Overlay Zone. (Ord. 96-07)

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EXHIBIT D

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2006 Report of Soil Construction Engineering, Inc.

Report of Soil Engineering Construction, Inc. dated November 28, 2006 reviewed by Dr. Mark Johnson.

"SEC performed slope stability analyses using previously accepted soil strength parameters. The results of these analyses indicates that the bluff has an acceptable FS for both static (FS=1.57 and pseudo static (FS=1.1) conditions.

"Based on the results of these analyses, it is our opinion that future development, at and beyond the 40 foot setback, will be reasonably safe from failure for the live of the structure which has been accepted to be 75 years."

SOIL ENGINEERING CONSTRUCTION

November 28, 2006

Dr. Len Olson
824 Neptune Avenue
Eureka, California 92024

Re: A-Bluff Slope Stability Analyses @ 40' Setback
Olson Residence, 828 Neptune Avenue, Eureka

Dear Dr. Olson:

Soil Engineering Construction, Inc. (SEC) has prepared this letter addressing the current estimated factor of safety against sliding (FS) at the 40 foot setback line as measured from the existing top of the upper wall. Our analyses consisted of reviewing previously submitted slope stability analyses presented in our earlier reports and as-built plans which were reviewed and approved by the City of Eureka and the California Coastal Commission (CCC).

Presented herein are the results of our slope stability analysis for the subject site. The purpose of the analysis was to find the minimum factors of safety with respect to sliding for the existing slope configuration at the 40 foot setback line. The analysis was performed for both static and pseudo static conditions utilizing the Modified Bishop Method of Slices (MUSARL7 computer program) and the results are discussed herein. The location of the assumed most critical failure cross section A-A, shown on our As-Built plans and in the same cross section used in all of the previous analyses. The computer print-outs are included in this report and are attached.

SEC performed slope stability analyses using previously accepted soil strength parameters. The results of these analyses indicate that the bluff has an acceptable FS for both static (FS=1.57) and pseudo static (FS=1.1) conditions.

Based on the results of these analyses, it is our opinion that future development, at and beyond the 40 foot setback, will be reasonably safe from failure for the life of the structure which has been accepted to be 75 years.

We trust this report will meet with your expectations and present needs. If you should have any questions, or need additional information, please contact us at your earliest convenience.

Very truly yours,

SOIL ENGINEERING CONSTRUCTION, Inc.
John Olson, P.E.
John Olson, P.E.

John for
Robert D. Mahony, O.E., C.E.G.

56711 11-28-06 181 Eureka, CA 92024 17601 533 3470 • FAX 17601 433 3472

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Report of Soil Engineering Construction, Inc.

December 2009 Report of
John Niven, RCE, and
Robert D. Mahony, GE,

"Further, Soil Engineering Construction, Inc. has certified that, with normal maintenance the seawall, bluff reconstruction and upper bluff retention system will remain effective throughout the life of the existing residential structure (75 years) and the proposed residential structures (75 years from date of construction)."

SOIL ENGINEERING CONSTRUCTION

(1)

MID-BLAFF (LANDSCAPE) RECOMMENDATIONS

1. We see no need for any changes in the mid-bluff landscape treatment. We recommend continued observation to assure that plantings are obtaining sufficient water. Verification that the temporary irrigation system as been capped is still pending as of the date of this report.

UPPER BLUFF RETENTION WALL

1. It is our professional opinion that the 828 Neptune Avenue upper bluff retention wall is in excellent condition and that no maintenance or repairs are necessary at this time. We recommend that conduits installed for subsurface drainage at the base of the wall be cut back closer to the wall.

As a final summary note, it is our professional opinion that the lower coastal bluff seawall has performed as planned to eliminate further up-slope erosion failure by overtopping the active clay seam failure plane and eliminating undercutting on the area of the bluff adjacent to 828 Neptune Avenue. The seawall is in excellent condition and requires no maintenance at this time other than graffiti removal.

Further, Soil Engineering Construction, Inc. has certified that, with normal maintenance, the seawall, bluff reconstruction and upper bluff retention system will remain effective throughout the life of the existing residential structure (75 years) and the proposed residential structures (75 years from date of construction).

This completes our 2009 monitoring review of the coastal bluff protective measures located at 828 Neptune Avenue. Should you have any questions, please contact Soil Engineering Construction, Inc. at (760)611-3370.

Respectfully submitted,
Soil Engineering Construction, Inc. The Trettha Company

John Niven, R.C.E. Bob Fretlin, President

Robert D. Mahony, G.E.
President

SOIL ENGINEERING CONSTRUCTION, INC. 1001 1/2 W. 10TH ST. SUITE 100, ANAHEIM, CALIFORNIA 92801-3000

Coastal Commission Geologist attests that existing walls will protect the new homes

Mark Johnson, Coastal Commission Staff Geologist, has reviewed the geology and examined the site several times. Johnson states that "... these analyses demonstrate that any structure at the bluff top will be stable indefinitely, provided that the shoreline protection system is maintained adequately."

STATE OF CALIFORNIA - THE RESOURCE AGENCY
CALIFORNIA COASTAL COMMISSION
1500 CALIFORNIA STREET, SUITE 200
SAN FRANCISCO, CA 94109-2000
415.774.2000 FAX 415.774.9610
WWW.CALCOASTAL.COM

ALAN R. SCHWARTZ, DIRECTOR

90 September 2010

GEOTECHNICAL REVIEW MEMORANDUM

To: Nick Dreher, Coastal Program Analyst
From: Mark Johnson, Staff Geologist
Re: A-6-ENC-09-40; A-6-ENC-09-41 (Okun)

With respect to the above referenced appraisals, I have reviewed the following documents:

- 1) Soil Engineering Construction, 2006, "As-built slope stability analyses @ 40 setback, Okun residence, 828 Neptune Avenue, Encinitas", 1 p. letter report dated 28 November 2006 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).
- 2) Soil Engineering Construction, 2006, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 1 p. letter dated 21 May 2006 and signed by J.W. Niven (CE 57517).
- 3) Soil Engineering Construction, 2006, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 10 p. letter report dated 21 May 2006 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).
- 4) Deepadic, Inc., 2008, "Third party review, 04-073, CDP, 828 Neptune Avenue, Encinitas, California, APN 288-011-173 B-03, Arvidson Mr. Leonard O'Neil", 2 p. review memorandum dated 21 August 2008 and signed by J. Knowlton (RCE 55764 CEG 1048).
- 5) Soil Engineering Construction and The Travin Company, 2008, "Monitoring report, 828 Neptune Avenue, Encinitas, California", 11 p. report dated December 2008 and signed by J.W. Niven (CE 57517), R.D. Mahony (CEG 847 GE 554), and B. Trebin.
- 6) Soil Engineering Construction, 2008, "Claw slope stability, 828 Neptune Avenue, Response to Coastal staff letter dated December 7, 2008", 3 p. letter report dated 18 December 2008 and signed by J.W. Niven (CE 57517).

In addition, I have visited the base of the coastal bluff at this site many times over the past several years, most recently on 10 June 2010 when I also observed the bluff top 106 and the existing structure.

Reference (1) documents that the completed seawall, mid-bluff gravel fill, and upper bluff retaining wall together have a factor of safety exceeding 1.5 for the static condition and 1.1 for the pseudo-static condition. Together with the recent monitoring report (Reference 5), these analyses demonstrate that any structure at the bluff top will be stable indefinitely, provided that the shoreline protection system is maintained adequately.

EXHIBIT NO. 5
APPLICATION NO. A-6-ENC-09-40
A-6-ENC-09-41
Staff Memorandum

State of California Coastal Commission

2011 Report of GeoSoils, Inc.

Geotechnical report of
David W. Skelly, RCE, and
Robert G. Chrisman, CEG,
dated January 7, 2011

"the proposed development,
as currently designed,
should be safe from bluff
erosion hazards for the next
75 years provided that the
existing, permitted shore
protection devices are
adequately maintained."

The slope stability analysis data indicates that it is feasible to safely construct the proposed dwellings in the location designed and approved by the City of Encinitas, if a properly designed deepened footing foundation is utilized that sufficiently penetrates below the critical failure plane identified in our analysis. Plate C-2 provides preliminary pile design and Plate C-3 provides a pier location in plan view. This pile foundation system depicted on Plate C-2 and C-3 can generally be used for both of the proposed residences. It may be necessary to add return piles along the sides based upon the building load distribution, but these piles will be located seaward of the piles depicted on Plate C-3. The same pile foundation system has been recently accepted by the CCC for new development without seawalls in Encinitas, including 708 Fourth Avenue (A-B-ENC-08-2), as well as in other local jurisdictions.

Again, we agree with the opinion expressed by SEC and by Mark Johnson in his memorandum of September 30, 2010, that with the existing shoreline protective devices, construction of two residences on standard footing foundations in the locations presently designed would meet the necessary factor-of-safety, based on the available data. These two residences were designed with a 40-foot setback from the bluff edge marked by the permitted land use zoning map supported retaining wall. We also agree that with appropriate maintenance of the existing permitted walls, the structures would be safe for the 75 year potential life of the structures.

However, if the CCC chooses to ignore the stability impacts of the shoreline protective devices which it approved, we do not believe that residences on standard footing foundations could be safely developed on the property given the required setbacks and geologic constraints. However, the same residential structures can be developed in the same location based upon a deepened cohesion design, as we have depicted on Plates C-2 and C-3. We can find no geologic reason that the presently designed setback from the existing retained fill needs to be increased from 40 feet, as approved by the City of Encinitas.

Conclusions

Based upon our review of the referenced documents and CCC staff report for the subject property, we conclude that the proposed development, as currently designed, should be safe from bluff erosion hazards for the next 75 years provided that the existing, permitted shore protection devices are adequately maintained. It is also GSI's opinion that if the bluff protection devices were not in place, that the proposed project could be developed in the location currently designed, provided the structure(s) were built on deepened foundation systems.

Comments

Inasmuch as our limited study is based upon our review and engineering analyses, the conclusions and recommendations are professional opinions. These opinions have been

Dr. Dequard Odom
825 Highway Avenue
Encinitas, CA 92025

W.D. 6161 A-SC
January 7, 2011
Page 8

GeoSoils, Inc.

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EXHIBIT E

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CALIFORNIA COASTAL COMMISSION

San Diego Coast Area Office
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421
(619) 767-2370



FILE COPY

Page: 1

Date: November 7, 2005

Permit Application No.: 6-05-030

COASTAL DEVELOPMENT PERMIT

On September 16, 2005, the California Coastal Commission granted to

Dr. Leonard Okun

this permit subject to the attached Standard and Special conditions, for development consisting of

Construction of an approx. 100 ft.- long, 20 to 27 ft.-high concrete tiedback seawall at the base of the bluff below an existing single-family residence as follow-up to an emergency permit, the removal of riprap from the public beach and payment of an in-lieu sand replenishment as mitigation for impacts of the seawall on sand supply

more specifically described in the application filed in the Commission offices.

The development is within the coastal zone at

On the public beach below 828 Neptune Avenue, Leucadia (San Diego County)

Issued on behalf of the California Coastal Commission by

PETER M. DOUGLAS
Executive Director

Gary Cannon
By: Gary Cannon
Coastal Program Analyst

ACKNOWLEDGMENT:

The undersigned permittee acknowledges receipt of this permit and agrees to abide by all terms and conditions thereof.

The undersigned permittee acknowledges that Government Code Section 818.4 which states in pertinent part that: "A Public entity is not liable for injury caused by the issuance. . . of any permit. . ." applies to the issuance of this permit.

IMPORTANT: THIS PERMIT IS NOT VALID UNLESS AND UNTIL A COPY OF THE PERMIT WITH THE SIGNED ACKNOWLEDGMENT HAS BEEN RETURNED TO THE COMMISSION OFFICE. 14 Cal. Admin. Code Section 13158(a).

_____ Date

_____ Signature of Permittee

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EXHIBIT E

COASTAL DEVELOPMENT PERMIT

Date: November 7, 2005

Permit Application No.: 6-05-030

Page 2 of 7

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

SPECIAL CONDITIONS:

The permit is subject to the following conditions:

1. **As-Built Plans.** WITHIN SIXTY (60) DAYS OF COMPLETION OF THE COLORING AND TEXTURING OF THE SEAWALL, the permittee shall submit final plans of the approved seawall and submit certification by a registered civil engineer, acceptable to the Executive Director, verifying the color and texturing of the seawall has been constructed in conformance with the project plans submitted by Soil Engineering Construction, Inc. dated 11/30/04. These plans shall document that only non-invasive or native plants will be utilized in any landscaping and include photographs sufficient to document the color and texture of the seawall.

2. **Condition Compliance.** WITHIN SIXTY (60) DAYS OF COMMISSION ACTION ON THIS COASTAL DEVELOPMENT PERMIT APPLICATION, or within such additional time as the Executive Director may grant for good cause, the applicants shall satisfy all requirements specified in the conditions hereto that the applicants are required to satisfy prior to issuance of this permit. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

3. **Mitigation for Impacts to Sand Supply.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall provide evidence, in a form and content

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COASTAL DEVELOPMENT PERMIT

Date: November 7, 2005

Permit Application No.: 6-05-030

Page 3 of 7

acceptable to the Executive Director, that a fee of \$11,687.20 has been deposited in an interest bearing account designated by the Executive Director as partial mitigation for the impacts of the project on local shoreline sand supply, and in-lieu of providing the total amount of sand to replace the sand and beach area that will be lost due to the impacts of the proposed protective structure. All interest earned by the account shall be payable to the account for the purposes stated below.

The required in-lieu fee mitigation covers certain impacts only through the identified 22-year design life of the seawall. The seawall was substantially completed by July 1, 2001 (the date Emergency Permit 6-01-85-G/Okun expired). Therefore, no later than 21 years after construction of the seawall, i.e., no later than July 1, 2022, the permittees or their successor in interest shall apply for and obtain an amendment to this permit that either requires the removal of the seawall within its initial design life or requires mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life. If within the initial design life of the seawall the permittees or their successor in interest obtain a coastal development permit or an amendment to this permit to enlarge or reconstruct the seawall or perform repair work that extends the expected life of the seawall, the permittee shall provide mitigation for the effects of the additional size of the seawall or the extended effects of the existing seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life.

The purpose of the account shall be to establish a beach sand replenishment fund to aid SANDAG, or a Commission-approved alternate entity, in the restoration of the beaches within San Diego County. The funds shall be used solely to implement projects which provide sand to the region's beaches, not to fund operations, maintenance or planning studies. The funds shall be released only upon approval of an appropriate project by the Executive Director of the Coastal Commission. The funds shall be released as provided for in a MOA between SANDAG, or a Commission-approved alternate entity, and the Commission, setting forth terms and conditions to assure that the in-lieu fee will be expended in the manner intended by the Commission. If the MOA is terminated, the Commission can appoint an alternative entity to administer the fund.

4. Removal of Unpermitted Riprap. WITHIN SIXTY (60) DAYS OF ISSUANCE OF THE SUBJECT COASTAL DEVELOPMENT PERMIT, or within such additional time as the Executive Director may grant for good cause, the applicants shall, as proposed, remove all visible rock riprap from the beach seaward of the seawall below 828 Neptune Avenue. If any additional rock riprap that currently is covered by sand seaward of the seawall below 828 Neptune Avenue should become visible in the future, the applicant is required to remove it within sixty (60) days of exposure, or within such additional time as the Executive Director may grant for good cause.

5. Monitoring Program. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit to the Executive Director for review and written approval, a monitoring program prepared by a licensed civil engineer or geotechnical engineer to monitor the performance of the seawall (and any future exposure of riprap seaward of the seawall) that includes the following:

- a. An annual evaluation of the condition and performance of the seawall addressing whether any significant weathering or damage has occurred that would adversely impact the future performance of the structure. This evaluation shall include an assessment of the color and texture of the seawall comparing the appearance of the structures to native bluffs.

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COASTAL DEVELOPMENT PERMIT

Date: November 7, 2005

Permit Application No.: 6-05-030

Page 4 of 7

- b. Annual measurements of any differential retreat between the natural bluff face and the seawall face, at the north and south ends of the seawall and at 20-foot intervals (maximum) along the top of the seawall face/bluff face intersection. The program shall describe the method by which such measurements shall be taken.
- c. Provisions for submittal of a report as described in subsection d to the Executive Director of the Coastal Commission by May 1 of each year (beginning the first year after coloring and texturing of the seawall is completed) for a period of three years, and then each third year following the last annual report, for the life of the approved seawall. However, reports shall be submitted in the Spring immediately following either:
 1. A significant storm event – comparable to or greater than a 20-year storm.
 2. An earthquake of magnitude 5.5 or greater with an epicenter in San Diego County or offshore.

Thus reports may be submitted more frequently depending on the occurrence of the above events in any given year.

- d. Each report shall be prepared by a licensed civil, geotechnical engineer or geologist. The report shall contain the measurements and evaluation required in sections a and b above. The report shall also summarize all measurements and analyze trends such as erosion of the bluffs or changes in sea level and the stability of the overall bluff face, including the upper bluff area, and the impact of the seawall on the bluffs to either side of the wall. In addition, the report shall identify if any riprap has become exposed seaward of the seawall. Each report shall contain recommendations, if any, for necessary maintenance, repair, changes or modifications to the project and include measures to remove any riprap that becomes exposed in the future.
- e. An agreement that the permittee shall apply for a coastal development permit or an amendment to this permit within 90 days of submission of the report required in subsection c. above for any necessary maintenance, repair, changes or modifications to the project recommended by the report or removal of exposed riprap that require a coastal development permit and implement the repairs, changes, riprap removal, etc. approved in any such permit.

The permittee shall undertake monitoring and the other related activities described above in accordance with the approved monitoring program. Any proposed changes to the approved monitoring program shall be reported to the Executive Director. No changes to the monitoring program shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

6. Storage and Staging Areas/Access Corridors. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and written approval, final plans indicating the location of access corridors to the construction site and staging areas. The final plans shall indicate that:

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COASTAL DEVELOPMENT PERMIT

Date: November 7, 2005

Permit Application No.: 6-05-030

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- a. No work shall occur on the beach on weekends, holidays or between Memorial Day weekend and Labor Day of any year.

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

7. Storm Design/Certified Plans. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit certification by a registered civil engineer that the proposed shoreline protective devices are designed to withstand storms comparable to the winter storms of 1982-83.

8. Future Response to Erosion. If in the future the permittees seek a coastal development permit to construct additional bluff or shoreline protective devices, the permittees will be required to include in the permit application information concerning alternatives to the proposed bluff or shoreline protection that will eliminate impacts to scenic visual resources, recreation and shoreline processes. Alternatives shall include but not be limited to: relocation of all or portions of the principle structure that is threatened, structural underpinning, and other remedial measures capable of protecting the principal structure and providing reasonable use of the property, without constructing bluff or shoreline stabilization devices. The information concerning these alternatives must be sufficiently detailed to enable the Coastal Commission or the applicable certified local government to evaluate the feasibility of each alternative, and whether each alternative is capable of protecting existing structures that are in danger from erosion. No additional bluff or shoreline protective devices shall be constructed on the adjacent bluff face above the approved seawall or on the beach in front of the proposed seawall unless the alternatives required above are demonstrated to be infeasible. No shoreline protective devices shall be constructed in order to protect ancillary improvements (patios, decks, fences, landscaping, etc.) located between the principal residential structures and the ocean.

9. Future Maintenance/Removal of Debris. The permittees shall maintain the permitted seawall in its approved state except to the extent necessary to comply with the requirements set forth below. Maintenance of the seawall shall include maintaining the color, texture and integrity. Any change in the design of the project or future additions/reinforcement of the seawall beyond minor regrouting or other exempt maintenance as defined in Section 13252 of the California Code of Regulations to restore the seawall to its original condition as approved herein, will require a coastal development permit. However, in all cases, if after inspection it is apparent that repair and maintenance is necessary, including maintenance of the color of the wall to ensure a continued match with natural bluffs, the permittee shall contact the Commission office to determine whether a coastal development permit is necessary, and shall subsequently apply for any necessary coastal development permit for the required maintenance. In addition, the permittees shall also be responsible for the removal of debris resulting from failure of, or damage to, the shoreline protective device in the future and the removal of any riprap seaward if the seawall that becomes visible in the future.

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COASTAL DEVELOPMENT PERMIT

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10. Other Permits. WITHIN SIXTY (60) DAYS OF COMMISSION ACTION ON THIS COASTAL DEVELOPMENT PERMIT APPLICATION, the permittee shall provide to the Executive Director copies of all other required local, state or federal discretionary permits for the development authorized by CDP #6-05-030. The applicant shall inform the Executive Director of any changes to the project required by other local, state or federal agencies. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this permit, unless the Executive Director determines that no amendment is legally required.

11. State Lands Commission Approval. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit to the Executive Director for review and written approval, a written determination from either:

1. State Lands Commission documenting that:

- a) No state lands are involved in the development; or
- b) State lands are involved in the development, and all permits required by the State Lands Commission have been obtained; or
- c) State lands may be involved in the development, but pending a final determination of state lands involvement, an agreement has been made by the applicants with the State Lands Commission for the project to proceed without prejudice to the determination.

or

2. City of Encinitas documenting that:

- a) The City of Encinitas has amended or intends to amend its lease with State Lands for State Lands within the City of Encinitas so as to include the subject seawall site.

12. Public Rights. The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that exist or may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that exist or may exist on the property.

13. Assumption of Risk, Waiver of Liability and Indemnity Agreement. By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from erosion, landslides and coastal bluff collapse; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

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COASTAL DEVELOPMENT PERMIT

Date: November 7, 2005

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14. Best Management Practices. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit for review and written approval of the Executive Director, a Best Management Plan that effectively assures no shotcrete or other construction byproduct will be allowed onto the sandy beach and/or allowed to enter into coastal waters. The Plan shall apply to both concrete pouring/pumping activities as well as shotcrete/concrete application activities. During shotcrete/concrete application specifically, the Plan shall at a minimum provide for all shotcrete/concrete to be contained through the use of tarps or similar barriers that completely enclose the application area and that prevent shotcrete/concrete contact with beach sands and/or coastal waters. All shotcrete and other construction byproduct shall be properly collected and disposed of off-site.

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

15. Deed Restriction. PRIOR TO ISSUANCE OF THE 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 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.

EXHIBIT F

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Johnsson's present opinion is based on facts that do not exist

"If the existing seawall, gravel backfill and slope and upper bluff retaining wall were not present"

The staff recommendation is based upon assuming that there are no protective devices. This is not supported by the Certified LCP which has no such requirement. In fact, the Certified LCP requires geotechnical evaluation to take all factors into account.



learn, and asked that they calculate where (if anywhere) on the bluff top a 1.5 factor of safety could be attained if the existing seawall, gravel backfill and slope and upper bluff retaining wall were not present. As stated in reference (7), the consultant object both to performing an analysis of hypothetical conditions not to the geologic model I provided. As discussed in my review memo of 30 September 2010, the geologic model I provided is based on experience at the subject site during original perilling of the seawall, gravel, and retaining wall, as well as at other sites in northern Eschschia. I find that the geologic model is the appropriate model for the site.

The consultant's analysis loaded the bluff with the proposed building (which is partially excavated into the bluff) and defined the bluff edge as the edge of the retained fill behind the upper bluff retaining wall. As mentioned in my review memo of 30 September 2010, this is not how I would identify the bluff edge. The Council's report demonstrates to my satisfaction, however, that a 1.5 factor of safety would be maintained for the life of any proposed development. The bluff retreat reported over that time would have to be added to the 63-foot figure. In the absence of a site-specific study, the Consultant has typically used a figure of 0.40 D/Yr (adapted from a 1999 study of Beaumont and Griggs) for the future long-term average bluff retreat rate in this part of Eschschia. Assuming a 75-year design life, this translates to 37 feet of bluff retreat. My recommended setback given these data would thus be 100 feet. This value should be measured from the natural bluff edge, which is now buried beneath the retained fill. I note that such a setback does not yield a buildable space on either of the lots.

Reference (7) goes on to demonstrate, however, that placing the houses in the proposed locations but using column foundations 53 feet deep, with or without setbacks, yields a factor of safety exceeding 1.3 (static) and 1.1 (pseudostatic).

I hope that this review is helpful. Please do not hesitate to contact me with any further questions.

Sincerely,

Mark Johnson, Ph.D., CEO, CH2M
Staff Geologist

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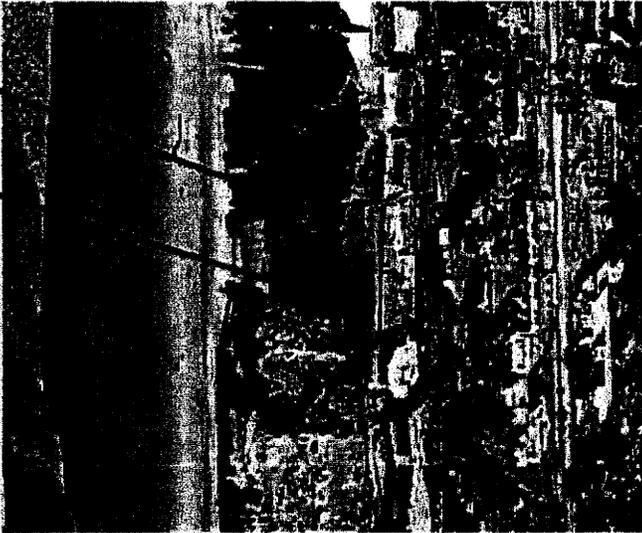
EXHIBIT G

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EXHIBIT H

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Approved Development substantially similar to
Okun's City approvals



566 & 560 Neptune Avenue
Under construction - 2006



566 & 560 Neptune Avenue
Completed - 2010

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Other Development Permitted to Rely on Existing Walls

The City of Encinitas approved the demolition of a home crossing two lots at 560 & 566 Neptune Avenue and the construction of two new homes. Geologic stability was demonstrated relying upon the Coastal Commission approved seawalls. City CDP 01-196 & 01-197. No appeal was filed by the Coastal Commission.



EXHIBIT H-2

EXHIBIT I

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DISCUSSION OF SCHEDULING OF HEARING
ON APPEAL NOS. A-6-ENC-09-040 & A-6-ENC-09-041

The Appeals were filed on July 7, 2009. The Commission found substantial issue on August 14, 2009.

The first communication from the Staff on the Appeals came on December 9, 2009, almost 4 months later. A request for a monitoring report on the existing shoreline protection was made. The requested monitoring report was submitted on January 11, 2010. Although there was a San Diego area meeting in February 2010, the matter was not put on the agenda.

The Applicant did desire a San Diego area hearing location. The next available meeting was October 2010 and the Applicant agreed to that date. The Appeals were placed on the agenda as Items 16a and 16b on October 14, 2010. (Agenda page attached.) On September 30, 2010, the Commission Staff postponed the hearing.

The Staff Report incorrectly states that "[o]n September 30, 2010, staff received an email from Mr. Stacey requesting the October meeting in Oceanside." (Page 15) In fact, Mr. Stacey's September 30, 2010 email confirmed the telephone communication of that date from Nick Dreher that the Commission Staff had postponed the hearing and taken the matter off the Commission agenda for October 14, 2010. (Copy of email attached.)

When placed on the November 17, 2010 Agenda in Santa Monica, the Staff Recommendation was denial. The Applicant postponed the hearing to respond to the Staff Report.

Due to the denial recommendation, the Applicant had additional geologic exploration done which was submitted on January 10, 2011. The purpose of the additional geologic exploration was to design a caisson foundation system by which the stability of the houses could be assured without reliance upon the existing shoreline protection. It was the Applicant's objective to reach some compromise or agreement with the Staff.

The Staff requested further information including a geologic analysis which applied assumptions about the soils and that the existing shoreline protection system did not exist. This analysis was performed and submitted on May 2, 2011.

In July 2011, Staff requested that the Applicant provide the Staff with a taking analysis that would respond to the Staff's takings analysis included in the November 3, 2010 Staff Report for denial. There is nothing in the Commission regulations that requires an applicant to provide a takings analysis, but the Applicant chose to comply. Although initially expecting to comply by August 1, 2011, the form provided by the Commission for a taking analysis proved inadequate. The taking analysis was effectively a brief on the issue much like pages 30-42 of the current Staff Report. Mr. Stacey's taking analysis was not submitted until September 16, 2011. At that time, the Applicant expected to go to hearing in Oceanside, November 2-4 2011. But the Appeals were not scheduled for November 2011.

At this point, the Applicant was no longer concerned about having a San Diego hearing. The Applicant only wanted to be in Southern California. When informed in October 2011 that no hearing would be scheduled for November 2011, Mr. Stacey asked for January 2012 in Santa Monica. At the end of November 2011, Mr. Stacey was on vacation. Voice messages which the Staff left for him went unanswered because a power failure erased the messages. On December 9, 2011, Mr. Stacey contacted Staff by email asking about the January 2012 meeting date. Mr. Stacey was informed that Staff was not planning to schedule hearing for January 2012.

On December 12, 2011, Mr. Stacey sent an email expressing disappointment that the Appeals would not be scheduled in January 2012, and objecting to March 2012 in the mistaken belief that March 2012 would be in Santa Cruz. (Email chain attached) When not scheduled in January 2012, Mr. Stacey asked to be scheduled in March 2012, in Chula Vista. Mr. Stacey met with Staff in San Diego on February 13, 2012 and was informed that Staff declined to schedule the matter in March 2012 claiming a need to evaluate the study of blufftop development in Encinitas which the Applicant submitted on January 20, 2012.

When the Appeals were not scheduled for March 2012, Mr. Stacey requested the June 2012 hearing in Huntington Beach. Staff would not schedule the Appeals in Huntington Beach. Frustrated at his seeming inability to get on a hearing agenda, and unconvinced that he would be scheduled in July 2012, the Applicant filed an action in San Diego Superior Court for a writ ordering the Commission to set the matter for hearing and produce a Staff Report. (Okun v. California Coastal Commission, Case No. 30-2012-00097711-CU-WM-CTL.)

After the Petition for Writ was filed, Mr. Stacey negotiated through Deputy Attorney General Jamee Patterson an agreement which obviated the need for a writ.

the town to a mix of residential, commercial, natural resources and business park uses and extend the urban limit line within the approximately 138 acre Samoa town site on the Samoa Peninsula west of Humboldt Bay. (RSM-E) [TO CONTINUE]

12. NEW APPEALS. See AGENDA CATEGORIES.

a. **Appeal No. A-1-MEN-09-23 (Wernette, Mendocino Co.)** Appeal by Duane M. Hines & Richard & Judith Turnlund from decision of County of Mendocino granting permit with conditions to George & Jerri Wernette for construction of 2-story single-family home with 1,950 sq.ft. living space and 350 sq.ft. attached garage, installation of sewage pump tank and connection to off-site septic disposal services, connection to community water, installation of driveway, retaining walls, LPG tank, generator, on-site drainage infrastructure, and connect to utilities, at 38454 Robinson Reef Drive, Gualala, Mendocino County. (TG-E) [POSTPONED]

b. **Appeal No. A-1-MEN-10-31 (Phillips, Mendocino Co.)** Appeal by Commissioners Wan and Sanchez from decision of County of Mendocino granting permit with conditions to Van L. Phillips for construction of new commercial horse stable facility consisting of (1) 6,900 sq.ft., 35 ft.-tall, 14-stall barn with hay storage and work areas; and (2) 11,200 sq.ft., 35 ft.-tall covered arena with fencing, installation of septic system, well, connection to offsite utilities, and driveway at 4520 Albion Little River Road, one-half mile northeast of Albion, Mendocino County. (TG-E) [POSTPONED]

SAN DIEGO COAST DISTRICT

13. DEPUTY DIRECTOR'S REPORT. Report by Deputy Director on permit waivers, emergency permits, immaterial amendments & extensions, LCP matters not requiring public hearings, and on comments from the public. For specific information contact the Commission's San Diego office at (619) 767-2370. [APPROVED]

a. **City of Encinitas LCP Amendment No. 1-10 (Grading Modifications) Certification Review.** Concurrence with Executive Director's determination that action of City of Encinitas accepting certification of LCP Amendment No. 1-10 with suggested modifications is legally adequate. (DNL-SD) [APPROVED]

14. CONSENTCALENDAR (removed from Regular Calendar). See AGENDA CATEGORIES. [APPROVED WITH CONDITIONS]

15. LOCAL COASTAL PROGRAMS (LCPs) Major. See AGENDA CATEGORIES.

a. **City of Solana Beach LCP Land Use Plan. Time Extension.** Public hearing and action to extend 90 day time limit for Commission action up to one year on request by City of Solana Beach to certify LCP Land Use Plan. (DL-SD) [Time Extension APPROVED]

b. **City of San Diego LCP Amendment No. 2-10 (Pt. Loma Townhomes Resubmittal). Time Extension.** Public hearing and action to extend 90 day time limit for Commission action up to one year on request by City of San Diego to amend the Peninsula Community Plan LUP to re-designate 1.65 acre site bounded by Carleton, Scott and Dickens Streets from Industrial (fishing/marine-related) to Commercial use. (DNL-SD)[Time Extension APPROVED]

16. COASTAL PERMIT APPLICATIONS. See AGENDA CATEGORIES. Attention: Items appearing in this section of the agenda may be moved to the Consent Calendar for this area by the Executive Director when, prior to taking up the Consent Calendar, staff and the applicant are in agreement on the staff recommendation. If an item is moved to the Consent Calendar it will be processed in the same manner as other Consent Calendar items (See AGENDA CATEGORIES) except that if that item is subsequently removed from the Consent Calendar by a vote of three or more commissioners, the item will be acted upon at the meeting in the order in which it originally appears on this Meeting Notice and in the manner Coastal Permit Applications are processed. The purpose of this procedural change is to expedite the Commission's coastal development permit process.

a. **Appeal No. A-6-ENC-09-40 (Okun, Encinitas)** Appeal by Commissioners Wan & Shallenberger from decision of City of Encinitas granting permit with conditions to Leonard Okun to demolish portions of existing single-family home and construct 2,986 sq.ft. 2-story home with 447 sq.ft. garage and 1,677 sq.ft. basement on coastal blufftop lot, at 828 Neptune Avenue (lot 18), Encinitas, San Diego County. (ND-SF) [POSTPONED]

b. **Appeal No. A-6-ENC-09-41 (Okun, Encinitas)** Appeal by Commissioners Wan and Shallenberger from decision of City of Encinitas granting permit with conditions to Leonard Okun to demolish portions of existing single-family family home and construct 3,136 sq.ft., 2-story home with 459 sq.ft. garage and 1,798 sq.ft. basement on coastal blufftop lot, at 828 Neptune Avenue (lot 19), Encinitas, San Diego County. (ND-SF) [POSTPONED]

[An addendum has been appended to the staff report for item 16c below on October 12.]

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Stacey, Sherman

From: Stacey, Sherman
Sent: Thursday, September 30, 2010 11:47 AM
To: 'ndreher@coastal.ca.gov'
Cc: Leonard Okun; 'trettincompany@gmail.com'
Subject: Appeals A-6-ENC-0-9-040, 041(Okun)

Nick:

This is to confirm that the Coastal Commission staff has decided to postpone the hearing on Appeal Nos. A-6-ENC-09-040, 041(Okun) from the Commission meeting in October in Oceanside to the Commission meeting in November. If you are able, please advise me of where the precise location of the November meeting is intended to be.

Sherman L. Stacey
Gaines & Stacey, LLP
1111 Bayside Drive, #280
Corona del Mar, CA 92625
Tel: 949-640-8999
Fax: 949-640-8330

Stacey, Sherman

From: Stacey, Sherman
Sent: Monday, December 12, 2011 4:52 PM
To: 'Nicholas Dreher'
Cc: Lee McEachern; Sherilyn Sarb
Subject: RE: Okun

Nick:

According to the website, February is in Chula Vista and March is in Santa Cruz. Even so, I would like to be scheduled in January so that I have adequate time after receipt of your staff report.

Sherman L. Stacey
Gaines & Stacey, LLP
1111 Bayside Drive, #280
Corona del Mar, CA 92625
Tel: 949-640-8999
Fax: 949-640-8330

From: Nicholas Dreher [mailto:ndreher@coastal.ca.gov]
Sent: Monday, December 12, 2011 4:50 PM
To: Stacey, Sherman
Cc: Lee McEachern; Sherilyn Sarb
Subject: RE: Okun

Hello Sherman,

I understand your position. To clarify, the March hearing is in San Diego, not Santa Cruz.

I will continue to discuss this with Lee and Sherilyn and get back to you some time this week.

Thank you for your continued patience,

Nicholas B. Dreher
Coastal Program Analyst
California Coastal Commission
(415) 904-5251
ndreher@coastal.ca.gov

From: Stacey, Sherman [mailto:sstacey@gaineslaw.com]
Sent: Monday, December 12, 2011 4:18 PM
To: Nicholas Dreher
Cc: Lee McEachern; Sherilyn Sarb
Subject: RE: Okun

Nick:

I have considerable difficulty with a hearing in March in Santa Cruz. The appeal was filed in July 2009 and the Commission found substantial issue in August 2009, more than 28 months ago. Despite the fact that Mark Johnsson has opined that the property is made stable for the indefinite future by the existing permitted walls, the Staff Recommendation for November 2010 was to deny.

The applicant performed considerable additional geologic exploration and proposed a separate (but unnecessary) caisson foundation system to support the residences which would not rely upon the existing walls. I have never had any response to the submissions related to such foundation system. In the Summer of 2011, the staff requested that the Applicant submit a takings analysis with regard to the denial recommendation. I agreed to submit a memorandum on takings if the Staff would schedule the matter for November 2011, in Oceanside. Although highly unusual for a memorandum of this nature to be submitted so far in advance, I did so as an accommodation to Staff and with a clear understanding about a November meeting.

I submitted the takings analysis on September 16, 2011. When I inquired on October 10, 2011 about a possible meeting prior to the November hearing, I was notified that the Staff would not place the matter on the November agenda. As the December hearing was in San Francisco, there seemed to be no reason for which the Staff could not set the matter at the hearing in January 2011 in Long Beach. You will have had the appeal for 2 ½ years, you have had the additional geological reports and alternative foundation design since January 2011. You have had my takings analysis since September 16, 2011. On several occasions I have offered to meet to discuss whatever issues Staff may have.

I can find no justification to agree that this matter requires yet another 4 months for the Staff to prepare a recommendation. I point out that the March meeting is in Santa Cruz. It is not acceptable to schedule this at such a remote location. I am offered no explanation for why additional time is required. I expect the matter to be scheduled in January.

Sherman L. Stacey
Gaines & Stacey, LLP
1111 Bayside Drive, #280
Corona del Mar, CA 92625
Tel: 949-640-8999
Fax: 949-640-8330

From: Nicholas Dreher [mailto:ndreher@coastal.ca.gov]
Sent: Monday, December 12, 2011 1:01 PM
To: Stacey, Sherman
Subject: RE: Okun

Hi Sherman,

Are you comfortable with a March hearing?

I am available later this afternoon if you want to talk.

Nicholas B. Dreher
Coastal Program Analyst
California Coastal Commission
(415) 904-5251

ndreher@coastal.ca.gov

From: Stacey, Sherman [mailto:sstacey@gaineslaw.com]
Sent: Saturday, December 10, 2011 8:50 AM
To: Nicholas Dreher
Cc: Lee McEachern
Subject: RE: Okun

Nick:

I have not seen any emails. I was out of the country at the end of November and a power outage and restart had the result of deleting phone messages. Look forward to speaking with you soon.

Sherman L. Stacey, Esq.
Gaines & Stacey, LLP
1111 Bayside Drive, #280
Corona del Mar, CA 92625
Tel: 949-640-8999
Fax: 949-640-8330

From: Nicholas Dreher [mailto:ndreher@coastal.ca.gov]
Sent: Fri 12/9/2011 4:42 PM
To: Stacey, Sherman
Cc: Lee McEachern
Subject: RE: Okun

Hello Mr. Stacey,

Over the last couple weeks, I left a couple voicemails for you and I believe a couple emails asking whether or not it was your (your client's) desire to go to the January hearing, or whether February or March would be acceptable. At this point, staff is still discussing an approval recommendation with certain conditions, but we need additional time to continue our discussions. We hope to have a much better sense of our recommendation in the coming weeks, but January might not be possible. If January is your preference, I will discuss it with Lee to see what we can do. In any case, we will set up a meeting with you in the coming weeks to discuss our recommendation.

Nicholas B. Dreher
Coastal Program Analyst
California Coastal Commission
(415) 904-5251
ndreher@coastal.ca.gov

From: Stacey, Sherman [mailto:sstacey@gaineslaw.com]
Sent: Friday, December 09, 2011 4:32 PM
To: Nicholas Dreher
Cc: Lee McEachern
Subject: Okun

Nick:

Do you have any desire to meet or have a telephone conference before you complete your report for the January hearing?

Sherman L. Stacey, Esq.
Gaines & Stacey, LLP

1111 Bayside Drive, #280
Corona del Mar, CA 92625
Tel: 949-640-8999
Fax: 949-640-8330

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W102:b

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- Torrey Pines*

Chairperson Mary Shallenberger
and Coastal Commissioners
California Coastal Commission
San Diego Area Office
7575 Metropolitan Avenue, #103
San Diego, California 92108

**RE: Nos. A-6-ENC-09-040 & A-6-ENC-09-041 (Okun)
820 & 828 Neptune Avenue, Encinitas**

Dear Chairperson Shallenberger and Commissioners:

I am sending this letter in support of Dr. Leonard Okun who is one of my constituents. On July 11, 2012, you will hold a hearing on an appeal of the decisions of the City of Encinitas related to two single family houses proposed by Dr. Leonard Okun. I would like to be at your hearing but my obligation to attend a Board of Supervisors meeting prevents my attendance. Therefore, I am writing to convey the reasons I support Dr. Okun's request that a reasonable setback be applied. A setback of 40 feet from Dr. Okun's retaining wall was approved by the City of Encinitas and is reasonable. The 65 feet recommended by your staff by Special Condition No. 1 is not reasonable and should not be imposed. It will leave him with insufficient room to build reasonably sized homes that conform to the neighborhood character.

In 1996, Dr. Okun almost lost his home to a landslide. Over the next 10 years he obtained all of the necessary permits from your Commission to construct a seawall, a mid bluff fill, and an upper bluff retaining wall. All of these walls were engineered and designed to last a lifetime. I have read your Staff Report and all of the geologists and engineers agree that the existing walls adequately protect the homes which Dr. Okun has proposed and, if maintained, will last the lifetime of the project. Despite the uncontested evidence of stability, your Staff Report asks you to assume that the shoreline protection does not exist. You approved the seawalls and never indicated that he could not rely upon those stabilization devices. How can you justify severe restrictions on property by applying assumptions you know are not true?

County Administration Center • 1600 Pacific Highway
(619) 531-5533 • Toll Free
Email: pam.slater@scsd.gov

**LETTER OF OPPOSITION TO
STAFF RECOMMENDATION**

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A setback that destroys Dr. Okun's use and enjoyment of his property is unfair and unneeded. The impacts of the shoreline protection have already been evaluated, mitigated and approved by your Commission. Dr. Okun's homes do not impose any additional impacts on coastal resources. The homes are already set back substantially farther from the bluff than any other homes in the area. Dr. Okun followed all of the rules and obtained all of the required permits. You should not apply some new set of rules to Dr. Okun which are not clearly set out in your Local Coastal Program. Local governments and property owners have relied upon your approval of Local Coastal Programs to locally administer the Coastal Act. You undermine that authority if you let new rules be invented that are not created properly in the Local Coastal Program amendment process.

I urge you to remove Special Condition No. 1 from the action which you take on July 11.

Sincerely,



PAM SLATER-PRICE
District 3 Supervisor
San Diego County Board of Supervisors

PSP/sk

TO: The California Coastal Commission

From: Carolyn Jones
843 Neptune Avenue
Leucadia, California

RECEIVED

JUL 09 2012

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COUNTY

Re: Permit No. A-6-ENC-09-040/A-6-ENC-09-041

Date: July 9, 2012

I strongly object to the proposed construction at 828 Neptune Avenue. I have lived here for 22 years, in what the City of Encinitas calls the "slide zone." They are poor stewards of the Coastal Act; for example, I had to berate the Department of Parks and Recreation for several weeks this winter to put up signs warning people to stay off the bluffs at Beacon's Beach, where climbing and digging are epidemic. They put a very few signs up finally, but they are ignored.

LETTER OF OPPOSITION

79

There is no enforcement of Coastal protection measures; in fact there is an illegal gravel dump on the slope adjacent to the proposed project. What's more, the illegal path carved into the bluff by the gravel workers has now become a sanctioned shortcut to the beach. The City of Encinitas has, however, put up numerous signs in the Beacons parking lot warning visitors to park at their own risk because of possible bluff failure.

There is no stabilizing Torrey Sandstone present, only Del Mar Shale, capped by Baypoint or Linda Vista, all of which is extremely fragile.

Commissioners, I beseech you to  reject this project. I close with this

quote from the LA TIMES editorial of July 2, 2012:

The UCLA study was followed... by a National Research Council report predicting that rises in the sea level will be more dramatic along the California coast than the global average, with a rise of up to a foot in 20 years and possibly more than 5 feet by the end of the century. It sets the stage for catastrophic flooding... and erosion of coastal cliffs and beaches.

My husband and I know two people in Encinitas who have lost family members to spontaneous bluff failures. Let us not merely hope for a more secure future, please assist us in planning for it.

Thank you.

81

W102:b

July 9, 2012

CONCUR with staff recommendations

California Coastal Commissioners
c/o Lee McEachren, San Diego Office

RE: #A-6-ENC-09-040/A-6-ENC-09-041
Applicant: Len Okun
Project Location: 828 Neptune Avenue, Encinitas

RECEIVED
JUL 09 2012

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Dear Commissioners:

My wife and I have owned 836-838 Neptune Ave. for approximately 32 years. We live next door to Len Okun. Our son Kelly has lived in 838 Neptune for 11 years as our manager /tenant. We and some of our neighbors including Len Okun suffered a massive landslide in June of 1996 and have been working with the C.C.C. since to restore our properties.

We CONCUR with the C.C.C. staff recommendation to allow Len to build 2 houses on his lots. Whether those houses should be constructed as the staff recommended, 65 feet back from his upper wall or less involves many factors. One factor is geotechnical history and excavation depths for the proposed basements. From what we have seen online from the C.C.C, it appears that a basement will be excavated approximately 9 feet below grade with foundation footings another 2 feet below that next to our property line. We installed a "deadman" system after the 1996 landslide with an emergency C.C.C. permit. Its purpose was to protect our foundation and house from total collapse onto the beach 85 feet below. The deadman is on our south and north property lines, connected by a high strength cable surrounding the foundation footings and slab.

A shoring wall excavation only 3 to 5 feet away from the deadman and another 4-5 feet to our foundation is a major concern. The proposed 11 foot vertical cut and shoring for the basement of Len's northerly house. Our footings are only 1-2 feet deep.

11 years ago this month, we completed a seawall/backfilling project. The 200 foot wide backfill ran northerly from the seawall of Len's property, across our property, ending on our northerly neighbors, the Sonnies. Our concern now is the proposed vertical cut will be steeper than a 1 to 1 slope. Our house foundation will be approximately 9 feet away from the 11 foot deep cut. The shoring wall itself would be even closer. Our project geotechnical consultant for the last 12 years, Dan Math of CTE in Escondido, is concerned that we do not have any information to review about a shoring system. Today we have asked Len's advisor/applicant, Mr. Sherman Stacey, to provide us a shoring plan. We think that the Commissioners at the least should question the safety of these deep excavations so near our property without any shoring plans. With proper review and possible changes, we would feel much safer. The City of Encinitas may or may not concur with the C.C.C. staff geologists recommendations but shoring plans are the starting point for such a high risk proposal.

Mike and Pat Brown

Mike Brown
Pat Brown

83

Letter of Comment

CALIFORNIA COASTAL COMMISSION

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



W10a & b

49th Day: Waived
SI Found: 8/14/2009
Staff: Nicholas Dreher-SD
Staff Report: 6/25/2012
Hearing Date: 7/11/2012

STAFF REPORT: APPEAL – DE NOVO

Appeal No.: **A-6-ENC-09-040 and A-6-ENC-09-041**

Applicant: **Leonard Okun**

Agent: Sherman Stacey

Location: 828 Neptune Avenue, Encinitas, San Diego County
(APNs 256-011-13, 256-011-02, 256-011-03)

Project Description: Demolish existing one-story, approx. 16 ft. high, approx. 1,200 sq. ft. single-family residence that straddles two lots (lots 18 and 19) which contain an existing seawall, reconstructed midbluff and upper bluff wall and construct:

- 1) On Lot 18, an approximately 5,000 sq. ft. single family residence including garage and basement on a 9,922 sq. ft. coastal blufftop lot (approx. 5,880 sq. ft. for the blufftop and 4,042 sq. ft. for the bluff face).
- 2) On Lot 19, an approximately 5,000 sq. ft. single family residence including garage and basement on a 10,419 sq. ft. blufftop lot (approx. 5,880 sq. ft. for the blufftop and 4,539 sq. ft. for the bluff face).

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends the Commission approve the proposed demolition of the existing residence, and revise the plans for the proposed residences to instead approve an approximately 3,780 sq. ft. building envelope beginning 65 ft. landward of the existing upper bluff retaining wall, spanning lots 18 and 19 of the Applicant's property, upon which the Applicant may design/construct one or two residences or one duplex (see **Exhibit 6**). The City's LCP requires that new residential development be 1) sited so it is safe without the need for future bluff protection; 2) sited in a safe location for a 75 year design life of the structure; and 3) sited no closer than 40 feet from the bluff edge. The primary issues raised by the subject developments relate to landslide potential, bluff stability and the siting of new development in a hazard area so as not to require future shoreline protection that adversely impacts coastal resources. The existing shoreline protection was permitted to protect the existing residence under an emergency permit in 2001 and a follow-up permit to that emergency permit was approved in 2005 (CDP# 6-05-030).

As proposed, the two single-family homes would be set back approximately 40 ft. from the edge of a bluff retaining wall, each with a cantilevered second floor extending 8 ft. (lot 18) and 7.5 ft. (lot 19) toward the retaining wall. However, the actual bluff edge is the natural bluff edge as it existed prior to construction of the upper bluff stabilization measures, rather than the retaining wall and fill behind the wall. Thus, as proposed, the homes would be sited closer to the actual bluff edge than permitted by the City's LCP. Notwithstanding this issue, using assumptions regarding the composition of the bluff required by the Commission's geologist, the applicant's technical experts have determined (and the Commission staff geologist concurs) that due to the landslide potential that exists, there is no safe location to site new development for a 75 year design life on the bluff top lots without the need for shoreline protection. In other words, the only way to find the new proposed homes will be safe for at least 75 years is to assume the existing shore and bluff protection will remain in its current stable condition or that new shore and bluff protection will be constructed in the future.

When the Commission finds a project inconsistent with the LCP and accordingly subject to denial, the question sometimes arises whether the Commission's action constitutes a "taking" of private property without just compensation, as this is not allowed under the Fifth Amendment of the United States Constitution or under Section 30010 of the Coastal Act. Application of IP Section 30.34.020, by itself, would require denial of the project, because the project would not be safe for a minimum 75-year design life, and it would be approximately 20 feet from the natural bluff edge, where no less than a 40 ft. setback is the standard. Thus, staff recommends the Commission approve some new development, as described below, to avoid a potential taking of private property without just compensation.

The Applicant's technical experts and the Commission's staff geologist agree that there is a location to site development that is safe today, even without reliance on the existing bluff protection, which begins 63 feet landward of the retaining wall. This setback is also consistent with the LCP requirement that development be setback no less than 40 feet

from the bluff edge. The Applicant's geotechnical experts have demonstrated that development can be safely sited on the blufftop lot today and have assured staff that without the seawall, which was designed and constructed to protect the existing residence proposed to be demolished, two residences can be safely sited 63 feet from the upper bluff retaining wall on this bluff top lot (approximately 50-60 feet from the natural bluff edge). While safe today, the portion of the lot beginning 63 feet landward of the retaining wall still would not provide a reasonably safe site upon which to site development for a minimum 75-year design life without the need for future shoreline protection.

Accordingly, staff recommends a 65-ft setback, which establishes an approximately 3,780 sq. ft. building envelope (with side yard setbacks of 5 ft. and front yard setback of 20 ft.). Staff is recommending the Commission approve this development envelope as the most landward location to site residential development while avoiding a potential taking and as an area consistent with the LCP to the maximum extent possible under these site specific circumstances. This development envelope could accommodate development of one residence, two residences or a duplex (one structure with two living units). These uses and this development intensity would be consistent with development in the surrounding area. For purposes of slope stability, there is no significant difference between one or two homes/structures; however, there could potentially be two separate owners in the future who would be bound by the conditions of approval of this CDP for the residence. **Special Condition 1** requires revised plans to be submitted to the Executive Director to approve the resulting revised development plans consistent with the Commission's action.

Special Conditions 2 and 3 require the Applicant to submit a study, subject to the Executive Director's review and approval, to reassess the stability of the home 10 years from the approval of this permit and every 10 years thereafter, to ensure the subject development remains safely sited taking into consideration status of the previously approved seawall (CDP #6-05-030), which, through condition of approval, must either be removed or re-approved subject to additional mitigation by July 2022. If the required study shows that the principal structure(s) is no longer safely located, the Applicant(s) are required to submit a permit amendment to undertake measures required to remove the residence(s) or reduce the size of the residence(s) to reduce the hazard potential.

Therefore, Staff is recommending approval of the demolition as proposed and is recommending that the proposed development be revised (the Applicant may choose one residence, two residences or a duplex) and confined to an approximately 3,780 sq. ft. building envelope beginning no less than 65 ft. from the upper bluff retaining wall (see **Exhibit 6** for approximate location), to ensure any approved development is consistent with the City of Encinitas' certified Local Coastal Plan to the maximum extent possible under these site specific circumstances.

Commission staff recommends **approval** of coastal development permits A-6-ENC-09-040 and A-6-ENC-09-041, as conditioned.

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APPENDICES

Appendix A – Substantive File Documents

EXHIBITS

Exhibit 1 – Location Map

Exhibit 2 – Project Plans (2a-1)

Exhibit 3 – Aerial View

Exhibit 4 – Beach View

Exhibit 5 – Staff Memoranda

Exhibit 6 – Staff Recommended Development Envelope

Exhibit 7 – Open Space Bluff Face Restriction

I. MOTIONS AND RESOLUTIONS

Motion 1:

I move that the Commission approve Coastal Development Permit No. A-6-ENC-09-040 pursuant to the staff recommendation.

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

Resolution:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development will be in conformity with the policies of the certified LCP and the public access policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because there are no feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

Motion 2:

I move that the Commission approve Coastal Development Permit No. A-6-ENC-09-041 pursuant to the staff recommendation.

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

Resolution:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development will be in conformity with the policies of the certified LCP and the public access policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because there are no feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

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

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Final Revised Plans.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for review and written approval of the Executive Director, final plans for the proposed development chosen by the Applicant as either one residence, two residences or one duplex structure within the approved 3,780 sq. ft. building envelope described in section 1 below. Said plans shall first be approved by the City of Encinitas and be revised as follows:
 - (1) The Applicant shall submit a surveyed site plan depicting a development envelope located no less than 65 feet landward of the existing upper bluff retaining wall, to be surveyed by a licensed surveyor to determine the exact building area on the blufftop lot, including the location of the retaining wall, natural bluff edge, side yard setbacks, front yard setbacks and property lines;

- (2) The surveyed location of either one single family residence, one duplex, or two single family residences (one on each lot), that are consistent with all of the following criteria:
 - (a) The residence(s) are to be sited entirely within the surveyed building envelope that begins at no less than 65 feet landward of the existing upper bluff retaining wall;
 - (b) The residence(s) must be designed so that they can easily be removed once the approved location is no longer safe;
 - (c) The residence(s) must conform in height, size, and bulk with the applicable zoning regulations and be keeping with the character of the surrounding area;
 - (d) The residence(s) may include a basement level;
 - (e) The residence(s) may include a reduced front yard setback (if approved pursuant to a variance from the City of Encinitas);
 - (f) All runoff from the site shall be collected and directed away from the bluff edge towards the street; and
 - (g) Existing and any proposed accessory improvements (i.e., patios, walls, windscreens, etc.) located in the geologic setback area on the site shall be detailed and drawn to scale on the final approved site plan and shall include measurements of the distance between the accessory improvements and the natural bluff edge taken at 3 or more locations. The locations for these measurements shall be identified through permanent markers, benchmarks, survey position, written description, or other method that enables accurate determination of the location of structures on the site. All existing and proposed accessory improvements shall be placed at grade, be capable of being removed if threatened and located no closer than 5 feet landward of the natural bluff edge.

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

2. **Limited Approval for Structures on Property.** By acceptance of this permit, the applicant agrees, on behalf of himself and all successors and assigns, to the following limitations on use of the blufftop residential parcels (APNs 256-011-13, 256-011-02, 256-011-03):
 - (A) The applicant agrees to remove the approved residence(s), either in part or entirely, should it become unsafe for occupancy in the future;
 - (B) Every ten years from the date of approval of this CDP (i.e., the first date being July 11, 2022), the permittee(s) shall submit a geotechnical/engineering report

assessing bluff stability and whether the approved residence(s) remains in a safe location. To comply with this condition, the permittee(s) and/or successor(s) in interest shall submit to the Commission a site assessment evaluating the site conditions to determine whether or not alterations to the residence(s) or removal of the residence(s) is necessary to avoid risk to life or property. In the event more than one residence or unit is developed as a result of this approval, and more than one owner is associated with this property as a whole, all owners must submit an application to the Commission as co-applicants;

- (C) The study shall be based upon a site specific analysis of site stability, bluff alteration due to natural and manmade processes, and the hazard potential at the site. The required study shall include the following:
- (1) An analysis of site stability based on the best available science and updated standards, of beach erosion, wave run-up, sea level rise, inundation and flood hazards prepared by a licensed civil engineer with expertise in coastal engineering and a slope stability analysis, prepared by a licensed Certified Engineering Geologist and/or Geotechnical Engineer or Registered Civil Engineer with expertise in soils, in accordance with the procedures detailed in the Local Coastal Program (LCP) and the City Zoning Code;
 - (2) An analysis of the condition of the existing shoreline and bluff protection and any impacts it may be having on public access and recreation, scenic views, sand supplies, and other coastal resources. Pursuant to the requirements of CDP # 6-05-030, the submittal shall include an evaluation of the means to remove the existing shoreline protection which was permitted to protect the existing structure to be demolished; and
 - (3) An evaluation of the means to remove in whole or in part the subject permitted residence(s) if and when either becomes unsafe for occupancy.

The bluff stability analysis required pursuant to this condition shall be submitted concurrent with the CDP amendment required pursuant to CDP # 6-05-030 for the existing, previously-permitted seawall and bluff retention devices. No removal, modification or expansion of the approved residence(s), shoreline protection, or additional bluff or shoreline protective structures shall occur, without approval of an amendment to CDP #A-6-ENC-09-040 & 041 by the Coastal Commission.

The submitted analysis shall address all the structures existing on the subject property and, depending on the results of the bluff stability analysis, include proposals to remove or retain the existing residences, seawall and bluff stabilization measures. If the required study shows that the principal structure(s) is no longer safely located, the permittee(s) shall submit a permit amendment to undertake measures required to remove the

residence(s) or reduce the size of the residence(s) to reduce the hazard potential.

3. No Future Bluff or Shoreline Protective Device.

- (A) By acceptance of this permit, the applicant agrees, on behalf of himself and all successors and assigns, that the residence(s) will remain only as long as it is reasonably safe from failure and erosion without having to propose any shore or bluff stabilization to protect the residence(s) in the future. Thus, no new bluff or shoreline protective device(s), including reconstruction of existing bluff and shoreline protective devices, shall be constructed or undertaken to protect the development approved pursuant to Coastal Development Permit Nos. A-6-ENC-09-040/-041, including, but not limited to, the residence(s) with the attached garage, patio and BBQ area, and driveway in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, ground subsidence or other natural hazards in the future;
- (B) By acceptance of this Permit, the applicant further agrees, on behalf of himself and all successors and assigns, that the landowner(s) shall remove the development authorized by this permit, including the residence(s) with the attached garage, and driveway if any government agency has ordered that the structures are not to be occupied due to any of the hazards identified above. In the event that portions of the development fall to the beach before they are removed, the permittee(s) shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit; and
- (C) In the event the edge of the bluff recedes to within 10 feet of the principal residence(s) but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed geologist or civil engineer with coastal experience retained by the permittee(s), that addresses whether any portions of the residence(s) are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the principal residence(s) without shore or bluff protection, including but not limited to removal or relocation of portions of the residence(s). The report shall be submitted to the Executive Director and the appropriate local government official. If the Executive Director determines based on the geotechnical report that the residence(s) or any portion of the residence(s) is unsafe for occupancy, the permittee(s) shall, within 90 days of submitting the report, apply for a coastal development permit amendment to remedy the hazard which shall include removal of the entire residence or threatened portion of the structure.

4. **Deed Restriction.** PRIOR TO ISSUANCE OF THE 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 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.

5. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the applicant acknowledges and agrees: (i) that the site may be subject to hazards from landslide, bluff retreat, erosion, subsidence, and earth movement; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

6. **Best Management Practices and Construction Responsibilities.** The permittee(s) shall comply with the following construction-related requirements:
 - (A) All debris resulting from demolition and construction activities shall be removed and disposed of at an authorized disposal site;

 - (B) Temporary sediment control Best Management Practices (BMPs) such as straw bales, fiber rolls, or silt fencing shall be installed prior to, and maintained throughout, the construction period to intercept and slow or detain runoff from the construction, staging, and storage/stockpile areas, allow entrained sediment and other pollutants to settle and be removed, and prevent discharge of sediment and pollutants toward the bluff edge. When no longer required, the temporary sediment control BMPs shall be removed. Fiber rolls shall be 100% biodegradable, and shall be bound with non-plastic biodegradable netting such as jute, sisal, or coir fiber; photodegradable plastic

netting is not an acceptable alternative. Rope used to secure fiber rolls shall also be biodegradable, such as sisal or manila; and

- (C) On-site vegetation shall be maintained to the maximum extent possible during construction activities;

7. **Final Landscaping Plan.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and written approval final landscaping plans approved by the City of Encinitas. The plans shall be updated to reflect the approved development envelope pursuant to **Special Condition 1** and must otherwise be in substantial conformance with the conceptual landscape plans by Cohn and Associates, dated 10/28/2008, and shall include the following:

- (A) All landscaping shall be drought-tolerant and native or non-invasive plant species. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property;
- (B) Any existing permanent irrigation located on the bluff top site shall be removed or capped and no permanent irrigation system may be installed;
- (C) A written commitment by the applicant that, five years from the date of the issuance of the coastal development permit for the residential structure, the applicant will submit for the review and written approval of the Executive Director a landscape monitoring report prepared by a licensed Landscape Architect or qualified Resource Specialist that certifies whether the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition.

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

The permittee shall undertake the development in accordance with the approved landscape plans. Any proposed changes to the approved plans shall be reported to the

Executive Director. No changes to the plans shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is legally required.

8. **Future Development.** This permit is only for the development described in coastal development permit No. A-6-ENC-09-40 & 41. Pursuant to Title 14 California Code of Regulations Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) shall not apply. Accordingly, any future improvements to the proposed single family residence(s), including but not limited to repair and maintenance identified as requiring a permit in Public Resources Code section 30610(d) and Title 14 California Code of Regulations section 13252(a)-(b), shall require an amendment to permit No. A-6-ENC-09-40 & 41 from the California Coastal Commission or shall require an additional coastal development permit from the California Coastal Commission or from the applicable certified local government.
9. **Open Space Bluff Face Restriction.** No development, as defined by Section 30106 of the Coastal Act, shall occur seaward of the upper bluff retaining wall on the parcels governed by this permit, except for: (a) repair and maintenance of existing seawalls and bluff protective devices and (b) maintenance of landscaping.

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction, prepared by a licensed surveyor, of the portion of the subject property affected by this condition, as generally described above and shown on **Exhibit 7** attached to this staff report.

IV. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION

The project as approved by the City involves the demolition of an existing one-story, 16 ft. high, approximately 1,200 sq. ft. single-family residence, built in 1929, that straddles two lots (Lots 18 and 19), and the construction of a 2,986 sq. ft. two-story, 25 ½ -ft high single-family home with a 447 sq. ft. garage and a 1,677 sq. ft. basement (total building area of 5,110 sq. ft.) on a 9,922 sq. ft. coastal blufftop lot (Lot 18) and construction of a 3,136 sq. ft. two-story, 25 ½ -ft. high single-family home with 459 sq. ft. garage and 1,798 sq. ft. basement (total building area of 5,393 sq. ft.) on a 10, 419 sq. ft. coastal blufftop lot (Lot 19). The Lot 18 residence will be located 40 ft. landward of an artificial bluff retaining wall and the second floor will be cantilevered 8 ft. seaward of the first floor and the Lot 19 residence will be located 40 ft. landward of an artificial bluff retaining wall and the second floor will be cantilevered 7.5 ft. seaward of the first floor. While Lot 18 is 9,922 sq. ft., the blufftop area where the new home is proposed is comprised of approximately 5,880 sq. ft., with the bluff face consisting of approximately

4,042 sq. ft. Similarly, while Lot 19 is 10,419 sq. ft., the blufftop area where the new home is proposed is comprised of approximately 5,880 sq. ft., with the bluff face consisting of approximately 4,539 sq. ft.

B. HISTORY OF SITE AND SURROUNDING AREA

In 1996, the bluff fronting the subject residence sustained a major landslide, followed by a series of smaller sloughages/landslides that eventually led to the loss of an approximately 300¹ sq. ft. portion of the residence. The landslides extended to two lots south of the subject site and three lots north. As a result of these landslides, the Executive Director approved emergency permits in 1996 authorizing a series of measures to temporarily protect the residence until more substantive measures could be designed and implemented. These included the use of soil nails, chemical grouting, the placement of riprap at the toe of the landslide and underpinning of the residence. Of these, only the underpinning of the residence subsequently occurred (ref. Emergency Permit 6-96-96-G/Okun). In January of 2001, the Executive Director authorized an emergency permit for the construction of a 100 ft.-long, 20 to 27 ft. high seawall with tiebacks and backfill (ref. Emergency Permit #6-01-005/Okun) to protect the existing home. Since the work was not completed before the emergency permit expired, the Executive Director authorized a new emergency permit for the seawall's completion in June of 2001 (ref. Emergency Permit #6-01-85-G/Okun). The applicant was informed (in the context of each emergency permit authorization) and signed an acknowledgement that the work authorized by the permit was "temporary and subject to removal if a regular Coastal Permit is not obtained to permanently authorize the emergency work" and that any such permit may be subject to special conditions.

Because of winter storms that occurred during the construction, the Executive Director also authorized the temporary placement of riprap seaward of the seawall to protect a construction platform/ramp (ref. Emergency Permit 6-01-011-G/Okun). During construction of the seawall, the Executive Director also authorized the construction of an approximately 100 ft.-long upper bluff retaining wall, approximately 14 to 20 ft.-high to be placed approximately 20 ft. seaward of the bluff edge and backfilled (ref. Emergency Permits #6-01-40-G/Okun, 6-01-62-G/Okun and 6-02-074-G/Okun). The upper wall was proposed to be colored and textured to match the natural bluff. At the time of the Executive Director's authorization of the emergency permit for construction of this upper bluff wall, portions of the residence were undermined such that they extended approximately 10 ft. seaward of the eroded bluff edge.

Both the seawall and upper bluff retention systems authorized by the emergency permits were subsequently constructed. In addition, although soil was approved to backfill the area between the seawall and the upper bluff retaining wall, the applicant substituted gravel for the soil in violation of the emergency permit. The gravel was highly visible and not in character with the natural appearance of the bluffs along this section of

¹ The 300 sq. ft. figure is the result of subtracting the current area estimation provided by the applicant (1,200 sq. ft.) from the total area identified on Redfin.com (approximately 1527 sq. ft.).

coastline. The upper bluff retaining wall and backfill behind the seawall lie within the City of Encinitas' coastal development permit jurisdiction. On March 3, 2005, the City approved the required follow-up regular coastal development permit for the residential underpinning, upper bluff wall and backfill material as they were constructed pursuant to the emergency permit, with the exception of the gravel which was not permitted. To mitigate the visual impacts of the gravel material that was placed without authorization, the City required that a portion of the gravel be removed and be replaced by soil and landscaping. In the area where gravel could not be completely removed, the City required the gravel be covered by soil and landscaped. That action by the City was not appealed to the Coastal Commission.

In September of 2005, the Commission approved the required follow-up regular coastal development permit for the construction of a 100 ft.-long, 20-27 ft. high seawall at the base of the bluff subject to several special conditions including a requirement that the seawall be monitored and maintained in its approved state (ref. CDP #6-05-30/Okun). Special Condition #3 required an \$11,687.20 in-lieu fee for partial sand supply mitigation, which the applicant paid to SANDAG on October 6, 2005. Special Condition #3 also required the permittee (subject Applicant) or successor to apply for and obtain a permit amendment that either 1) requires the removal of the seawall within its initial design life (22 years) or 2) requires reapproval subject to additional mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life. Special Condition #5 of that permit required that monitoring reports be submitted for Executive Director review every year for three years and then every three years thereafter for the life of the seawall. Although the seawall was completed in 2005, the applicant has failed to submit any of the monitoring reports as required by Special Condition #5 of the seawall permit, in an apparent violation of Coastal Development Permit #6-05-30.

In 2005, there were two unrelated applications similar to the subject proposed development located approximately 5 blocks south of the subject site, which the City of Encinitas approved (ref. Encinitas CDP Nos. 01-196 and 01-197/Bradley). These involved the demolition of an existing smaller home straddling the lot line of two lots and the subsequent construction of a new home on each of the blufftop lots. An existing seawall and mid and upper bluff walls protected the home and similar to the existing application, there was no safe location on the lots that would not require protection over the life of the structures. Those projects were not appealed to the Commission.

The coastal development permit for the present project (Okun) was originally approved by the City of Encinitas Planning Commission on June 4, 2009. On July 7, 2009, the project was appealed to the Coastal Commission and at its August 14, 2009 hearing, the Commission found Substantial Issue exists with respect to the grounds on which these two appeals were filed.

The City of Encinitas approved two separate CDPs and thus there are two separate appeals/CDP applications. The applicant is the same for each CDP application and the property involved consists of two contiguous lots (18 and 19). The two proposed projects

share similar issues and the applications are best understood if evaluated jointly. As a result, the de novo review is combined into one staff report; however, because the applications were considered separately by the City, there is a separate motion and resolution necessary for each Commission action (see page 5).

On December 9, 2009, Commission staff requested additional information regarding the project, specifically related to the required monitoring reports and the adequacy of the existing shore and bluff protection. On January 11, 2010, staff received the Applicant's Monitoring Report, Dated December 2009. While staff reviewed the submitted materials and discussed the content with the Applicant, it was made clear to staff that a local San Diego hearing was the most desirable to the Applicant and requested delay of a hearing until it was local. On September 30, 2010, staff received an email from Mr. Stacey, requesting the October meeting in Oceanside (San Diego County).

On November 3, 2010, Commission staff issued a De Novo staff report for the November 17, 2010 Commission Hearing in Santa Monica, recommending denial of the proposed project. On November 12, 2010, staff received a letter wherein the applicant exercised his right to postponement, pursuant to Title 14 of the California Code of Regulations Section 13073. On December 3, 2010, Mr. Stacey informed staff that he intended to submit additional materials in light of the previously released staff recommendation. On December 8, 2010, Mr. Stacey informed staff that the preparation of the additional information he intended to send had been delayed and that he understood the January 2011 hearing would not be possible.

On January 10, 2011, staff received a supplemental geotechnical report including site borings dated January 7, 2011, in response to certain findings made in the 2010 de novo staff recommendation report. On January 13, 2011, Staff met with the applicant's representative, Sherman Stacey, via phone conversation, wherein Staff reaffirmed its denial recommendation, even in light of the new geotechnical information, as the new information did not conclusively rule out the existence of a clay seam layer within the bluff. On January 18, 2011, the applicant's geotechnical expert submitted additional boring logs and a report regarding the existence of a clay seam layer within the bluff.

On January 19, 2011, the Commission's geologist requested additional materials from the applicant's geotechnical experts via email. On February 7, 2011, the applicant's geotechnical experts discussed the project with Commission staff and subsequently information regarding clay seams was sent to the applicant's experts so they could continue their analysis. On March 17, 2011, the applicant's representative contacted staff to state that 1) additional geotechnical analyses and an analysis of factors related to a regulatory "takings" claim were forthcoming and 2) that he hoped for a June hearing date.

On May 2, 2011, staff received updated geotechnical analyses from the applicant's experts. When submitted, staff made it clear given the approaching deadlines that June would not be possible and that more time would be necessary to review the submitted material. Staff contacted Mr. Stacey by phone on August 25, 2011 and Mr. Stacey asked

that this item be scheduled for the November 2011 hearing and that he planned to send staff the takings analysis sometime around Labor Day weekend. On September 2, 2011, staff received an email from Mr. Stacey that read: "If you can confirm scheduling of Okun hearing for November, I will get you my memorandum on taking by the end of next week." On September 16, 2011, staff received the takings analysis (15 pages) from Mr. Stacey via email, wherein Mr. Stacey requested a meeting sometime prior to the November 2011 hearing. On October 10, 2011, Staff received an email from Mr. Stacey, wherein he restated his desire to have a meeting to discuss the staff recommendation and stated that the applicant was amenable to revisions to the project description involving caisson supports. On October 13, 2011, staff informed Mr. Stacey via phone call that staff would not be prepared to make a recommendation to the Commission in November 2011, in order to more thoroughly evaluate the analysis Mr. Stacey provided regarding takings in the hopes of approving the project with conditions. During the October 13, 2011 phone conversation with staff, Mr. Stacey discussed the possibility of a January 2012 or March 2012 hearing date.

During November and December of 2011, staff left voicemail messages for Mr. Stacey, attempting to contact him to discuss a timeline for a hearing and whether January was the Applicant's preference. On December 9, 2011, staff received an email from Mr. Stacey asking whether staff would like to meet to discuss the recommendation for a January 2012 hearing date. On December 9, 2011, staff responded via email that March, not January would be better to allow staff time to better evaluate an approval with conditions recommendation. On December 12, 2011, staff received an email from Mr. Stacey regarding his disappointment that staff would not be bringing the recommendation to the January 2012 hearing and the March hearing was not acceptable. On December 14, 2011, Staff informed Mr. Stacey that staff was continuing to have internal discussions on this matter in order to try to get to a recommendation of approval. On January 12, 2012, staff received an email from Mr. Stacey requesting a meeting with staff and alerting staff to a study he intended to submit to staff. Shortly thereafter, a meeting was scheduled for February 13, 2012. On January 20, 2012, staff received from Mr. Stacey, a 200+ page study of development along Neptune Avenue and nearby streets in Encinitas, California, dated January 16, 2012. On February 13, 2012, staff met with Mr. Stacey to discuss the project and informed him at that time that additional time would be needed to properly evaluate the voluminous study provided and that therefore a March hearing date would not be possible. In April 2012, Mr. Stacey requested that staff take a recommendation to the June hearing. In May 2012, Mr. Stacey threatened to file a request in court to issue an order directing Commission staff to take this item to hearing in July 2012.

C. STANDARD OF REVIEW

After the Commission has certified a Local Coastal Program (LCP), Section 30603 of the Coastal Act provides for appeals to the Coastal Commission of the certified local government's actions on certain types of development applications (including those proposing development between the sea and the first public road paralleling the sea and development within 300 feet of the top of the seaward face of any coastal bluff). In this case, the City of Encinitas Planning Commission's June 4, 2009 approval was appealed

to the Commission in July of 2009, and the Commission opened a public hearing on August 14, 2009, and found that the appeal raised a substantial issue.

In its “de novo” review of this application, the Commission’s standard of review for the proposed development is whether it would conform with the policies and provisions of the City of Encinitas Local Coastal Program (LCP), which was certified by the Commission in November of 1994, and the public access and recreation policies of the Coastal Act. The LCP consistency issues raised by the proposed development are discussed in the following sections.

D. COASTAL BLUFFTOP SETBACK

Section 30.34.020(B) of the City’s certified Implementation Plan states, in part:

In addition to development and design regulations which otherwise apply, the following development standards shall apply to properties within the Coastal Bluff Overlay Zone. In case of conflict between the following standards and other standards, regulations and guidelines applicable to a given property, the more restrictive shall regulate.

- (1) *With the following exceptions, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. Exceptions are as follows:*
 - a. *Principal and accessory structures closer than 40 feet but not closer than 25 feet from the top edge of the coastal bluff, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below. This exception to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is setback a minimum of 25 feet from the coastal blufftop edge and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future. Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.*
 - b. *Minor accessory structures and improvements located at grade, including landscaping, shall be allowed to within 5 feet of the top edge of the coastal bluff. Precautions must be taken when placing structures close to the bluff edge to ensure that the integrity of the bluff is not threatened. For the purposes of the Coastal Bluff Overlay Zones, "minor accessory structures and improvements" are defined as those requiring no City approval or permit including a building or grading permit, and not attached to any principal or accessory structure which would require a permit. Grading for reasonable*

pedestrian access in and around a principal or accessory structure may be permitted by the City Engineer following review of a site specific soils report.

- c. Essential public improvements providing coastal access, protecting natural resources, or providing for public safety, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below, including but not limited to, walkways leading to approved public beach access facilities, open fences for safety or resource protection, public seating benches, lighting standards, and signs.*
- d. Drainage improvements within 5 feet of the top edge of coastal bluff as required to satisfy Section 30.34.020(B)5 of this Code.*

[...]

In addition, Section 30.34.020(C)(1) contains similar restrictions:

DEVELOPMENT PROCESSING AND APPROVAL. In addition to findings and processing requirements otherwise applicable, the following establishes specific processing and finding requirements for proposed development within the Coastal Bluff Overlay Zone. The Planning Commission shall be the authorized agency for reviewing and granting discretionary approvals for proposed development within the Coastal Bluff Overlay Zone. Recommendations to the Planning Commission shall come from staff and qualified City Consultants. (Ord. 96-07)

- (1) Development and improvement in compliance with the development standards in paragraph B "Development Standards", proposing no structure or facility on or within 40 feet of the top edge of the coastal bluff (except for minor accessory structures and improvements allowed pursuant to Section 30.34.02(B)1b, and proposing no preemptive measure as defined below), shall be subject to the following: submittal and acceptance of a site-specific soils report and geotechnical review described by paragraph D "Application Submittal Requirements" below. The authorized decision-making authority for the proposal shall make the findings required based on the soils report and geotechnical review for any project approval. A Second Story cantilevered portion of a structure which is demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area may be permitted 20% beyond the top edge of bluff setback if a finding can be made by the authorized agency that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure. (Ord. 92-31)*

The project is not an addition or expansion and, thus, does not involve the above-cited exceptions to the 40 ft. minimum setback from the bluff edge for new development, therefore, the new residence must be sited no closer than 40 ft. inland of the natural bluff edge. In addition, "bluff edge" is defined in the City's certified IP as:

***BLUFF EDGE** shall mean the upper termination of a bluff. When the top edge of the bluff is rounded away from the face of the bluff as a result of erosional processes related to the presence of the steep bluff face, the edge shall be defined as that point nearest the bluff beyond which the downward gradient of the land surface increases more or less continuously until it reaches the general gradient of the bluff. In a case where there is a step-like feature at the top of the bluff face, the landward edge of the topmost riser shall be taken to be the bluff edge. In those cases where irregularities, erosion intrusions, structures or bluff stabilizing devices exist on a subject property so that a reliable determination of the bluff edge cannot be made by visual or topographic evidence, the Director shall determine the location of the bluff edge after evaluation of a geologic and soil report.*

One of the concerns raised by the proposed development is that the City relied on an incorrect bluff edge in order to measure the 40 ft. setback. As noted previously, the subject site includes existing shore and bluff protection. At the time of the upper bluff failures, a significant portion of the upper bluff collapsed, resulting in the loss of the western portion of the home with the bluff edge extending under the remaining residence. In order to protect the existing home, an upper bluff wall was necessary (and approved) that consisted of construction of a bluff retaining wall seaward of the home, and the placement of fill material between the bluff edge and retaining wall so that there was a small area of “land” created between the home and the protection. The City, in its review, determined that the bluff edge for purposes of setbacks for the new homes would be measured from the edge of the retaining wall, rather than the from the top of the bluff as it existed before the retaining wall and fill were added to the property.

A retaining wall with backfill is not the same as the bluff edge. The IP provision defining “bluff edge” provides direction on how to determine the bluff edge when “bluff stabilizing devices exist on a subject property.” Specifically, the location of the bluff edge must be determined after evaluating geologic and soils reports. If the bluff edge were the edge of the bluff stabilizing device, as the applicant claims, then there would be no need for the IP to include instructions on how to determine the bluff edge when there is a bluff stabilizing device on site. This IP provision is necessary because the existence of upper bluff protection or a reconstructed bluff top can obscure the natural bluff edge, making delineation of the actual bluff edge difficult. The upper bluff protection in this case hides the bluff edge. Thus, pursuant to the IP, a geologic/soil survey must be conducted to determine the bluff edge’s exact location.

In this particular case, the plans approved by the City identified the location of the bluff edge (ref. “Neptune Residence” by Cohn+Associates Architecture Planning dated 12/2/08), and after review of the plans and geotechnical information, the City staff and third party geotechnical reviewer determined the location of the “natural bluff edge” that existed prior to construction of the upper bluff wall, as depicted on the plans. The City Planning Commission, however, erroneously determined that the bluff edge for purposes of setback for the homes should be the edge of the upper bluff wall.

Based upon the siting of the constructed bluff retaining wall and backfill and the historical extent of the natural bluff edge, the Commission finds that the bluff edge for the purposes of determining the geologic setback for the homes meanders between 0 and 12 ft. landward of the present retaining wall. Accordingly, consistent with the IP, the Commission will review the proposed setbacks and siting requirements based upon the bluff edge that existed prior to construction of the bluff retaining wall and the addition of backfill.

E. GEOLOGIC STABILITY.

Section 30.34.020(D) of the City's certified Implementation Plan states, in part:

*APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. **The review/report shall certify that the development proposed will have no adverse effect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future.** [emphasis added]. Each review/report shall consider, describe and analyze the following: (Ord. 95-04)*

- (1) *Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;*
- (2) *Historic, current and foreseeable-cliff erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;*
- (3) *Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features, such as bedding, joints and faults;*
- (4) *Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;*
- (5) *Impact of construction activity on the stability of the site and adjacent area;*

- (6) *Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage;*
- (7) *Potential erodibility of site and mitigating measures to be used to ensure minimized erosion problems during and after construction (i.e., landscaping and drainage design);*
- (8) *Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data; (Ord. 95-04)*
- (9) *Potential effects of seismic forces resulting from a maximum credible earthquake;*
- (10) *Any other factors that might affect slope stability;*
- (11) *Mitigation measures and alternative solutions for any potential impacts.*

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. The report shall use a current acceptable engineering stability analysis method and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project.

In addition to the above, each geotechnical report shall include identification of the daylight line behind the top of the bluff established by a bluff slope failure plane analysis. This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:

- *Cover all types of slope failure.*
- *Demonstrate a safety factor against slope failure of 1.5.*
- *Address a time period of analysis of 75 years.*

[. . .]

In addition, Resource Management (RM) Policy 8.5 of the LUP states, in part, that:

The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards 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, Public Safety (PS) Policy 1.3 of the City's LUP requires that:

The City will rely on the Coastal Bluff and Hillside/Inland Bluff Overlay Zones to prevent future development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse.

In addition, PS Policy 1.6 of the LUP requires that:

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

[. . .]

- (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; and*
- (f) Requiring new structures and improvements to existing structures to be setback 25 feet from the inland blufftop edge, and 40 feet from coastal blufftop edge with exceptions to allow a minimum coastal blufftop setback of no less than 25 feet. For all development proposed on coastal blufftops, a site-specific geotechnical report shall be required. The report shall indicate that the coastal setback will not result in risk of foundation damage resulting from bluff erosion or retreat to the principal structure within its economic life and with other engineering evidence to justify the coastal blufftop setback. [. . .]*

[. . .] In all cases, all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the applicants shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City.

This does not apply to minor structures that do not require a building permit, except that no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary accessory buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet from the bluff top edge; and

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

The subject site is located within the City's Coastal Bluff Overlay Zone and the proposed homes will be sited as close as 28 ft. from the edge of an approximately 96 ft.-high coastal bluff subject to marine erosion. As proposed, the second stories of the new homes will be as close as 20-20.5 ft. from the bluff edge as they will be cantilevered 7.5 to 8 ft seaward of the first floor.

Coastal bluffs in this area are subject to a variety of erosive forces and conditions (e.g., wave action, reduction in beach width, block failures and landslides). As a result, the bluffs and blufftop lots in the Encinitas area are considered a hazard area. Furthermore, in 1986 the Division of Mines and Geology mapped the entire Encinitas shoreline as an area susceptible to landslides, i.e., mapped as either "Generally Susceptible" or "Most Susceptible Areas" for landslide susceptibility (ref. Open File Report, "Landslide Hazards in the Encinitas Quadrangle, San Diego County, California", dated 1986). The Encinitas shoreline has been the subject of numerous Executive Director approved emergency permits for seawall and upper bluff protection devices (ref. Emergency Permit Nos. 6-89-136-G/Adams, 6-89-297-G/Englekirk, 6-93-36-G/Clayton, 6-99-35-G/MacCormick, 6-99-75-G/Funke, Kimball, 6-99-131-G/Funke, Kimball, 6-00-171-G/Brown, Sonnie, 6-01-005-G/Okun, 6-01-040-G/Okun, 6-01-041/Sorich, 6-01-42-G/Brown, Sonnie and ; 6-01-62-G/Sorich). In addition, documentation has been presented in past Commission actions concerning the unstable nature of the bluffs throughout Encinitas (ref. 6-85-396/Swift, 6-92-82/Victor, 6-93-131/Richards, et al, 6-93-136/Favero, 6-95-66/Hann, 6-98-39/ Denver/Canter, 6-98-131/Gozzo, Sawtelle and Fischer, 6-99-9/Ash, Bourgault, Mahoney, 6-99-41/Bradley, 6-00-009/Ash, Bourgault, Mahoney, and 6-03-48/Sorich, Gault and 6-05-30/Okun).

Section 30.34.020(D) of the City's certified IP and Public Safety Policy 1.6 of the LUP require that an applicant provide extensive geotechnical information documenting that any new development on the coastal bluff top will be safe over its lifetime from the threat of erosion so as to not require future shoreline protection. In addition, Public Safety (PS) Policy 1.3 of the City's LUP prevents new development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse.

In documenting that information, the geotechnical report must evaluate many factors, including an estimate of the long-term erosion rate at the site. To that end, the applicant's geotechnical consultants did provide the information required by the LCP. The Commission's staff geologist has reviewed the Applicant's site-specific estimation of

long-term erosion at the subject site and concurs with his estimated erosion rate, based on site-specific historic information. However, the applicant's geotechnical consultants analyzed the site with the existing shore and bluff protection in place and provided little analysis that considered the site without this protection. Approval of protective structures for new development is not consistent with several provisions of the certified LCP.

In addition, in order to find the appropriate geologic setback for new bluff top homes such as those proposed, the LCP requires not only that a long-term erosion rate be adequately identified but also that the geotechnical report demonstrate an adequate factor of safety against slope failure (i.e., landsliding), of 1.5 will be maintained for the entire 75 years (See Section 30.34.020(D) above). Moreover, Section 30.34.020(D) states that "[t]he review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future."

Seawalls and bluff stabilization measures, while formidable, are not permanent structures and have a finite life. They are subject to erosion, wave scour and other forces that ultimately undermine and require repair and/or replacement of such structures. There are numerous examples in San Diego County of seawalls and other bluff stabilization devices collapsing and failing. Moreover, in this case, the design life of the existing seawall is 22 years, and it was constructed 12 years ago. The permit approving that seawall requires the applicant to submit an amendment to remove it or pay additional mitigation in 10 years. The seawall on this property will therefore be reevaluated and potentially removed in 10 years. Thus, to allow the proposed homes to be sited in reliance on existing shore/bluff protection that will not necessarily be there for the 75 year life of the homes, is inconsistent with the LCP provisions cited above. Again, the LCP policies are designed to allow shoreline protection solely to protect existing principal structures in danger from erosion. To allow new structures to be sited and designed in reliance on existing shoreline protection would essentially allow applicants to use shoreline protection to protect new development and perpetuate the presence of shoreline armoring, inconsistent with the LCP. Thus, the Commission must consider where to site the proposed development so that it will not need protection by shoreline protective devices.

The Applicant's geotechnical report of December 15, 2009 states that there is no place on the subject lot where stability can be assured for the next 75 years without reliance on shoreline protective devices. The letter states that "[a]bsent the presence of the existing coastal bluff protective measures, this clay seam failure would remain active and the Okun lots should be deemed undevelopable." Furthermore, the report goes on to say that "[w]ithout the existing coastal bluff protective measures in the area encompassing the Okun property, and to the north and south of the Okun property, all of the residential structures on these lots would remain imminently threatened."

The Commission's staff geologist has reviewed this report and concurs with these findings. The Commission's staff geologist indicates that normal bluff failure

mechanisms along the Encinitas and Solana Beach shoreline include undercutting and/or sloughage due to erosion, whereas the proposed project will be located on a site subject to a landslide threat, which is triggered by an underlying clay seam. To assure that a 1.5 factor of safety would be maintained for the life of any proposed development, the bluff retreat expected over that time would have to be added to the calculation of where the 1.5 factor of safety would be located today. In the absence of a site-specific study, the Commission has typically used a figure of 0.49 ft/yr (adapted from a 1999 study of Benumof and Griggs) for the future long-term average bluff retreat rate in this part of Encinitas. And the applicant's geologists have determined that the 1.5 factor of safety is met at 63 feet from the retaining wall. Assuming a 75-year design life, this translates to 37 feet of bluff retreat. Thus, given this data, to site the development safely without reliance on shoreline protective devices for a 75 year life, the Commission's staff geologist would recommend a 100-foot setback for siting development (63 feet for today's 1.5 factor of safety plus 37 feet of future erosion). The lots are not much more than 100 feet deep, however, so there is no place to site development on these lots consistent with the LCP standard.

In addition to the LCP provisions cited above, Policy 1.3 of the LUP also prohibits "future development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse." The applicant has not demonstrated that the proposed new residences, set as close as 28 ft. from the natural bluff edge, will be safe over their estimated lifetime without reliance on structural measures to protect them. As explained above, the applicant's geotechnical report finds just the opposite, that the proposed residences will not be safe for 75 years without reliance on structural measures, inconsistent with certified LCP standards. Thus, the proposed project is also inconsistent with LUP Policy 1.3.

The applicant has also failed to demonstrate that the proposed homes are consistent with the LCP provision requiring that they be designed and constructed so that they could be removed in the event of endangerment (LUP Public Safety Policy 1.6).

The Applicant's geologist submitted an updated geologic report dated April 19, 2011, which demonstrates to the Commission's staff geologist's satisfaction that a 1.5 factor of safety is obtained today at a point 63 feet landward of the retaining wall, without relying on stability provided by that retaining wall and lower bluff protection. However, this 63-foot setback location is only safe today, without taking into account the approximately 37 feet of expected erosion over a 75-year life of the proposed residences. As stated above, to account for such erosion, development would need to be sited no less than 100 ft. landward of the bluff edge, which would establish a safe area landward of the Applicant's inland property line and preclude any development on the subject bluff top property. Therefore, the currently safe location 63 feet landward of the retaining wall, which is based only on a current factor of safety at or above 1.5, is still not consistent with the LCP requirement that development be sited safe for its design life, accounting for slope stability and erosion over the lifetime of the development.

In summary, the proposed project is inconsistent with the certified LCP for the following reasons: 1) the proposed residences are sited less than 40 feet from the bluff edge; 2) the applicant has not demonstrated the proposed residences will be reasonably safe over their design life (75 – year minimum) without reliance on future shoreline protection; and 3) the proposed residences have not been designed and constructed so they can be removed in the event of endangerment. For these reasons, the Commission finds that the development as proposed is inconsistent with the City’s certified LCP, which justifies denial of the proposed development.

F. WATER QUALITY

Recognizing the value of protecting the water quality of oceans and waterways for residents and visitors alike, the City’s LCP requires that preventive measures be taken to protect coastal waters from pollution. The following policies are applicable:

Resource Management Policy 2.1 of the LCP states:

In that the ocean water quality conditions are of utmost importance, the City shall aggressively pursue the elimination of all forms of potential unacceptable pollution that threatens marine and human health.

Resource Management Policy 2.3 of the LCP states in part:

To minimize harmful pollutants from entering the ocean environment from lagoons, streams, storm drains and other waterways containing potential contaminants, the City shall mandate the reduction or the elimination of contaminants entering all such waterways . . .

The proposed development will be located at the top of the bluffs overlooking the Pacific Ocean. As such, drainage and run-off from the development could potentially affect water quality of coastal waters as well as adversely affect the stability of the bluffs. In order to protect coastal waters from the adverse effects of polluted runoff, the Commission has typically required that all runoff from impervious surfaces be directed through landscaping as a filter mechanism prior to its discharge into the street. In this case, however, directing runoff into blufftop landscape areas could have an adverse effect on bluff stability by increasing the amount of ground water within the bluff material, which can lead to bluff failures. The proposed project would result in additional impervious surface area on the bluff top property. This increased surface area will direct increased amounts of rainwater runoff to feed into the bluff directly unless directed elsewhere. Additionally, the proposed irrigation plan (dated 10/28/08) incorporates certain irrigation fixtures that will result in the introduction of water to the bluff, which will contribute to decreased bluff stability due to increased weight of groundwater. As proposed, the project does not sufficiently account for the potential impacts caused by increased runoff to the bluff and irrigating the bluff. Therefore, in order to avoid inconsistency with LCP Policies 2.1 and 2.3 (resource management) the Commission is imposing **Special Conditions 1 and 7** to ensure that 1) runoff discharges are directed

toward the street to reduce impacts to bluff stability and to reduce contaminant discharge on site and 2) onsite irrigation be non-permanent to reduce impacts to bluff stability.

Additionally, **Special Condition 7** requires the permittee to submit a monitoring report to the Commission every 5 years demonstrating consistency with the condition. Only through this condition can the Commission to ensure runoff is directed toward the street and that irrigation techniques will be more protective of coastal resources. To address some of these concerns during actual construction, **Special Condition 6** requires the applicant to conform to best management practices and construction responsibilities throughout construction at the project site, to ensure all resulting debris is properly removed/disposed, temporary sediment control measures are put in place and on-site vegetation is maintained to the maximum extent possible during construction. Therefore, the Commission finds the proposed project, as conditioned, consistent with Resource Management Policies 2.1 and 2.3 of the Certified LCP.

G. PUBLIC ACCESS

The project site is located on the blufftop west of Neptune Avenue in Encinitas, which is designated as the first public roadway. As the proposed development will occur between the first public roadway and the sea, pursuant to Section 30.80.090 of the City's LCP, 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, in part:

- (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....*

Additionally, Section 30220 of the Coastal Act provides that “Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses”

The beach fronting this location is used by local residents and visitors for a variety of recreational activities. As proposed, the development at the top of the bluff will not affect existing public access to the shoreline since no public access across the property to the beach currently exists because of the hazardous nature of the approximately 96 ft. high coastal bluff. In addition, public access to the beach below this home is currently available approximately 7 lots north of the subject site at the Beacon's public access path. Finally, by siting and designing the proposed development in the most landward portion of the property and conditioning the permit to prohibit shoreline protection in the future, no future shoreline devices will be constructed at this location that might otherwise impact public access and recreation along the shoreline or affect the contribution of sand to the beach from the bluff. Therefore, the proposed development is consistent with the public access and recreation policies of the certified Local Coastal Program and Sections 30210, 30212 and 30220 of the Coastal Act.

H. VISUAL RESOURCES

The City's certified Land Use Plan contains several policies relating to the requirement that new development be designed to be compatible with existing development and the visual resources of the area. Land Use (LU) Policies 6.5 and 6.6 state as follows:

The design of future development shall consider the constraints and opportunities that are provided by adjacent existing development. (LU Policy 6.5)

The construction of very large buildings shall be discouraged where such structures are incompatible with surrounding development. The building height of both residential and non-residential structures shall be compatible with surrounding development, given topographic and other considerations, and shall protect public views of regional or statewide significance. (LU Policy 6.6)

In addition, RM Policy 8.5 of the LUP states, in part, that:

The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards 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.

Finally, Section 30.34.020B.8 of the Implementation Program 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.

The proposed project involves the demolition of an existing single-family residence that straddles two lots (Lots 18 and 19) and the construction of two large homes (with a total building area for Lot 18 of 5,110 sq. ft and 5,393 sq. ft. for Lot 19). The proposed residences will be located in a residential neighborhood containing one to two story

single- and multi-family residences. As discussed below, the Commission is approving a building envelope that can accommodate 1-2 new residences. As required by **Special Condition 1**, the proposed new homes must conform to the underlying R11 zoning and will not exceed the height, bulk and scale of the existing surrounding development and therefore can be found compatible with the surrounding neighborhood. The home(s) will be located on the most landward portion of the lot for site stability purposes, further minimizing the visual impact from development on this individual site. In addition, public views of the shoreline or other coastal resources will be unaffected by the proposed residence.

The Commission finds that the proposed residences do not adversely affect visual resources and are consistent with LUP Policies 6.5 and 6.6 of the City's LCP.

I. LOCAL COASTAL PLANNING

In November of 1994, the Commission approved, with suggested modifications, the City of Encinitas Local Coastal Program (LCP). Subsequently, on May 15, 1995, coastal development permit authority was transferred to the City. The project site is located within the City's permit jurisdiction and, therefore, the standard of review is the City's LCP.

Based on specific policy and ordinance language requirements in the LCP, the City of Encinitas is required to develop a comprehensive program for addressing the shoreline erosion problem in the City. The intent of the plan is to look at the shoreline issues facing the City and to establish goals, policies, standards and strategies to comprehensively address the identified issues. To date, the City has conducted several public workshops and meetings on the comprehensive plan to identify issues and present draft plans for comment. However, at this time, no action to adopt the plans has been scheduled for local review by the Encinitas City Council.

As discussed in the above findings, the proposed residential developments are inconsistent with the policies of the LCP. When the Commission reviews a proposed project that is inconsistent with the certified LCP, there are several options available to the Commission. In many cases, the Commission will approve the project but impose reasonable terms and conditions to bring the project into conformance with the LCP. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission would deny the proposed projects because the proposed projects are significantly out of conformance with the LCP, due to inadequate coastal blufftop setbacks and cannot be brought into conformance with special conditions applied to the project. However, given the potential that a denial of new residential development on this site might constitute a taking of private property without just compensation, the Commission is approving some reduced development with conditions that are designed to make the project as consistent with the LCP as is possible without constituting a taking. Thus, the Commission is approving a revised design at this time that will set the proposed development back onto the most landward area of the property. Under the particular subject facts and circumstances, the Commission finds

that approval of a 3,780 sq. ft. development area will not prejudice the City's ability to continue to implement its certified LCP and to prepare the comprehensive program for addressing the shoreline erosion problems in the City as called for in Public Safety Policy 1.7 of the certified LUP.

J. TAKINGS

As discussed above, the two houses proposed for development are inconsistent with the hazards policies of the certified LCP and therefore the LCP requires the proposed development must be denied. When the Commission denies a project, however, a question may arise as to whether the denial results in an unconstitutional "taking" of the applicant's property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Commission must assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project while still complying with Section 30010. If the Commission concludes that its action might constitute a taking, then Section 30010 requires the Commission to approve some level of development, even if the development is otherwise inconsistent with LCP or Coastal Act policies. In this situation, the Commission proposes modifications to the development to minimize its LCP or Coastal Act inconsistencies, while still allowing some reasonable amount of development.²

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, its denial of the project would constitute a taking. As discussed further below, the Commission finds that to avoid a taking in compliance with Section 30010, the Commission determines it will allow a reasonable residential development on the subject property.

² For example, in CDP A-3-SCO-00-033 (Hinman), the Commission in 2000 approved residential development on a site that was entirely ESHA even though it was not resource dependent development and thus was inconsistent with the LCP (which was the standard of review in that case).

General Takings Principles

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”³ Article 1, section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.”

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee, supra*, 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass’n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). The Commission’s actions here would be evaluated under the standards for a regulatory taking.

In recent takings cases, the United States Supreme Court (Court) has identified two circumstances in which a regulatory taking might occur. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a “case specific” inquiry into the public interest involved (*Id.*). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless” (*Id.* at pp. 1016-1017 [emphasis in original]) (see *Riverside Bayview Homes, supra*, 474 U.S. at p. 126 [regulatory takings occur only under “extreme circumstances”]).⁴

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. (Penn Central) v. New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the sufficiency of the applicant’s property interest, its economic impact, and its interference with reasonable, investment-backed expectations (*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the

³ The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

⁴ Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036).

Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *id.* [rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*]).

Before a Landowner May Establish a Taking, Government Must Have Made a Final Determination Concerning the Use to Which the Property May Be Put

Before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, however, it must demonstrate that the taking claim is “ripe” for review. This means that the takings claimant must show that government has made a “final and authoritative” decision about the use of the property (e.g., *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Premature adjudication of a takings claim is highly disfavored, and the Supreme Court’s cases “uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it” (*Id.* at p. 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (e.g., *McDonald, supra*).

In this case, and as discussed further below, although the LCP instructs the Commission to deny the proposed development that would be constructed inconsistent with the hazards provisions of the LCP, application of such policies would preclude the applicant from siting any new development on the site. In these circumstances, the applicant might successfully argue that the Commission has made a final and authoritative decision about the use of the subject property. Therefore, the applicant might successfully argue that the Commission’s denial is a taking because a takings claim is “ripe.”

Determination of Unit of Property Against Which Takings Claim Will be Measured

As a threshold matter, before a takings claim can be analyzed, it is necessary to define the parcel of property against which the taking claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable parcel of property on which development is proposed. The issue is complicated in cases where the landowner owns or controls adjacent or contiguous parcels that are related to the proposed development. In these circumstances, courts will analyze whether the lots are sufficiently related so that they can be aggregated as a single parcel for takings purposes. In determining whether lots should be aggregated, courts have looked to a number of factors, such as unity of ownership, the degree of contiguity, the dates of acquisition, and the extent to which the parcel has been treated as a single unit [*e.g., District Intown Properties, Ltd. v. District of Columbia* (D.C.Cir.1999) 198 F.3d 874, 879-880 (nine individual lots treated as single parcel for takings purposes); *Ciampitti v. United States* (Cl.Ct. 1991) 22 Cl.Ct. 310, 318].

In this case, the applicant owns both of the adjacent parcels to be developed with single-family residences. He purchased them at the same time for a single purchase price in 1975. At the time, and currently, there was one single family residence straddling both lots. Although the applicant submitted two separate applications for development of the

two new single family residences, he submitted the applications at the same time, and they are contingent on the applicant demolishing the existing residence, so there is a unified development scheme for development of these two parcels. The parcels have been bought and sold as a single unit at least since 1929, and the applicant acknowledges that he believed that he was only buying a single parcel when he purchased the property.⁵ Thus, this application meets all of the criteria for when a court should aggregate parcels when determining the property subject to a takings claim.

Therefore, the evidence establishes that for purposes of assessing the amount of development to be approved on these lots, the Commission should treat 828 Neptune Ave. as a single parcel for the purpose of determining whether a taking occurred.

The Commission Will Allow a Reasonable Residential Development on the Subject Property to Avoid a Taking in Compliance with Section 30010 of the Coastal Act

CATEGORICAL TAKING

The Commission interprets Section 30010, together with the *Lucas* decision, to mean that if Commission denial of the project would deprive an applicant's property of all reasonable economic use, the Commission may be required to allow some development even if a Coastal Act or LCP policy would otherwise prohibit it, unless the proposed project would constitute a nuisance under state law. In other words, the City of Encinitas Certified Local Coastal Plan cannot be read to deny all economically beneficial or productive use of land because LUP Public Safety Policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D) cannot be interpreted to require the Commission to act in an unconstitutional manner. In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property of some economically viable use.

As described above, the subject parcel was designated in the City of Encinitas Implementation Plan for residential use. The parcel is currently being used for residential purposes, as it has been since at least 1929. If the Commission were to deny this permit, there would still be a residence on this property, so denial of the proposed project would not deprive the applicant's property of all reasonable economic use. Thus, under the *Lucas* takings analysis, the Commission's denial of the project would likely not constitute a taking.

TAKING UNDER *PENN CENTRAL*

The Commission has already determined that it is likely not necessary to approve some new residential use on this property to avoid a categorical taking under *Lucas*, but a court may also consider whether the permit decision would constitute a taking under the *ad hoc* inquiry stated in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123-125. This *ad hoc* inquiry generally requires an examination into factors such as the sufficiency of the applicant's property interest, the regulation's economic impact, and the regulation's interference with reasonable, investment-backed expectations.

⁵ Discussed during in-person meeting in San Diego District Office on October 12, 2010.

SUFFICIENCY OF INTEREST

In the subject case, the applicant purchased 828 Neptune Ave. for \$129,000 on January 24, 1975. On that same date, a *Grant Deed* was recorded in Book 1975 Page number 75-017112 in the Official Records of the San Diego County Recorder's Office, effectively transferring and vesting fee-simple ownership to the applicant. Based upon an examination of a copy of this document the Commission concludes that the applicant has demonstrated that he has a sufficient real property interest in the subject parcel to allow pursuit of the proposed project.

REASONABLE INVESTMENT-BACKED EXPECTATIONS

In this case, the applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a residence; however, it could be argued that a reasonable person would not have had a reasonable expectation to build two homes on this site, when it only had one home on it at the time it was purchased and not even the applicant knew at the time of purchase that the property consisted of multiple lots. In addition, the applicant purchased a home that was approximately 1,527 square feet, and a reasonable person would not have had a reasonable expectation that he could demolish the existing house and construct two new homes of approximately 5,000 square feet each (including basement), which is triple the size of the one existing home on the lot and larger than the average home size in the immediate area at the time the applicant purchased the property.

To determine whether the applicant had an investment-backed expectation to construct two 5,000 square foot homes at 828 Neptune Ave., it is necessary to assess what the applicant invested when he purchased that lot. To determine whether an expectation to develop a property as proposed is reasonable, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the applicant's proposed use, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

The applicant purchased 828 Neptune Ave. for a single purchase price of \$129,000. When the applicant purchased the property in 1975, there was already a single family residence on the site and there was no indication that development of a residence on this site was inconsistent with applicable law. In fact, the property was zoned for residential use and there were numerous existing homes on bluff top parcels all along Neptune Ave. in Encinitas. Consequently, the applicant may have had a reasonable investment-backed expectation that he had purchased a lot that could be developed with a single family residence, and his investment reflected that current and presumably future use.

To assess whether the applicant had a reasonable expectation to build the two proposed 5,000 square foot houses, the Commission calculated the average size of the 50 single family residences that exist today that appear to have been constructed in or before

1975.⁶ The average size of those homes today was approximately 1,900 square feet. A reasonable person therefore may have expected to build an approximately 1,900 square foot home on the bluff top lot purchased by the applicant.

Therefore, the applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be redeveloped with a somewhat larger residence; however he likely did not have a reasonable expectation that he could construct two homes that were twice as large as the average home size at the time he purchased his property, given the average home size on the seaward side of Neptune Ave. when he purchased his property. In addition, a landslide has naturally occurred since the applicant has owned the property, which resulted in the loss of a portion of the land and existing residential structure. This event was predictable at the time the applicant purchased the property, and the uncertainty regarding the stability of the bluff should reasonably have a negative effect on any potential investment-backed expectations for redevelopment of the property. In sum, a reasonable person would not have had a reasonable investment-backed expectation that after purchasing one approximately 1,500 sq. ft. home, he could subsequently develop two 5,000 sq. ft. homes in this area of Encinitas.

ECONOMIC IMPACT

The *Penn Central* analysis also requires an assessment of the economic impact of the regulatory action on the applicant's property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished (see *Tahoe-Sierra Pres. Council, Inc., supra*, [citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 [applying *Penn Central*, court finds that diminution of property's value by 91% not a taking]).

As noted previously, the subject property is planned and zoned for residential use in the City's LCP. According to the LCP, the residential land use designation permits a variety of residential development types found within the coastal areas, ranging from single-family detached units to single-family attached units, such as condominiums, townhouses, and senior housing. The minimum lot size is 3,950 net square feet and the maximum density is 11 units per net acre.

⁶ To calculate this figure, Commission staff took the "effective date" of homes on Neptune Ave., as identified by the applicant, and assumed that the current square footage of those homes is the same as it was in 1975. It is likely that this number is at least slightly inflated, however, as it may not take into account any significant remodels or additions to those homes since 1975. Commission staff also verified these figures by researching these properties on the website: www.redfin.com, which typically shows the year constructed and the year remodeled for properties, although these appeared to always be the same date, suggesting that they more likely corresponded to the most recent remodel, rather than the construction date. Commission staff did not independently verify that the dates reported on www.redfin.com were accurate.

If the Commission were to deny the proposed application, there would still be an existing residence on this property, so arguably the Commission's action would be insufficient to diminish the property's value to the degree that would constitute a taking. Under most circumstances, the Commission would find that denial of new development, when there is an existing use on the property, would not meet this portion of the *Penn Central* test. The facts presented here are, however, unique, and under these circumstances, a court could find that denial of the project would meet this portion of the *Penn Central* test.

The applicant's home was constructed in 1929, more than 80 years ago. The Commission has calculated the "economic life" of residential structures to be typically approximately 75-100 years. In addition, an approximately 300 square foot portion of the applicant's home was destroyed when it fell off of the bluff after a significant bluff failure in 1996. As described above, the bluff edge is actually approximately 5-10 feet underneath the home, meaning that portions of the home are technically about 5-10 feet seaward of the bluff edge, so it is only stable due to significant shoreline protection and fill material used to shore up the home. The Encinitas LCP also contains strict limitations on a landowner's ability to expand existing residences on blufftop lots. LUP Section 1.7 (Public Safety) limits additions to only 250 square feet, which is less than the square footage that the applicant lost in the bluff failure. Thus, at best, the applicant could add 250 square feet to a home supported partially on fill which would need perpetual protection from shoreline protective devices to continue to exist at all. Under these circumstances (the age of the home, the location of the home, and the strict limitations on redeveloping the existing home), a court could conclude that even though there would be an existing home if the Commission denied the permit, the denial would still have a substantial enough economic impact on the value of the subject property to meet this portion of the *Penn Central* test.

To address this potential takings claim and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit therefore allows for the construction of a residential development, although not precisely the residential development proposed by the applicant, to provide a reasonable economic use of the subject property. This determination is based on the Commission's finding in this staff report that residential development is commensurate with the investment-backed expectations for the property, and that no non-residential uses otherwise allowable under the certified LCP would provide an economic use.

A Taking Cannot Be Avoided Because the Project Could Not Be Prohibited Under Background Principles of State Property Law

Finally, *Lucas* provides that a regulatory action does not constitute a taking if the restrictions inhere in the title of the affected property; that is, "background principles" of state real property law would have permitted government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036). These background principles include a State's traditional public nuisance doctrine or real property interests that preclude the proposed use, such as restrictive easements. Here, the proposed project would not constitute a public nuisance, so as to preclude a finding that the Commission's denial of the project would constitute a taking.

California Civil Code Section 3479 defines a nuisance as follows:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

California Civil Code Section 3480 defines a public nuisance as follows:

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

There is no evidence that construction of the proposed residences set significantly back from the bluff edge on the subject property would create a nuisance under California law. The site is located in a developed residential area where the single-family residential development is compatible with surrounding land uses. While the proposed location of the homes would potentially make them more likely to be threatened by bluff failures and instability in the future, there is insufficient evidence at this time to find that the proposed homes would create a public health risk unless they become undermined and fall to the public beach below the bluff. Furthermore, the proposed use is residential, rather than, for example, industrial, which might create noise or odors or otherwise create a public nuisance.

Therefore, the Commission finds the proposed project would not constitute a public nuisance that would preclude a finding that the regulatory action constitutes the taking of private property without just compensation.

CONCLUSION

To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit approval allows for the construction of at least one residence to provide a reasonable economic use of the subject property. In view of the evidence that: (1) denying residential use on the property could potentially sufficiently diminish the economic value of the property to meet the economic value prong of the *Penn Central* test; (2) residential use of a small portion of the property would provide an economic use; and (3) an applicant would have had a reasonable investment-backed expectation that a fully mitigated residential use would be allowed on the property, there is a reasonable possibility that a court might determine that the final denial of a residential use, based on the inconsistency of this use with LCP Policies and LCP Zoning would constitute a taking. Therefore, the Commission determines that the City's LCP in this case does not preclude development of a residence on this bluff top lot.

Having reached this conclusion, however, the Commission also finds that the Coastal Act only instructs the Commission to construe the City's LCP in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore the hazard protection policies of the LCP in acting on this appeal. Thus, the Commission must still comply with the requirements of the LCP by siting the proposed development, to the maximum extent feasible, to ensure that it will be reasonably safe for its economic life (at least 75 years) without the need for future shoreline protection, designed to be removed in the event the structure becomes threatened and that the development will be set back consistent with the reasonable safe location and no less than 40 feet from the bluff edge. To achieve consistency with the LCP's hazards policies in light of constitutional takings issues, the project must be reduced in scope from that proposed, and relocated as far landward as possible.

K. APPROVAL

Maximizing LCP Conformity While Avoiding Takings

As explained above, Coastal Act Section 30010 requires that the Commission will not act in such a way as to take an applicant's property without just compensation, but this provision does not authorize the Commission to completely avoid application of the policies and standards of the certified LCP, including LUP Public Safety Policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D). Instead, the Commission is only directed to avoid construing these applicable policies in a way that would take private property for public use. Aside from this instruction, the Commission is still otherwise directed to enforce the requirements of the LCP. Therefore, in this situation, the Commission must still comply with LUP Public Safety Policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D), by requiring the applicant to site development on this property as far landward as possible.

As discussed above, the proposed development is inconsistent with LCP Public Safety policy 1.6 and IP provisions 30.34.020(B), 30.34.020(C)(1) and 30.34.020(D) regarding siting development in a reasonably safe location for the design life of the structure (75-year minimum evaluation period), set back a minimum of 40 feet from the bluff edge and sited such that the development will not require future shoreline protection. As also discussed above, accounting for the 37 feet of erosion over a 75-year design life, any residence(s) would need to be constructed no less than 100 feet landward of the retaining wall to ensure a safe location for its design life without relying on future shoreline protection.

However, the Commission, in approving development consistent with Coastal Act Section 30010, cannot site new development beyond existing property lines, but it must maximize LCP conformity to the extent possible given site circumstances and constraints. Thus the Commission must site new development near the landward property line while still allowing reasonable home sites. Commission staff analyzed approximate square footage of existing single family residences on the seaward side of Neptune Avenue within Encinitas by using the figures for property square footage listed on the website: www.zillow.com. This analysis of similarly situated residences demonstrates that the

surrounding residential developments in the area average approximately 2,600 sq. ft. floor area. Accordingly, in order to give the Applicant the minimum amount of development to avoid a taking of private property without just compensation, while maximizing consistency with the LCP, the Commission finds that a development envelope allowing a home that is similar in size to surrounding residential development is reasonable.

Given the typical bulk and scale of homes in this area of Encinitas, staff has determined that a setback of 65 feet landward of the artificial retaining wall would allow the applicant to construct a home similar to those in the surrounding area. This conclusion is based on identifying a building envelope that allows the applicant enough room and flexibility, taking into consideration the City's required setbacks, to design a home with reasonable articulation and design (rather than just a box) at similar bulk and scale to surrounding development.

This setback is therefore established to be as landward as possible while still allowing a residence that is consistent with community character and is similar in bulk and scale to those in the surrounding area. This setback would create a development envelope equal to an area of approximately 3,780 sq. ft., due to the fact that the width of the two lots together is 100 feet. Within this 3,780 square foot development envelope, the applicant could construct development that is consistent with the LCP, with the exception of the geologic setback conditions with which it cannot be consistent. Under existing zoning, the principal structures that could be constructed are one or two reasonably sized residences or a duplex. Therefore, the Commission imposes **Special Condition 1**, which requires the applicant to survey the property to accurately identify, subject to the Executive Director's review and approval, the exact building envelope allowed in this approval. **Special Condition 1** also requires the applicant to submit to the Commission for Executive Director review and approval, final project plans for construction of one or two single family residences, or a duplex, sited at least 65 feet landward from the existing upper bluff retaining wall and demonstrating that the proposed development is: sited entirely within the surveyed building envelope; designed so that it can be easily removed once the approved location is no longer safe; and consistent with zoning requirements regarding height, size and bulk and that it is in keeping with the character of the area. **Special Condition 1** allows the applicant to seek a reduction in the City's required front yard setback. Finally, the revised final plans shall include details regarding any existing or proposed accessory improvements.

The applicant claims that a setback greater than 40 feet from the bluff edge, such as that required by Special Condition 1, would in and of itself constitute a taking of the applicant's property without just compensation. The Commission does not believe that a court would find a larger setback to constitute a taking.

The Applicant provided an analysis involving approximately 230 residences in Encinitas. Based upon his analysis, only 14 of those residences were setback more than 40 feet from the bluff edge and 50 were setback approximately 40 feet from the bluff edge. The study indicates that approximately 60 of the total addresses/lots have residences constructed

prior to 1973. For a number of reasons, explained below, the study's analysis is misleading. First, the only relevant setbacks are those required by the Commission or the City of Encinitas after the passage of the Coastal Act and certification of the City's LCP that involved construction of new development on these bluffs. It is only after the properties became subject to Coastal Act and LCP hazards policies that relevant setbacks would have been imposed, and only with construction of new homes would new setbacks have been imposed. Of the 230 addresses identified by the applicant, Commission staff only had at least one record of some form of development on site for approximately 100 of them. Of the 100 addresses, approximately 76 did not involve construction of new single family residences, or demolition of an existing home and replacement with one or more single family residences. The majority of the records involved additions to the home, interior remodels and shoreline protective structures, all of which would not have an impact on the setback of the principal residence. Therefore, the inclusion of such developments is irrelevant and misleading when attempting to identify the City's and Commission's records regarding primary residence setbacks.

Moreover, it is worth noting that the Applicant's study regarding bluff top setbacks for development approximates setbacks based upon recent aerial and oblique images, which do not account for the conditions at the time development was undertaken, which according to the majority of the identified staff records includes homes built in the late 1970's and 1980's. Thus, although the setback appears to be fewer than 40 feet today, it would have been larger when the development was actually constructed, as current aerial photos would not reflect the loss of the seaward portions of these properties due to the highly erodible nature of the bluffs in Encinitas.⁷

Commission staff identified 24 of the 230 addresses that involved construction of a new single family residence (either entirely new or following demolition of an existing residence) since the Coastal Act's inception. Nine (5 new and 4 demo/rebuilds (including CDP#6-81-205/Frick and Lynch – involving reconstruction of a fire-damaged residence, which is subject to the limitations in Coastal Act 30610)) of these were approved by the Commission and 15 of these approved by the City of Encinitas (4 new and 11 demo/rebuilds) and not appealed to the Coastal Commission. The setback was not consistently identified in the records in the Commission's permit tracking system. In cases where reference was made to a setback, it corresponded to City-approved permits and was at least 40 feet.

Thus, despite the applicant's arguments to the contrary, the Commission does not believe a court would find that a required setback of 65 feet from the artificial retaining wall would constitute a taking of private property without just compensation.

Given that the LCP requires new development to be sited such that it does not represent a hazard to its owner or occupants, and that future erosion is expected on this site, the Commission imposes **Special Condition 2**, requiring a re-assessment of hazards on this

⁷ Based upon the accepted 0.49 ft/year bluff retreat rate in Encinitas, the bluff edge would be approximately 15 feet closer to a residence constructed in 1980 (30 years ago).

site in 2022. As discussed above, the subject property is protected by full shoreline protection, including a Commission-approved seawall at the toe of the bluff (CDP#6-05-030). CDP# 6-05-030 contained a special condition requiring the Applicant to submit an amendment application to the Commission in 2022 to either remove the seawall within its initial design life or to retain it subject to the reevaluation of mitigation for impacts to local sand supply. The potential removal of the permitted lower seawall in 2022 raises concerns regarding the site's overall stability and may implicate any development sited on the bluff top as a result of this permit action. Accordingly, the required reevaluation of the subject development's safety (pursuant to **Special Condition 2**) must coincide with the seawall's evaluation in 2022 as required in CDP#6-05-030. Therefore, the Commission finds an evaluation of the subject development's safety 10 years from this approval, and every 10 years thereafter, is appropriate, given that reassessment should coincide with the seawall reevaluation to ensure all conditions on the site related to stability and hazards are appropriately considered.

The site reassessment required under **Special Condition 2** shall recognize the hazardous condition of this bluff and will consist of an evaluation of the geological conditions on the entire property, to determine whether the property can continue to safely support the approved development. To comply with this condition, the permittee(s) and/or successor(s) in interest shall submit to the Commission a site assessment evaluating the site conditions to determine whether or not alterations to the residence(s) or removal of the residence(s) is necessary to avoid risk to life or property. In the event more than one residence or unit is developed as a result of this approval, and more than one owner is associated with this property as a whole, all owners must submit the required study to the Commission's Executive Director as co-applicants. The study shall be based upon a site specific analysis of site stability, bluff alteration due to natural and manmade processes, and the hazard potential at the site. The required study shall include the following: (1) An analysis of site stability based on the best available science and updated standards, of beach erosion, wave run-up, sea level rise, inundation and flood hazards prepared by a licensed civil engineer with expertise in coastal engineering and a slope stability analysis, prepared by a licensed Certified Engineering Geologist and/or Geotechnical Engineer or Registered Civil Engineer with expertise in soils, in accordance with the procedures detailed in the Local Coastal Program (LCP) and the City Zoning Code; (2) An analysis of the condition of the existing shoreline and bluff protection and any impacts it may be having on public access and recreation, scenic views, sand supplies, and other coastal resources. Pursuant to the requirements of CDP # 6-05-030, the submittal shall include an evaluation of the means to remove the existing shoreline protection which was permitted to protect the existing structure to be demolished; and (3) An evaluation of the means to remove in whole or in part the subject permitted residence(s) if and when either becomes unsafe for occupancy.

If the required study shows that the principal structure(s) is no longer safely located, the permittee(s) shall submit a permit amendment to undertake measures required to remove the residence(s) or reduce the size of the residence(s) to reduce the hazard potential. The bluff stability analysis required pursuant to this condition shall be submitted concurrent with the CDP amendment required pursuant to CDP # 6-05-030 for the existing,

previously-permitted seawall and bluff retention devices. No modification or expansion of the approved residence(s), shoreline protection, or additional bluff or shoreline protective structures shall be constructed, without approval of an amendment to this coastal development permit by the Coastal Commission

Moreover, consistent with Policy 1.6, **Special Conditions 1, 2 and 3** require this development to be designed to be removed in whole or in part should it become threatened by landslide, erosion or other natural processes. **Special Condition 3** prohibits the development of any shoreline protective device to protect the proposed new residential development. To ensure that future owners are aware of the significant geologic hazards on this site and the conditions imposed on this development by this permit, **Special Condition 4** requires the applicants to record a deed restriction imposing the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property. **Special Condition 5** requires the Applicant to assume the risk of siting development at the top of the bluff and to release the Commission from liability should the residence(s) become threatened in the future, because the applicant is choosing to site this development in a known hazardous location, so he should bear the risks of developing in such a location. **Special Condition 9** requires an open space bluff face restriction, consistent with LUP Public Safety Policy 1.6(g), which requires permanent conservation of the bluff face with an open space easement to reduce unnatural causes of bluff erosion.

L. CONCLUSION

For all of the above reasons, the Commission concludes that its approval of the applicant's proposal, with the specified conditions, is sited in the landward portion of the site, in an attempt to maximize LCP consistency while avoiding a "taking," consistent with Coastal Act Section 30010.

M. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) CONSISTENCY

Section 13096 of the Commission's administrative regulations requires Commission approval of a Coastal Development Permit to be supported by a finding showing the permit is consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project, as conditioned, is consistent with the policies of the City's LCP relating to blufftop development, geologic stability, water quality, public access and visual resources. In addition, the project is consistent with applicable Chapter 3 policies of the Coastal Act. There are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the

activity may have on the environment. Therefore, the Commission finds that the proposed project is consistent with applicable CEQA requirements.

(G:\San Diego\Reports\Appeals\2009\A-6-ENC-09-40 41 de novo Okun 6-25-2012 final.doc)

APPENDIX A - SUBSTANTIVE FILE DOCUMENTS

City of Encinitas Certified LCP; Appeal applications by Commissioners Wan and Shallenberger dated 7/7/09; Case Number 08-189 PCIN; City Permit #07-155-CDP; City Permit #08-73-CDP; "Study of Development of Oceanfront along Neptune Avenue and Streets South to Moonlight State Beach, City of Encinitas, California," prepared by Gary Cohn and Sherman Stacey, dated January 16, 2012; 11 p. letter with attachments dated September 16, 2011, from Sherman Stacey; "Feasibility for Construction Evaluation," prepared by GeoSoils, Inc., dated April 19, 2011; "Review and Discussion of Documents and Comments in CCC Staff Report," prepared by GeoSoils, Inc., dated January 7, 2011; Project plans "Neptune Residence" by Cohn+Associates Architecture Planning 12/2/08; "Review Memorandum" by GEOPACIFIC INC. dated April 21, 2008; "Additional Geotechnical Recommendations" by Soil Engineering Construction, Inc. dated May 21, 2008; Soil Engineering Construction, 2006, "As-built slope stability analyses @ 40' setback, Okun residence, 828 Neptune Avenue, Encinitas", 1 p. letter report dated 28 November 2006 and signed by J.W. Niven and R.D. Mahony; Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 1 p. letter dated 21 May 2008 and signed by J.W. Niven; Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 10 p. letter report dated 21 May 2008 and signed by J.W. Niven and R.D. Mahony; Geopacific Inc., 2008, "Third party review, 08-073 CDP, 828 Neptune Avenue, Encinitas, California, APN 256-011-13 &-03, Applicant Mr. Leonard Okun", 2 p. review memorandum dated 21 August 2008 and signed by J. Knowlton; Soil Engineering Construction and The Trettin Company, 2009, "Monitoring report, 828 Neptune Avenue, Encinitas, California", 11 p. report dated December 2009 and signed by J.W. Niven, R.D. Mahony, and B. Trettin; Soil Engineering Construction, 2009, "Okun slope stability, 828 Neptune Avenue, Response to Coastal staff letter dated December 7, 2009", 3 p. letter report dated 15 December 2009 and signed by J.W. Niven; "Geotechnical Review Memorandum", by Coastal Commission Staff Geologist Mark Johnsson, dated September 30, 2010; 6-96-96-G/Okun, 6-01-005/Okun, 6- 6-01-011-G/Okun, 6-01-40-G/Okun, 6-01-62-G/Okun, 6-02-074-G/Okun and 01-85-G/Okun; Coastal Development Permit 6-05-30/Okun; Finding of Substantial Issue A-6-ENC-09-040/Okun; Finding of Substantial Issue A-6-ENC-09-041/Okun; Emergency Permit Nos. 6-89-136-G/Adams, 6-89-297-G/Englekirk, 6-93-36-G/Clayton, 6-99-35-G/MacCormick, 6-99-75-G/Funke, Kimball, 6-99-131-G/Funke, Kimball, 6-00-171-G/Brown, Sonnie; 6-01-42-G/Brown, Sonnie; 6-01-62-G/Sorich; 6-85-396/Swift, 6-92-82/Victor, 6-93-131/Richards, et al, 6-93-136/Favero, 6-95-66/Hann, 6-98-39/ Denver/Canter, 6-98-131/Gozzo, Sawtelle and Fischer, 6-99-9/Ash, Bourguault, Mahoney, 6-99-41/Bradley, 6-00-009/Ash, Bourguault, Mahoney, and 6-03-48/Sorich, Gault; Encinitas CDP Nos. 01-196 and 01-197 Bradley

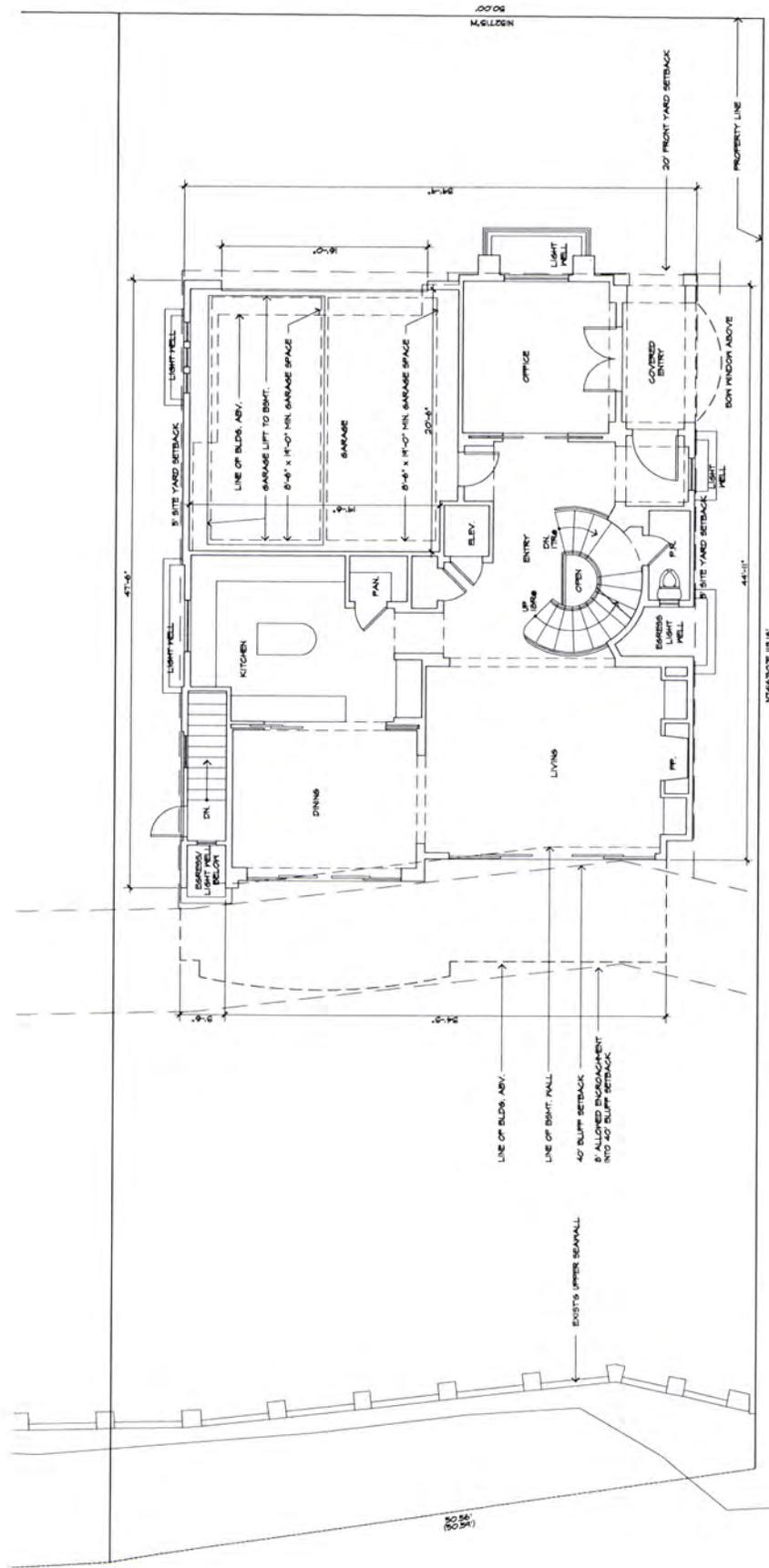
DATE/VERSION
BY/CHK
APP/REV
DATE

NEPTUNE AVENUE
ENCINITAS, CALIFORNIA
NEPTUNE RESIDENCE

COHN + ASSOCIATES
ARCHITECTURE PLANNING
20000 SANDHILL DRIVE
SAN MARINO, CALIFORNIA 91766
TEL: 909.391.9888



DATE: 07/20/08
SCALE: 1/4" = 1'-0"
SHEET: 04/011
PROJECT: LOT 18 PLAN
SHEET NO. **A3**



FIRST FLOOR PLAN

EXHIBIT NO. 2b
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 18 First Floor
Plan

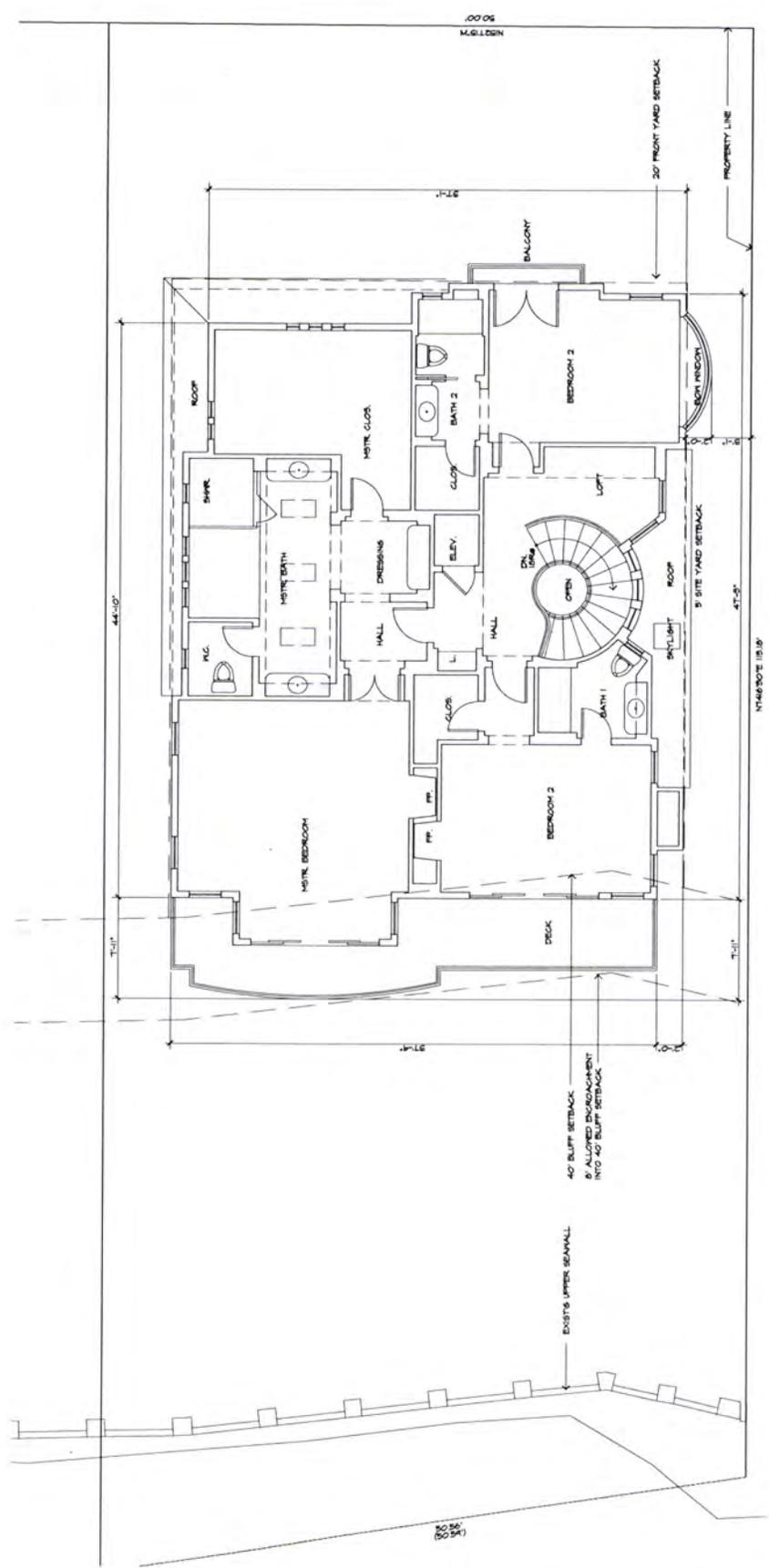


DATE	07/10/09
BY	COHN
CHKD	COHN
APP	COHN
DATE	07/10/09
BY	COHN
CHKD	COHN
APP	COHN

NEPTUNE RESIDENCE
 NEPTUNE AVENUE
 ENGINITAS, CALIFORNIA

COHN + ASSOCIATES
 ARCHITECTURE PLANNING
 2225 BAYVIEW DRIVE
 SUITE 100
 OAKLAND, CA 94612
 TEL: 415.778.1800
 FAX: 415.778.1801

ARCHITECT'S SEAL
 STATE OF CALIFORNIA
 ARCHITECT
 NO. 01474
 DATE: 07/10/09
 SHEET: 24
 PROJ: COHN11
 FILE: 18_2ND_FLN
 SHEET: A4
 OF: 10



SECOND FLOOR PLAN

EXHIBIT NO. 2c
 APPLICATION NOS.
 A-6-ENC-09-040
 A-6-ENC-09-041
 Lot 18 Second Floor
 Plan

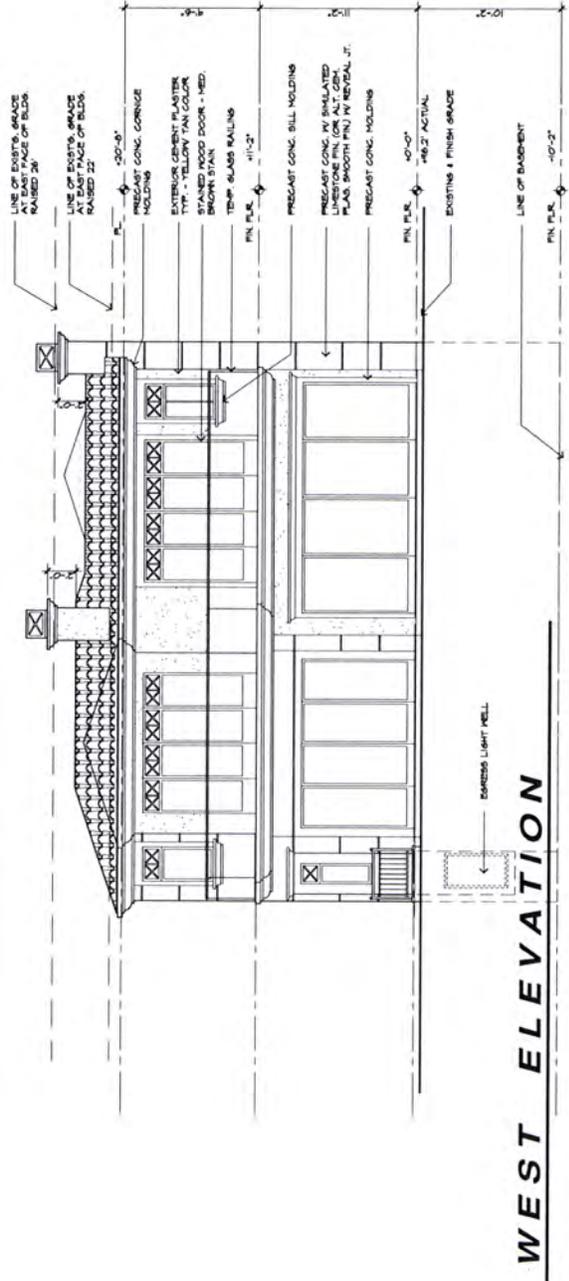
California Coastal Commission

DATE: 08/25/2010
 DRAWN BY: JH
 CHECKED BY: JH

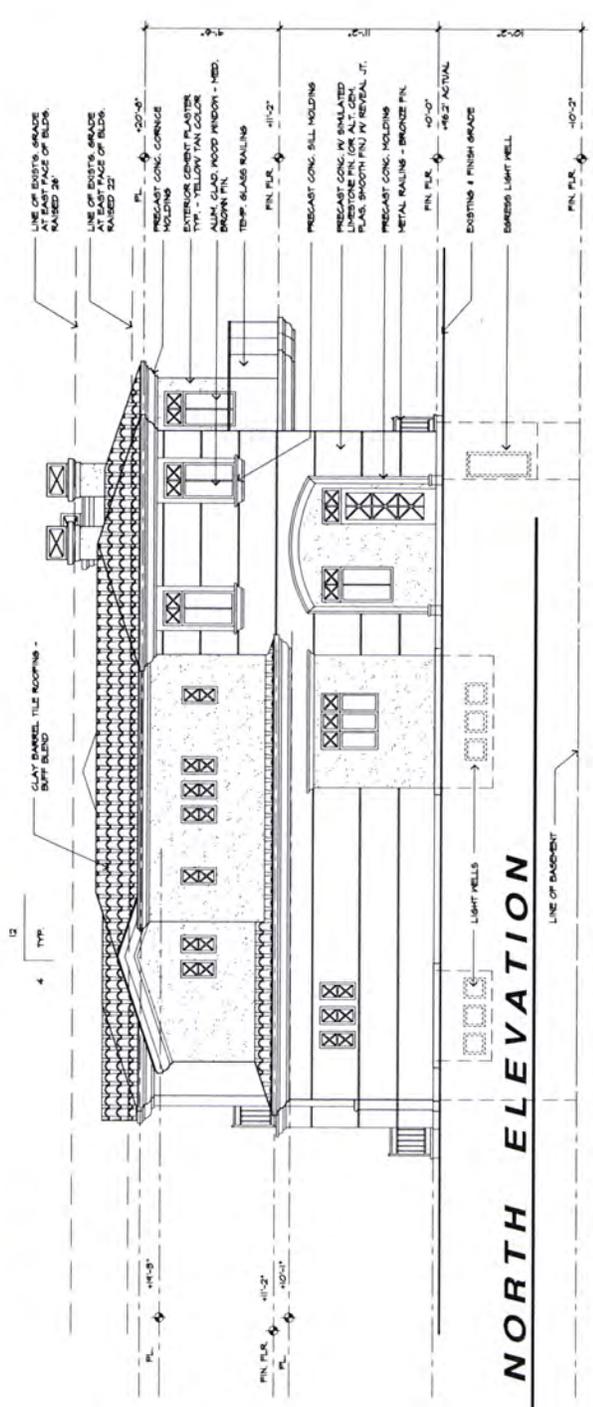
NEPTUNE AVENUE
 ENCINITAS, CALIFORNIA
NEPTUNE RESIDENCE

COHN + ASSOCIATES
 ARCHITECTURE PLANNING
 20000 SANDHILL DRIVE
 SAN MARCO, CALIFORNIA 92078
 TEL: 760.749.1800
 FAX: 760.749.1801

PROJECT NO. 09-041
 SHEET NO. 09-041-07
 DATE: 08/25/2010
 DRAWN BY: JH
 CHECKED BY: JH
 TITLE: WEST ELEVATION
 SCALE: 1/4" = 1'-0"
 SHEET NO. **A7**
 OF 07 SHEETS



WEST ELEVATION



NORTH ELEVATION

ELEVATIONS



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

EXHIBIT NO. **2e**
 APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
 Lot 18 Elevations
 (West and North)



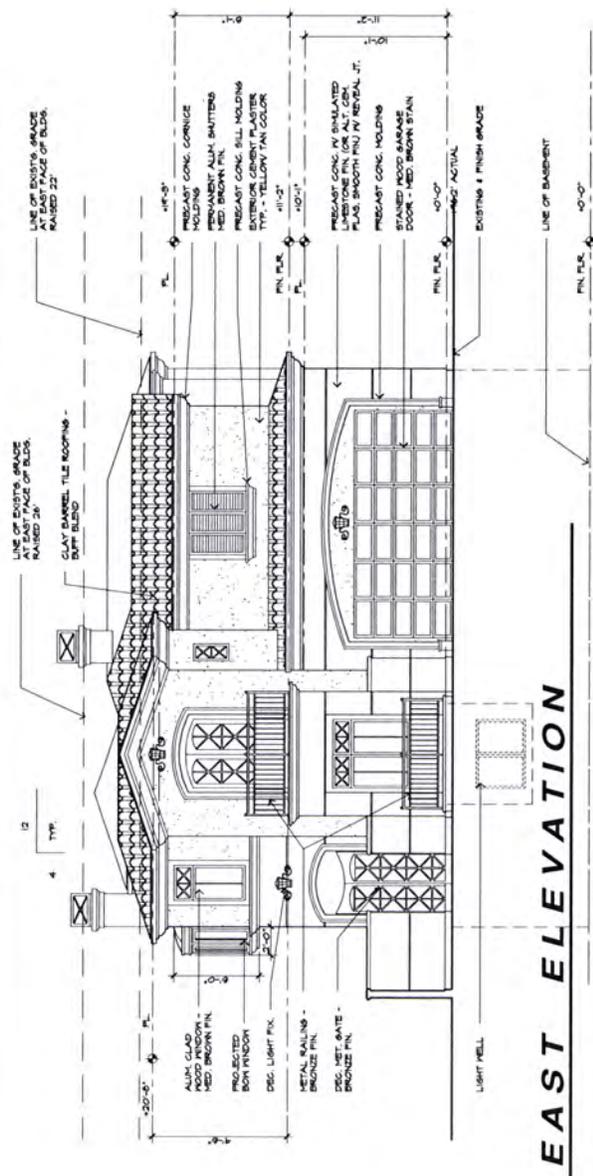
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NEPTUNE RESIDENCE
NEPTUNE AVENUE
ENCINITAS, CALIFORNIA

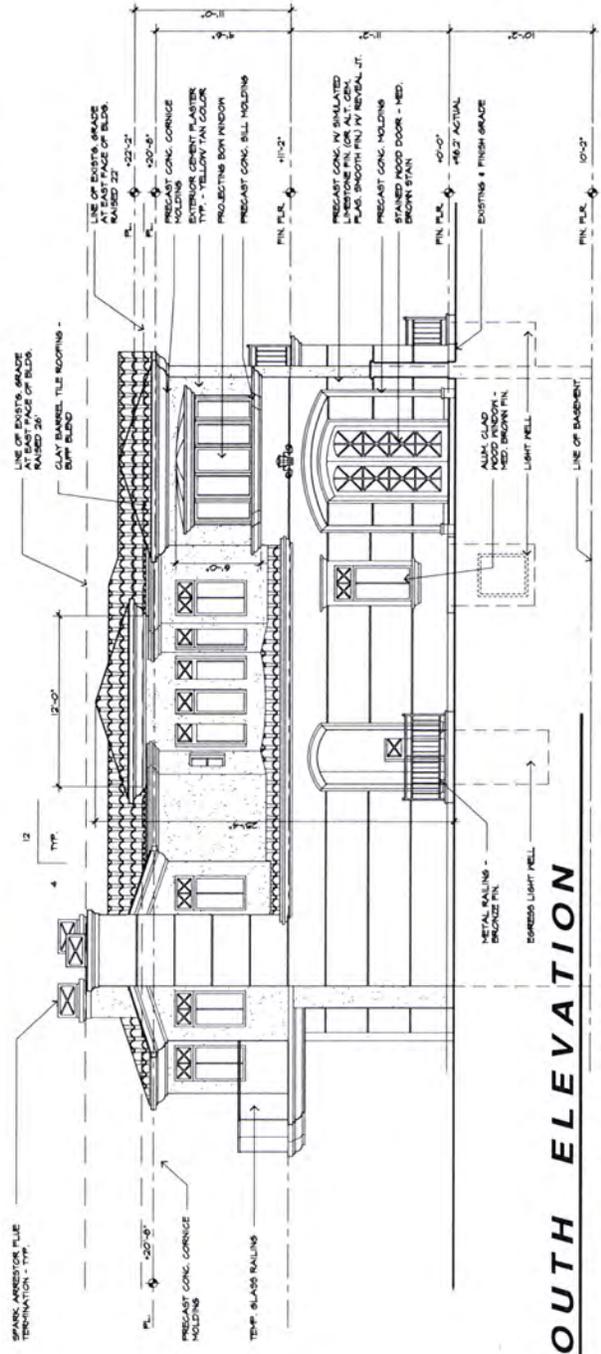
COHN + ASSOCIATES
ARCHITECTURE PLANNING
2200 MARCO VILLAGE DRIVE
SAN MARINO, CA 91766
TEL: 909/261-8888

PROFESSIONAL SEAL
ARCHITECT
STATE OF CALIFORNIA
NO. 10000
EXPIRES 12/31/2010

DATE: 07/20/08
SCALE: 1/4" = 1'-0"
DRAWN: JH
FILE: NEPTUNE
SHEET: A6



EAST ELEVATION



SOUTH ELEVATION

ELEVATIONS

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

EXHIBIT NO. 2f
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 18 Elevations
(East and South)



Printed on Tuesday, October 28, 2010

BASEMENT CALCULATION:
 BUILDING PERIMETER OF BASEMENT = 105'-1"
 FIRST FLOOR 4'-4" ABOVE GRADE = 105'-1"
 105'-1" OF 105'-1" = 100% > 50%

9/15 S.F.
 • 31
 • 56

VICINITY MAP



**BUILDING FOOTPRINT
 BROWN RESIDENCE
 836/838 NEPTUNE AVENUE**

MALL BEHIND F.Y. SETBACK
 6'-0" ADV. FIN. OKN GRADE -
 TYP. - OKN EXISTS/ FIN.
 GRADE IS LOWER THAN EXISTS.
 ADJ. GRADE

EXIST'S SECOND
 STORY WINDOWS
 OF ADJ. HOUSE

EXISTING GRADES TYP.

APPROXIMATE LINE OF
 BLUFF FALLING TAKEN
 FROM DRAWING BY SOIL
 ENGINEERING
 CONSTRUCTION, INC.
 DATED 12/16/12

EXISTING LOWER SEA
 WALL PER PERMIT NO.
 16-142E

EXISTING COLUMNS &
 REINFORCING
 IN EX. SEAWALL

BLUFF LINE PER
 MAP NO. 10847

30.01'
 (30.06')

EXISTING UPPER SEA
 WALL PER PERMIT NO.
 16-142E

EXISTING RESIDENCE TO BE
 REMOVED

6' ALLOWED CANE
 DECK ABOVE
 INTO 40' BLUFF
 SETBACK

40' BLUFF
 SETBACK

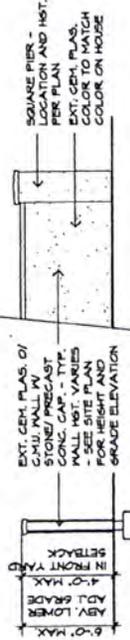
LINE OF SECOND
 FLOOR

LINE OF ROOF
 OVERHANGS

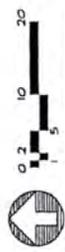
FIN. FLR. = +6.2'

LINE OF NEW
 BUILDING
 FOOTPRINT

EMERGENCY LIGHT
 MELL



TYPICAL SITE WALL DETAIL
 SCALE: 1/4" = 1'-0"



SCALE: 1" = 10'-0"

SITE PLAN

EXHIBIT NO. 2g
 APPLICATION NOS.
 A-6-ENC-09-040
 A-6-ENC-09-041
 Lot 19 Site Plan



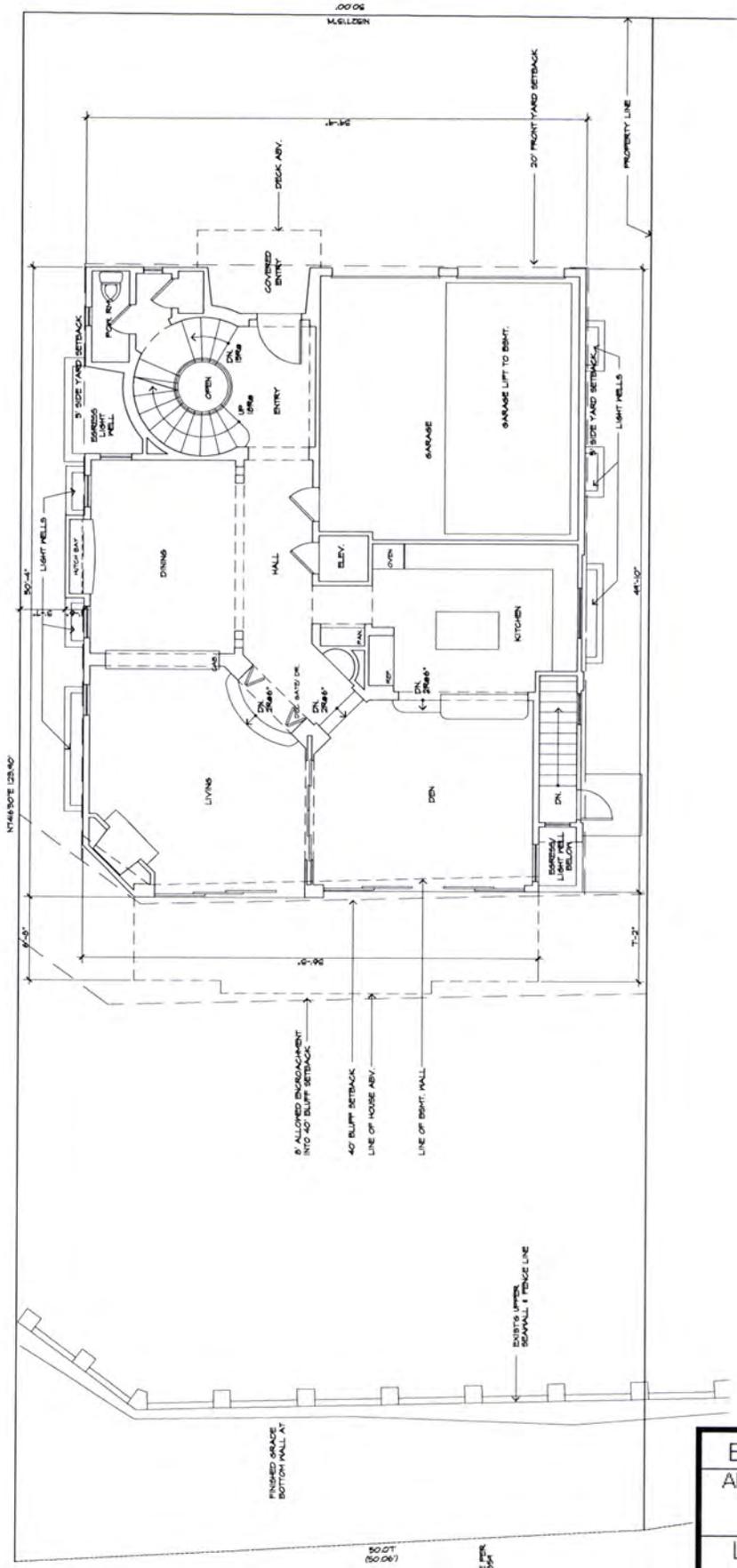
DATE: 08/20/08
BY: J. COHN
CHECKED: J. COHN
SCALE: 1/4" = 1'-0"
PROJECT: OKUN RESIDENCE
SHEET: 01-PLAN

OKUN RESIDENCE
NEPTUNE AVENUE
ENCINITAS, CALIFORNIA

COHN + ASSOCIATES
ARCHITECTURE PLANNING
3015 AVENUE 158
SAN MARINO, CALIFORNIA 91766
TEL: 909/391-8888
FAX: 909/391-8888



DATE: 08/20/08
SCALE: 1/4" = 1'-0"
PROJECT: OKUN RESIDENCE
SHEET: 01-PLAN
OF SHEETS: A3



FIRST FLOOR PLAN



EXHIBIT NO. 2h
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 19 First Floor
Plan

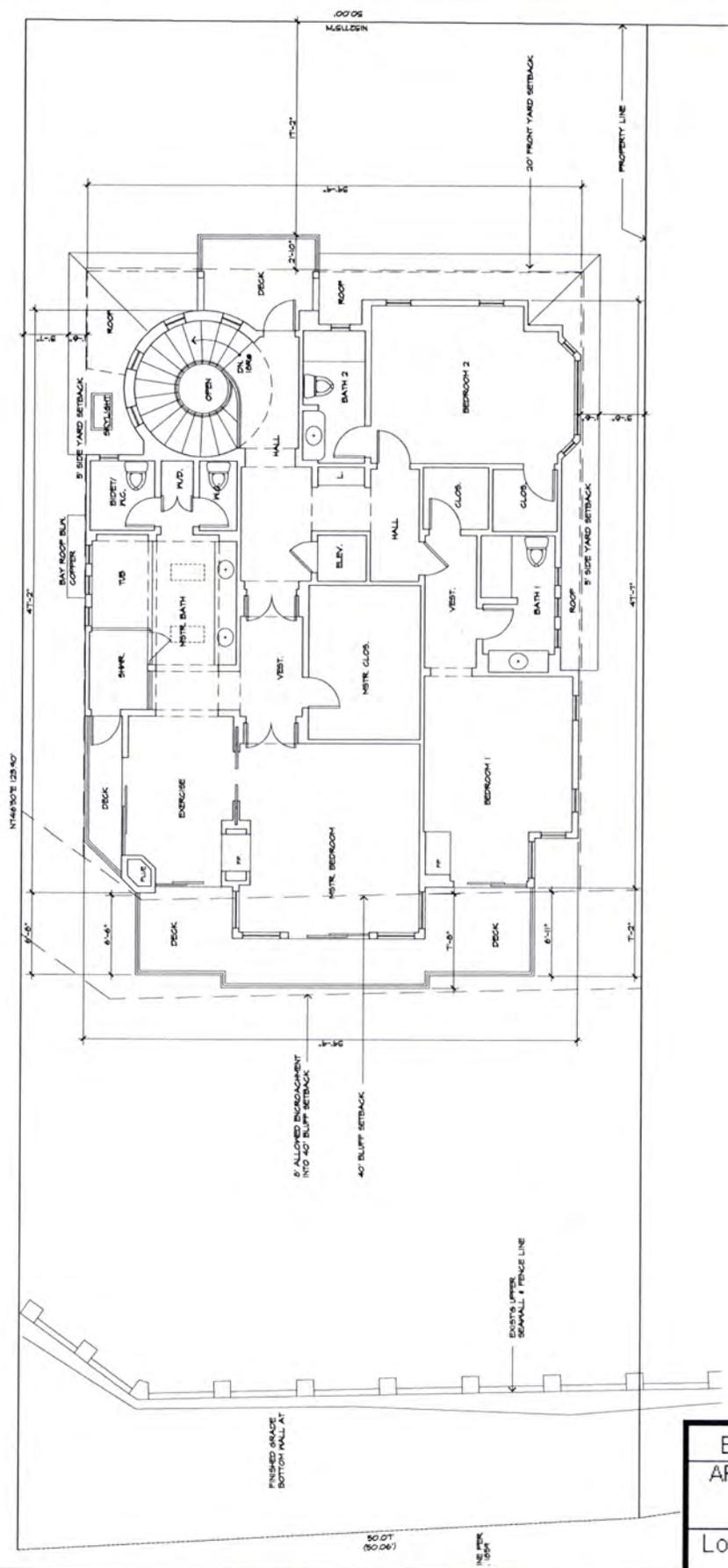
Printed on Monday, October 28, 2008

DATE: 10/20/08
 DRAWN BY: J. J. JONES
 CHECKED BY: J. J. JONES

OKUN RESIDENCE
 NEPTUNE AVENUE
 ENCINITAS, CALIFORNIA

COHN + ASSOCIATES
 ARCHITECTURE PLANNING
 2000 W. SANDHILL ROAD, SUITE 100
 SAN MARINO, CA 91766
 TEL: 909.391.1100
 FAX: 909.391.1101

ARCHITECT'S SEAL
 J. J. JONES
 REGISTERED ARCHITECT
 STATE OF CALIFORNIA
 NO. 12345
 EX. 12345
 SCALE: 1/4" = 1'-0"
 SHEET: A4
 OF: 12
 FILE: OKUN PLAN



SECOND FLOOR PLAN

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



EXHIBIT NO. 2i
 APPLICATION NOS.
 A-6-ENC-09-040
 A-6-ENC-09-041
 Lot 19 Second Floor
 Plan

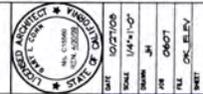
California Coastal Commission

Printed on Monday, October 28, 2008

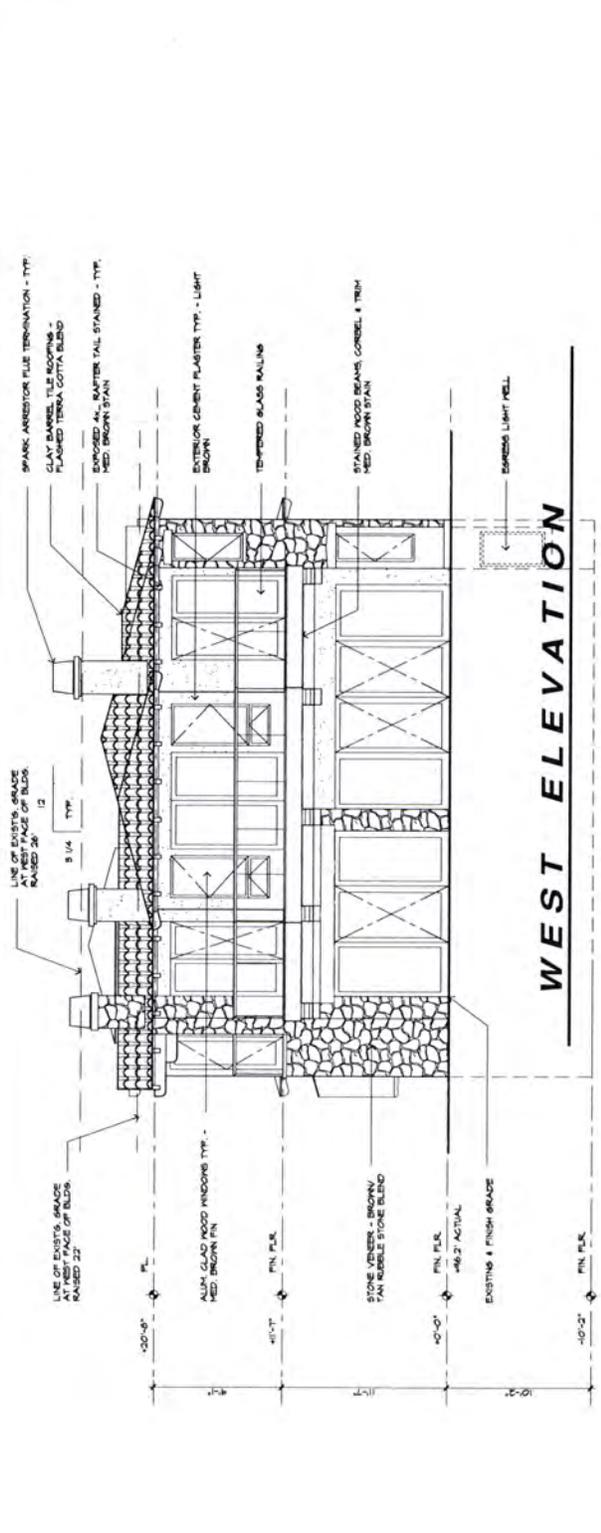
DATE	10/27/08
BY	JM
CHECKED	JM
SCALE	1/4" = 1'-0"
SHEET	OF
PROJECT	RESIDENCE
LOCATION	ENCINITAS, CALIFORNIA

**O K U N
R E S I D E N C E**

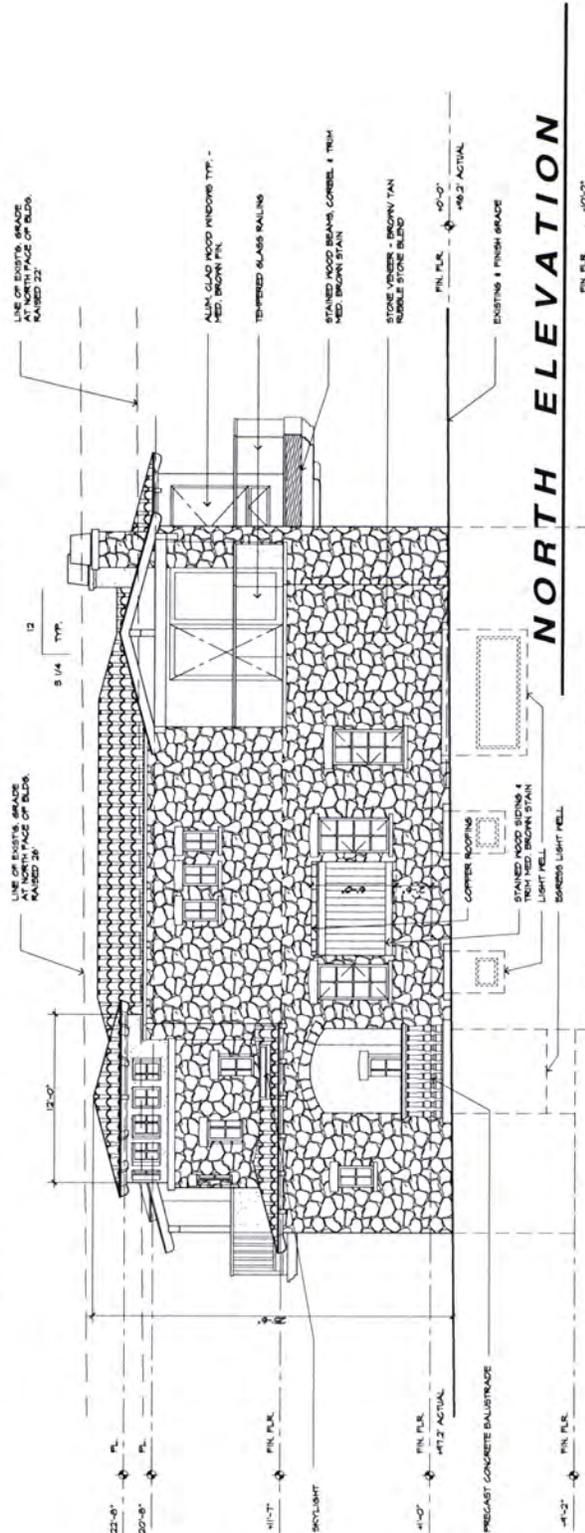
COHN + ASSOCIATES
ARCHITECTURE PLANNING



A7
OF SHEETS



WEST ELEVATION



NORTH ELEVATION

ELEVATIONS

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



EXHIBIT NO. 2k
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Lot 19 Elevations
(West and North)



Printed on: Tuesday, October 26, 2010

DATE: 10/27/09
 SCALE: 1/4" = 1'-0"
 DRAWN: JH
 PER: CRAFT
 TEL: 949.451.1100
 FAX: 949.451.1100

PROJECT NO. 09-040
 SHEET NO. A6

CLIENT: OKUN RESIDENCE
 ADDRESS: REFLUNE AVENUE, ENCINITAS, CALIFORNIA

ARCHITECT: COHN + ASSOCIATES
 ARCHITECTURE PLANNING

REGISTERED ARCHITECT
 STATE OF CALIFORNIA
 NO. 12588
 EXPIRES 12/31/10

REGISTERED ARCHITECT
 STATE OF CALIFORNIA
 NO. 12588
 EXPIRES 12/31/10

REGISTERED ARCHITECT
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REGISTERED ARCHITECT
 STATE OF CALIFORNIA
 NO. 12588
 EXPIRES 12/31/10

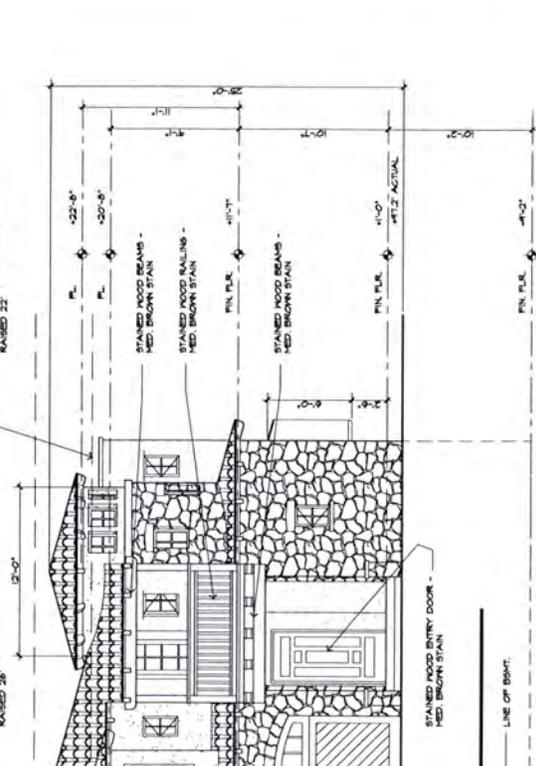
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 EXPIRES 12/31/10

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 NO. 12588
 EXPIRES 12/31/10

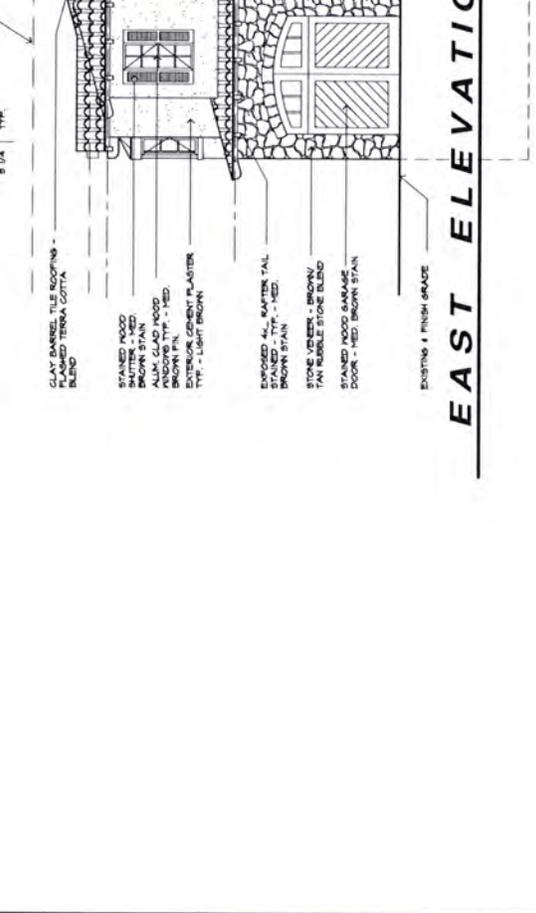
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 NO. 12588
 EXPIRES 12/31/10

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 STATE OF CALIFORNIA
 NO. 12588
 EXPIRES 12/31/10

REGISTERED ARCHITECT
 STATE OF CALIFORNIA
 NO. 12588
 EXPIRES 12/31/10



EAST ELEVATION



SOUTH ELEVATION

ELEVATIONS

SCALE 1/4" = 1'-0"



0 1 2

EXHIBIT NO. 21
 APPLICATION NOS.
 A-6-ENC-09-040
 A-6-ENC-09-041
 Lot 19 Elevations
 (East and South)



California Coastal Commission



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EXHIBIT NO. 3
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Aerial View



EXHIBIT NO. 4
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041
Beach View

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



17 October 2011

SUPPLEMENTARY GEOTECHNICAL REVIEW MEMORANDUM

To: Nick Dreher, Coastal Program Analyst
From: Mark Johnson, Staff Geologist
Re: A-6-ENC-09-40; A-6-ENC-09-41 (Okun)

With respect to the above referenced appeals, I have reviewed the following documents:

- 1) Soil Engineering Construction, 2006, "As-built slope stability analyses @ 40' setback, Okun residence, 828 Neptune Avenue, Encinitas", 1 p. letter report dated 28 November 2006 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).
- 2) Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 1 p. letter dated 21 May 2008 and signed by J.W. Niven (CE 57517).
- 3) Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 10 p. letter report dated 21 May 2008 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).
- 4) Geopacific Inc., 2008, "Third party review, 08-073 CDP, 828 Neptune Avenue, Encinitas, California, APN 256-011-13 & -03, Applicant Mr. Leonard Okun", 2 p. review memorandum dated 21 August 2008 and signed by J. Knowlton (RCE 55754 CEG 1045).
- 5) Soil Engineering Construction and The Trettin Company, 2009, "Monitoring report, 828 Neptune Avenue, Encinitas, California", 11 p. report dated December 2009 and signed by J.W. Niven (CE 57517), R.D. Mahony (CEG 847 GE 554), and B. Trettin.
- 6) Soil Engineering Construction, 2009, "Okun slope stability, 828 Neptune Avenue, Response to Coastal staff letter dated December 7, 2009", 3 p. letter report dated 15 December 2009 and signed by J.W. Niven (CE 57517).
- 7) GeoSoils, 2011, "Feasibility for construction evaluation, 828 Neptune Avenue (Lots 18 and 19 of Block 11, Map 1859), Encinitas, California 92024", 10 p. geotechnical report dated 19 April 2011 and signed by J.P. Franklin (CEG 1340) and D.W. Skelly (RCE 47857).

In addition, I have visited the base of the coastal bluff at this site many times over the past several years, most recently on 10 June 2010 when I also observed the bluff top lot and the existing structure.

The purpose of this supplemental geotechnical review memo is to report on reference (7), and how the results therein affect the safe building envelope on the subject lots. I provided what I feel is a suitable geologic model and rock/soil strength parameters to the applicant's consultant team, and asked that they calculate where (if anywhere) on the bluff top a 1.5 factor of safety

EXHIBIT NO. 5
APPLICATION NOs. A-6-ENC-09-040 A-6-ENC-09-041
Staff Memoranda
California Coastal Commission

could be attained if the existing seawall, gravel backfill and slope, and upper bluff retaining wall were not present. As stated in reference (7), the consultants object both to performing an analysis of hypothetical conditions and to the geologic model I provided. As discussed in my review memo of 30 September 2010, the geologic model I provided is based on experience at the subject site during original permitting of the seawall, gravel, and retaining wall, as well as at other sites in northern Encinitas. I feel that this geologic model is the appropriate model for the site.

The consultants' analysis loaded the bluff with the proposed building (which is partially excavated into the bluff) and defined the bluff edge as the edge of the retained fill behind the upper bluff retaining wall. As mentioned in my review memo of 30 September 2010, this is not how I would identify the bluff edge. The Geosoils report demonstrates to my satisfaction, however, that a 1.5 factor of safety is obtained at a point 63 feet from the retaining wall. To assure that a 1.5 factor of safety would be maintained for the life of any proposed development, the bluff retreat expected over that time would have to be added to the 63-foot figure. In the absence of a site-specific study, the Commission has typically used a figure of 0.49 ft/yr (adapted from a 1999 study of Benumof and Griggs) for the future long-term average bluff retreat rate in this part of Encinitas. Assuming a 75-year design life, this translates to 37 feet of bluff retreat. My recommended setback given these data would thus be 100 feet. This value should be measured from the natural bluff edge, which is now buried beneath the retained fill. I note that such a setback does not yield a buildable space on either of the lots.

Reference (7) goes on to demonstrate, however, that placing the houses in the proposed locations but using caisson foundations 55 feet deep, with or without tiebacks, yields a factor of safety exceeding 1.5 (static) and 1.1 (pseudostatic).

I hope that this review is helpful. Please do not hesitate to contact me with any further questions.

Sincerely,


Signature on File —

✓

Mark Johnsson, Ph.D., CEG, CHG
Staff Geologist

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



30 September 2010

GEOTECHNICAL REVIEW MEMORANDUM

To: Nick Dreher, Coastal Program Analyst
From: Mark Johnsson, Staff Geologist
Re: A-6-ENC-09-40; A-6-ENC-09-41 (Okun)

With respect to the above referenced appeals, I have reviewed the following documents:

- 1) Soil Engineering Construction, 2006, "As-built slope stability analyses @ 40' setback, Okun residence, 828 Neptune Avenue, Encinitas", 1 p. letter report dated 28 November 2006 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).
- 2) Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 1 p. letter dated 21 May 2008 and signed by J.W. Niven (CE 57517).
- 3) Soil Engineering Construction, 2008, "Additional geotechnical recommendations, proposed new single-family residence, 828 Neptune Avenue, Encinitas, California", 10 p. letter report dated 21 May 2008 and signed by J.W. Niven (CE 57517) and R.D. Mahony (CEG 847 GE 554).
- 4) Geopacific Inc., 2008, "Third party review, 08-073 CDP, 828 Neptune Avenue, Encinitas, California, APN 256-011-13 &-03, Applicant Mr. Leonard Okun", 2 p. review memorandum dated 21 August 2008 and signed by J. Knowlton (RCE 55754 CEG 1045).
- 5) Soil Engineering Construction and The Trettin Company, 2009, "Monitoring report, 828 Neptune Avenue, Encinitas, California", 11 p. report dated December 2009 and signed by J.W. Niven (CE 57517), R.D. Mahony (CEG 847 GE 554), and B. Trettin.
- 6) Soil Engineering Construction, 2009, "Okun slope stability, 828 Neptune Avenue, Response to Coastal staff letter dated December 7, 2009", 3 p. letter report dated 15 December 2009 and signed by J.W. Niven (CE 57517).

In addition, I have visited the base of the coastal bluff at this site many times over the past several years, most recently on 10 June 2010 when I also observed the bluff top lot and the existing structure.

Reference (1) documents that the completed seawall, mid-bluff gravel fill, and upper bluff retaining wall together have a factor of safety exceeding 1.5 for the static condition and 1.1 for the pseudostatic condition. Together with the recent monitoring report (Reference 5), these analyses demonstrate that any structure at the bluff top will be stable indefinitely, provided that the shoreline protection system is maintained adequately.

Conversely, given the nature of the slide that occurred in 1999 on this and adjacent properties, without this shoreline protection system, there is no place on the subject lot where stability can be assured for the next 75 years (reference 6). Indeed, similar geologic conditions lead to an ancient slide in the 600 block of Neptune Avenue, and the street curves around the headscarp. Similarly, a slide ¼ mile to the north of the subject site destroyed the former beach access stairs and has a headscarp essentially coincident with the narrow parking lot adjacent to the street.

The bluff edge can retreat either by gradual erosion or by landsliding. When the bluff edge retreats by landsliding the top of the headscarp becomes the new bluff edge. It has been the Commission's practice in general that if fill is placed over the bluff edge, it does not change the position of the bluff edge—the bluff edge still exists beneath the fill. As demonstrated by the City's review letter (Reference 4), this has also been the position of the City in the past.

I hope that this review is helpful. Please do not hesitate to contact me with any further questions.

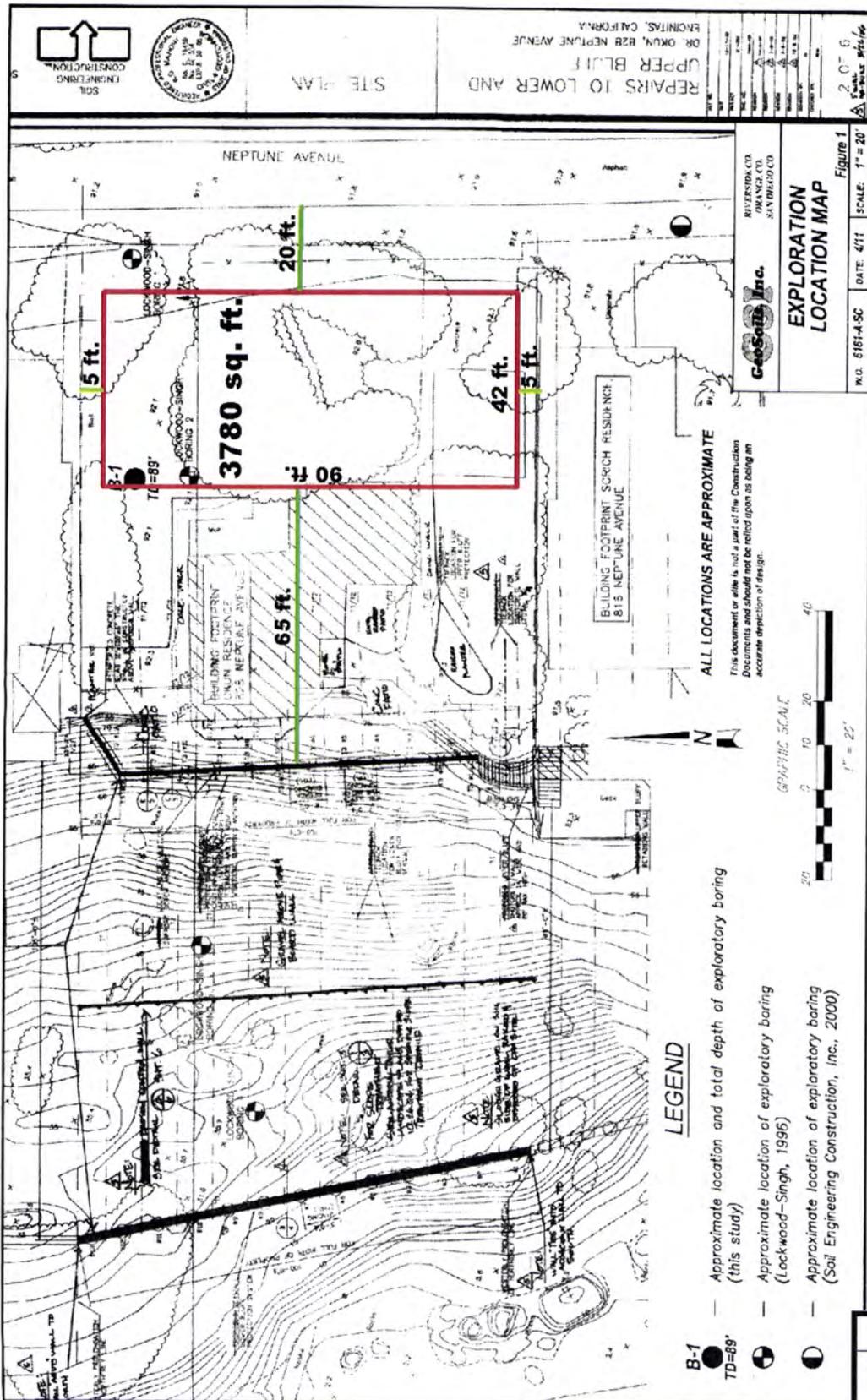
Sincerely,



Signature on File —



Mark Johnson, Ph.D., CEG, CHG
Staff Geologist



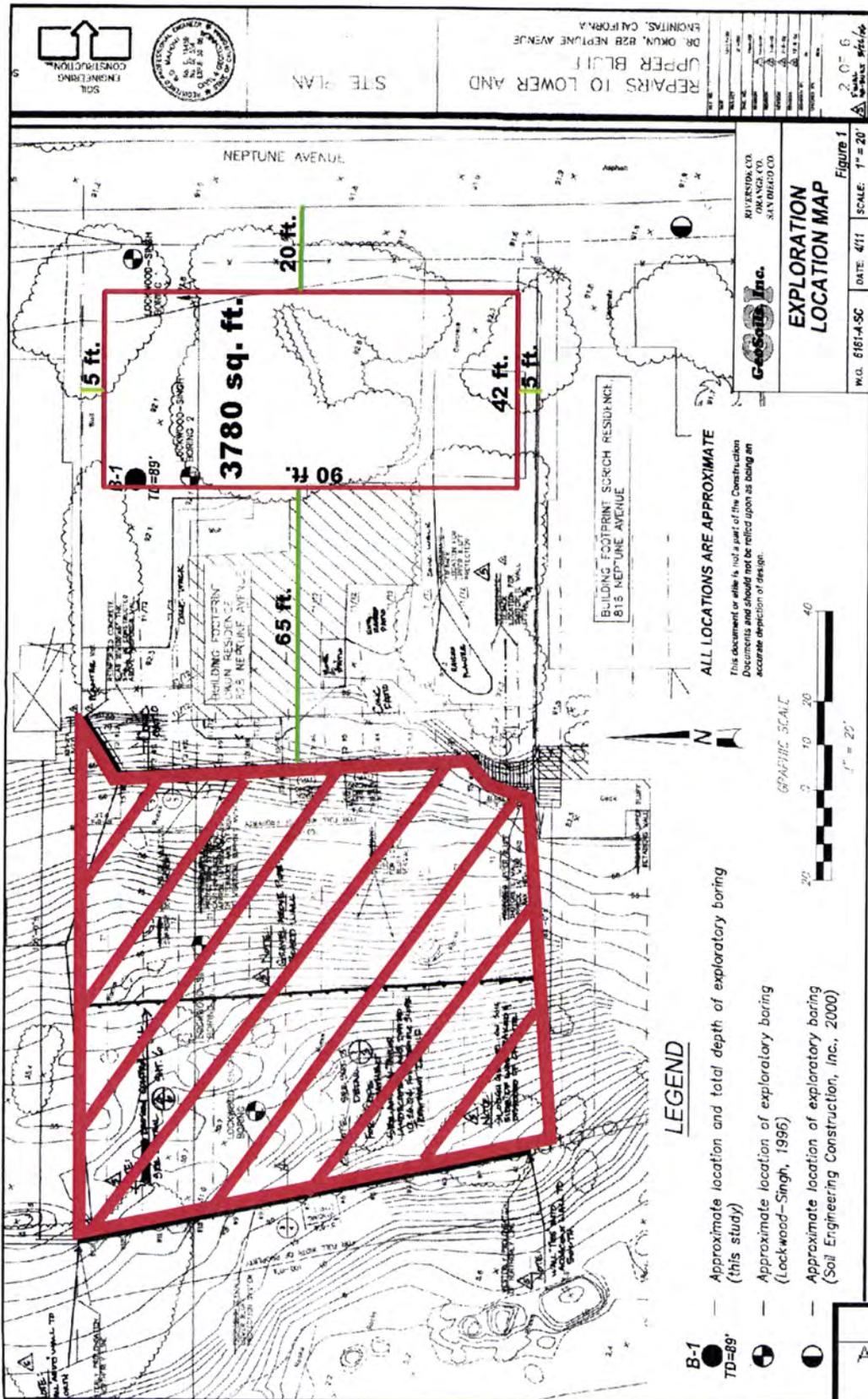
For Illustrative purposes only.

F O R N I A
S T A L
I S S I O N
 ervices Division

EXHIBIT NO. 6
 APPLICATION NOS.
 A.6-ENC-09-040
 A.6-ENC-09-041
 Staff Recommended
 Development Envelope



Open Space Bluff Face Restriction



For Illustrative purposes only.

OR N I A
S T A L
I S S I O N
Services Division

EXHIBIT NO. 7
APPLICATION NOS.
A-6-ENC-09-040
A-6-ENC-09-041

Open Space Bluff Face Restriction