

**CALIFORNIA COASTAL COMMISSION**

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# W23a

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Staff: M. Alvarado-LB  
Staff Report: 09/22/2017  
Hearing Date: 10/11/2017

## STAFF REPORT: PERMIT AMENDMENT

**Application No.:** 5-10-180-A1

**Permittee:** Trustees of Barth Family Trust, Mr. Leonard and Michael Barth

**Agent:** Sherman Stacey

**Location:** 1880 N. El Camino Real, Unit Space 90, (Capistrano Mobile Home Park), San Clemente (Orange County) (APN: 691-432-02)

**Description of Original Project Approved in 2016:** Request for after-the-fact approval for replacement of an approx. 1,332 sq. ft., 12-13 ft. high one-story mobile home with an approx. 1,569 sq. ft., 19.8 ft. high (with loft) mobile/manufactured home with a shed and covered patio, BBQ, drainage improvements, and minimal landscaping.

**Description of Proposed First Amendment:** Amendment Request to modify existing Special Condition 3 (now proposed as Special Condition 2) of Coastal Development Permit 5-10-180 to remove the required waiver of rights to future shoreline protection. The revised condition will alternatively require that the applicants acknowledge: (1) that they have no future automatic right to a shoreline protective device; and (2) that the existing revetment may require future work, but that the Commission retains the power to prohibit any alteration that is inconsistent with the lawful application of the Coastal Act, as articulated in a recent Orange County Superior Court decision.

**Staff Recommendation:** Approval with conditions.

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## SUMMARY OF STAFF RECOMMENDATION

At the July 14, 2016 meeting, the Commission approved the proposed project with ten (10) special conditions. One of the special conditions required, in part, that the applicants waive any rights to shoreline protection that may exist under Public Resources Code section 30235 for the proposed new mobile/manufactured home. The applicants sued the Commission challenging the condition, and both parties have entered into a Stipulation to Entry of Remand Order; Order Remanding Case, signed by the Court on May 11, 2017, as amended by joint stipulation on June 20, 2017 to extend the remand deadline, overturning the waiver requirement of this special condition. Accordingly, the matter is being remanded to the Commission for further proceedings consistent with the remand order. Considering the above, Commission staff has scheduled a new public hearing for amendment of this special condition in light of the remand order and here recommends approval of the revised condition consistent with the stipulation.

Commission Staff recommends approval of the amendment request. **Special Condition 2**, as modified, requires the applicants to acknowledge both: (1) that they have no future automatic right to a shoreline protective device; and (2) that the existing revetment may require future work, but that the Commission retains the power to prohibit any alteration that is inconsistent with the lawful application of the Coastal Act<sup>1</sup>, consistent with the Commission's action on the most recent application for a replacement mobile home at the Park (CDP No. 5-14-1582 (Capistrano Shores Property, LLC). The applicants agree with the staff's recommendation.

**PROCEDURAL NOTE:** The Commission's regulations provide for referral of permit amendment requests to the Commission if:

- 1) The Executive Director determines that the proposed amendment is a material change,
- 2) Objection is made to the Executive Director's determination of immateriality, or
- 3) The proposed amendment affects conditions required for the purpose of protecting a coastal resource or coastal access.

If the applicants or objectors so request, the Commission shall make an independent determination as to whether the proposed amendment is material. (14 Cal. Code of Regulations Section 13166.)

The subject application is being forwarded to the Commission because the Executive Director has determined that the proposed amendment is a material change because the proposed amendment has the potential for adverse impacts, either individually or cumulatively, on coastal resources or public access to and along the shoreline.

### Staff Note:

The standard of review for the proposed project is the policies and provisions of the Coastal Act regarding hazards and public access. **Due to the requirements of a Joint Stipulation to Entry of Remand Order, as amended, the Commission must act upon this permit amendment application at the OCTOBER 2017 Commission meeting.**

<sup>1</sup> As recently articulated in an Orange County superior court case involving a similar development proposal for a similarly-situated mobile home owner in the Capistrano Shores Mobile Home Park. (*See Capistrano Shores Property LLC v. Cal. Coastal Com.*, Case No. 30-2015-00785032-CU-WM-CJC.)

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

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### APPENDICES

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### EXHIBITS

Exhibit 1 – Project Location

Exhibit 2 – Stipulation to Entry of Remand Order; Order Remanding Case

Exhibit 3 – Joint Stipulation to Amend Remand Order to Extend Deadline

Exhibit 4 – Memorandum of Decision

Exhibit 5 – Writ of Mandate

## I. MOTION AND RESOLUTION

### Staff Recommendation of Approval

Staff recommends that the Commission adopt the following resolution. The motion passes only by affirmative vote of a majority of the Commissioners present.

### Motion:

*I move that the Commission adopt the staff recommendation to **approve** Coastal Development Permit Amendment 5-10-180-A1, with the approval subject to the conditions set forth in the staff recommendation, by adopting the resolution set forth in the staff report.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in conditional approval of the permit amendment 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** the proposed coastal development permit amendment and adopts the findings set forth below on the grounds that the development, as amended and subject to conditions, will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

## II. STANDARD CONDITIONS

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. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
3. **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.
4. **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

**NOTE:** The original Coastal Development Permit Application No. 5-10-180 was presented to the Commission on July 14, 2016 in a combined staff report that addressed thirteen separate coastal development permit applications for after-the-fact replacement mobile homes at the Capistrano Shores Mobile Home Park in San Clemente that listed 11 total special conditions. Out of the 11 special conditions, only 10 special conditions (2-11) apply to CDP Application No. 5-10-180.<sup>2</sup> The 10 Special Conditions approved by the Commission in its prior action on Coastal Development Permit Application No. 5-10-180 have been renumbered and are listed below. Special Conditions 1 through 10 continue to apply; however, modifications are recommended to Special Condition 2 (formerly Special Condition 3) as part of this amendment application No. 5-10-180-A1 (Language to be added to the conditions is shown in underlined text, and language to be deleted is identified by ~~strike-out~~):

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

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

#### **3. ~~Future Response to Erosion/No Future Shoreline Protective Device.~~**

~~No repair or maintenance, enhancement, reinforcement, or any other activity affecting the existing shoreline protective device, is authorized by this coastal development permit. By acceptance of this Permit, the applicant waives, on behalf of itself and all successors and assigns of the applicant's mobile home space, any rights to shoreline protection that may exist under Public Resources Code Section 30235 to protect the proposed new mobile home on the applicant's mobile home space.~~

~~By acceptance of this permit, the applicant further agrees, on behalf of itself and all successors and assigns to the applicant's mobile home space, that the applicant and all successors and assigns shall remove the development authorized by this permit, including the residence, foundations, patio covers, if any government agency has issued a permanent order that the structure not be occupied due to the threat of or actual damage or destruction to the premises resulting from waves, erosion, storm conditions, sea level rise, or other natural hazards in the future. In the event that portions of the development fall to the beach before they are removed, the applicant or successor shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the~~

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<sup>2</sup> Special Condition 1 (Revised Final Plans) does not apply to CDP No. 5-10-180 because the development for which after-the-fact approval was sought was approved by the Commission as built.

~~material in an approved disposal site. Such removal shall require a coastal development permit.~~

2. **Shoreline Hazards.** No repair or maintenance, enhancement, reinforcement, or any other activity affecting the existing shoreline protective device protecting the mobile home park (Capistrano Shores Mobile Home Park) owned by Capistrano Shores Inc., is authorized by this coastal development permit (the "Permit").

By acceptance of this permit, the applicants, on behalf of itself and all successors and assigns to the applicants' mobile home space (Unit 90), acknowledges that (a) Unit 90 and any structures within that space may become threatened in the future (by floods, wave uprush, tsunami, sea level rise, etc.) and (b) the revetment and bulkhead owned by Capistrano Shores, Inc., that currently protect the entire park, may not continue to provide the protection that they currently provide unless they can be repaired, maintained, enhanced, or reinforced in the future. However, the applicants, on behalf of itself and all successors and assigns, further acknowledges that expansions or alterations thereof require a Coastal Development permit, which the Commission may deny if future requests for such expansions or alterations are inconsistent with the lawful application of the Coastal Act as articulated in the ruling of the Orange County Superior Court in *Capistrano Shores Property LLC v. California Coastal Commission*, Case No. 30-2015-00785032-CU-WM-CJC, which is attached to the findings for this Permit as **Exhibits 4 & 5**.

By acceptance of this permit, the applicants further acknowledge and agree on behalf of itself and all successors and assigns that it shall remove the development authorized by this Permit (including the residence, foundations, patio covers, etc.) if any government agency has issued a permanent and final order that the structure is not to be occupied due to the threat of or actual damage or destruction to the premises resulting from waves, erosion, storm conditions, sea level rise, or other natural hazards in the future. In the event that portions of the development become dislodged or dislocated onto the beach before they are removed, the applicants or successor 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.

4. **3. Future Improvements.**

This permit is only for the development described and conditioned herein. Any non-exempt future improvements or development shall be submitted for Commission review and shall not commence unless Commission approval is granted. New development, unless exempt, shall require an amendment to this permit from the Coastal Commission.

5. **4. Construction Best Management Practices.**

The permittee shall comply with the following construction-related requirements and shall do so in a manner that complies with all relevant local, state and federal laws applicable to each requirement:

- (1) No construction materials, debris, or waste shall be placed or stored where it may be subject to wave, wind, or rain erosion and dispersion;

- (2) Staging and storage of construction machinery and storage of debris shall not take place on any sandy beach areas or areas containing any native vegetation;
- (3) Any and all debris resulting from construction activities shall be removed from the project site within 24 hours of completion of the project;
- (4) Construction debris and sediment shall be removed from construction areas each day that construction occurs to prevent the accumulation of sediment and other debris which may be discharged into coastal waters;
- (5) Concrete trucks and tools used for construction of the approved development shall be rinsed off-site;
- (6) Erosion control/sedimentation Best Management Practices (BMP's) shall be used to control dust and sedimentation impacts to coastal waters during construction. BMP's shall include, but are not limited to: placement of sand bags around drainage inlets to prevent runoff/sediment transport into coastal waters; and
- (7) All construction materials, excluding lumber, shall be covered and enclosed on all sides, and as far away from a storm drain inlet and receiving waters as possible.

Best Management Practices (BMP's) designed to prevent spillage and/or runoff of construction-related materials, sediment, or contaminants associated with construction activity shall be implemented prior to the onset of such activity. Selected BMP's shall be maintained in a functional condition throughout the duration of the project.

**6. 5. Landscaping – Drought Tolerant, Non-Invasive Plants.**

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit, in a form and content acceptable to the Executive Director, two (2) full size sets of final revised landscaping plans, which shall include and be consistent with the following:

- i. Vegetated landscaped areas shall only consist of native plants or non-native drought tolerant plants, which are non-invasive. No plant species listed as problematic and/or invasive by the California Native Plant Society (<http://www.CNPS.org/>), the California Invasive Plant Council (formerly the California Exotic Pest Plant Council) (<http://www.cal-ipc.org/>), or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a “noxious weed” by the State of California or the U.S. Federal Government shall be utilized within the property. All plants shall be low water use plants as identified by California Department of Water Resources (See: <http://www.water.ca.gov/wateruseefficiency/docs/wucols00.pdf>).

**7. 6. Bird Strike Prevention.**

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit final revised plans showing the location, design, height and



materials of fences, screen walls and gates, if proposed, for the review and approval of the Executive Director. Said plans shall reflect the requirements of this special condition. Ocean front deck railing systems, fences, screen walls and gates subject to this permit, if proposed, shall use materials designed to minimize bird-strikes with the deck railing, fence, or gate. Such materials may consist, all or in part, of wood; wrought iron; frosted or partially-frosted glass, Plexiglas or other visually permeable barriers that are designed to prevent creation of a bird strike hazard. Clear glass or Plexiglas shall not be installed unless they contain UV-reflective glazing that is visible to birds or appliqués (e.g. stickers/decals) designed to reduce bird-strikes by reducing reflectivity and transparency are also used. Any appliqués used shall be installed to provide coverage consistent with manufacturer specifications (e.g. one appliqué for every 3 foot by 3 foot area) and the recommendations of the Executive Director. Use of opaque or partially opaque materials is preferred to clean glass or Plexiglas and appliqués. All materials and appliqués shall be maintained throughout the life of the development to ensure continued effectiveness at addressing bird strikes and shall be maintained at a minimum in accordance with manufacturer specifications and as recommended by the Executive Director

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

**8. 7. Proof of Legal Ability to Comply with Conditions.**

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall demonstrate its legal ability or authority to comply with all the terms and conditions of this coastal development permit by submitting information indicating approval from the record title property owner that authorizes the applicants to proceed with the approved development and permits the applicants to comply with the terms and conditions of this coastal development permit.

**9. 8. Occupancy Agreement.**

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit to the Executive Director for review and written approval documentation demonstrating that the landowner and the applicants have executed an Amendment to the Occupancy Agreement for the applicants' mobile home space, (1) stating that pursuant to this permit, the California Coastal Commission has authorized the placement of a manufactured home and related accessory structures, including without limitation, manufactured home foundation system and patio covers, on the mobile home space, subject to terms and conditions that restrict the use and enjoyment of the manufactured home and related accessory structures located on the mobile home space; and (2) stating that the Special Conditions of this permit are restrictions on the use and enjoyment of the manufactured home and related accessory structures located on the mobile home space. The Amendment to the Occupancy Agreement shall also state that, in the event of an extinguishment or termination of the Occupancy Agreement for any reason, the terms and

conditions of this permit shall continue to restrict the use and enjoyment of the manufactured home and accessory structures located on the mobile home space of the mobile home park so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on the mobile home space. Notwithstanding the foregoing, the landowner and lessee may, at their discretion, extend, assign, execute a new Occupancy Agreement, providing that the Occupancy Agreement provision required under this Permit Condition may not be deleted, altered or amended without prior written approval of the Executive Director of the Coastal Commission or by approval of an amendment to this coastal development permit by the Commission, if legally required.

**~~10.~~ 9. Condition Compliance.**

Within 180 days of issuance of this coastal development permit or within such additional time as the Executive Director may grant in writing for good cause, the applicants shall satisfy all requirements specified in all conditions 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.

**~~11.~~ 10. Application Fee.**

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall pay the balance of the application fee for after-the-fact development, which equals \$7,500.

## **IV. FINDINGS AND DECLARATIONS**

### **A. PROJECT DESCRIPTION AND LOCATION**

The applicants request that Special Condition 2 (formerly Special Condition 3) Coastal Development Permit (CDP) 5-10-180 be modified to no longer require waiver of rights to future shoreline protection but to alternatively require that the applicants acknowledge: (1) that they have no future automatic right to a shoreline protective device; (2) that the existing revetment may require future work, but that the Commission retains the power to prohibit any alteration that is inconsistent with the lawful application of the Coastal Act, consistent with the Commission's action on the most recent application for a replacement mobile home at the Park (CDP No. 5-14-1582 (Capistrano Shores Property, LLC)).<sup>3</sup> The applicants agree with the staff's recommendation.

The project site is located within the 90-space Capistrano Shores Mobile Home Park ("Park"), located between the first public road (El Camino Real (ECR)) and the sea and seaward of the Orange County Transportation Authority (OCTA) railroad tracks in San Clemente (**Exhibit 1**). The Park is a legal non-conforming use on a stretch of beach developed with a single row of 90 mobile/manufactured homes parallel to the shoreline on a lot zoned OS2 Privately Owned Open Space (intended for open space – no formal easement) and designated Open Space in the City of San Clemente Land Use Plan (LUP). A pre-Coastal Act rock revetment and bulkhead protects the

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<sup>3</sup> As recently articulated in an Orange County superior court case involving a similar development proposal for a similarly-situated mobile home owner in the Capistrano Shores Mobile Home Park. (*See Capistrano Shores Property LLC v. Cal. Coastal Com.*, Case No. 30-2015-00785032-CU-WM-CJC.)

mobile home park property from direct wave attack. No improvements are proposed to the existing bulkhead or revetment as part of this CDP amendment request.

## **B. PROJECT HISTORY**

In July 2010, Commission staff became aware that unpermitted demolition and construction had commenced at the project site, and sent a Notice of Violation letter to the owner of Unit 90. The Notice of Violation letter explained that construction of the replacement structure that was occurring on the space required a coastal development permit, that no such permit had been applied for or obtained, and therefore the construction ongoing at the site constituted a violation of the Coastal Act. Subsequently, the applicants submitted to the Coastal Commission's South Coast District office an after-the-fact coastal development permit application for the remodel of an (then-existing) single-story mobile home structure on August 13, 2010. The application was assigned CDP Application No. 5-10-180 and the project description was updated to the following: *Request for after-the-fact approval for replacement of an approx. 1,332 sq. ft., 12-13 ft. high one-story mobile home with an approx. 1,569 sq. ft., 19.8 ft. high (with loft) mobile/manufactured home with a shed and covered patio, bbq, drainage improvements, and minimal landscaping.* The completed application was first scheduled for the April 2016 Commission meeting, but the item was postponed. It was later presented to the Commission on July 14, 2016.

On July 14, 2016, the Commission approved the proposed project with ten (10) special conditions. One of the special conditions required that the applicants waive any rights to shoreline protection of a proposed new mobile/manufactured home. The condition read in full:

***Future Response to Erosion/No Future Shoreline Protective Device.*** *No repair or maintenance, enhancement, reinforcement, or any other activity affecting the existing shoreline protective device, is authorized by this coastal development permit. By acceptance of this Permit, the applicant waives, on behalf of himself and all successors and assigns of the applicant's mobile home space, any rights to shoreline protection that may exist under Public Resources Code Section 30235 to protect the proposed new mobile home on the applicant's mobile home space.*

*By acceptance of this permit, the applicant further agrees, on behalf of itself and all successors and assigns to the applicant's mobile home space, that the applicant and all successors and assigns shall remove the development authorized by this permit, including the residence, foundations, patio covers, if any government agency has issued a permanent order that the structure not be occupied due to the threat of or actual damage or destruction to the premises resulting from waves, erosion, storm conditions, sea level rise, or other natural hazards in the future. In the event that portions of the development fall to the beach before they are removed, the applicant or successor 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.*

The applicants sued the Commission challenging this condition. Subsequently both parties entered into a Stipulation to Entry of Remand Order; Order Remanding Case, signed by the Orange County Superior Court of California on May 11, 2017, as amended by joint stipulation on June 20, 2017 to extend the remand deadline, granting the applicants a writ of mandamus and overturning the waiver requirement of this special condition. (See Case No. 30-2016-00872336-CU-WM-CJC (the "Remand Order").) Accordingly, the matter is being remanded to the Commission for further

proceedings consistent with the remand order. Within this context, Commission staff has prepared this Staff Report and now recommends approval of a modified condition in accordance with the stipulation, as further discussed below. The stipulation (“Remand Order”) is attached to this Staff Report as **Exhibit 2**, as well as the Joint Stipulation to Amend Remand Order to Extend Deadline as **Exhibit 3**.

### **C. HAZARDS**

Section 30235 of the Coastal Act states in relevant part:

*Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply...*

Section 30253 of the Coastal Act states, in relevant part:

*New development shall do all of the following:*

*(a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*

*(b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. ...*

Though just guidance here, the certified San Clemente Land Use Plan (LUP) also contains policies to address hazard areas. Policy VII.5 of the LUP reflects Section 30253 of the Coastal Act verbatim.

LUP Policy XV.4 states in relevant part:

*Designate lands for protection of significant environmental resources and protection of life and property from environmental hazards...*

The project site is located within the 90-space Capistrano Shores Mobile Home Park (“Park”), located between the first public road (El Camino Real (ECR)) and the sea and seaward of the Orange County Transportation Authority (OCTA) railroad tracks in San Clemente. A pre-Coastal Act rock revetment and bulkhead protects the mobile home park property from direct wave attack. No improvements are proposed to the existing bulkhead or revetment. Coastal hazards associated with beachfront development includes, but is not limited, to wave attack, erosion, sea level rise, flooding, and impacts to public beach access. In addition, a primary issue concerning coastal hazards is the potential expectation that the existing revetment may be augmented in the future to protect new development at the project site. Any seaward encroachment of the revetment would directly impact existing lateral public access along the shoreline and encroach onto State tidelands or lands subject to the public trust.

Under coastal development permit amendment application No. 5-10-180-A1, the applicants do not propose any changes or improvements to the existing bulkhead/revetment along the portion that protects the mobile home park. Any repair or maintenance, enhancement, reinforcement or other activity to the existing bulkhead/revetment is the responsibility of Capistrano Shores Inc., which owns the land that the Unit 90 mobile home occupies (and the other mobile home unit spaces) and all common areas in the mobile home park. The applicants are only responsible for repair/maintenance to the mobile home, landscape, and ancillary structures (i.e, decks, patios, and garden walls) on Unit 90. Capistrano Shores Inc. would be the applicant for the coastal development permit required for any modifications to the existing bulkhead/revetment that may be necessary to protect existing structures. Although the bulkhead/revetment that currently protects the mobile home park may require repair, maintenance, enhancement, or reinforcement in the future, **Special Condition 2**, requires that the applicants acknowledge that the Commission retains full power and discretion to prohibit any expansions or alterations thereof that would be inconsistent with the lawful application of the Coastal Act as articulated in a recent Orange County Court decision.

Regarding the latter point, a recent Orange County Superior Court opinion issued in late 2016, *Capistrano Shores Property LLC v. Cal. Coastal Com.*, Case No. 30-2015-00785032-CU-WM-CJC (the “Court Opinion”) provided guidance on the Commission’s ability to condition a similarly-situated project proposal in the Capistrano Shores Mobile Home Park with respect to shoreline protection, taking into consideration future coastal hazards. Special Condition 2 has been drafted in conformance with, and in reference to, that Court Opinion. Although the Court Opinion involved the owner of Unit 12 in the Capistrano Shores mobile home park (not the current applicants for unit 90) and therefore is not binding on the current applicants as a matter of law, the applicants for Unit 90 are amendable to the same special condition ultimately imposed on the owners of Unit 12 following remand by the Court Opinion in that case. Furthermore, the erosion and flooding hazards at issue are identical for similarly-situated mobile home owners proposing similar development projects in the same mobile home park. Therefore, in drafting Special Condition 2 for the current project proposal, staff determined it to be reasonable to rely on and reference the Court Opinion.

Given that the applicants do not have an automatic right to expand or alter the revetment in ways that are inconsistent with lawful application of the Coastal Act (and the park owner may not choose to or be able to do so), the mobile home may need to be altered or removed in the future either in response to changes to the revetment or to threats posed by shoreline hazards. Therefore, **Special Condition 2** also establishes requirements related to response to future coastal hazards, including relocation and/or removal of structures that may be threatened in the future if any government agency has issued a permanent order that the structure is not to be occupied due to the threat of or actual damage or destruction to the premises resulting from waves, erosion, storm conditions, sea level rise, or other natural hazards in the future, and in the event that portions of the development fall to the beach before they are removed, requiring the applicants or successor(s) to 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.

#### **D. PUBLIC ACCESS**

Section 30210 of the Coastal Act states:

5-10-180-A1 (Barth)

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

Section 30212 of the Coastal Act states, in relevant 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: ...*

*(2) Adequate access exists nearby ...*

Section 30213 of the Coastal Act states:

*Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.*

Section 30223 of the Coastal Act states:

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

Furthermore, the San Clemente Land Use Plan contains policies regarding public coastal access, including the following:

LUP Policy IX.14 mirrors Section 30212 of the Coastal Act.

LUP Policy IX.15 states in relevant part:

*New developments lying between the first public roadway and the shoreline shall provide both physical and visual access to the coastline.*

As shown in **Exhibit 1**, the proposed project site is located between the first public road and the sea directly seaward of the OCTA railroad tracks.

The adjacent North Beach area is a heavily used public beach. North Beach is a popular regional coastal access point as it is located along a popular regional bike route along El Camino Real, it is also the trailhead to the popular San Clemente Coastal Trail, and is the site of a Metrolink/Amtrak train stop. Because of the supply of public parking, popularity of the adjacent North Beach area, and the location of vertical access north of the mobile home park at Poche Beach, the public beach in front of the mobile home park is used by sunbathers, and beach strollers, and the beach is a popular surfing location.

The beach in front of this site, and the mobile home park, is narrow varying from a few feet to 70 feet, depending on the season. High tide extends up to the existing rock revetment which makes public access difficult to impossible during high tide. Because of the narrow beach in this location, allowing a future shoreline protective device to protect a new residential structure could adversely

impact public access by occupying existing sandy beach and deprive the beach of sand renourishment.

Shoreline protective devices are all physical structures that occupy space. When a shoreline protective device is placed on a beach area, the underlying beach area cannot be used as beach. This generally results in the privatization of the public beach and a loss of space in the public domain such that the public can no longer access that public space. The encroachment also results in a loss of sand and/or areas from which sand generating materials can be derived. The area where the structure is placed will be altered from the time the protective device is constructed, and the extent or area occupied by the device will remain the same over time, until the structure is removed or moved from its initial location. Coastal shoreline experts generally agree that where the shoreline is eroding and armoring is installed, the armoring will eventually define the boundary between the sea and the upland.

In addition, sea level has been rising for many years. Also, there is a growing body of evidence that there has been an increase in global temperature and that acceleration in the rate of sea level rise can be expected to accompany this increase in temperature (some shoreline experts have indicated that sea level could rise 4.5 to 6 feet by the year 2100 ). Mean sea level affects shoreline erosion in several ways, and an increase in the average sea level will exacerbate all these conditions. On the California coast the effect of a rise in sea level will be the landward migration of the intersection of the ocean with the shore, leading to a faster loss of the beach as the beach is squeezed between the landward migrating ocean and the fixed backshore.

Given the foregoing potential impacts to access and shoreline sand supply that a shoreline protective device would cause (among other coastal resource impacts), the applicants would be taking a risk by relying on future alterations to the existing revetment which may not be approved. To adequately protect public access, recreation, and shoreline sand supply, especially in light of probable future sea level rise, **Special Condition 2**, as amended, requires the applicants to acknowledge that it has no future automatic right to a shoreline protective device and further requires the applicants to acknowledge the risk that, although the existing revetment may warrant alterations in the future to respond to coastal hazards, the Commission retains the authority to deny any future request for such alteration or expansion that is inconsistent with the lawful application of the Coastal Act as articulated in the Court Opinion.

#### **E. LOCAL COASTAL PROGRAM**

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal development permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program that conforms to Chapter 3 policies of the Coastal Act. The Commission certified the Land Use Plan for the City of San Clemente on May 11, 1988, and certified an amendment approved in October 1995. On April 10, 1998, the Commission certified with suggested modifications the Implementation Plan portion of the Local Coastal Program. The suggested modifications expired on October 10, 1998. The City re-submitted on June 3, 1999, but withdrew the submittal on October 5, 2000.

The proposed amendment request is consistent with the policies contained in the certified Land Use Plan and with the Chapter 3 policies of the Coastal Act. Therefore, approval of proposed amendment request will not prejudice the City's ability to prepare a Local Coastal Program for San

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Clemente that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a).

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

1. City of San Clemente certified Land Use Plan
2. Application No. 5-10-180
3. Coastal Development Permit (CDP) Nos. 5-09-179, 5-09-180, 5-14-1582, 5-16-0265, and 5-16-0624