

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
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(562) 590-5071

Th10a



ADDENDUM

February 6, 2017

TO: Coastal Commissioners and Interested Parties

FROM: Karl Schwing, Deputy Director
South Coast District Staff, Orange County

SUBJECT: Commission Hearing of February 9, 2017, item Th10a of Commission Agenda, Coastal Development Permit Application No. 5-14-1582 (Capistrano Shores Property, LLC), San Clemente, Orange County.

Mr. Sherman Stacey submitted a letter dated February 1, 2017 (see attachment, **Exhibit A**) in response to Commission staff's recommendation.

Mr. Stacey expressed concerns regarding the wording of the heading for Special Condition 3, "Future Response to Erosion/No Automatic Right to Protective Shoreline Construction" and language in the findings of the staff report related to this condition, located at the end of the first sentence of the second full paragraph on Page 12. In response to his concerns, staff has agreed to revise the heading and the findings, both of which are not significant revisions and will not affect staff's recommendation for the project. Following is staff's changes (Deletions are indicated in strikethrough and additions are indicated in Underline):

- 1) Summary of Staff Recommendation, bottom paragraph on Page 2, make the following revisions:

Additionally, the proposed development has been conditioned to assure the proposed project is consistent with the resource protection policies of the Coastal Act. The conditions are: **1) Assumption of Risk; 2) Future Improvements; 3) ~~Future Response to Erosion/No Future Shoreline Protective Device~~ Shoreline Hazards; 4) Construction Best Management Practices; 5) Landscaping; 6) Occupancy Agreement; and 7) Proof of Legal Ability to Comply with Conditions.**

- 2) Section III (Special Conditions), Special Condition 3 "Heading" on Page 5, make the following revisions:

3. ~~Future Response to Erosion/No Automatic Right to Protective Shoreline Construction.~~ Shoreline Hazards

- 3) Section IV (Findings and Declarations), Subsection C. Hazards on Page 12, second full paragraph, delete and add the following:

As previously discussed, the Court Opinion overturned the portion of Special Condition 3 that required waiver of rights to future shoreline protection on the basis that it was overbroad (since the applicant did not propose any change to the existing bulkhead or revetment as part of the development proposal under consideration) and because the Commission already retains the authority to reject future requests to alter or expand the revetment if it concludes that such an alteration or expansion would be inconsistent with the lawful application of the Coastal Act, ~~considering the Coastal Act's policies and goals (so there was no automatic right to shoreline protection to be waived). (See *id.*, pp. 6, 7.)~~ as articulated in the Court Opinion (see **Exhibits 5 & 6**).

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February 1, 2017

Marlene Alvarado
California Coastal Commission
South Coast District
200 Oceangate, #1000
Long Beach, CA 90802

Re: CDP No. 5-14-1582 (Capistrano Shores Property, LLC)

Dear Marlene:

I am writing on behalf of the applicant in relation to CDP No. 5-14-1582 (Capistrano Shores Property, LLC). The applicant has had an opportunity to review the Staff Report dated January 27, 2017 and still objects to the heading for Special Condition 3, "Future Response to Erosion/No Automatic Right to Protective Shoreline Construction." The title of Special Condition 3 was specifically the subject of negotiation with the applicant that included Chris Pederson, Jack Ainsworth, Larry Salzman (Pacific Legal Foundation), and many members of staff. During that process, the title was changed as follows:

- STAFF: Notice: No Automatic Right to Protective Shoreline Construction
- APPLICANT: Notice
- STAFF: Notice and Acknowledgment: Future Response to Erosion/No Automatic Right to Protective Shoreline Construction
- APPLICANT: Notice
- STAFF: Special Condition 3
- APPLICANT: The applicant agreed to call it Special Condition 3.
- STAFF: After our agreement on the exact language for Special Condition 3, staff now wants to call it: Future Response to Erosion/No Future Shoreline Protective Device (page 2) or Future Response to Erosion/No Automatic Right to Protective Shoreline Construction (page 5)

The current proposed title is not consistent with negotiated content of Special Condition 3. In my e-mail of January 26, 2017, I requested that the title be changed to "Notice of Hazards." If "Notice" or "Notice of Hazards" is not acceptable, the applicant would accept "Shoreline Protection Notice." Changes in the description on Page 2 would also be required. I

COASTAL COMMISSION

EXHIBIT # A
PAGE 1 OF 2

Marlene Alvarado
February 1, 2017
Page 2

request that staff accept one of these titles so that we can put this issue behind us and move forward.

The applicant continues to object to the language at the end of the first sentence of the second full paragraph on Page 12 that begins "As previously discussed." We request that you delete the language at the end of the sentence "considering the Coastal Act's, policies and goals (so there was no automatic right to shoreline protection to be waived). See *i.d.*, pages pp. 6, 7." We do not agree that the characterization that this language places on the court's opinion is accurate. This language was the subject of significant discussion with the attorneys and staff and it was agreed that it would be deleted in Special Condition 3. It is inconsistent with the agreement regarding Special Condition 3 to now include it in other areas in the Staff Report. Instead of including that language, staff and Wills agreed to attach the court's Statement of Decision and since that Statement of Decision is attached, there is no reason to characterize it.

We request that you make these revisions in an Addendum to the Staff Report. If you have any questions or wish to discuss the matter, please call me.

Very truly yours,

Sherman L. Stacey

SHERMAN L. STACEY

SLS:ck

cc: Eric Wills
Larry Salzman, Esq.
Jack Ainsworth
Chris Pederson, Esq.
Karl Schwing
Al Padilla
Hayley Peterson, Esq.
Sue Loftin, Esq.

COASTAL COMMISSION

EXHIBIT # A
PAGE 2 OF 2

CALIFORNIA COASTAL COMMISSION

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Th10a

Filed: 07/05/2016
180th Day: N/A
Staff: M. Alvarado-LB
Staff Report: 01/27/2017
Hearing Date: 02/09/2017

STAFF REPORT: REGULAR CALENDAR

Application No.: 5-14-1582

Applicants: Capistrano Shores Property, LLC

Project Location: Capistrano Shores Mobile Home Park
1880 N. El Camino Real, Space #12
San Clemente, Orange County

Project Description: Removal/demolition of an existing 1,440 sq. ft., 16 ft. high single-story mobile/manufactured home structure and installation of a new 1,248 sq. ft., 16-ft. high single story mobile/manufactured home structure, 85 sq. ft. storage shed, slab on grade concrete patio, 18 in. high wood seatwall, 6-ft. tall glass fence, and minor landscaping on an oceanfront mobile home space.

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

Procedural Note: At the April 15, 2015 meeting, the Commission approved the proposed project with seven (7) special conditions. One of the special conditions required, in part, that the applicant waive any rights to shoreline protection that may exist under Public Resources Code section 30235 for the proposed new mobile/manufactured home. The applicant sued the Commission challenging the condition, and the Orange County Superior Court granted relief to the applicant by overturning the waiver requirement of this special condition. The court remanded the matter to the Commission for further proceedings consistent with its ruling. Considering the above, Commission staff has scheduled a new public hearing to reconsider the Coastal Development Permit application in light of the court's ruling and here recommends approval with revised conditions in accordance with that decision.

The applicant proposes to install a new mobile home in Unit Space #12 in the Capistrano Shores Mobile Home Park located between the first public road and the sea and seaward of the Orange County Transportation Authority (OCTA) railroad tracks in San Clemente. The mobile home park

is a legal non-conforming use on a stretch of beach developed with a single row of 90 mobile homes parallel to the shoreline on a lot designated OS2 Privately Owned Open Space (intended for open space – no formal easement) in the City of San Clemente Land Use Plan (LUP). A rock revetment protects the 90 mobile home units at this site from direct wave attack. No improvements are proposed to the existing bulkhead or revetment. The primary issue raised by significant improvements to or replacement of the existing mobile homes within the park is the potential expectation that the exiting revetment may be augmented in the future to protect such development. 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. Therefore, Commission staff is recommending approval of the installation of a new mobile home in Unit Space #12 with a condition requiring acknowledgement that Unit Space #12 may be subject to hazards from flooding, wave uprush, sea level rise, and erosion and a requirement that the applicant acknowledge it has no automatic future right to shoreline protection and that the Commission may deny any future request for alteration or expansion of the shoreline protective device that is inconsistent with the lawful application of the Coastal Act, consistent with *Capistrano Shores Property LLC v. California Coastal Commission*, Case No. 30-2015-00785032-CU-WM-CJC.

The applicant, a mobile home owner in the Park owns the mobile/manufactured home, but does not own the land upon which the applicant has placed its new manufactured home. Capistrano Shores, Inc. is a non-profit mutual benefit corporation in which each mobile home owner, such as the applicant, holds a 1/90 “membership” interest which allows the use of the unit space for mobile home purposes. Typically the recordation of a deed restriction is required to notify future owners or occupants of the new mobile/manufactured home of the permit requirements. However, the mobile home owner does not own the land on which its unit lies and therefore cannot record a deed restriction against that real property; in addition, the property owner (Capistrano Shores, Inc.) has indicated that it will not agree to record a deed restriction for the applicant. Therefore, an amendment to the occupancy agreement between the land owner and the applicant is necessary to ensure that future owners or occupants are aware of the permit requirements. The occupancy agreement amendment would not apply to the entire parcel of land within which Unit Space #12 exists, but would apply specifically to Unit Space #12, with the intention to provide future owners of the proposed new manufactured home at Unit Space #12 notice of the special conditions imposed on this permit for the installation/construction of the new manufactured home. An amendment to the mobile home owner’s occupancy agreement must be executed by the applicant for Unit Space #12. The occupancy agreement amendment would indicate that, pursuant to the permit for Unit Space #12 subject to this staff report, the California Coastal Commission has authorized development on Unit Space #12, subject to terms and conditions that restrict the use and enjoyment of this space only; the conditions imposed would not apply to the mobile home park as a whole or to other units within the mobile home park.

Additionally, the proposed development has been conditioned to assure the proposed project is consistent with the resource protection policies of the Coastal Act. The conditions are:

1) Assumption of Risk; 2) Future Improvements; 3) Future Response to Erosion/No Future Shoreline Protective Device; 4) Construction Best Management Practices; 5) Landscaping; 6) Occupancy Agreement; and 7) Proof of Legal Ability to Comply with Conditions.

Commission staff recommends **approval** of coastal development permit application 5-14-1582, as conditioned.

TABLE OF CONTENTS

I. MOTION AND RESOLUTION.....	4
II. STANDARD CONDITIONS	4
III. SPECIAL CONDITIONS	5
IV. FINDINGS AND DECLARATIONS:	7
A. PROJECT DESCRIPTION AND LOCATION	7
B. PROJECT HISTORY	9
C. HAZARDS	10
D. PUBLIC ACCESS.....	14
E. SCENIC AND VISUAL RESOURCES.....	16
F. WATER QUALITY	17
G. LOCAL COASTAL PROGRAM.....	17
H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA).....	18

APPENDICES

Appendix A – Substantive File Documents

LIST OF EXHIBITS

Exhibit 1 – Vicinity Map
Exhibit 2 – Aerial of Project Site
Exhibit 3 – Plan of Existing Seawall
Exhibit 4 – Plans and Elevations
Exhibit 5 – Memorandum of Decision
Exhibit 6 – Writ of Mandate

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit No. 5-14-1582 pursuant to the staff recommendation.*

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

Resolution:

The Commission hereby approves a Coastal Development Permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. 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 will 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. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS

1. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the applicant acknowledges and agrees (i) that Unit Space #12 may be subject to hazards from flooding and wave uprush, tsunami, sea level rise, and erosion; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such coastal hazards.
2. **Future Improvements.** This permit is only for the development described in Coastal Development Permit No. 5-14-1582 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.
3. **Future Response to Erosion/No Automatic Right to Protective Shoreline Construction.** 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 applicant, on behalf of itself and all successors and assigns to the applicant's mobile home space (Unit 12), acknowledges that (a) Unit 12 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 applicant, 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 5 & 6**.

By acceptance of this permit, the applicant further acknowledges and agrees 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

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.

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.

5. **Landscaping – Native, Drought Tolerant, Non-Invasive Plants.** All areas affected by construction activities not occupied by structural development shall be re-vegetated for erosion control purposes.

Vegetated landscaped areas shall consist of non-invasive and drought-tolerant plants. 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.owue.water.ca.gov/docs/wucols00.pdf>).

6. **Occupancy Agreement.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the landowner(s) and the applicant have executed an amendment to the Occupancy Agreement for Space #12, (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 Space #12, subject to terms and conditions that restrict the use and enjoyment of the manufactured home and related accessory structures located on Space #12; 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 Space #12. 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 Space #12 of the mobilehome park so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on Space #12. 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 approval of the Executive Director of the Coastal Commission.
7. **Proof of Legal Ability to Comply with Conditions.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant 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 applicant to proceed with the approved development and permits the applicant to comply with the terms and conditions of this coastal development permit.

IV. FINDINGS AND DECLARATIONS:

A. PROJECT DESCRIPTION AND LOCATION

The proposed project is located between the first public road and the sea and seaward of the Orange County Transportation Authority (OCTA) railroad tracks at Unit Space #12 in the Capistrano Shores Mobile Home Park at 1880 N. El Camino Real in the City of San Clemente, Orange County (**Exhibits 1 & 2**). The mobile home park is an existing non-conforming use on a stretch of beach developed with a single row of 90 mobile homes parallel to the shoreline on a lot designated OS2 Privately Owned Open Space (intended for open space – no formal easement) in the City of San Clemente Land Use Plan (LUP).

The applicant’s attorney, in his March 30, 2015 and April 13, 2015 letters, argues that the Commission lacks jurisdiction because the State Department of Housing and Community Development has exclusive jurisdiction over the replacement and remodeling of mobile homes. The applicant’s attorney is basing his claim on an assertion that the Mobilehome Parks Act (Health

and Safety Code, sections 18200 et seq.) and the Manufactured Housing Act (Health and Safety Code, sections 18000, et seq.) supersede the Commission's authority to regulate development in mobilehome parks. The Manufactured Housing Act is not relevant here because the Commission is not, in this action, regulating building standards of mobilehomes. The Mobilehome Parks Act only supersedes "any ordinance enacted by any city, county, or city and county, whether general law or chartered, applicable to" the Mobilehome Parks Act. (Health and Safety Code, section 18300.) The Mobilehome Parks Act, however, does not supersede state law, including the Coastal Act. Even though this particular site is subject to the Commission's jurisdiction, had it been subject to the City's LCP jurisdiction, application of the City's LCP would not be superseded by the Mobilehome Parks Act because LCPs are a function of state law in their implementation of the Coastal Act. (Charles A. Pratt Construction Co., Inc. v. Coastal Commission (2008) 162 Cal.App.4th 1068, 1075.) The applicant's attorney attempts to create a conflict between the Coastal Act and the Mobilehome Parks Act when there is no such conflict. The commission has jurisdiction over development in the coastal zone. The definition of development in the Coastal Act (section 30106) includes the placement or erection of a structure on land, which is what the applicant is proposing to do on Space 12. Therefore, the Commission has jurisdiction over the proposed mobilehome project at the subject site.

On the seaward side of Unit Space #12, the subject site is fronted by a narrow perched beach inland of an older timber bulkhead that exists roughly along the seaward limits of Unit Space #12. A quarry stone rock revetment exists seaward of the bulkhead and between the proposed development and the Pacific Ocean (**Exhibit 3**). The pre-Coastal Act timber bulkhead and rock revetment protects the row of 90 mobile home units along the entire length of the Capistrano Shores Mobile Home Park, including the subject site, from direct wave attack. The applicant provided a Coastal Hazard and Wave Runup Study prepared by GeoSoils Inc. of the site and the proposed development.

Vertical public access to this beach is not available at the site or anywhere else along the length of the Capistrano Shores Mobile Home Park. The nearest vertical public access is available approximately 300 yards south at the North Beach access point (**Exhibit 1**) and to the north at the Poche Beach access point. In addition, lateral access along the beach in front of the mobile home park and bulkhead/rock revetment is only accessible during low tide; during high tide the waves crash up against the rock revetment. Pursuant to the grant deed property description of the parcels owned by Capistrano Shores, Inc. comprising Capistrano Shores Mobile Home Park, property ownership of the common area seaward of the Unit Space property lines extends from the bulkhead to the ordinary high tide line. Seaward of the bulkhead is an approximately 30-foot wide beach area owned in common by the entire mobile home park up to the ordinary high tide line (per the legal property description). According to the cross-section of the rock revetment provided in the Coastal Hazard and Wave Runup Study prepared by GeoSoils (**Exhibit 3**), the rock revetment begins immediately adjacent to the wood bulkhead and extends approximately 25-feet out seaward but still inland of the ordinary high tide line. A large portion of the rock revetment remains buried depending on varying sand level elevations throughout the year.

Detailed Project Description

The applicant proposes to remove an existing 1,440 sq. ft., 16-ft. high single-story mobile/manufactured home and install a new 1,248 sq. ft., 16-ft. high mobile home with an above-ground concrete block pier foundation, slab on grade concrete patio along the side yards and rear yard (oceanfront) with an 18-inch high wood seat wall, and a 6-ft. high fence with a solid half wall and tempered glass on the upper half, an 85 sq. ft. storage shed along the side yard, drainage improvements, and minimal landscaping. The proposed oceanfront concrete patio will extend 8 ft.-10 in. from the mobile home parallel to a narrow 6-foot wide perched beach inland of a timber bulkhead/rock revetment that exists roughly along the seaward limits of Unit Space #12. Project plans are included as **Exhibit 4**.

The proposed siting of the new mobile home and hardscape improvements meet the LUP structural and deck stringline policy for new infill construction on a beachfront and all other City standards as it extends no farther seaward than the existing units on either side. The applicant is not proposing any work to the existing bulkhead/rock revetment. Each unit in the mobile home park provides two parking spaces per unit.

The applicant would own the proposed new mobile home but does not hold fee title to the land at Unit Space 12 or to the bulkhead/rock revetment. The Capistrano Shores Mobile Home Park is owned by Capistrano Shores, Inc., a non-profit mutual benefit corporation in which the applicant holds a 1/90 “membership” interest which allows him the use of the Unit Space #12 for mobile home purposes. The applicant, as “member” of the corporation is only responsible for repair/maintenance of his own mobile home and to the landscape on his unit space. The corporation provides for all necessary repairs, maintenance and replacements to the rest of the mobile home park common areas including the bulkhead/rock revetment.

Section 30106 of the Coastal Act defines “Development”, in part, as the “placement or erection of any solid material or structure...” The applicant is proposing to remove an existing structure (manufactured/ mobile home) and place, or construct, a new manufactured/mobile home on the site. Pursuant to Section 30106, the proposed project is considered “Development” and requires a coastal development permit. The Commission, through past permit action, has consistently found that replacement of existing manufactured/ mobile homes with new manufactured/ mobile homes, constitutes “Development” and requires a coastal development permit.

B. PROJECT HISTORY

In 2014, the applicant submitted to the Coastal Commission’s South Coast District office a coastal development permit application for the removal/demolition of an existing single-story mobile home structure and the installation of a new 1,248 sq. ft., 16-ft. high mobile/manufactured home with ancillary development. The application was assigned CDP Application No. 5-14-1582. The completed application was first scheduled for the January 2015 Commission meeting, but the item was postponed. It was later presented to the Commission on April 15, 2015.

On April 15, 2015, the Commission approved the proposed project with seven (7) special conditions. One of the special conditions required that the applicant waive any rights to shoreline protection of a proposed new mobile/manufactured home. The condition read, in relevant part:

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 Unit Space #12, any rights to shoreline protection that may exist under Public Resources Code Section 30235 to protect the proposed new mobile home on Unit Space #12.

The applicant sued the Commission, challenging this condition, and the Orange County Superior Court of California granted relief for the applicant by overturning the waiver requirement of this special condition. (See Case No. 30-2015-00785032-CU-WM-CJC, p. 9 (the “Court Opinion”).) The court remanded the matter to the Commission for further proceedings consistent with its ruling. Within this context, Commission staff has prepared this Staff Report and now recommends approval of a new coastal development permit with revised conditions in accordance with the court’s decision, as further discussed below. The court’s Memorandum of Decision (*i.e.*, the Court Opinion) is attached to this Staff Report as **Exhibit 5** and the Writ of Mandate is attached as **Exhibit 6**.

C. HAZARDS

Section 30253 of the Coastal Act states in relevant part:

New development shall:

(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.

Revetment/Bulkhead – Existing Conditions

The applicant provided a Coastal Hazard and Wave Runup Study prepared by GeoSoils, Inc., dated October 15, 2014. The Study states that the site’s shore protection primarily consists of a quarry stone revetment; a timber bulkhead abuts the stone revetment on its landward side, which is then back-filled with a 6-10 foot wide perched beach that runs the length of the mobile home park (**Exhibit 3**). The perched beach at Unit Space #12 is approximately 6-feet wide. The revetment is composed of meta-volcanic quarry stones that range in size from less than ½ ton to about 11 ton with an average size of about 5 tons. According to the GeoSoils report, which used the National Geodetic Vertical Datum 1929 (NGVD 29), the top of the revetment at the subject site varies from +13.7 feet NGVD29 to +15.7 feet NGVD29 with an average elevation of about +15 feet NGVD29. The visible slope of the revetment varies from 2/1 to 1.5/1 (h/v). A visual inspection of the existing revetment/bulkhead in front of Unit Space #12 conducted by GeoSoils, Inc. found the revetment in good condition and not in need of maintenance at this time.

Wave Run-Up/Overtopping Analysis

The Wave Run-Up and Coastal Hazard Study conducted by GeoSoils, Inc. identified a design life of 37 years for a mobile home structure as these are typically constructed of lighter material with a shorter design life than a regular standard construction single family residence. In addition, the Study states, that a mobile home is unique in that the structure is “mobile” and can be moved if jeopardized by coastal hazards. The Study continues:

“The design water level will be the maximum historical water level of +4.9 feet NGVD29 plus 2.0 feet of Sea Level Rise (SLR) or +6.9 feet NGVD29. The maximum SLR prediction for the year 2060 (45 years from now) is 2 feet. If the total water depth is about 7 feet, based upon a maximum scour depth at the toe of the revetment fronting the site of +0.0 feet NGVD29 and a water elevation of 6.9 feet NGVD29, then the design wave height will be about 6.1 feet. The average height of the revetment is +15 feet NGVD29 and the timber bulkhead about 1 foot above at elevation +16 feet NGVD29...The calculated overtopping rate of the revetment under the eroded beach conditions with 2 feet of future SLR is 0.42 ft.³/s-ft. This is less than 1 foot of water coming over the top of the revetment for each wave. The 10 foot wide beach and the presence of the low height bulkhead will significantly prevent wave runoff from impacting the mobile home. In addition, the mobile home is proposed to be raised 18 inches above the street which is at about elevation +16.5 feet NGVD29. Due to the proposed elevation of the development above the adjacent grade, the proposed development is reasonably safe from coastal hazards and wave runoff even under the most onerous SLR conditions in the next 40+ years. In the event the water does reach the replacement mobile home and associated improvements, the water velocity will be insufficient to cause significant damage.”

The sea level rise amount used in the provided analysis for the proposed project is a low estimate for the coming 100 year time period. However, as the proposed project is a mobile home, it may represent a reasonable upper limit for sea level rise for a 40 to 50 year time period and this time period may be appropriate for a mobile home development as the expected life of a mobile home structure is lower than that of a permanent detached single-family residence and can reasonably be estimated at approximately a 50 year time life. In addition, a mobile unit can be easily relocated in the event of a threat. For purposes of a mobile home replacement, the Commission’s staff coastal engineer concurs that an upper limit for sea level rise for a 40 to 50 year time period is appropriate for the anticipated economic life of a mobile home development.

Erosion and Flooding Hazards

Regarding erosion hazards on the subject site, the Coastal Hazard and Wave Runup Study states, “While the beach experiences short term erosion, there is no clear indication of a significant long term erosion trend. Because the shoreline is stabilized by the revetment and as long as the revetment is maintained, the mobile home park will be reasonably safe from the short term erosion hazards.”

The Study finds that the proposed mobile home is reasonably safe from flooding. The analysis shows that the site has the potential to be flooded on occasion from waves breaking on the revetment, overtopping the bulkhead and reaching the mobile house units. Such flooding is a hazard that would be expected for a location this close to the ocean even with the existing shore protection provided by the bulkhead/revetment (deemed adequate by the Study) that is protecting the units from the main wave attack.

Furthermore, the entire mobile home park, including Unit Space #12, is located within the tsunami inundation zone according to the California Emergency Management Agency (CalEMA). **Special Condition 1** places the applicant and subsequent owners on notice (through an amendment to the occupancy agreement per **Special Condition 6**) that this is a high hazard area and that by

acceptance of Coastal Development Permit (CDP) #5-14-1582 the applicant acknowledges the risks, such as flooding, that are associated with location in the tsunami inundation zone, and that are associated with development sited so close to the ocean. The applicant should cooperate with the local CalEMA or emergency responders in case of a large earthquake or a tsunami warning.

Under CDP application No. 5-14-1582, the applicant does not propose any changes or improvements to the existing bulkhead/revetment 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 holds fee title to the land that Unit Space #12 occupies (and the other mobile home unit spaces) and all common areas in the mobile home park. The applicant is only responsible for repair/maintenance to the mobile home, landscape, ancillary structures (i.e, decks, patios, and garden walls) on Unit Space #12. Capistrano Shores Inc. would be the applicant for the coastal development permit required for any modifications to the existing revetment that may be necessary to protect existing structures.

As previously discussed, the Court Opinion overturned the portion of Special Condition 3 that required waiver of rights to future shoreline protection on the basis that it was overbroad (since the applicant did not propose any change to the existing bulkhead or revetment as part of the development proposal under consideration) and because the Commission already retains the authority to reject future requests to alter or expand the revetment if it concludes that such an alteration or expansion would be inconsistent with the lawful application of the Coastal Act, considering the Coastal Act's policies and goals (so there was no automatic right to shoreline protection to be waived). (*See id.*, pp. 6, 7.) Therefore, **Special Condition 3** (specifically the second paragraph) has been drafted in accordance with the guidance set forth in the Court Opinion.

Given that the applicant does not have a right to expand or alter the revetment in ways that are inconsistent with Coastal Act requirements (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 inland changes to the revetment or to threats posed by shoreline hazards. Therefore, **Special Condition 3** (specifically the third paragraph) 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 applicant 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.

Because of the shoreline location of the proposed development, pursuant to sections 13250(b) and 13252(a)(3) of the Commission's regulations, the Commission imposes **Special Condition 2** requiring a coastal development permit amendment for any future improvements or repair and maintenance to the development approved under the subject permits and/or any new development.

Because the applicant does not own the land on which its unit lies, it cannot record a deed restriction against that real property. In addition, the property owner (Capistrano Shores, Inc.) has indicated that it will not agree to record a deed restriction for the applicant. The Commission finds that the purpose of such a deed restriction can be accomplished through an alternative means. If the

deed restriction is not recorded against the parcel, it would not change or weaken the requirement for the applicant to acknowledge the risks and agree to remove the structure if it becomes unsafe for occupancy. The purpose of the deed restriction is simply to notify future owners of the permit conditions of approval. An Occupancy Agreement Amendment between the land owner and the applicant will serve to notify future owners or occupants of the new mobile home of the permit requirements, with the amendment stating that: (1) pursuant to this permit, the California Coastal Commission has authorized the placement of a mobile/manufactured home and related accessory structures, including, without limitation, manufactured home foundation system and patio covers, on Unit 12, subject to terms and conditions that restrict the use and enjoyment of the manufactured home and related accessory structures located on Unit 12; and (2) the Special Conditions of this permit are restrictions on the use and enjoyment of the manufactured home and related accessory structures located on Unit 12 that will continue to apply as long as either this permit or any part of the development it authorizes remains in place.

Furthermore, Coastal Act Section 30601.5 states:

Where the applicant for a coastal development permit is not the owner of a fee interest in the property on which a proposed development is to be located, but can demonstrate a legal right, interest, or other entitlement to use the property for the proposed development, the commission shall not require the holder or owner of any superior interest in the property to join the applicant as co-applicant. All holders or owners of any other interests of record in the affected property shall be notified in writing of the permit application and invited to join as co-applicant. In addition, prior to the issuance of a coastal development permit, the applicant shall demonstrate the authority to comply with all conditions of approval.

Therefore, the Commission imposes **Special Condition 7** requiring the applicant to demonstrate its legal ability or authority to comply with all the terms and conditions of the subject coastal development permit (No. 5-14-1582), prior to issuance of said permit. The applicant shall submit information indicating approval from the record title property owner that authorizes the applicant to proceed with the approved development and permits the applicant to comply with the terms and conditions of its coastal development permit.

Thus, as conditioned, the permit ensures that any prospective future owners of any of the development approved on Unit 12 pursuant to the coastal development permit, will receive notice of the restrictions and/or obligations imposed on the use and enjoyment of the land in connection with the authorized development, including the risks of the development and/or hazards to which Unit 12 is subject, and the Commission's immunity from liability. The amendment to the occupancy agreements will indicate that the California Coastal Commission has authorized development on Unit 12, subject to terms and conditions that restrict the use and enjoyment of Unit 12 only and does not restrict the remainder of the land that the mobile home park occupies.

Since the scope of the development in this case is limited to Unit 12, the Commission has focused discussion on the fact that its authorization for placement of a new mobile home on that space (and ancillary development) does not necessarily mandate or support any future requests for repair, maintenance, or expansion of shoreline protection if doing so would conflict with any applicable Chapter 3 policy of the Coastal Act. In addition, representatives for Capistrano Shores, Inc. were previously notified that repair, maintenance or enhancement of the existing shoreline protection, if deemed necessary, should occur as part of a comprehensive plan for the entire mobile home park.

The Capistrano Shores Mobile Home Park Homeowner Association submitted a coastal development permit application in February 2012 which in addition to park wide improvements, included maintenance of the existing shoreline protective device. That application has since remained incomplete, pending submittal of additional information regarding the bulkhead/rock revetment and project alternatives. Any such repairs/enhancements should occur within the mobile home park's private property and not further encroach onto the public beach. No additional shoreline protective devices should be constructed for the purpose of protecting ancillary improvements (e.g., patios, decks, fences, landscaping, etc.) located between the mobile home and the ocean. For any type of future shoreline hazard response, alternatives to the shoreline protection must be considered that will eliminate impacts to coastal and recreational resources including, but not limited to, scenic visual resources, recreation, and shoreline processes. Alternatives would include but are not limited to: relocation and/or removal of all or portions of the mobile home and ancillary improvements that are threatened, and/or other remedial measures capable of protecting the mobile home without shoreline stabilization devices. Alternatives must be sufficiently detailed to enable the Coastal Commission to evaluate the feasibility of each alternative, and whether each alternative is capable of protecting a mobile home that may be in danger from erosion and other coastal hazards.

Only as conditioned does the Commission find the proposed development consistent with City's Local Coastal Land Use Plan, and Sections 30235 and 30253 of the Coastal Act.

D. PUBLIC ACCESS

Section 30210 of the Coastal Act states:

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

Section 30212 of the Coastal Act states, in part:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(2) Adequate access exists nearby, or,

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.

As shown in **Exhibit 1**, the proposed mobile home will be located between the first public road and the sea directly seaward of the OCTA railroad tracks. Vertical public access is not available through the Capistrano Shores Mobile Home Park, therefore, no construction impacts to public access are anticipated. Lateral public access is available along the public beach seaward of the bulkhead/revetment during low tide. Vertical public access to the beach exists nearby at Poche Beach, approximately 600 yards north of the site. Public access from the southern end of the mobile home park is available at the North Beach public access point. **Exhibit 1** provides a map of the primary public coastal access points in the City.

The proposed project is sufficiently setback to be consistent with the pattern of development of the surrounding mobile homes within the Capistrano Shores Mobile Home Park. Furthermore, the setback provides an area that may accommodate any necessary future bulkhead/revetment repairs/enhancement efforts within the mobile home unit's private property thereby protecting intertidal habitat and avoiding any possible future public access impacts that may arise due to rock revetment encroachment into public beach areas (both individually and cumulatively).

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. North Beach is identified as a primary beach access point in the City with the greatest number of public parking spaces (approximately 250 off-street and 100 on-street) in the City's certified LUP. 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 applicant 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 3** requires the applicant to acknowledge that it has no future automatic right to a shoreline protective device and further requires the applicant 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.

As conditioned, the Commission finds the development consistent with the public access and recreation policies of Chapter 3 of the Coastal Act.

E. SCENIC AND VISUAL RESOURCES

Section 30251 of the Coastal Act states that:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

The above-cited policy of the Coastal Act was designed to minimize visual impacts and landform alteration and to avoid cumulative adverse impacts of development encroachment into natural areas.

Development at this location must be sited and designed to be visually compatible with the character of the area. It is also necessary to ensure that new development be sited and designed to protect views along public vantage points such as public beaches, public trails and roads. The proposed development is on a perched beach protected by a bulkhead/revetment adjacent to the public beach. The site is visible looking inland from the beach. Views of the mobile home park and white water ocean views are available from proposed public trails along the coastal bluffs inland of El Camino Real at the Marblehead Coastal site. The proposed mobile home meets the structural and deck stringlines and replaces an existing mobile home structure at the subject site, and can therefore be found compatible with the character of the mobile home park. Additionally, as designed, the 16-ft. height of the proposed single-story mobile home is compatible with the height of the rest of the permitted mobile homes in the Capistrano Shores Mobile Home Park. As sited

the new structure will not adversely impact coastal views. Therefore, the Commission finds the proposed development consistent with Section 30251 of the Coastal Act.

F. WATER QUALITY

Section 30230 of the Coastal Act states, in pertinent part:

Marine resources shall be maintained, enhanced, and where feasible, restored...

Section 30231 of the Coastal Act states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

To protect water quality during construction, the applicant proposes, and **Special Condition 4** requires the applicant to implement best management practices (BMPs) designed to avoid temporary impacts to the ocean by minimizing erosion and preventing soil and debris from entering coastal waters during construction. Furthermore, the applicant proposes drainage from the predominantly paved site to slope away from the ocean and toward the street where water runoff from the site will be directed to a dry well for onsite water infiltration and to a small strip of landscaped permeable area. The applicant proposes minor landscaping in contained planters. **Special Condition 5** requires the applicant utilize drought tolerant, non-invasive plant species in order to minimize water use and water runoff from the subject site.

As proposed and conditioned, the project will minimize possible adverse impacts on coastal waters to such an extent that it will not have a significant impact on marine resources, biological productivity or coastal water quality. Therefore, the Commission finds that the proposed development, as conditioned, conforms to Sections 30230 and 30231 of the Coastal Act regarding the protection of water quality to protect marine resources, promote the biological productivity of coastal waters and to protect human health.

G. 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 development, as conditioned, is consistent with the policies contained in the certified Land Use Plan. Moreover, as discussed herein, the development, as conditioned, is consistent with the Chapter 3 policies of the Coastal Act. Therefore, approval of the proposed development will not prejudice the City's ability to prepare a Local Coastal Program for San Clemente that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a).

H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

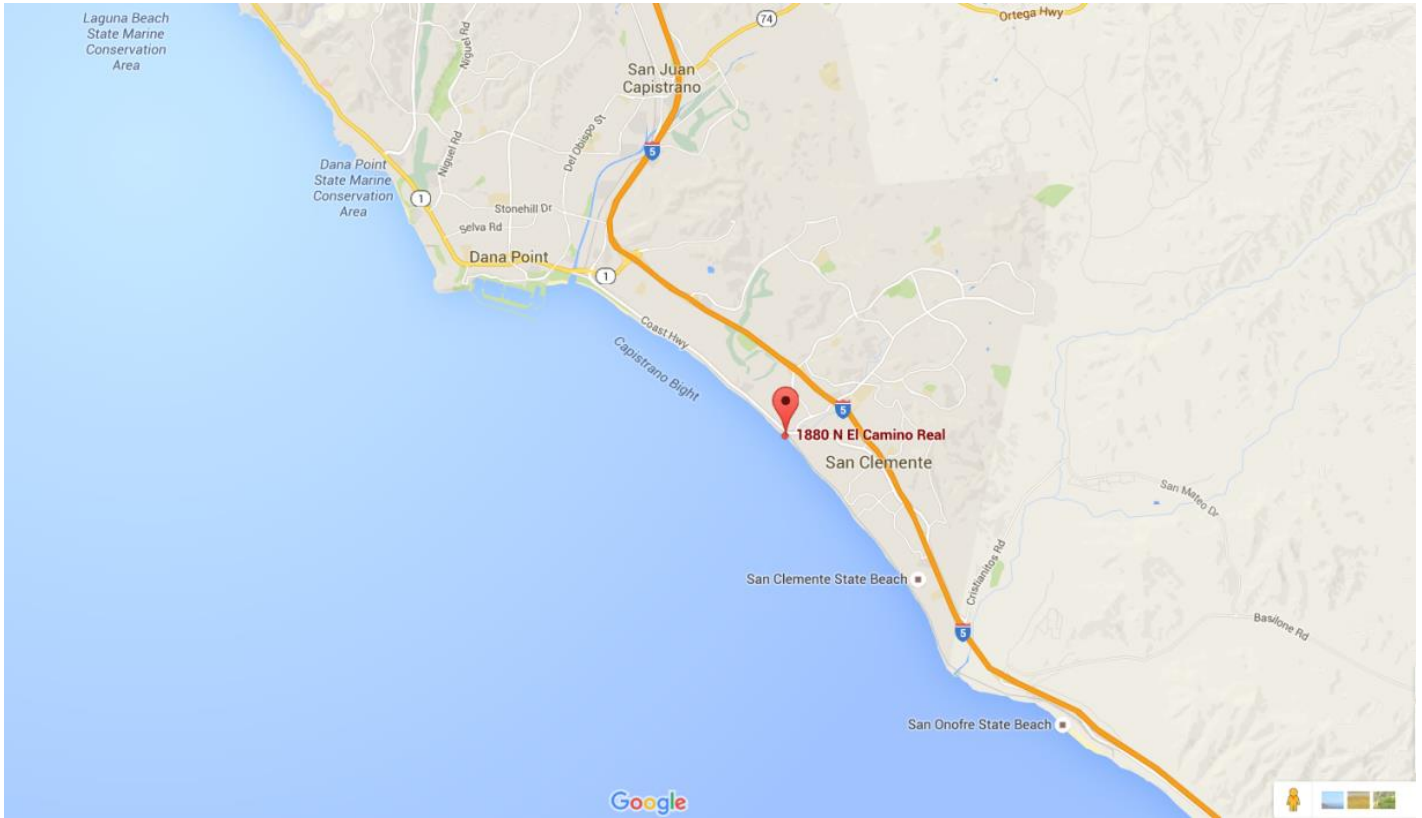
Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment.

The City of San Clemente is the lead agency for purposes of CEQA compliance. As determined by the City, the project is categorically exempt pursuant to CEQA Guidelines section 15302 as a Class 2 Item (replacement of an existing structure). In order to ensure compliance with Coastal Act requirements, the Commission adopts additional mitigation measures including: special conditions related to compliance with construction-related best management practices (BMPs), drainage, landscaping, shoreline protection, future improvements, assumption of risk, waiver of liability and indemnity. As conditioned, the proposed project is consistent with the public access, water quality and visual resource protection policies of the Coastal Act and there are no feasible alternatives or additional feasible mitigation measures available which would substantially lessen any significant adverse effect, which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, is the least environmentally damaging feasible alternative and is consistent with the requirements of the Coastal Act and CEQA.

APPENDIX A

SUBSTANTIVE FILE DOCUMENTS

1. City of San Clemente LUP
2. *Wave Runup and Coastal Hazard Study and shore Protection Observation, 1880 N. El , Unit 12, San Clemente, California, Coastal Development Permit Application No. 5-14-1582, by GeoSoils Inc., dated October 15, 2014*
3. CDP 5-09-179(Hitchcock) and CDP 5-09-180(Hitchcock)



COASTAL COMMISSION

Public Beach

EXHIBIT # 1
PAGE 1 OF 1

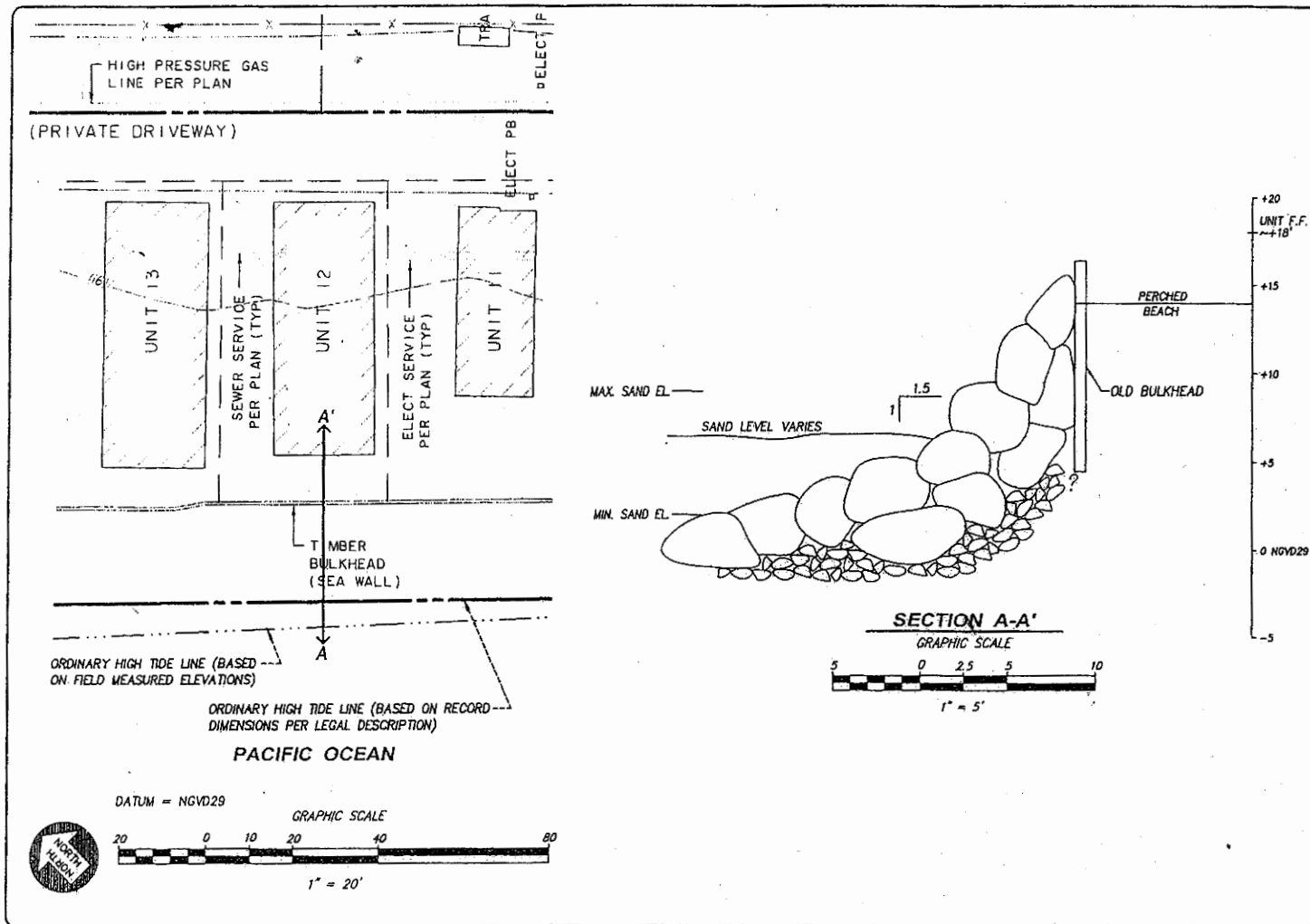
COASTAL COMMISSION

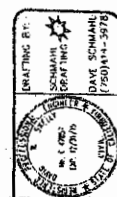
EXHIBIT # 2
PAGE 1 OF 1



COASTAL COMMISSION

EXHIBIT # 3
PAGE 1 OF 1





Capistrano Shores Unit 12
Geotechnical - Geologic - Coastal - Environmental
5741 Palmer Way, Carlsbad, CA 92010
760-438-3155

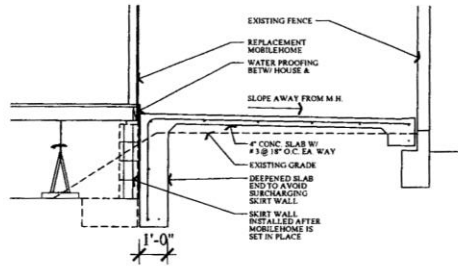
Capistrano Shores Unit 12

10/14/14
S1

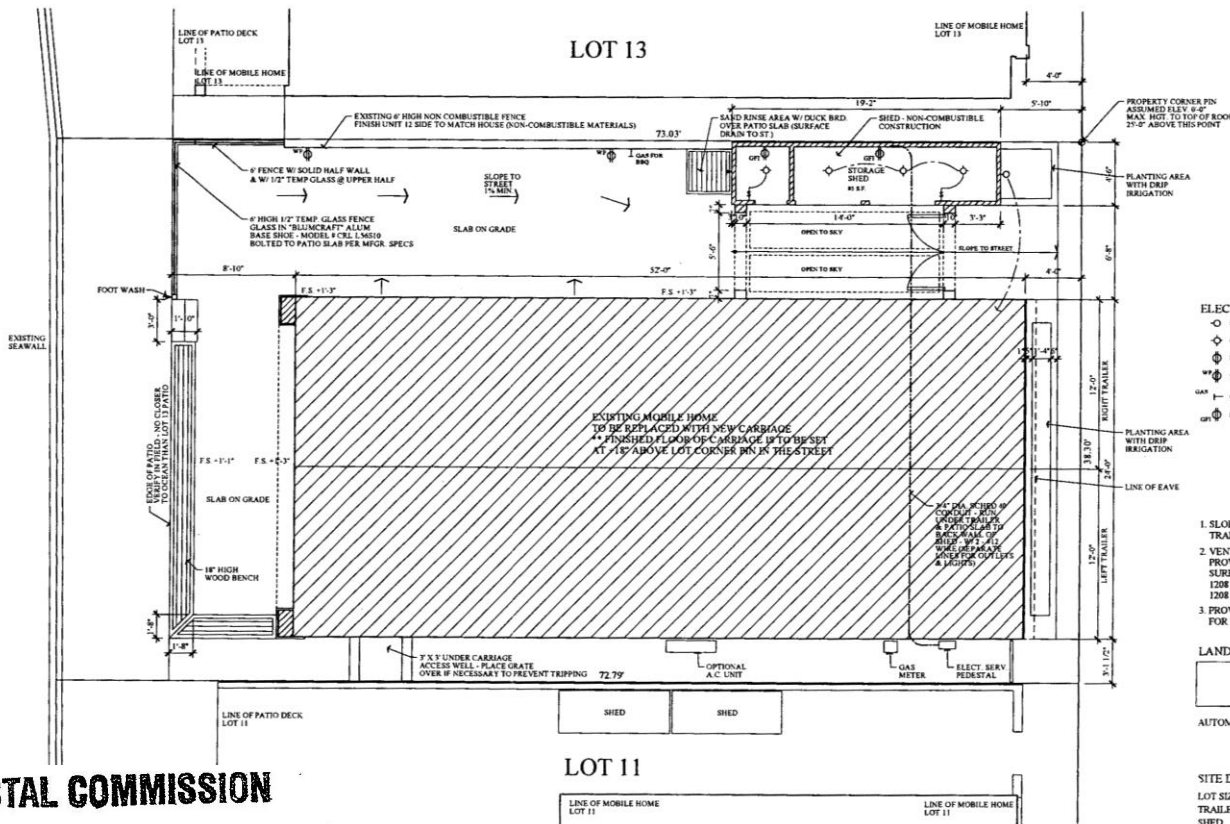
RECEIVED
South Coast Region

OCT 23 2014

CALIFORNIA
COASTAL COMMISSION



SECTION THRU PATIO



ELECTRICAL SYMBOLS

- SURFACE MOUNTED LIGHT FIXTURE
- ◇ CEILING MOUNTED LIGHT FIXTURE (PENDANT)
- ◇ DUPLEX OUTLET - ARC
- WT WATER PROOF UTILITY - UP
- GAS GAS SUPPLY FOR APPLIANCE
- ◇ DUPLEX OUTLET ON GFI CIRCUIT

1. SLOPE FINISH GRADE AND HARDSCAPE AWAY FROM TRAILER
2. VENTING / PRESSURE RELIEF
PROVIDE 1 SQ. IN. OF VENTING PER SQUARE FOOT OF SURFACE AREA UNDER CARRIAGE
1208 S.F. - REQUIRES 1208 SQ. IN. MIN. -
1208 / 144 SQ. IN. PER FOOT - 8.4 S.F. OF VENTING REQ'D
3. PROVIDE SCUPPERS THROUGH SKIRT WALLS TO ALLOW FOR DRAINAGE IN THE EVENT OF FLOODING

LANDSCAPING AREA

DROUGHT TOLERANT SHRUBS
AND GROUND COVER FROM
THE COASTAL ACTS PLANT
PALLETTE

AUTOMATIC IRRIGATION ON TIMER

SITE DATA

LOT SIZE 2,791 S.F.
TRAILER FOOTPRINT 1,248 S.F.
SHED 85 S.F.

TOTAL COVERAGE 1,333 S.F.
PERCENT OF COVERAGE 48 %

BUILDING DATA

MAIN FLOOR 1,248 S.F.
SHED 85 S.F.

**PETERS
ASSOCIATES**

33771 BLUE LANTERN STREET
DANA POINT, CA 92629
949-412-4428

williamapeters@yahoo.com

Seal / Signature:

Structural Engineer

D.E.J. ENGINEERING

14271 JEFFREY DR.,
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949-497-6810, FAX: 949-497-6819
dejengineering@yahoo.com

**WILLS
RESIDENCE**

1880 N. El Camino Real
Unit 12 Capistrano Shores
San Clemente,
California

ERIC & BUCKY WILLS
714-473-3058
ewills@capshores.com

H.C.D. Approval

Revisions:

No.	Date	Revision
1		
2		
3		
4		

Date: 6 / 15 / 14

Job No.:

Association Submittal:

Bldg. Dept. Submittal:

Bid Issue:

Construction Issue:

Sheet Title:

SITE PLAN

Sheet No.:

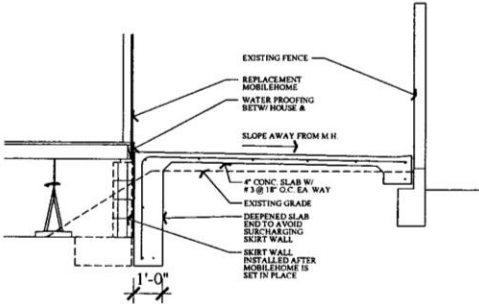
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COASTAL COMMISSION

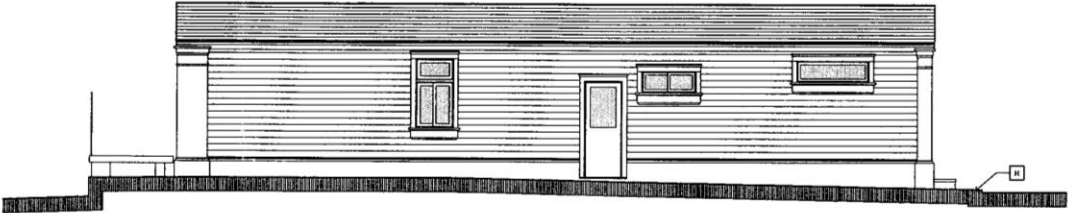
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PAGE 1 OF 3

COASTAL COMMISSION

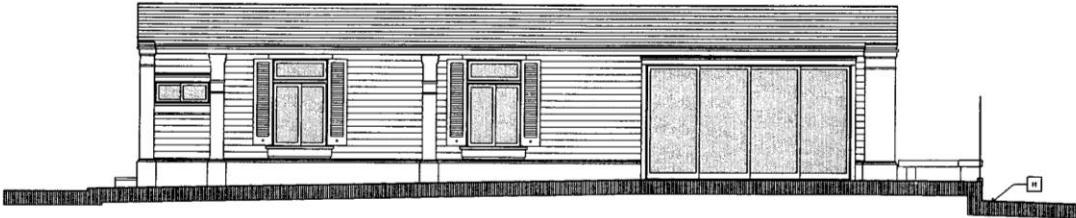
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PAGE 2 OF 3



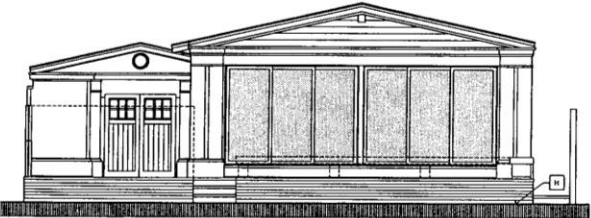
DETAIL THRU PATIO SLAB



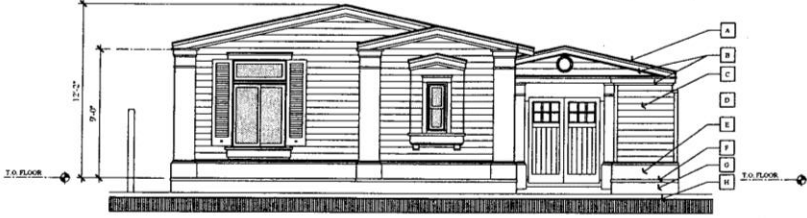
LEFT SIDE ELEVATION (SOUTH)



RIGHT SIDE ELEVATION (NORTH)



REAR ELEVATION (OCEAN)



FRONT ELEVATION (STREET) 1/4" = 1'-0"

- ELEVATION KEY NOTES
- A ASPHALT ROOF
 - B ACRYL TRIM
 - C CEMENT-FIBER FIBER LAP-BEARD SIDING
 - D MELBARD "TERRAZZO" FIBERGLASS WINDOW
 - E CEMENT-FIBER PANELS
 - F PRECAST CAP
 - G CONCRETE PLANTER
 - H GRADE

PETERS ASSOCIATES

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Seal / Signature:

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WILLS RESIDENCE
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San Clemente,
California

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714-473-3058
ewills@capshores.com

H.C.D. Approval

Revisions		
No.	Date	Revision
1		
2		
3		
4		
5		

Date: 6/10/14

Job No.:

Association Submittal:

Bldg. Dept. Submittal:

Bid Issue:

Construction Issue:

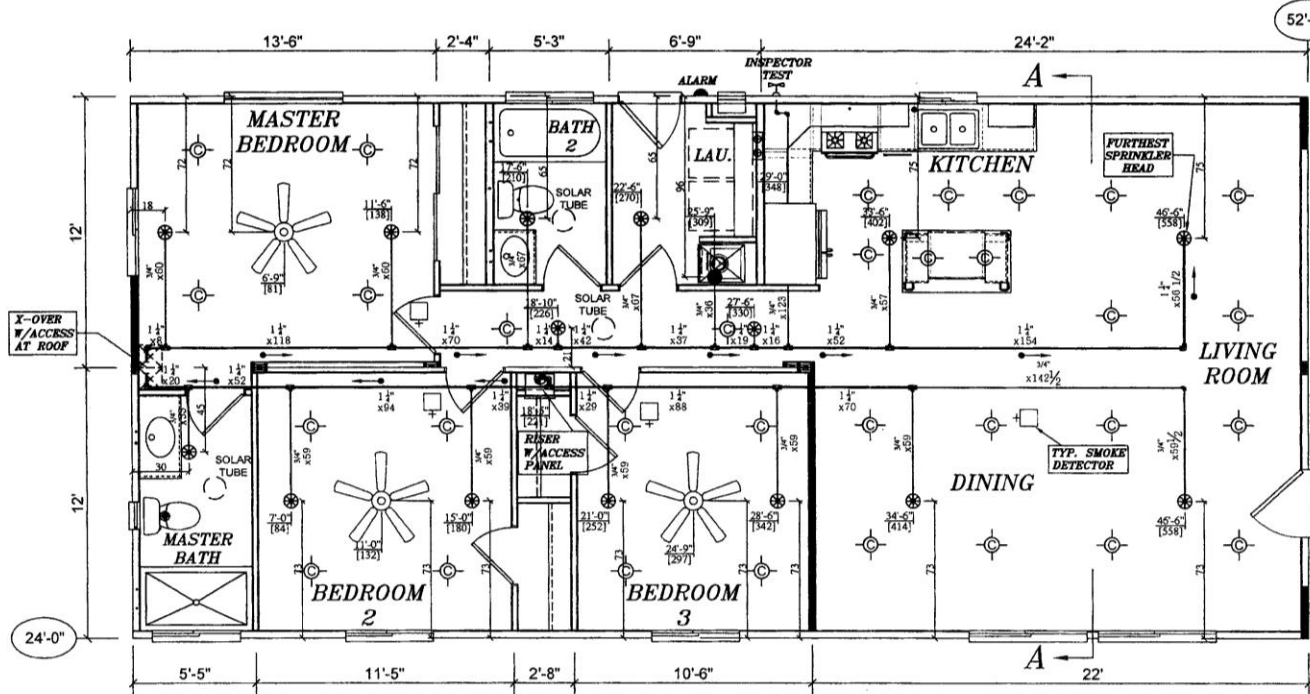
Sheet Title:

ELEVATIONS

Sheet No.:

A - 3

13C-3



The development as proposed is approved by the City of San Clemente in concept. This is a preliminary approval and does not grant the recipient any development rights. When approved by the California Coastal Commission, the City will then process the plans for permits. Please check with other City departments and divisions to ensure full compliance with all City codes, standards and requirements.

City Planner

8/14/14
Date

SILVERCREST
CHANDLER
2211 N. SMITH AVENUE
CORONA, CA 92705
APPROVAL: 2009

COASTAL COMMISSION

EXHIBIT # 4
PAGE 3 OF 3

APPROVED: CHILL ENGINEERING, INC.
These plans have been approved according to the requirements found in the California Code of Regulations Title 25, Chapter 3, Subchapter 2. This approval does not constitute or approve any additions or deviations from state laws or valid local ordinances.
Plan Approval No. 13C-3-14

The adequacy of the water supply piping at the site to supply the necessary water flow pressure at the head of the riser is subject to the local jurisdiction or the applicant and is not part of this review.

NOTES:

1. MIN. PRESSURE IN THE BASE OF RISER 31.12 P.S.I. PER N.F.P.A. 13 D 2010 SEC. 2-4 & 4-4.3 (K) EXCEPTION NO. 2. SEE SHT. 2 OF 3 FOR CALCULATIONS
2. PIPE IS 1 1/4" DIAMETER CPVC. RISER IS 1 1/4" DIAMETER COPPER TYPE 'M'.
3. PIPE IS PROTECTED FROM FREEZING WITH R-22 MIN. IN ROOF CAVITY.

DEALER'S NAME: Inception Homes, Inc.
HOME OWNER'S NAME: Willis
ADDRESS:
BLDG. TYPE: V-N SQ. FT. OF BLDG. AREA: 1248 STORIES: 1
OCCUPANCY CLASSIFICATION: B-3
DESIGNER: CHAMPION HOME BUILDERS, INC. (MANUFACTURED HOMES)
ADDRESS: 288 N. SMITH AVE., CORONA, CA. 91720
PHONE: 1-800-382-0706 OR 951-734-6610

TITLE: SPRINKLER HEAD LOCATION (NFPA 13D-2010)	
PROPERTY AND COPYRIGHT: THESE PLANS, SPECIFICATIONS AND CALCULATIONS ARE THE PROPERTY OF CHAMPION HOME BUILDERS, INC. 2011	
SCALE: 3/16" = 1'-0"	
DATE: 01-09-2013	DRAWN BY: JESSE
APPROVED BY:	CHECKED BY:
COMPUTER No. 1461H-SPRK	
SHEET 1	OF 3

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Central Justice Center
700 W. Civic Center Drive
Santa Ana, CA 92702

SHORT TITLE: Capistrano Shores Property LLC vs. California Coastal Commission

**CLERK'S CERTIFICATE OF MAILING/ELECTRONIC
SERVICE**

CASE NUMBER:
30-2015-00785032-CU-WM-CJC

I certify that I am not a party to this cause. I certify that a true copy of the above Minutes finalized for Under Submission Ruling 08/22/2016 dated 08/23/16 has been placed for collection and mailing so as to cause it to be mailed in a sealed envelope with postage fully prepaid pursuant to standard court practice and addressed as indicated below. This certification occurred at Santa Ana, California on 8/24/16. Following standard court practice the mailing will occur at Santa Ana, California on 8/24/16.

LAWRENCE G. SALZMAN
930 G STREET
SACRAMENTO, CA 95814

Clerk of the Court, by: Kathya Penza, Deputy

I certify that I am not a party to this cause. I certify that the following document(s), Minutes finalized for Under Submission Ruling 08/22/2016 dated 08/23/16, have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from email address on August 24, 2016, at 8:20:07 AM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

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COASTAL COMMISSION

Clerk of the Court, by: Kathya Penza, Deputy

EXHIBIT # 5
PAGE 1 OF 10

CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 08/22/2016

TIME: 09:33:00 AM

DEPT: C18

JUDICIAL OFFICER PRESIDING: Theodore Howard

CLERK: Kathy Peraza

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT:

CASE NO: **30-2015-00785032-CU-WM-CJC** CASE INIT.DATE: 04/29/2015

CASE TITLE: **Capistrano Shores Property LLC vs. California Coastal Commission**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72431722

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken Petitioner's Petition for Writ of Mandate and Petitioner's Motion for Judgment on Verified Petition for Writ of Mandate under submission on 8/18/2016 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

**Capistrano Shores Property, LLC vs. California Coastal Commission
Memorandum of Intended Decision**

A. BACKGROUND

Capistrano Shores Property, LLC (hereinafter "CSP") on 4/29/15 filed its Petition for Writ of Mandate and other relief. CSP is a member of Capistrano Shores, Inc. (hereinafter "CSI" and not to be confused with CSP) which owns the mobile home park at 1880 N. El Camino Real, San Clemente. CSP is a member of the CSI and this entitles it to lease one space, Space #12, at the property under an Occupancy Agreement. Petitioner does not own the space, the CSI does. CSP's lease is dated 2007, with a 99-year term and renewals thereafter.

This park was built about 1960 and consists of some 90 spaces located between the former Southern Pacific rail line and the beach. Separating the coach spaces and the beach is a rocky seawall (also referred to in the record as "revetment"), apparently built the same time as the park and belonging to CSI which is responsible for its maintenance (rather than the space lessee, here CSP).

COASTAL COMMISSION

EXHIBIT # 5

PAGE 2 OF 10

DATE: 08/22/2016

MINUTE ORDER

DEPT: C18

Page 1
Calendar No.

As noted, CSI owns the entire park. The seawall creates protection of the park homes, from the beach/ocean below, and protects the property somewhat from the waves and water. [See Photo in the Administrative Record (hereinafter, "A/R") p. 53 and p. 429]. The seawall has been in place since, before the Coastal Act was enacted (according to the A/R p. 460). Also, the beach that is in front of the revetment, is partly owned by the community and partly public beach (the boundary is at the mean high tide line). Public access to the beach is about a half mile south. This is a fairly narrow beach area. At high tide, the water comes all the way up to the seawall and can overflow from time to time but homes are built on foundations and water can go under. (A/R pp. 110, and 460.)

CSP sought replace its old mobile home at its leased space in the park in 2014, with a new mobile home that it bought (and a smaller one, at that). But placing a structure on the California Coast constitutes "development", so CSP applied to the Coastal Commission for a waiver of a coastal permit, under *Pub Res. Code* § 30624.7 (based on a *de minimis* project that will not have potential adverse impact on coastal resources). In the past, the Commission had apparently approved two similar waivers of permits, for two lessees, who were replacing their mobile homes inside the park, in 2008. But when Petitioner sought the waiver (things change, sea levels have risen), the Commission denied the waiver. It appears that CSP is not at this point challenging the denial of a waiver of a permit.

This means that Petitioner needed to apply for a coastal "development" permit per *Pub Res. Code* sec. 30106 (hereinafter referred to as "PRC") Petitioner did this in 2015. The Commission's staff issued a Report and later an Addendum, indicating that the Commission would *conditionally* approve a permit for changing out the mobile homes, subject to certain "Special Conditions." There were a number of Special Conditions, but we are here involved only in a consideration of Special Condition 3. There is one particular portion of it that Petitioner disputes (not the entirety of it) which is the following:

By acceptance of this Permit, the applicant waives, on behalf of himself and all successors and assigns of Unit Space #12, any rights to shoreline protection that may exist under Public Resources Code Section 30235 to protect the proposed new mobile home on Unit Space #12.[A/R p.457]

It appears the Coastal Commission is concerned that the seawall that protects the entire park is going to require expansion in the future, based on rising sea levels, and that such an expansion could diminish the small beach there if the expansion is seaward, and diminish the sand available for the public beach. So in anticipation of this future event, the Commission is essentially trying to have the individual mobile home owners and space lessees give up any rights to shoreline protection when they are updating their mobile homes entirely inside the park. This may be a recurring issue as the mobile homes are replaced inside the park as has been occurring in the recent past.

B. PROCEDURAL HISTORY

After the Petition was filed in or about April 2015, the parties reached a Stipulation about certain matters. These were placed into a formal Order by Judge Claster:

- (1) Petitioner can go ahead with removing the old mobile home and installing the new one during the pendency of the case, but subject to the special conditions;
- (2) Petitioner's Occupancy Agreement with the nonprofit corp. will be amended to say that the Commission has approved the project, subject to the special conditions;

COASTAL COMMISSION

EXHIBIT # 5

PAGE 3 OF 10

(3) The Commission will issue Petitioner a coastal permit to Petitioner, and Petitioner will then dismiss the 2nd cause of action in the lawsuit, and

(4) The parties will abide by the Court's decision on Special Condition 3. (Order dated 8/3/15 and Stip. filed 7/28/15).

Petitioner has dismissed its 2nd cause of action, as stipulated (for declaratory and injunctive relief). (8/11/15 Dismissal). This leaves the 1st cause of action for a writ of mandate.

This is the hearing on the Petition, via a Motion for Judgment, filed by petitioner.

C. THE MOTION FOR JUDGMENT

Petitioner filed as the opening brief a Motion for Judgment on the petition. Basically, that motion seeks a final decision on the petition. It does not seem to be two matters, but only one-deciding the writ. Specifically, "If no return be made [NB --that seems to be the case here, there is no return on a writ issued], the case may be heard on the papers of the applicant. . ."

If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ." CCP § 1094. That seems to be what we have here.

Also, under the California Coastal Act, the decisions of the Coastal Commission are reviewed by a petition for writ of mandate in accordance with CCP §1094.5. (PRC sec.30801, sec. 30105).

CCP § 1094.5 provides: "Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, ... board, or officer, the case shall be heard by the court sitting without a jury."

"The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." CCP § 1094.5(b).

"Where it is claimed that **the findings are not supported by the evidence**, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, **abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.** [emphasis added] CCP § 1094.5(c).

Published cases on reviewing a decision on a coastal development permit, utilize the test of *substantial evidence* for the agency's findings. E.g., *McAllister v. California Coastal Commission* (2008) 169 Cal.App.4th 912, 921; *Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921. Under that test, "[t]he trial court presumes that the agency's decision is supported by substantial evidence, and the

COASTAL COMMISSION

EXHIBIT # 5
PAGE 4 OF 10

petitioner bears the burden of demonstrating the contrary. [citations omitted]. In reviewing the agency's decision, the trial court examines the whole record and considers all relevant evidence, including evidence that detracts from the decision. [citations omitted]. 'Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. Rather, it is for the [agency] to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it.' [citations omitted] "

On the other hand, the trial court exercises independent judgment on pure questions of law, including the interpretation of statutes and judicial precedent. *McAllister v. California Coastal Com'n* (2008) 169 Cal.App.4th 912, 921-22; *Schneider v. California Coastal Com'n*. (2006) 140 Cal.App.4th 1339, 1344.

Courts have final responsibility for interpreting a statute but nevertheless, an agency's interpretation of its governing statutes is entitled to great weight. *McAllister*, 169 Cal.App.4th 921-22; *Schneider v. California Coastal Com.* (2006) 140 Cal.App.4th 1339, 1344. But "[b]ecause an interpretation is an agency's legal opinion, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Schneider*, 140 Cal.App.4th at 1349)

D. THE CALIFORNIA COASTAL ACT

The California Coastal Act was created in 1976 and is found in *PRC* secs. 30000 – 30900. It has myriad purposes and goals and is a comprehensive scheme to govern coastal land use planning for the entire state. *Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 923. Its broad goals are protection of the coastline and its resources, and maximization of public access. *Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n* (2008) 163 Cal.App.4th 215, 242.

In general, the Coastal Act "shall be liberally construed to accomplish its purposes and objectives." *PRC* sec. 30009. The California Coastal Commission considers many factors in granting coastal development permits, e.g., *PRC* §§ 30604, subd. (c) [the Commission "shall" make findings that the permit complies with public access and recreational policies]; *PRC* sec. 30251 [scenic and visual qualities of coastal areas "shall" be considered and protected as a resource of public importance]; *PRC* sec. 30240 [environmentally sensitive habitats "shall" be protected].) The Commission has a duty to consider impacts and has discretion to impose conditions to mitigate them. *Ocean Harbor House Homeowners Ass'n*, 163 Cal.App.4th 215, 241. See also *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 793.

To this end, *PRC* sec. 30600(a) generally provides that except for certain emergency work, any person wishing to "perform or undertake any development in the coastal zone" shall obtain a coastal development permit. *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794, 796.

Under *PRC* sec. 30106, "'Development' means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land,; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for

COASTAL COMMISSION

EXHIBIT # 5
PAGE 5 OF 10

agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line." (PRC sec. 30106).

The Commission has the right to impose conditions on permits. "Any permit that is issued or any development or action approved on appeal, pursuant to this chapter, shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division." (PRC sec. 30607; see also *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491, 498).

PRC sec. 30235 provides in 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. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible." Note that "existing structures" used in this section, is NOT defined.

A court has said the language of the above sec. 30235 is permissive, not exclusive. It allows seawalls under certain conditions: (1) when necessary to protect existing structures and (2) when they can be designed to minimize sand loss. The Commission can consider the above statute in deciding on a matter but the above statute does not purport to preempt other sections of the Coastal Act that require the Commission to consider other factors in granting coastal development permits. *Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n* (2008) 163 Cal.App.4th 215, 241.

Another section of the Act that addresses shorelines protection is PRC sec.30253. This section provides:

"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.
- (c) Be consistent with requirements imposed by an air pollution control district or the State Air Resources Board as to each particular development.
- (d) Minimize energy consumption and vehicle miles traveled."
- (e) Where appropriate, protect special communities and neighborhoods that, because of their unique characteristics, are popular visitor destination points for recreational uses. (Pub. Resources Code § 30253).

E. DISCUSSION

COASTAL COMMISSION

EXHIBIT # 5
PAGE 6 OF 10

This case is basically a conflict between the interests of the private person vs. the public interest sought to be discharged by the Coastal Commission. However, it appears to the Court that the Petitioner has the better arguments under the facts here.

The Commission actually required Petitioner to submit a geological study of the hazards of the site, i.e. erosion, wave attacks, flooding etc. based on expected rising sea level, in order to consider this application. (See Commission's Letter in the A/R p. 406). In response, Petitioner had "Geo Soils" do a study (See A/R p. 61, Study). The engineer found that the expected life of this new mobile home is 37 years; that the revetment is in good condition, and does not need maintenance at this time, and it will protect the mobile home from structural wave damage ahead. But the long-term stability of the revetment depends on continued maintenance including replacing some stones. (See A/R p. 60).

The Commission is concerned that the seawall/revetment is going to need to be expanded out in the future. The Commission wants the park owner (CSI), the nonprofit corporation, to undertake a comprehensive plan to address this. The Commission absolutely does not want the revetment to expand seawards towards the beach, because this will diminish the public beach, public land and sand. It wants any expansion to go inwards in the private property.

The Staff Report mentions that the nonprofit had a pending application for work regarding the revetment. It was from 2012 and it is said to be stalled /incomplete at this time, as the applicant is submitting more information about "project alternatives". (See A/R p. 466) The Commission wants that matter resolved.

Meanwhile, the Commission is taking action by requiring individual lessees of the Park (including CSP and members of the nonprofit corporation), who are trying to change out mobile homes, to WAIVE any right to shoreline protection that they may have to protect their new homes. *(It is unclear what specific rights Petitioner has, since Petitioner doesn't own the seawall/revetment at issue; the nonprofit corporation does)*. But the Commission is seeking this waiver "just in case" and "for good measure" as the Court sees it. The Commission justifies this on the ground that replacing a mobile home, extends its life by 37 years, therefore, the life of the revetment has to be considered in conjunction with that.

The Commission argues that the engineering study found that the revetment is good-enough to protect CPS's unit, so Petitioner loses nothing by waiving any rights to shoreline protection under PRC sec. 30235 for the new unit. In other words, Petitioner is being asked only to accept the findings of its own study. However, as the Court sees it, the study is not a guarantee of what will happen in the future. Nature is unpredictable. What if there is a major disaster? The applicant will have in hindsight lost any rights to advocate for repair or maintenance of the seawall/revetment by accepting the present condition. And if the Commission **will always have the right to reject any future requests** to expand the revetment itself, why proactively require people to waive any rights ahead of time?

The Commission argues: "Without the [special] condition, mobile home owners may replace and upgrade their mobile homes relying on the false assumption that they will be entitled to build whatever is necessary to protect the new structures." (Opp. p. 1). As to this point, if the Commission is concerned about an estoppel, it is not a simple task to successfully argue an estoppel against a public agency which is charged with looking after public interest and policy. See *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1262 ("[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it" ... [but] an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public..."); *Barrie v. California Coastal Com.* (1987) 196 Cal.App.3d 8, 17.

COASTAL COMMISSION

EXHIBIT # 5
PAGE 7 OF 10

In *Barrie*, homeowners got a temporary emergency permit to build a seawall. They were not entitled to keep that wall permanently where the Coastal Commission had always advised them it was a temporary wall, and advised them not spend a lot of money on it, as they had to apply for a permanent permit. The Commission acted reasonably in ordering them to tear down the temporary wall which had been built on the public beach area, and to move the wall to their private property where it would not impact coastal resources as much. Seawalls are known to take up space on public beaches and erode the sand.

In the present case, the Commission relies on *Barrie* primarily in its brief. The fundamental difference is that in *Barrie*, the very object of the permit that was sought was to maintain a seawall. As noted, there is no seawall that is being built by Petitioner, or being expanded. It is simply a mobile home owner seeking to replace his old model home with a newer model.

Rather than compelling what appears to be a preemptive waiver of any rights, the Commission could consider a different type of condition, perhaps one that engages an applicant and successors to acknowledge that the revetment and bulkhead that currently protect the entire park, may require serious attention in the future, as to which the Coastal Act's policies and the State of California's goals may preclude expansions or alterations thereof, thus acknowledging the risk of the proposed development. *Barrie* may present just the kind of guidance to assist the balancing of the private vs. public interests in this matter, in the finding there was no estoppel where the evidence showed that "The Commission staff warned the Homeowners that the location of the temporary seawall was very controversial and that there was a strong likelihood the staff would recommend relocation of the seawall if the Homeowners applied for approval for a permanent seawall. The Commission staff "urged [the Homeowners] to keep this in mind and not to invest excessive amounts of money in the proposed development." (*Barrie, supra*, at p. 15-16)

Further, the concern which the Commission seeks to address - any expansion of the revetment - is not in a direct subject of this particular application. The Commission seems to acknowledge, "the applicant does not propose any changes or improvements to the existing bulkhead/revetment along the portion that protects Unit Space #12 under this ... application" (A/R p 463 and see also A/R p. 410). It acknowledges that the "applicant is only responsible for the repair/maintenance to the mobile home ... on Unit #12" (A/R p. 463). The Commission further acknowledges that any development of the revetment would have to be applied for separately by the park owner, not by this applicant. (*Id.*) In relation to any such (future) application and decision, the Commission seems to fully retain the power to prevent any seaward expansion of the revetment, considering the Coastal Act's policies and goals. The record does not defeat a scenario where the revetment could be expanded inward, in a way that may not endanger the public coastal resources, for example. [See Opp. Brief at 9:3 "Because the Commission does not have such an application in front of it for the seawall, the Commission does not know what specific impacts it could have or what alternatives may exist"). Therefore, it appears unreasonable to require a waiver from this applicant, of this magnitude ("any rights"). The special condition does not seem reasonably, closely, substantially tied to the specific project at hand (replacing one mobile home inside the park). *Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 Cal.App.3d 1260, 1267-1268 noted there should be a "substantial connection" or "nexus" or "substantial relationship" between the public burden created by the proposed new construction and the condition required by the Commission under federal constitutional and standards enunciated in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 107 S. Ct. 3141.

In *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, another revetment case, at p. 262, where the Court is discussing approval of the Trial Court's finding of an abuse of discretion in

COASTAL COMMISSION

EXHIBIT # 5
PAGE 8 OF 10

the imposition of a condition that the property owners that they acknowledge they may not be eligible for public disaster funds if the revetment is built. The Court said: "This condition was overbroad. The Commission could extract a more narrowly drawn assumption of liability from erosion hazard and waiver of claims against the Commission or any agency involved in the issuance of the permit for damage caused by erosion or storms."

The Commission points out, *PRC sec. 30235* only protects "existing structures" and that putting a new mobile home on coastal property is "new development" under *PRC sec. 30253* so that the new home is not entitled to "existing structure" status or protection under the former section. However, the former section does not actually define "existing structures" nor was a definition found in the definitions within the Coastal Act or in regulations. If the Legislature had meant for section *sec. 30235's* protection not to apply to any "new development" then it seems it could have created an exception or exclusion for any "new development" within that section. It is not clear that the Commission's reading of "existing structures" in *PRC sec. 30235* is proper as excluding anything that is "new development". Are the two terms synonymous necessarily?

The Commission argues that Special Condition 3 is justified by the language in *PRC sec. 30253* that states, "new development shall [m]inimize risks to life and property in areas of high geologic, flood and fire hazard." (*PRC sec. 30253(a)*). It appears that by putting in place the condition of requiring applicants to waive any shoreline protection rights for new mobile homes, that the stated risk is not lessened. The Commission also cites subdivision (*b*) which says, new development shall not "in any way require the construction of protection devices that would substantially alter natural landforms along bluffs and cliffs." (*PRC sec. 30253(b)*). However, evidence was not found in the record, that this mobile home Park is along a bluff or cliff or that replacing the unit in Space #12 will substantially alter any such bluffs and cliffs. Nor is evidence cited, that the indirect concern of the Commission-the need to expand the revetment-is going to substantially alter natural landforms, along bluffs and cliffs. So the reliance on *PRC sec. 30253* is not persuasive.

The Park's revetment/bulkhead structure is a pre-Coastal Act structure, according to the record. (See A/R, p. 460). If so, this would suggest it is an existing structure, and not a new development (at this moment). See also *Cal. Code Regs., tit. 14, § 13252*, Repair and Maintenance Activities Requiring a Permit. If so, then it appears to be overreaching to have the Petitioner give up any rights to possible repair or maintenance of the device, under *PRC sec. 30235*, which Petitioner's membership in the Capistrano Shores Inc. association may yield. The waiver seems unreasonably broad and contrary to the above guidance from *Nollan* and *Whaler's Village*.

The Commission argues that the "waiver condition ... keeps all options open for appropriate adaptation measures in the future to address sea level rise and protect the public beaches." (Opp. Brief p. 10). It appears, to the contrary, to extract a preemptive waiver from Petitioner on a matter that is not presently directly before the Commission as to this applicant. It appears to be less closely related to the project at hand and instead related to a broader project which the Commission anticipates will become necessary in the future. As one Commission staff person apparently wrote, "A lot of this is beyond the issues related to the individual site. . . since this is work on a new house [sic] that will not initiate any work on the existing shore protection, I do not think there is any connection between what's being done and any seawall mitigation." (A/R p. 410).

F. RULING

The Court **GRANTS** the Petition for Writ of Mandate to overturn the waiver condition in Special Condition

COASTAL COMMISSION

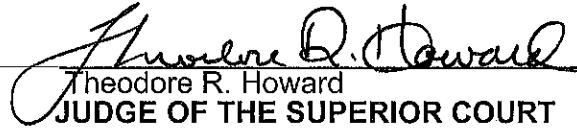
EXHIBIT # 5
PAGE 9 OF 10

in the future. As one Commission staff person apparently wrote, "A lot of this is beyond the issues related to the individual site. . . since this is work on a new house [sic] that will not initiate any work on the existing shore protection, I do not think there is any connection between what's being done and any seawall mitigation." (A/R p. 410).

F. RULING

The Court **GRANTS** the Petition for Writ of Mandate to overturn the waiver condition in Special Condition 3 and remand to the Commission to consider in the light of this ruling.

DATED: AUG 22 2016


Theodore R. Howard
JUDGE OF THE SUPERIOR COURT

COASTAL COMMISSION

EXHIBIT # 5
PAGE 10 OF 10

09/16/2016 at 04:58:32 PM
Clerk of the Superior Court
By Giovanni Galon, Deputy Clerk

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

OCT 28 2016

COASTAL COMMISSION

EXHIBIT # 6
PAGE 1 OF 2

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Capistrano Shores Property, LLC

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF ORANGE

10
11 CAPISTRANO SHORES PROPERTY, LLC, a) No. 30-2015-00785032-CU-WM-CJC
California limited liability company,)
12) ~~PROPOSED~~ PEREMPTORY
Petitioner,) WRIT OF MANDATE
13)
v.) Dept. C18
14 CALIFORNIA COASTAL COMMISSION, and DOES) Action Filed: April 29, 2015
15 I through 30, inclusive,)
16 Respondent.)
17)
18)

19 TO RESPONDENT CALIFORNIA COASTAL COMMISSION:

20 Judgment having been entered in this action ordering the issuance of a peremptory writ of
21 mandate,

22 YOU ARE HEREBY COMMANDED to set aside your April 15, 2015 decision
23 conditionally approving Coastal Development Permit No. 5-14-1582; and to hold a hearing within
24 90 days of service of this writ on you to reconsider the approval of Coastal Development Permit
25 No. 5-14-1582 in light of the Court's August 22, 2016 ruling, which overturned that portion of
26 Special Condition 3 requiring Petitioner Capistrano Shores Property, LLC, to waive any right to
27 a shoreline protective device as may exist under Public Resources Code § 30235 to protect its new
28 mobilehome.

1 You are further commanded to make and file a return of this writ of mandate within 90 days
2 of service of this writ on you, setting forth a description of your action taken to comply with this
3 writ.

4 ALAN CARLSON

5 DATED: OCT 28 2016


CLERK OF THE COURT

JORGE GOMEZ



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PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

COASTAL COMMISSION

EXHIBIT # 6
PAGE 2 OF 2