

## CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST AREA  
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# Th21a

Appeal Filed:	1/15/09
49th Day:	Waived
Staff:	D. Venegas
Staff Report:	10/19/17
Hearing Date:	11/9/17

## STAFF REPORT: APPEAL- SUBSTANTIAL ISSUE

**APPEAL NUMBER:** A-4-MAL-09-006

**APPLICANT:** Peter Morton, later transferred to “HMG Carbon Beach Development, LLC”

**APPELLANTS:** Commissioners Sara Wan and Mary Shallenberger

**LOCAL GOVERNMENT:** City of Malibu

**LOCAL DECISION:** Approval with Conditions of Coastal Development Permit No. 07-007

**PROJECT LOCATION:** **22258 & 22310 Pacific Coast Highway**, City of Malibu, Los Angeles County (APNs: 4451-006-012 & 4451-001-021)

**PROJECT DESCRIPTION:** An application to allow for the conditional approval of an as-built front yard solid concrete wall topped with wood screening and two side yard gates, and modification to the previously approved landscape plan for 22310 Pacific Coast Highway, including a neighborhood standards determination for the height of the as-built front yard wall and side yard gates that are non-visually permeable and are 7.73 feet tall; demolition of a single-family residence located at 19862 Pacific Coast Highway to create an offsite view corridor with a visually permeable glass wall; and a Local Coastal Program Amendment to permit offsite view corridors.

**STAFF RECOMMENDATION:** No Substantial Issue

**MOTION & RESOLUTION:** Page 6

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NOTE: This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally, and at the discretion of the Chair, testimony is limited to 3 minutes total per side. Please plan your testimony accordingly. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify. Others may submit comments in writing. If the Commission determines that the appeal does raise a substantial issue, the *de novo* phase of the hearing will occur at a future Commission meeting during which it will take public testimony.

### **SUMMARY OF STAFF RECOMMENDATION**

The Commission's role at the "substantial issue" phase of an appeal is to decide whether the appeal of the local government action raises a substantial issue with respect to the grounds on which the appeal was filed, which can include a claim that the approved development is not in conformity with the applicable provisions of the certified Local Coastal Program (LCP) or with the public access policies of the Coastal Act (Pub. Res. Code §§30210-14). Staff recommends that the Commission, after public hearing, determine that **no substantial issue exists** with respect to the grounds on which the subject appeal has been filed. The **motion** and **resolution** for a "no substantial issue" finding are found on **page 6**.

The City of Malibu (City) conditionally approved a Coastal Development Permit (CDP) authorizing: 1) an as-built, front yard, solid concrete wall topped with wood screening, 2) two side yard gates, 3) modification to a previously approved landscaped plan, 4) a neighborhood standards determination for the height of the as-built front yard wall and side yard gates that are non-visually permeable and are 7.73 feet tall, and 5) demolition of a single-family residence to create an offsite view corridor. The project site is located on two contiguous beachfront parcels on Carbon Beach, a built-out area of Malibu primarily consisting of residential development.

Specifically, the City issued after-the-fact approval for a concrete wall topped with wood screening, two side yard gates, and landscaping, all located within required public view corridors of the subject property. This development obstructs views of the Pacific Ocean from Pacific Coast Highway across the project site, in violation of special conditions imposed by previous Coastal Commission permits (CDPs 4-00-057 and 4-01-100) for development on the parcels. These permits, which authorized a single family residence on each parcel, limited development within the public view corridors to visually permeable fencing in order to retain views of the Pacific Ocean through the subject property. In order to mitigate for development's impact on public views, the City required the dedication of a view corridor across an entire off-site beachfront parcel (19862 Pacific Coast Highway) in lieu of providing onsite view corridors on the subject properties. Additionally, the City required the applicant to make a contribution to the City for the development of Legacy Park.

The City's final action on the subject CDP was appealed by Commissioners Sara Wan and Mary Shallenberger. The appellants asserted that the project was inconsistent with the onsite public view corridor requirements of the certified Malibu LCP; in particular, LUP Policy 6.18 and LIP Section 6.5(E)(2) required that new development on parcels on the ocean side of Pacific Coast

Highway, such as the subject parcels, must provide a view corridor comprising at least 20 percent of lineal frontage on the project site. At the time the City approved the CDP, the LCP did not allow the option of providing off-site view corridors and public benefits in lieu of the required on-site view corridor for new development. The City conditioned the subject CDP to not be effective until the Commission certified an associated LCP amendment that allowed off-site view corridors to substitute for required on-site view corridors. Because the City approved the CDP concurrently with the associated LCP amendment (which had not yet been certified by the Commission), the CDP was necessarily inconsistent with the certified Malibu LCP.

The applicant waived its right to a hearing within 49 days. Commission staff and the applicant agreed, in cooperation with City of Malibu staff, to postpone the Commission's consideration of the appeal to provide additional time to resolve the main issues. Commission staff further agreed to request that Commissioners Wan and Shallenberger withdraw their appeal if certain actions were completed to resolve the visual impact issues raised by the appeal. These actions included the certification of Malibu LCP Amendment No. 2-10, Commission approval of CDP Amendments 4-00-057-A3 and 4-01-100-A4, and compliance by the applicant with all special conditions of these CDP amendments, including the dedication in fee title of the offsite view corridor to a public agency. These actions have now all been completed. However, Sara Wan and Mary Shallenberger are no longer serving as Coastal Commissioners, so they cannot withdraw the subject appeal. Accordingly, Commission staff recommends that the Commission find that the appeal raises no substantial issue, which will allow the City's approvals to become final.

Specifically, on July 14, 2011 the Commission approved, subject to suggested modifications, Malibu LCP Amendment No. 2-10, which modified LUP Section 6.18 and LIP Section 6.5(E)(2) to allow for the option of providing off-site view corridors and public benefits in lieu of the LCP required on-site view corridor. The modifications were accepted by the City of Malibu and this LCP amendment was effectively certified on January 11, 2012. As a result of the LCP amendment, the approved project is now consistent with the certified Malibu LCP policies and provisions. In addition, the front yard solid concrete wall topped with wood screening and two side yard gates are no longer located within a public view corridor on the site, because CDP Amendment Nos. 4-00-057-A3 and 4-01-100-A4 allowed for the substitution of an off-site view corridor parcel for the previous onsite public view corridors. All conditions of those CDP amendments have been met. As a result of the previously approved LCP amendment and the issuance of CDP Amendment Nos. 4-00-057-A3 and 4-01-100-A4, the City's action on the subject permit no longer raises a substantial issue with regard to its conformity with the policies and standards of the Malibu LCP. The Commission therefore concludes that there is adequate factual and legal support for the City's decision that the development is consistent with the LCP.

Moreover, the development is relatively minor in scope, does not have a significant adverse effect on significant coastal resources, has little precedential value and does not raise issues of regional or statewide significance. Therefore, staff recommends that the Commission find that the appellants' contentions raise no substantial issue with regard to the approved project's consistency with the policies and provisions of the City of Malibu's certified LCP.

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### EXHIBITS

Exhibit 1.	Vicinity Map
Exhibit 2.	Aerial Photo
Exhibit 3.	Off-site Public View Corridor Photo
Exhibit 4.	Appeal by Commissioners Wan & Shallenberger
Exhibit 5.	Final Local Action Notice

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## **I. APPEAL JURISDICTION AND PROCEDURES**

### **A. APPEAL PROCEDURES**

The Coastal Act provides that after certification of a local government's Local Coastal Program (LCP), the local government's actions on Coastal Development Permit applications for development in certain areas and for certain types of development may be appealed to the Coastal Commission. Local governments must provide notice to the Commission of their coastal development permit actions. During a period of ten working days following Commission receipt of a notice of local permit action for an appealable development, an appeal of the action may be filed with the Commission.

#### **1. Appeal Areas**

Approvals of CDPs by cities or counties may be appealed if the development authorized is to be located within the appealable areas, which include the areas between the sea and the first public road paralleling the sea; within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is greater; on state tidelands; or along or within 100 feet of natural watercourses and lands within 300 feet of the top of the seaward face of a coastal bluff. (Coastal Act Section 30603(a)). Any development approved by a County that is not designated as a principal permitted use within a zoning district may also be appealed to the Commission irrespective of its geographic location within the Coastal Zone. (Coastal Act Section 30603(a)(4)). Finally, developments that constitute major public works or major energy facilities may be appealed to the Commission. (Coastal Act Section 30603(a)(5)).

In this case, the project site is located on Pacific Coast Highway, in the City of Malibu (Exhibits 1-3). The Post LCP Certification Permit and Appeal Jurisdiction map certified for the City of Malibu (Adopted September 13, 2002) indicates that the appeal jurisdiction for the area extends between the first public road and the sea, which includes the subject property. As such, the City's coastal development permit for the subject project is appealable to the Commission.

#### **2. Grounds for Appeal**

The available grounds for an appeal of a local government approval of development are limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in the Coastal Act. (Coastal Act Section 30603(b)(1)).

#### **3. Substantial Issue Determination**

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. When Commission staff recommends that no substantial issue exists with respect to the grounds of the appeal, the Commission will hear arguments and vote on the "substantial issue" question. A majority vote of the Commissioners present is required to determine that an appeal raises no substantial issues and that the Commission will therefore not review the merits of the appeal *de novo*. If the Commission determines that no substantial issue exists, then the local government's coastal development permit action will be considered final.

#### **4. De Novo Permit Hearing**

Should the Commission determine that a substantial issue exists, the Commission will consider the CDP application de novo. The applicable test for the Commission to apply in a de novo review of the project is whether the proposed development is in conformity with the certified Local Coastal Program and, if the development is between the sea and the first public road paralleling the sea, the public access and recreation policies of the Coastal Act. (Coastal Act Section 30604(b) & (c)).

#### **B. LOCAL GOVERNMENT ACTION AND FILING OF APPEAL**

The project that is the subject of this appeal was approved by the City of Malibu Planning Commission on December 2, 2008. The City's Notice of Final Action for the project was received by Commission staff on January 2, 2009 (Exhibit 5). Commission staff provided notice of the ten working day appeal period, which began on January 5, 2009 and ended on January 16, 2009. Former Coastal Commissioners Sara Wan and Mary Shallenberger filed an appeal of the local CDP on January 15, 2009, during the Commission's appeal period (Exhibit 4). No other appeals were filed.

Commission staff notified the City, the applicant, and all interested parties that were listed on the appeal and requested that the City provide its administrative record for the permit. The administrative record was received on February 10, 2009. Pursuant to Section 30621(a) of the Coastal Act, a hearing on an appeal must be set no later than 49 working days after the date on which the appeal was filed with the Commission, which would be March 5, 2009; however, according to Section 30625(a), the applicant can waive that time limit. On January 15, 2009, prior to the 49-day deadline for Commission action, the applicant waived their right to a hearing within 49 days.

## **II. STAFF RECOMMENDATION FOR NO SUBSTANTIAL ISSUE**

**MOTION:** *I move that the Commission determine that Appeal No. A-4-MAL-09-006 raises NO substantial issue with respect to the grounds on which the appeal has been filed under §30603 of the Coastal Act.*

### **STAFF RECOMMENDATION OF NO SUBSTANTIAL ISSUE:**

Staff recommends a **YES** vote. Passage of this motion will result in a finding of **No Substantial Issue** and adoption of the following resolution and findings. If the Commission finds **No Substantial Issue**, the Commission will not hear the application de novo, and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

### **RESOLUTION TO FIND NO SUBSTANTIAL ISSUE:**

The Commission finds that Appeal No. A-MAL-09-006 does not present a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the

Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

### **III. FINDINGS AND DECLARATIONS FOR NO SUBSTANTIAL ISSUE**

The Commission hereby finds and declares<sup>1</sup>:

#### **A. PROJECT DESCRIPTION AND SETTING**

On December 2, 2009, the City of Malibu Planning Commission approved Coastal Development Permit No. 07-029 for the conditional approval of an as-built front yard solid concrete wall topped with wood screening and two side yard gates, modification to the previously approved landscaped plan for 22310 Pacific Coast Highway, a neighborhood standards determination for the height of the as-built front yard wall and side yard gates that are non-visually permeable and are 7.73 feet tall, and demolition of a single-family residence located at 19862 Pacific Coast Highway to create an offsite view corridor at 22258 and 22310 Pacific Coast Highway, Malibu (APNs: 4451-006-012 and 4451-001-02) (Exhibits 1-3). Lastly, the project includes a monetary contribution to the City of Malibu for the development of Legacy Park.

The approved project is located on two contiguous beachfront properties (22310 and 22258 Pacific Coast Highway) zoned Single Family Medium 4du/acre and located on Carbon Beach between Pacific Coast Highway and the Pacific Ocean, in an area characterized as a built-out portion of Malibu consisting of residential development. The property site at 22310 Pacific Coast Highway is a 0.48-acre parcel currently developed with a 5,425 sq. ft. single family residence, 400 sq. ft. garage, driveway, privacy wall, 125 ft. long bulkhead, 50 ft. long return wall, and septic system (approved in Commission CDP 4-00-057, as discussed in detail below). 22258 Pacific Coast Highway is a 0.21-acre parcel developed with an 1,175 sq. ft. single family residence, 400 sq. ft. attached garage, driveway and parking court, bulkhead and return wall, swimming pool, wood deck, privacy wall and septic system (approved in Commission CDP 4-01-100, as discussed in detail below). Furthermore, there is development which includes a front yard concrete wall topped with wood screening, two side yards gates and landscaping which collectively obstructs all three of the public view corridors that were required by CDPs 4-00-057 and 4-01-100. The subject City of Malibu permit that is the subject of this appeal seeks after-the-fact authorization to retain the wall, gates and landscaping that blocks the original view corridors.

In its action on the subject permit, the City's Planning Commission approved the permit with a condition that stated that the permit would not be effective until the Coastal Commission certified an LCP amendment that would allow for satisfaction of public view corridor requirements on off-site parcels. The City also required that the applicant obtain an amendment to Commission Coastal Development Permit Nos. 4-00-057 and 4-01-100 to remove the on-site public view corridor requirements prior to the City's CDP effectiveness.

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<sup>1</sup> The suggested findings and conclusions from the Summary of Staff Recommendation are also hereby incorporated by reference.

The project is located between the first public road and the sea, but the proposed project and related construction activities are not anticipated to interfere with the public's right to access the coast. Additionally, the project site does not contain any environmentally sensitive habitat areas (ESHA) or ESHA buffer as depicted on the LCP ESHA and Marine Resources Overlay Map.

## **B. BACKGROUND AND PRIOR SITE DEVELOPMENT**

The subject sites have been the subject of several recent permit actions, including an LCP amendment and CDP amendments by the Coastal Commission and City.

### Prior Commission Action

CDP No. 4-00-057 (Morton) was approved by the Commission on February 13, 2001 for the demolition of two existing single family residences and a 65 foot long bulkhead; construction of a new 5,425 sq. ft. single family residence with an attached 400 sq. ft. garage, driveway, privacy wall, 125 foot long bulkhead, and 50 foot long return wall; installation of a new alternative septic system; and performance of approximately 350 cu. yds. of grading (excavation) at 22310 Pacific Coast Highway. The project also included an offer to dedicate a lateral public access easement over the southern beachfront portion of the site as measured from the deck stringline to the ambulatory mean high tide line, and the reconstruction of an existing five foot wide public sidewalk located between Pacific Coast Highway and the proposed development. In addition, the permit was approved with a public view corridor special condition, which required a deed restriction to be recorded over a 5 foot wide view and a 16 foot wide public view corridor on the property. Development within the public view corridor was limited to fencing of visually permeable designs and materials that minimized adverse effects to public views.

On December 11, 2001, Coastal Development Permit No.4-01-100 (Morton) was approved by the Commission for the demolition of an existing single family residence including decks, fencing, paved areas and bulkhead; construction of a new 24 ft. high, 1,175 sq. ft. single family residence with 400 sq. ft. attached garage, driveway and parking court, bulkhead and return wall, swimming pool, wood deck, and stairs, 6 ft. high stucco privacy wall, three 6 ft. high wrought iron gates; secondary treatment septic system, and approximately 200 cu. yds. of associated grading on the adjacent parcel located at 22258 Pacific Coast Highway. This permit was also approved with a public view corridor special condition which required a deed restriction to be recorded over two 5 foot wide public view corridors on the subject property. Development within the view corridor was also limited to just fencing of visually permeable designs and materials that minimized adverse effects to public views.

As previously mentioned, the property owner subsequently built structures that were not in compliance with the view corridor requirements established by the special conditions noted above. Specifically, an as-built front yard solid concrete wall topped with wood screening, two side gates, and landscaping collectively obstruct all three of the public view corridors on the subject properties. The applicant applied to the City of Malibu for a coastal development permit, which is the subject of this permit appeal staff report, to seek authorization to retain this as-built development.



On July 14, 2011, after the subject permit was appealed by Commissioners Wan and Shallenberger, the Commission approved a project-specific City of Malibu LCP amendment (Malibu LCP Amendment No. 2-10) with suggested modifications to modify LUP Policy No. 6.18 and LIP Section No. 6.5 (E)(2) (View Corridor Requirements) to allow for the option of providing an off-site public view corridor and public benefits in lieu of the LCP required on-site public view corridor. Specifically, the LCP amendment allows the City to consider permitting an off-site public view corridor in lieu of an on-site public view corridor where the off-site visual resource improvement will provide a greater public benefit than what would otherwise be provided through the on-site view corridor. Notably, any off-site visual resource benefit must span the entire width of a beachfront parcel and be at least twenty-five (25) percent wider than the view corridor or corridors that would otherwise be required on the project site. The potential off-site public view corridor parcel shall be located adjacent to at least one publicly owned beachfront parcel that affords ocean views and, to the extent feasible, be located in the same geographic portion of the City as the project site. Any unimproved parcel to be used as an off-site view corridor must otherwise be suitable for the development of a habitable structure or other primary use in that there are no geotechnical hazards or other constraints present that would render the parcel unsafe. In addition, the substitution of an off-site parcel for a required on-site view corridor shall be effectuated by the recordation of an open space deed restriction and transfer of the view parcel in fee title to a public entity.

On November 14, 2011, the City's Council accepted the Coastal Commission's modifications in full, and adopted the ordinance revising its LCP. Finally, on January 11, 2012, the Coastal Commission confirmed that the City's adoption of the LCP amendment conformed to the Coastal Commission's actions and therefore, the LCP, as amended, is now effectively certified. As a result of the LCP amendment, the property owner submitted CDP amendments (4-00-057-A3 and 4-01-100-A4) to modify the Public View Corridor Special Conditions to delete the requirements to maintain the on-site view corridors, including the execution and recordation of deed restrictions which provided that no less than twenty percent of the lineal frontage of each project site shall be maintained as a view corridor, and substitute the requirement for the dedication in fee of an off-site view corridor parcel that is at least twenty-five percent wider and for a monetary contribution to the City of Malibu towards the development of Legacy Park.

The Commission approved CDP Amendment Nos. 4-00-057-A3 and 4-01-100-A4 on September 13, 2012. In that action the Commission found that the deletion of the onsite public view corridors by providing a separate off-site view corridor on a separate parcel would result in the loss of public views of the Pacific Ocean from Pacific Coast Highway at the project site. To mitigate the loss of public views, the applicant had to provide an off-site view corridor parcel that would provide for greater public benefit in the forms of coastal views and potential public access than what would otherwise be provided through the on-site view corridors. The applicant proposed to dedicate a 60-foot wide off-site view corridor mitigation parcel located at 19862 Pacific Coast Highway, Malibu. At the time these CDP amendments were approved, this parcel was owned by the applicant and was developed with an existing single family residence. This off-site parcel is immediately adjacent to a 65-foot wide parcel owned by the State of California and is utilized by the California Department of Transportation (Caltrans) as an ocean-front public viewing platform known as Vista Point. The proposed off-site view corridor would provide 60 feet of contiguous coastal views through the demolition of an existing residence that obstructs all views of the ocean. The applicant proposed to dedicate this 60-foot wide off-site view corridor in

lieu of the on-site view corridor requirements of both CDPs 4-00-057 and 4-01-100. These two CDPs required three non-contiguous onsite view corridors, spanning a total of 31 linear feet over the two lots, to be maintained as public view corridors. The replacement of the 31 linear feet of on-site view corridors with a 60 foot off-site view corridor would result in a view corridor nearly twice as wide (94% percent wider) than the onsite view corridors. Furthermore, the Commission found that the development of the contiguous 60-foot wide view corridor furthers the LCP policy of protecting Malibu's scenic and visual qualities to a much greater degree than the existing three, non-contiguous onsite view corridors across the project sites that were required by the original CDPs. To ensure that the adverse effects to public views were adequately mitigated, the Commission imposed a special condition on the amendments to CDPs 4-00-057 and 4-01-100 that required the applicant to provide evidence that the applicant had permanently protected the off-site view corridor through the recordation of an open space deed restriction and transfer of fee title to a public agency prior to the issuance of the CDP amendments.

In order to comply with the special condition above, the applicant applied to the City of Malibu (CDPA No. 12-004) to amend CDP No. 07-029 to remove the demolition of the residence at 19862 Pacific Coast Highway from the subject permit so that the demolition of the residence would be processed under a separate CDP. This way, the site could be cleared before the open space deed restriction was recorded and the site was dedicated in fee title to a public agency. The applicant then submitted a separate CDP application (CDP No. 12-045) and demolition application (Demolition No. 12-012) to the City of Malibu for the demolition of the existing residence, removal of all existing development, and installation of a 6-foot high visually permeable fence on the off-site public view corridor parcel. The City approved CDPA No. 12-004, CDP No. 12-045 and Demolition No. 12-012 on October 15, 2012.

The applicant completed the demolition and removal of the existing development on the off-site view corridor parcel and the installation of a 6-foot high visually permeable fence. Subsequently, the applicant recorded an open space deed restriction on the off-site view corridor parcel and transferred the fee title of the property to Mountains Recreation and Conservation Authority (MRCA). Afterwards, the applicant provided the Commission with the required evidence that the imposed special conditions of CDP Amendments 4-00-057-A3 and 4-01-100-A4 had been satisfied. As a result, the Commission then issued the CDP Amendments on September 19, 2017.

### **C. APPELLANTS' CONTENTIONS**

The City's final action on the subject coastal development permit was appealed by Commissioners Sara Wan and Mary Shallenberger. The appeal was filed on January 15, 2009, and is attached as Exhibit 4. The appellants contend that the subject permit was found to be inconsistent with the onsite public view corridor requirements of the certified Malibu Land Use Plan (LUP) Policy 6.18 and Local Implementation Plan (LIP) Section 6.5(E)(2), which at the time did not permit off-site view corridors in lieu of onsite view corridors, and therefore the subject CDP was conditioned by the City to prevent it from becoming effective until the Commission certified an LCP amendment adding a provision that would allow for satisfaction of public view corridor requirements off-site. In addition, the City required that the applicant obtain an amendment to Commission-approved CDPs 4-00-057 and 4-01-100 to remove the onsite public view corridor requirement prior to City's CDP effectiveness. As the City approved the coastal development permit concurrently with the associated LCP amendment, the CDP was

necessarily inconsistent with the certified Malibu LCP. More specifically, the required written findings of LCP consistency could not be made per LIP Section 13.9 since an LCP amendment must first be certified by the Coastal Commission, and until such time as an LCP amendment is certified, it is not possible to determine if the project will be consistent with the LCP, as amended.

Exhibit 4 contains the full text of the appeal.

#### **D. ANALYSIS OF SUBSTANTIAL ISSUE**

Pursuant to Sections 30603 and 30625 of the Coastal Act, the appropriate standard of review for an appeal is whether a substantial issue exists with respect to the grounds raised by the appellants relative to the locally-approved project's conformity to the policies contained in the certified Local Coastal Program (LCP) or the public access policies of the Coastal Act. In this case, the appellants cited the visual resources and coastal development permit process policies and provisions of the certified LCP and did not raise any issues with the public access policies of the Coastal Act as grounds for appeal.

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (Cal. Code Regs., Title 14, Section 13115(b)).

In evaluating the issue of whether the appeal raises a substantial issue, the Commission considers the following factors:

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

In this case, for the reasons discussed below, the Commission determines that the appeal raises no substantial issue with regards to the grounds on which the appeal has been filed, as discussed below.

##### **1. Visual Resources**

The appellants contend that the project, as approved by the City, does not conform to the policies of the LCP with regards to protecting public views to and along the ocean from Pacific Coast Highway. The appellants assert that the project is inconsistent with the onsite public view corridor requirements of the then-certified Malibu LUP Policy 6.18 and LIP Section 6.5(E)(2) (outlined below) and as the City approved the coastal development permit concurrently with the

associated LCP amendment, the CDP was necessarily inconsistent with the certified Malibu LCP.

The following Malibu LUP Policy 6.18 and LIP Section 6.5(E)(2) policy and provision were modified by City of Malibu LCP Amendment No. 2-10 (effectively certified on January 11, 2012), which occurred after the subject permit was appealed by Commissioners Wan and Shallenberger (January 15, 2009).

LUP Policy 6.18, as amended, states:

For parcels on the ocean side of and fronting Pacific Coast Highway, Malibu Road, Broad Beach Road, Birdview Avenue, or Cliffside Drive where it is not feasible to design a structure located below road grade, new development shall provide a view corridor on the project site, that meets the following criteria:

- a. Buildings shall not occupy more than 80 percent maximum of the lineal frontage of the site
- b. The remaining 20 percent of lineal frontage shall be maintained as one contiguous view corridor.
- c. No portion of any structure shall extend into the view corridor.
- d. Any fencing across the view corridor shall be visually permeable and any landscaping in this area shall include only low-growing species that will not obscure or block bluewater views.
- e. In the case of development that is proposed to include two or more parcels, a structure may occupy up to 100 percent of the lineal frontage of any parcel(s) provided that the development does not occupy more than 70 percent maximum of the total lineal frontage of the overall project site and that the remaining 30 percent is maintained as one contiguous view corridor.
- f. The requirements of Section 6.18 may be satisfied by providing an off-site view corridor that preserves and enhances coastal views from Pacific Coast Highway, Malibu Road, Broad Beach Road, Birdview Avenue, or Cliffside Drive. The required off-site view corridor shall span the entire width of a beachfront parcel and be at least twenty-five (25) percent wider than the view corridor or corridors that would otherwise be required on the project site. Potential off-site view parcels shall be located adjacent to at least one publicly owned beachfront parcel that affords ocean views, which parcel was publicly owned as of the effective date of the Land Use Plan amendment that added Section 6.18.f, and, to the extent feasible, be located in the same geographic portion of the City as the project site. The off-site view corridor must provide public visual resource benefits that are greater than what would otherwise be provided through an on-site view corridor. Public beach access and accessways shall be permitted uses on the view corridor mitigation site. Any unimproved parcel to be used as an off-site view corridor must otherwise be suitable for the development of a habitable structure or other primary use consistent with the underlying zoning regulations. If the decision making body finds that there are legitimate concerns over whether a proposed view corridor parcel, could otherwise be suitable for the development of a habitable structure or other primary constraints,

the proposed view corridor parcel shall be rejected as inadequate and inconsistent with the intent of this provision.

If deemed necessary by the decision-making body to satisfy the findings of this subsection, the applicant may, in addition to providing an off-site view corridor consistent with the above requirements undertake or fund all or a portion of an off-site measure, project, or program that provides additional public visual resource benefits.

LIP Section 6.5(E)(2), which, as amended states:

6.5 (E)(2) Where the topography of the project site does not permit the siting or design of a structure that is located below road grade, new development shall provide an ocean view corridor on the project site by incorporating the following measures.

- a. Buildings shall not occupy more than 80 percent maximum of the lineal frontage of the site.
- b. The remaining 20 percent of lineal frontage shall be maintained as one contiguous view corridor, except on lots with a width of 50 feet or less. Lots with a lineal frontage of 50 feet or less shall provide 20% of the lot width as view corridor; however, the view corridor may be split to provide a contiguous view corridor of not less than 10% of the lot width on each side. For lots greater than 50 feet in width, the view corridor may be split to provide a contiguous view corridor of not less than 10% of the lot width on each side, provided that each foot of lot width greater than 50 feet is added to the view corridor. On irregularly shaped lots, the Planning Manager shall determine which side yards shall constitute the view corridor in order to maximize public views. Sites shall not be designed so as to provide for parking within these designated view corridors.
- c. No portion of any structure shall extend into the view corridor above the elevation of the adjacent street.
- d. Any fencing across the view corridor shall be visually permeable and any landscaping in this area shall include only low-growing species that will not obscure or block bluewater views.
- e. In the case of development that is proposed to include two or more parcels, a structure may occupy up to 100 percent of the lineal frontage of any parcel(s) provided that the development does not occupy more than 80 percent maximum of the total lineal frontage of the overall project site and that the remaining 20 percent is maintained as one contiguous view corridor.
- f. The requirements of Section 6.5(E)(2) may be satisfied by providing an off-site view corridor that preserves and enhances coastal views from Pacific Coast Highway, Malibu Road, Broad Beach Road, Birdview Avenue, or Cliffside Drive. The requirements of Section 6.5(E)(2) may be deemed satisfied by an off-site view corridor if the decision making body makes the findings required in 1 through 6 below and the View Parcel has been dedicated in accordance with Section 6.5(E)(2)(g):

- (1) The proposed off-site view corridor parcel (the “View Parcel”) is a beachfront parcel that affords public views of the ocean and will provide public visual

- resources benefits that are greater than what would otherwise be provided through an on-site view corridor;
- (2) The View Parcel is located adjacent to at least one publicly owned beachfront parcel that also affords ocean views, which parcel was publicly owned as the effective date of the Local Implementation Plan amendment that added Section 6.5(2)(f), and, to the extent feasible, be located in the same geographic portion of the City as the project site;
  - (3) The off-site view corridor shall be provided across the entirety of the View Parcel and shall be at least twenty-five (25) percent wider than the view corridor(s) that would otherwise be required on the project site;
  - (4) There are no geotechnical hazards or other constraints present on or near the View Parcel that could otherwise render the View Parcel unsafe or unsuitable for the development of a habitable structure or other primary use consistent with the underlying zoning regulations. If the decision making body finds that the proposed view corridor parcel is not suitable for the development of a habitable structure or other primary use due the presence of geotechnical hazard or other constraints, the proposed view corridor parcel shall be rejected as inadequate and inconsistent with the intent of this provision.
  - (5) Public viewing, public beach access and accessways shall be permitted used on the dedicated View Parcel. Any physical development of facilities or structures to enhance public views or public access shall conform to the applicable standards, provisions, and requirements of the Malibu LCP.
  - (6) If deemed necessary by the decision-making body to satisfy the findings of this subsection, the applicant may, in addition to providing an off-site view corridor consistent with the above requirements, undertake or fund all or a portion of an off-site measure, project, or program that provides additional public visual resource benefits.
- g. The substitution of an off-site View Parcel for a required on-site view corridor shall be effectuated by the recordation of an open space deed restriction and transfer of the View Parcel in fee title to a public entity, including the following requirements and restrictions:
- (1) Recordation with the Los Angeles County Recorder of an open space deed restriction that applies to the entirety of the View Parcel(s), that ensures that any future development on the lot(s) is limited to only those improvements necessary to provide for public view enhancement or public beach access such as benches and visually permeable fencing, maintenance of roads, public accessways, and utilities consistent with existing easements; and shoreline protection if necessary to protect existing development and that restrictions can be enforced, the text of which has been approved pursuant to procedures in Section 13.19 of the Malibu LIP (recorded legal documents); and,
  - (2) Evidence that fee title to the donor site has been successfully transferred to a public entity after the recordation of a deed restriction listed in the prior paragraph and that the document effectuating the conveyance has been recorded with the Los Angeles County Recorder.

## **Discussion**

The appellants assert that the project is inconsistent with the onsite public view corridor requirements of the certified Malibu LUP Policy 6.18 and LIP Section 6.5(E)(2) because at the time the CDP was approved by the City of Malibu, the provisions of the LCP did not allow for the option of providing off-site view corridor and public benefits in lieu of the required on-site view corridor for new development. At the time this permit was appealed by Commissioners Wan and Shallenberger, the CDP was therefore necessarily inconsistent with the certified LCP. Accordingly, Commission staff's review of the record (at the time the local permit was approved) indicates that the Planning Commission did not have adequate factual evidence and legal support for its decision to approve the CDP.

However, subsequent to the appeal, the Commission certified an LCP amendment that allows the option of providing off-site view corridors and public benefits in lieu of on-site view corridors. As a result of the LCP amendment, the City is now allowed to permit an off-site view corridor in lieu of an on-site view corridor where the off-site visual resource improvement will provide a greater public benefit than what would otherwise be provided through the on-site view corridor. Here, the off-site view corridor spans the entire width of a beachfront parcel, is at least twenty-five (25) percent wider than the view corridors that would otherwise be required on the project site, is located adjacent to a publicly owned beachfront parcel that affords ocean views, and public beach access and accessways are permitted uses on the view corridor mitigation site. Furthermore, the applicant effectuated the off-site view corridor through the recordation of an open space deed restriction on the parcel and transferred the fee title of the property over to Mountains Recreation and Conservation Authority (MRCA). Thus, the proposed project is now consistent with Malibu LUP Policy 6.18 and LIP Section 6.5(E)(2). In addition, the proposed project, which includes the authorization of an as-built front yard solid concrete wall topped with wood screening and two side yard gates, is no longer located within a public view corridor on the site because CDP Amendment Nos. 4-00-057-A3 and 4-01-100-A4 allowed for dedication in fee of an off-site view corridor parcel instead of maintaining onsite public view corridors.

As a result of the previously approved LCP amendment and the issuance of CDP Amendment Nos. 4-00-057-A3 and 4-01-100-A4, the City's action on the subject permit no longer raises issue with regard to its conformity with the policies and standards of the Malibu LCP. The Commission therefore concludes that there is adequate factual and legal support for the City's decision that the development is consistent with the LCP in this respect.

For all these reasons, the Commission finds the City-approved project is consistent with the visual and scenic protection policies and provisions of the certified LCP.

## **2. Factors Considered in Substantial Issue Analysis**

The standard of review for the subject appeal is whether a substantial issue exists with respect to the grounds raised by the appellant relative to the appealable development's conformity to the policies contained in the certified LCP or the public access policies of the Coastal Act. In this case, the appeal cites visual resource protection policies of the LCP. The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (Cal. Code Regs., Title 14, Section 13115(b).) In previous decisions on appeals, the Commission has been guided by the following five factors that are addressed below.

The first factor in evaluating the issue of whether the appeal raises a substantial issue is the degree of factual and legal support for the local government's decision that the development is consistent with the subject provisions of the certified LCP. In this case, as discussed in detail above, the Commission finds that while the City's approval was not supported with adequate evidence at the time of approval as required by the City's LCP, a project specific LCP amendment and CDP amendments have since been approved and carried out. As such, the subject permit is now consistent with the LCP's visual resource protection policies and provisions. The avoidance of adverse impacts to visual and scenic resources were addressed in the staff report and the Planning Commission resolutions of approval, as described in detail above.

The second factor in evaluating the issue of whether the appeal raises a substantial issue is the extent and scope of the development as approved. As described above, the project consists of front yard walls, gates and landscaping on two previously development contiguous parcels located on Carbon Beach between Pacific Coast Highway and the Pacific Ocean, and in an area characterized as a build-out portion of Malibu consisting of residential development. Given that the development type is consistent with the surrounding area, the extent and scope of the subject development on this particular property is relatively small and is sized consistent with the surrounding neighborhood.

The third factor in evaluating the issue of whether the appeal raises a substantial issue is the significance of coastal resources affected by the decision. In this case, the project site consists of two infill lots located in an existing developed beachfront residential community. The loss of the public views identified in the appeal have been mitigated collectively through the creation of an off-site view corridor parcel that is larger and will provide for greater public benefit than the coastal view corridors on the two infill parcels. As such, the approved project is consistent with the LCP's scenic and visual protection policies. Thus, no significant coastal resources would be affected by the decision.

The fourth factor in evaluating the issue of whether the appeal raises a substantial issue is the precedential value of the local government's decision for the future interpretation of its LCP. In this case, the project approved for the project site is consistent with the policies and provisions of the LCP. As such, the City's decision will have no adverse precedential value for future CDP decisions.

The final factor in evaluating the issue of whether the appeal raises a substantial issue is whether the appeal raises only local issues, or those of regional or statewide significance. In this case, the permit approved for the project is consistent with the policies and provisions of the LCP, will not result in any adverse impacts to visual resources or other coastal resources. As such this appeal does not present issues of regional or statewide significance.

In conclusion, the Commission finds that none of the factors listed above, used to evaluate whether a substantial issue exists, favors a finding that a substantial issue exists. The permit approval will not be an adverse precedent for this area of development. Further, the approved development is supported by substantial evidence in the record and will not have an adverse effect on significant coastal resources.



**E. SUBSTANTIAL ISSUE REVIEW CONCLUSION**

For the reasons discussed above, the Commission finds that the appeal no longer raises substantial issue with respect to the consistency of the approved development with the policies of the City's certified LCP or the public access policies in Chapter 3 of the Coastal Act. Applying the five factors identified above, the Commission finds the City's record now adequately supports its position that the proposed project is consistent with the applicable LCP policies and provisions. In addition, the development is relatively small in scope, does not have a significant adverse effect on significant coastal resources, would not be an adverse precedent for future coastal development permits, and does not raise issues of regional or statewide significance. Therefore, the Commission finds that the appeal does not raise a substantial issue with respect to the grounds on which it was filed.

## **APPENDIX 1**

### **Substantive File Documents**

City of Malibu Local Coastal Program; City of Malibu's Planning Commission Agenda report for Coastal Development Permit No. 07-029 (prepared for their December 2, 2008 meeting); City of Malibu Local Coastal Program Amendment No. 2-10; Coastal Development Permit No. 4-00-057; Coastal Development Permit Amendment No. 4-00-057-A3; Coastal Development Permit No. 4-01-100; Coastal Development Permit Amendment No. 4-01-100-A4; City of Malibu Coastal Development Permit Amendment No. 12-004; City of Malibu Coastal Development Permit No. 12-045 and Demolition Permit No. 12-012.