

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
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Long Beach, CA 90802-4302
(562) 590-5071

Th10c



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 Th10c of Commission Agenda, Coastal Development Permit Application No. 5-16-0265 (Capo Surf No. 36, 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 2, "Future Response to Erosion/No Automatic Right to Protective Shoreline Construction" and language in the findings of the staff report related to this condition. 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, first full paragraph on Page 3, 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 Response to Erosion/No Automatic Right to Protective Shoreline Construction~~ Shoreline Hazards; 3) Future Improvements; 4) Permit Compliance; 5) Construction Best Management Practices; 6) Landscaping; 7) Bird Strike Prevention; 8) Proof of Legal Ability to Comply with Conditions; and 9) Occupancy Agreement.**

- 2) Section III (Special Conditions), Special Condition 2 "Heading" on Page 6, 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 16, first full paragraph, last sentence, and the second full paragraph, first sentence, delete and add the following:

Although the bulkhead/revetment that currently protects the mobile home park may require repair, maintenance, enhancement, or reinforcement in the future, **Special Condition 2** requires that the applicant acknowledge that it does not own the existing shoreline protective device and the shoreline protective device is not on Unit 36, and that the Commission retains full power and discretion to prohibit any expansions or alterations thereof that would be inconsistent with the lawful application of the Coastal Act, ~~considering the Coastal Act's policies and goals~~, 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 (the "Court Opinion"), which is attached to the findings for this Permit as **Exhibits 4 & 5**.

Regarding the latter point, ~~a recent Orange County Superior Court opinion issued in late 2016 *Capistrano Shores Property LLC v. Cal. Coastal Com.*, Case No. 30-2015-00785032-CU-WM-CJC (the "Court Opinion")~~ the Court Opinion provided guidance on the Commission's ability to condition a similarly situated project proposal in the Capistrano Shores Mobile Home Park...

- 4) Section IV (Findings and Declarations), Subsection C. Hazards on Page 16, third full paragraph, second sentence, add the following:

...Therefore, **Special Condition 2** also establishes requirements related to response to future coastal hazards, including relocation and/or removal of structures that may be threatened in the future if any government agency has issued a permanent 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,...

- 5) Section IV (Findings and Declarations), Subsection C. Hazards on Page 18, third line, delete and add the following:

...ancillary development) does not necessarily mandate or support any future requests for repair, maintenance, or expansion of shoreline protection if doing so would be inconsistent with the lawful application of the Coastal Act, ~~considering the Coastal Act's policies and goals~~ as articulated in the Court Opinion (see **Exhibits 4 & 5**)...

- 6) Section IV (Findings and Declarations), Subsection D. Public Access on Page 20, fourth full paragraph, second sentence, delete and add the following:

...To adequately protect public access, recreation, and shoreline sand supply, especially in light of probable future sea level rise, **Special Condition 2** ~~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 requests for such expansions or

alterations that are inconsistent with the lawful application of the Coastal Act;
~~considering the Coastal Act's policies and goals~~, as articulated in the Court Opinion (see Exhibits 4 & 5).

- 7) Section IV (Findings and Declarations), Subsection G. CEQA on Page 23, last paragraph, second sentence, delete and add the following:

... The conditions are: **1)** Assumption of Risk; **2)** ~~Future Response to Erosion/No Automatic Right to Protective Shoreline Construction~~ Shoreline Hazards; **3)** Future Improvements; **4)** Permit Compliance; **5)** Construction Best Management Practices; **6)** Landscaping; **7)** Bird Strike Prevention; **8)** Proof of Legal Ability to Comply with Conditions; and **9)** Occupancy Agreement...

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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. 5-16-0265 (Capo Shores No. 36, LLC)

Dear Marlene:

I am writing on behalf of the applicant in relation to CDP No. 5-16-0265 (Capo Shores No. 36, LLC). The applicant has had an opportunity to review the Staff Report and objects to the heading for Special Condition 2, "Future Response to Erosion/No Automatic Right to Protect to Shoreline Construction". The title of Special Condition 3 was specifically the subject of negotiation between Eric Wills and Larry Salzman and Coastal Staff including Chris Pederson and Jack Ainsworth. 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 2. 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 request that staff accept one of these titles so that we can put this issue behind us and move forward.

COASTAL COMMISSION

EXHIBIT # A
PAGE 1 OF 2

The applicant objects to the language "considering the Coastal Act's, policies and goals" at the end of the first paragraph on Page 16; in the third line on Page 18; and at the end of the next to last paragraph on Page 20. 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 2. It is inconsistent with the agreement regarding Special Condition 2 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.

Finally, delete the language on the sixth and seventh lines from the bottom of Page 20 which reads "requires the applicant to acknowledge that it has no future automatic right to a shoreline protective device and further". This language is not consistent with Special Condition 2.

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: Victor Cachia
Eric Wills
Larry Salzman, Esq.
Jack Ainsworth
Chris Pederson, Esq.
Karl Schwing
Al Padilla
Hayley Peterson, Esq.

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EXHIBIT # A
PAGE 2 OF 2

CALIFORNIA COASTAL COMMISSION

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Th10c

Filed: 07/05/2016
270th Day: 04/01/2017
Staff: M. Alvarado-LB
Staff Report: 01/27/2017
Hearing Date: 02/09/2017

STAFF REPORT: REGULAR CALENDAR

Application No.: 5-16-0265

Applicants: Capo Surf No. 36, LLC

Agent: Gaines & Stacey LLP (Attn: Sherman Stacey)

Project Location: 1880 N. El Camino Real (Capistrano Shores Mobile Home Park), Unit 36, San Clemente, Orange County.

Project Description: Removal of existing 1,200 sq. ft., 13 ft. high, one-story mobile home and installation of a 1,493 sq. ft., 16 ft. high, one-story manufactured home with a 120 sq. ft. shed, 85 sq. ft. covered patio, fencing (including 6 ft. high glass railing with painted or etched grid), drainage improvements, and minimal landscaping at an oceanfront mobile home space. Two parking spaces are provided.

Staff Recommendation: Approval with conditions

SUMMARY OF STAFF RECOMMENDATION

The project site is a mobile home space (Unit 36) located within a 90-space mobilehome park known as Capistrano Shores Mobile Home Park ("Park") located between the first public road and the sea, seaward of the Orange County Transportation Authority ("OCTA") railroad tracks in San Clemente. The Park is a legal non-conforming use on a stretch of beach developed with a single row of 90 mobile/manufactured homes parallel to the shoreline on a lot zoned OS2 Privately Owned Open Space (intended for open space – no formal easement) and designated Open Space in the City of San Clemente Land Use Plan (LUP). A pre-Coastal Act rock revetment and bulkhead protects the mobile home park property from direct wave attack. No improvements are proposed to the existing bulkhead or revetment as part of this application.

The primary issues raised by significant improvements to or replacement of a mobile home within the Park concern consistency with the visual resource and hazards policies of the Coastal Act. The issue before the Commission with regards to visual resources is the appropriateness of approving

the proposed project given the importance of preserving scenic resources and public views. In this particular case, consistency with the pattern of development in this area (a low-scale mobile home park) would maintain the scenic coastal vistas available from El Camino Real (“ECR”) and adjacent surrounding public recreational areas including the Poche Beach upcoast, North Beach area of San Clemente downcoast and the inland areas including the public recreational trails and open space system on the uplands associated with the Marblehead development immediately inland of the oceanfront Park and ECR.

The general pattern of existing development within the Park consists of development with a prevailing height of approximately 13-14 feet located on a perched beach directly seaward of ECR and the Commission-approved public trails along the coastal bluffs at the Marblehead Coastal Site (CDP No. 5-03-013). The applicant is proposing to replace an existing approximately 13 ft. high, one-story mobile home unit with a new 16 ft. high one-story unit. The height of the unit is being increased by approximately 3 ft. However, the proposed increased height will not result in significant obstruction of major coastal views from the nearby public areas (e.g. public trails and recreational areas) and is consistent with past Commission permit action for development in the Park. The Commission has previously required mobile homes in the Park that are in closer proximity to public vantage areas to not exceed a maximum roof height of 16 ft. as measured from the frontage road, Senda de la Playa, to ensure that public coastal views over the units are protected. The proposed project can, therefore, be found consistent with Section 30251 of the California Coastal Act, which requires that the visual qualities of coastal areas shall be considered and protected as a resource of public importance and that new development shall be sited and designed to protect views to and along the ocean and coastal scenic areas.

The issue concerning hazards is the potential expectation that the existing revetment will be augmented in the future as necessary to protect such new 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. Revetments are also known generally to have additional impacts to public access and recreation, shoreline sand supply, and shoreline/scenic views. Therefore, staff recommends a special condition that requires the applicant to acknowledge both: (1) that it has no future automatic right to a shoreline protective device; and (2) that the existing revetment may require future work, but that the Commission retains the power to prohibit any alteration that is inconsistent with the lawful application of the Coastal Act, considering the Coastal Act’s policies and goals¹.

The applicant, a mobile home owner in the Park, owns the mobile/manufactured homes 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

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

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 36 exists, but would apply specifically to Unit 36, with the intention to provide future owners of the proposed new manufactured home at Unit 36 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 36. The occupancy agreement amendment would indicate that, pursuant to the permit for Unit 36 subject to this staff report, the California Coastal Commission has authorized development on Unit 36, 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 Response to Erosion/No Automatic Right to Protective Shoreline Construction; **3)** Future Improvements; **4)** Permit Compliance; **5)** Construction Best Management Practices; **6)** Landscaping; **7)** Bird Strike Prevention; **8)** Proof of Legal Ability to Comply with Conditions; and **9)** Occupancy Agreement.

Commission staff recommends **approval** of coastal development permit application No. 5-16-0265, as conditioned.

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

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APPENDICES

Appendix A – Substantive File Documents

EXHIBITS

Exhibit 1 – Project Vicinity

Exhibit 2 – Project Site

Exhibit 3 – Plans & Elevations

Exhibit 4 – Memorandum of Decision

Exhibit 5 – Writ of Mandate

I. MOTION AND RESOLUTION

Staff recommends that the Commission **approve** the permit application with special conditions.

Motion:

*I move that the Commission **approve** Coastal Development Permit No. 5-16-0265 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 the applicant's mobile home space (Unit 36) 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 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 36), acknowledges that (a) Unit 36 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 4 & 5**.

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.

3. **Approved Development - Permit Compliance.** The permittee shall undertake development in accordance with the approved final plans/proposal, subject to all the requirements of all conditions herein, for the installation of a new mobile/manufactured home with a height of no greater than 16 ft. as measured from the frontage private road, Senda de La Playa, and a variable pitched roof. Any proposed change or deviation from the approved plans shall be submitted to the Executive Director to determine whether an amendment to this permit is necessary pursuant to the requirements of the Coastal Act and the California Code of Regulations. No changes to the approved plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.
4. **Future Improvements.** This permit is only for the development described in Coastal Development Permit No. 5-16-0265. Pursuant to Title 14 California Code of Regulations Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) shall not apply to the development governed by Coastal Development Permit No. 5-16-0265. Accordingly, any future improvements to the single-family house pursued under this Coastal Development Permit No. 5-16-0265, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Section 30610(d) and Title 14 California Code of Regulations Sections 13252(a)-(b), shall require an amendment to Permit No. 5-16-0265 from the Commission or shall require a new, additional coastal development permit from the Commission or from the applicable certified local government.
5. **Construction Best Management Practices.**

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

 - (1) No construction materials, debris, or waste shall be placed or stored where it may be subject to wave, wind, or rain erosion and dispersion;
 - (2) Staging and storage of construction machinery and storage of debris shall not take place on any sandy beach areas or areas containing any native vegetation;
 - (3) Any and all debris resulting from construction activities shall be removed from the project site within 24 hours of completion of the project;
 - (4) Construction debris and sediment shall be removed from construction areas each day that construction occurs to prevent the accumulation of sediment and other debris which may be discharged into coastal waters;
 - (5) Concrete trucks and tools used for construction of the approved development shall be rinsed off-site;
 - (6) Erosion control/sedimentation Best Management Practices (BMP's) shall be used to control dust and sedimentation impacts to coastal waters during construction. BMP's shall include, but are not limited to: placement of sand bags around drainage inlets to prevent runoff/sediment transport into coastal waters; and

- (7) All construction materials, excluding lumber, shall be covered and enclosed on all sides, and as far away from a storm drain inlet and receiving waters as possible.

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

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

- A. Vegetated landscaped areas shall only consist of native plants or non-native drought tolerant plants, which are non-invasive. No plant species listed as problematic and/or invasive by the California Native Plant Society (<http://www.CNPS.org/>), the California Invasive Plant Council (formerly the California Exotic Pest Plant Council) (<http://www.cal-ipc.org/>), or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a “noxious weed” by the State of California or the U.S. Federal Government shall be utilized within the property. All plants shall be low water use plants as identified by California Department of Water Resources (See: <http://www.water.ca.gov/wateruseefficiency/docs/wucols00.pdf>).
- B. Use of reclaimed water for irrigation is encouraged. If using potable water for irrigation, only drip or microspray irrigation systems may be used. Other water conservation measures shall be considered, such as weather based irrigation controllers.

7. Bird Strike Prevention.

- A. Ocean front deck railing systems, fences, screen walls and gates subject to this permit shall use materials designed to minimize bird-strikes with the deck railing, fence, or gate. Such materials may consist, all or in part, of wood; wrought iron; frosted or partially-frosted glass, Plexiglas or other visually permeable barriers that are designed to prevent creation of a bird strike hazard. Clear glass or Plexiglas shall not be installed unless they contain UV-reflective glazing that is visible to birds or appliques (e.g. stickers/decals) designed to reduce bird-strikes by reducing reflectivity and transparency are also used. Any appliques used shall be installed to provide coverage consistent with manufacturer specifications (e.g. one applique for every 3 foot by 3 foot area) and the recommendations of the Executive Director. Use of opaque or partially opaque materials is preferred to clean glass or Plexiglas and appliques. All materials and appliques shall be maintained throughout the life of the development to ensure continued effectiveness at addressing bird strikes and shall be maintained at a minimum in accordance with manufacturer specifications and as recommended by the Executive Director.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

8. Occupancy Agreement.

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and written approval documentation demonstrating that the landowner and the applicant have executed an Amendment to the Occupancy Agreement for the applicant's mobile home space (Unit 36), (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 Unit 36, subject to terms and conditions that restrict the use and enjoyment of the manufactured home and related accessory structures located on Unit 36; 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 Unit 36. 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 Unit 36 of the mobile home park so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on Unit 36. Notwithstanding the foregoing, the landowner and lessee may, at their discretion, extend, assign, or execute a new Occupancy Agreement, providing that the Occupancy Agreement Amendment provision required under this Permit Condition may not be deleted, altered or amended without prior written approval of the Executive Director of the Coastal Commission or by approval of an amendment to this coastal development permit by the Commission, if legally required.

9. 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 applicant is proposing the removal/demolition of a 1,200 sq. ft., 13 ft. high one-story mobile home, and installation of a 1,493 sq. ft., 16 ft. high, one-story manufactured home with an above-ground concrete block pier foundation, a 120 sq. ft. shed along the side yard, 85 sq. ft. covered patio, fencing (including 6 ft. high glass fence with applied or etched grid), drainage improvements, and minimal landscaping. The proposed oceanfront concrete patio will extend 9.4 ft. from the mobile home parallel to a narrow and approximately 10 ft. wide perched beach inland of a timber bulkhead/rock revetment that exists roughly along the seaward limits of the applicant's mobile home space (Unit 36). Drainage will be diverted into a percolation pit and to the street's main storm drain system. Project plans are included as **Exhibit 3**. The applicants are not proposing any work to the existing bulkhead/rock revetment. The Park provides two parking spaces per unit space.

The project site (Unit 36) is located between the first public road and the sea and seaward of the Orange County Transportation Authority (OCTA) railroad tracks at Unit 36 in the Capistrano Shores Mobile Home Park ("Park") at 1880 N. El Camino Real in the City of San Clemente, Orange County (**Exhibits 1 & 2**). The Park is an existing 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 zoned OS2 Privately Owned Open Space (intended for open space – no formal easement) and designated Open Space in the City of San Clemente Land Use Plan (LUP).

The subject site is fronted by a narrow perched beach inland of an older timber bulkhead that exists roughly along the seaward limits of the unit space. A quarry stone rock revetment exists seaward of the bulkhead and between the proposed development and the Pacific Ocean. The pre-Coastal Act timber bulkhead and rock revetment exists along the entire length of the Capistrano Shores Mobile Home Park and protects the Park from direct wave attack. The applicant has provided a Coastal Hazard and Wave Runup Study prepared by GeoSoils Inc. for the site and the proposed development.

The applicant owns the existing and proposed mobile/manufactured home but does not own the land upon which the existing unit is placed (and where the proposed unit would be placed) or to the land upon which the land owner has built the bulkhead/rock revetment. The Capistrano Shores Mobile Home Park property (1880 N. El Camino Real, San Clemente) is owned by Capistrano Shores, Inc., a non-profit mutual benefit corporation in which the applicant holds a 1/90 “membership” interest, which allows the applicant the use of a unit space for mobile home purposes. The applicant, as a “member” of the corporation is only responsible for repair/maintenance of its own mobile/manufactured home, ancillary development, and to the landscape on its 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.

Vertical public access to this beach is not available along the length of the Capistrano Shores Mobile Home Park. The nearest vertical public access is available at the North Beach access point to the south of the Park 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 beach area seaward of the Unit Space property lines extends 30 feet from the bulkhead to the ordinary high tide line. According to the cross-sections of the rock revetment provided in the Coastal Hazard and Wave Runup Study prepared by GeoSoils, the rock revetment begins immediately adjacent to the wood bulkhead and extends approximately 20-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.

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.

Since the City of San Clemente does not have a fully-certified LCP, the standard of review is the Chapter 3 policies of the Coastal Act. While the certified San Clemente Land Use Plan (LUP), certified by the Commission in 1988, is not the standard of review, the LUP policies provide guidance.

B. VISUAL RESOURCES

Section 30251 of the Coastal Act states:

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 certified San Clemente Land Use Plan echoes the priority expressed in the Coastal Act for preservation of scenic and visual qualities of coastal areas:

Policy VII.3 states, in relevant part:

The Scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be site and designed:

- a. To protect public views to and along the ocean and scenic coastal area.*
- b. To minimize the alteration of coastal bluffs and canyons.*
- c. Where feasible, to restore and enhance visual quality in visually degraded areas.*

Policy XII states:

Maintain the visual quality, aesthetic qualities and scenic public views in the Coastal Zone.

Policy XII.4 states:

Preserve the aesthetic resources of the City, including coastal bluffs, visually significant ridgelines, and coastal canyons, and significant public views.

Policy XIV.8 states:

Maintain a healthy coastline, preventing degradation of the community's visual and environmental resources.

Policy XII.9 states:

Promote the preservation of significant public view corridors to the ocean.

In past Commission actions pertaining to development in the Park, the Commission has found that development in the Park must be sited and designed to protect views of the coast from public vantage points (e.g. public trails and public recreational areas) and to be visually compatible with the heights of the rest of the exclusively single-story homes in the low scaled mobile home park; the prevailing height of development in the Park is approximately 13-14 feet. In addition, it is through the coastal development permit process that the Commission ensures that proposed development is consistent with the Coastal Act, including that the development does not adversely impact views to and along the coast.

The beach in front of the Park is narrow and varies from a few feet to 70 feet depending on the season. During low tide, this beach is used by sunbathers and beach strollers, and it is a popular

surfing location. However, high tide extends up to the existing rock revetment, which makes public access difficult to impossible during high tide. When public access is available, looking inland from this beach, views of the coastal bluffs at the Marblehead Coastal site are already obstructed by the existing one-story mobile homes at the Park; therefore, the applicant's proposed structures will not result in further visual obstruction of the coastal bluffs from the beach.

The proposed development is located immediately seaward from the public trails along the coastal bluffs inland of the first public road, at the Marblehead coastal site (**Exhibit 1**). The Marblehead 247-acre large-scale, mixed use development (CDP No. 5-03-013) was approved by the Coastal Commission in 2003, which included extensive public trails to and along the bluffs with view areas, public parks, preservation of coastal canyons and bluffs and riparian areas. Because of the close proximity to the trails, any redevelopment of the Park has the potential to significantly impact public views from the trails.

As previously stated, the standard of review is the Chapter 3 policies of the Coastal Act. Section 30251 of the Coastal Act requires that the scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. The applicant is proposing to replace a 13 ft. high, 1,200 sq. ft. one-story mobile home with a 16 ft. high, 1,493 sq. ft. mobile/manufactured home at the applicant's mobile home space (Unit 36), resulting in an increase in bulk and height. Unit 36 is located at the southern portion of the center of the Park. Unit 36 is visible from the beach, from El Camino Real and from along the public trails that extend along the coastal bluffs at the Marblehead Coastal site. The viewshed from the public trails provides views of major scenic resources including ocean white water and blue water, ocean horizon, shoreline and coastline, beach, headlands, the San Clemente Pier, and coastal bluffs.

The proposal will result in an increase of 3 ft. in height and 293 sq. ft. in floor area (**Exhibit 3**). The proposed 3 ft. increase in development height from 13 ft. to 16 ft., however, is consistent with the permitted height for residential structures within the Park located in closer proximity to public areas that provide public coastal views. Through past permit action (e.g. CDP No. 5-11-033), the Commission has concluded that a development height of 16 ft. for unit spaces located even closer in proximity to public vantage areas than the current proposal would allow for an increased height to the Park's prevailing approximately 13-14 foot unit height and upgraded one-story unit, but would not have a significant adverse impact on the ocean viewshed from public areas. Based on staff's visual analysis 16 ft. would not have a significant adverse visual impact on coastal views from the intersection and trails along Marblehead.

Additionally, at the proposed height and design, the proposed mobile/manufactured home will still preserve the relatively low-scale line of mobile homes in the Park, which allows views of the shoreline and scenic coastal areas from many public vantage areas, such as from the public City trails and public children recreational areas at the Marblehead coastal site, as well as from the public view corridor on the public right-of-way at the Avenida Pico and El Camino Real (ECR) intersection. The mobile homes in the Park are designed with pitched roofs varying from a low and flat angle of approximately 10 to 22 degrees. The existing pitched roofs add to the character of the Park and provide open space above and between the homes, which allows for enhanced coastal views from the public trails, parks, and ECR. Allowing homes to a maximum height of 16 ft. with a flat roof would adversely impact the community character and adversely impact coastal views. However, the proposed mobile home subject to this application is designed with a maximum height

of 16 ft. and a pitched roof consistent with the community character of the Park and therefore does not significantly adversely impact coastal views.

The proposed mobile/manufactured home also meets the structural and deck stringlines, and minimizes the bulk of the structures that can be seen from the public areas such as the public trails along the Marblehead bluffs.

Staff is recommending that the Commission approve the proposed development as-proposed. The Commission finds the proposed unit at Unit 36 is sited in a manner that would minimize its visibility from public areas and will not have a significant adverse impact on visual resources. Therefore, the Commission finds the proposed mobile home at Unit 36 is consistent with Section 30251 of the Coastal Act, as well as the relevant policies of the City's Local Coastal Land Use Plan.

The applicant is also requesting approval of ancillary development, such as drainage improvements, minimal landscaping, a 120 sq. ft. shed, fencing, and paved and covered patio areas (**Exhibit 3**). These components of the proposed projects will not be more visible than the existing mobile home and existing ancillary development in the side yards, will not increase the height of the original building, and the siting of these proposed hardscape improvements meet the LUP structural and first-floor deck stringline policy for new infill construction on a beachfront property and all other City standards as they extend no farther seaward than the original structures. These components of the proposal will avoid cumulative adverse impacts on visual resources.

Special Condition 3 is imposed to ensure that all development occurs in compliance to the proposal, subject to all the requirements of all conditions herein, for the installation of a new mobile/manufactured home with a height of no greater than 16 ft. and a variable pitched roof. In addition, pursuant to sections 13250(b) and 13252(a)-(b) of the Commission's regulations, the Commission imposes **Special Condition 4** requiring a coastal development permit amendment or new coastal development permit for any future improvements or repair and maintenance to the development approved under the subject permit and/or any new development to adequately protect public visual resources. As conditioned, the Commission finds the proposed project will not have a significant adverse impact on visual resources and is consistent with Section 30251 of the Coastal Act, as well as the relevant policies of the City's certified Land Use Plan.

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.

Section 30235 of the Coastal Act states in relevant part:

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

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

LUP Policy XV.4 states in relevant part:

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

Revetment/Bulkhead – Existing Conditions

The applicant has provided a Coastal Hazard and Wave Runup Study prepared by GeoSoils, Inc. for the project site. The study states that the shore protection for the site 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 10-ft. wide perched beach that runs the length of the mobile home park. 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 varies from +13.7-ft. NGVD29 to +14.7-ft. NGVD29 with an average elevation of about +14 ft. 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 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 (Study) conducted by GeoSoils, Inc. ascertains that mobile homes are typically constructed of lighter material with a shorter design life of less than 50 years on the ocean (as compared to non-mobile homes). In addition, the study states that the mobile homes are unique in that the structures are “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 SLR [Sea Level Rise], and plus 4 feet of SLR...the maximum CCC SLR prediction for the year 2050 (34 years from now) is 2 feet and the maximum CCC SLR for the year 2082 (66 years from now) is about 4 feet.”

Using the two above-mentioned SLR estimates, the study took into account ocean water depths and elevations, wave heights, the height of the revetment, the height of the timber bulkhead, the calculated overtopping rate of the revetment under both scenarios, and concluded that “the development is reasonably safe from coastal hazards associated with wave runup even under the most onerous SLR conditions in the next 80 years. In the event the water does reach the mobile home and associated improvements, the water velocity will [be] insufficient to cause significant damage.” The Study continues:

“Under the extreme, worst case (80 year) oceanographic conditions, the revetment can be overtopped at a rate of about 2.3 ft³/s-ft. This is less than one foot of water coming over the top of the revetment for each wave (18 second period). The area between the top of the revetment and the structure will partially dissipate the overtopping waters.”

Moreover, the Study continues:

“Wave runup and overtopping may impact the site over the design life. The elevation of the mobile home above the site grade and top of the shore protection, along with flood resistant foundation type, will protect the development from flooding, inundation, or damage. The presence of the shore protection will prevent shoreline erosion from impacting the development...The project will not impact coastal resources considering sea level rise. The mobile home can be moved or raised if coastal hazard impacts become too great.”

Staff concurs with the Study that a 40 to 50 year time period is a reasonable upper limit for measuring sea level rise impacts, and this time period is 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 home unit can be easily relocated in the event of a threat. For purposes of mobile home replacements, the Commission’s staff coastal engineer concurs that an upper limit of a 40 to 50 year time period to measure sea level rise impacts 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 homes [at Capistrano Shores Mobile Home Park] are reasonably safe from the short term erosion hazards. It is unlikely that additional shore protection will be necessary to protect the [subject] mobile home over the economic life of the structure.”

The Study found that the proposed mobile home is reasonably safe from flooding over its economic life. The analyses show that the site has the potential to be flooded on occasion from waves breaking on the revetment, overtopping the bulkhead and reaching the mobile home unit. 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 mobile home park property from the main wave attack.

Furthermore, the entire mobile home park, including Unit 36, is located within the tsunami inundation zone according to the California Emergency Management Agency (CalEMA). **Special Condition 1** places the applicants and subsequent owners on notice (through an amendment to the occupancy agreements per **Special Condition 8**) that this is a high hazard area and that by acceptance of coastal development permit No. 5-16-0265, 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 coastal development permit application No. 5-16-0265, the applicant does not propose any changes or improvements to the existing bulkhead/revetment along the portion that protects the mobile home park. Any repair or maintenance, enhancement, reinforcement or other activity to the existing bulkhead/revetment is the responsibility of Capistrano Shores Inc., which owns the land that the Unit 36 mobile home 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, and ancillary structures (i.e., decks, patios, and garden walls) on Unit 36. Capistrano Shores Inc. would be the applicant for the coastal development permit required for any modifications to the existing bulkhead/revetment that may be necessary to protect existing structures. Although the bulkhead/revetment that currently protects the mobile home park may require repair, maintenance, enhancement, or reinforcement in the future, **Special Condition 2** requires that the applicant acknowledge that it does not own the existing shoreline protective device and the shoreline protective device is not on Unit 36, and that the Commission retains full power and discretion to prohibit any expansions or alterations thereof that would be inconsistent with the lawful application of the Coastal Act, considering the Coastal Act's policies and goals.

Regarding the latter point, a recent Orange County Superior Court opinion issued in late 2016, *Capistrano Shores Property LLC v. Cal. Coastal Com.*, Case No. 30-2015-00785032-CU-WM-CJC (the "Court Opinion") provided guidance on the Commission's ability to condition a similarly-situated project proposal in the Capistrano Shores Mobile Home Park with respect to shoreline protection, taking into consideration future coastal hazards. Special Condition 2 has been drafted in conformance with, and in reference to, that Court Opinion. Although the Court Opinion involved the owner of Unit 12 in the Capistrano Shores mobile home park (not the current applicant for unit 36) and therefore is not binding on the current applicant as a matter of law, the erosion and flooding hazards at issue are identical for similarly-situated mobile home owners proposing similar development projects in the same mobile home park. Therefore, in drafting Special Condition 2 for the current project proposal, staff determined it to be reasonable to rely on and reference the Court Opinion.

Given that the applicant does not have an automatic right to expand or alter the revetment in ways that are inconsistent with lawful application of the Coastal Act (and the park owner may not choose to or be able to do so), the mobile home may need to be altered or removed in the future either in response to changes to the revetment or to threats posed by shoreline hazards. Therefore, **Special Condition 2** also establishes requirements related to response to future coastal hazards, including relocation and/or removal of structures that may be threatened in the future if any government agency has issued a permanent order that the structure is not to be occupied due to the threat of or actual damage or destruction to the premises resulting from waves, erosion, storm conditions, sea level rise, or other natural hazards in the future, and in the event that portions of the development fall to the beach before they are removed, requiring the 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)-(b) of the Commission's regulations, the Commission imposes **Special Condition 4**

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 upon which Unit 36 is situated, the applicant cannot record a deed restriction and the property owner (Capistrano Shores, Inc.) will not agree to record a deed restriction for the applicant. The Commission finds, 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 36, subject to terms and conditions that restrict the use and enjoyment of the manufactured home and related accessory structures located on Unit 36; 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 36. Thus, the Commission imposes **Special Condition 8**.

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 9** 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. 5-16-0265), 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 36 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 36 is subject, and the Commission's immunity from liability. The amendment to the occupancy agreement will indicate that the California Coastal Commission has authorized development on Unit 36, subject to terms and conditions that restrict the use and enjoyment of Unit 36 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 36, 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 be inconsistent with the lawful application of the Coastal Act, considering the Coastal Act's policies and goals. 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 Sections 30253 and 30235 of the Coastal Act, as well as the relevant policies of the City's certified Land Use Plan.

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 30211 of the Coastal Act states:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry and rocky coastal beaches to the first line of terrestrial vegetation.

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.

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

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

LUP Policy IX.15 states in relevant part:

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

As shown in **Exhibits 1 & 2**, the new 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 currently available through the Capistrano Shores Mobile Home Park ("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 Park (**Exhibit 1**). Vertical public access is also available at the North Beach public access point to the south of the mobile home park (**Exhibit 1**).

Regarding shoreline setbacks, the proposed project is sufficiently setback to be consistent with that 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/retreat efforts within the mobile home 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 the project site, and the mobile home park generally, 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 depriving the beach of sand re-nourishment.

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. There is also 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 an expectation to future alterations to the existing revetment which may not be approved. To adequately protect public access, recreation, and shoreline sand supply, especially in light of probable future sea level rise, **Special Condition 2** 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 requests for such expansions or alterations that are inconsistent with the lawful application of the Coastal Act, considering the Coastal Act's policies and goals, 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 as well as the relevant policies of the City's certified Land Use Plan.

E. BIOLOGICAL RESOURCES

Section 30230 of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

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.

Section 30240 of the Coastal Act states:

- (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

Policies XIV.1, XIV.2, XV.2 and XV.3 of the certified San Clemente Land Use Plan reflect Sections 30230, 30231, 30240(a), and 30240(b) of the Coastal Act verbatim, respectively.

LUP Policy XIV.5 states:

Maintain and enhance the City's beaches and marine resources

LUP Policy XIV.8 states:

Maintain a healthy coastline, preventing degradation of the community's visual and environmental resources

LUP Policy XV.4 states:

Balance the preservation of the City's habitat areas with new development

WATER QUALITY & LANDSCAPING

To protect water quality from construction related activities, the Commission imposes construction-related requirements and best management practices under **Special Condition 5** in order to minimize adverse construction-related impacts upon marine resources and for erosion control.

Drainage from the predominantly paved site slopes away from the ocean and toward the street where water runoff from the site is directed to a dry well/percolation box for onsite water infiltration. In addition, the applicant will incorporate minor landscaping in contained planters, in order to minimize water use and water runoff from the subject site. **Special Condition 6** requires the applicant utilize drought tolerant, non-invasive plant species in order to minimize water use and water runoff from the subject site.

The existing development minimizes 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 development 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.

PLEXIGLAS OR GLASS WIND SCREENS

The proposed development includes new glass railings around the decks/patios on the seaward side of the project site. Glass railing systems, walls or wind screens are known to have adverse impacts upon a variety of bird species. Birds are known to strike these glass walls causing their death or stunning them, which exposes them to predation. The applicant is proposing a 6 ft. high, ½ in. tempered glass fence with an etched or painted grid to ward off bird impacts. To ensure bird strike prevention, **Special Condition 7** requires that the applicant use a material for the glass railing that is designed to prevent creation of a bird strike hazard.

CONCLUSION

The Commission, therefore, finds that, as conditioned to require construction-related requirements and best management practices, non-invasive drought tolerant landscaping, and to incorporate glass walls or windscreens that will prevent bird strikes, the development will be consistent with Sections 30230, 30231 and 30240 of the Coastal Act, as well as the relevant policies of the Land Use Plan.

F. 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 certified Land Use Plan has specific policies addressing the protection of scenic and visual qualities of coastal areas, public recreation, and coastal access. As stated in the previous sections of this report, public coastal views from public facilities such as the trails and park along Marblehead bluffs are significant public resources and under the LUP, are required to be protected. The proposed development will not have a significant adverse impact on the ocean viewshed from public areas; thereby minimizing negative impacts to visual resources. The project will also not have any negative effects on public recreation or coastal access.

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, as conditioned, 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).

G. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

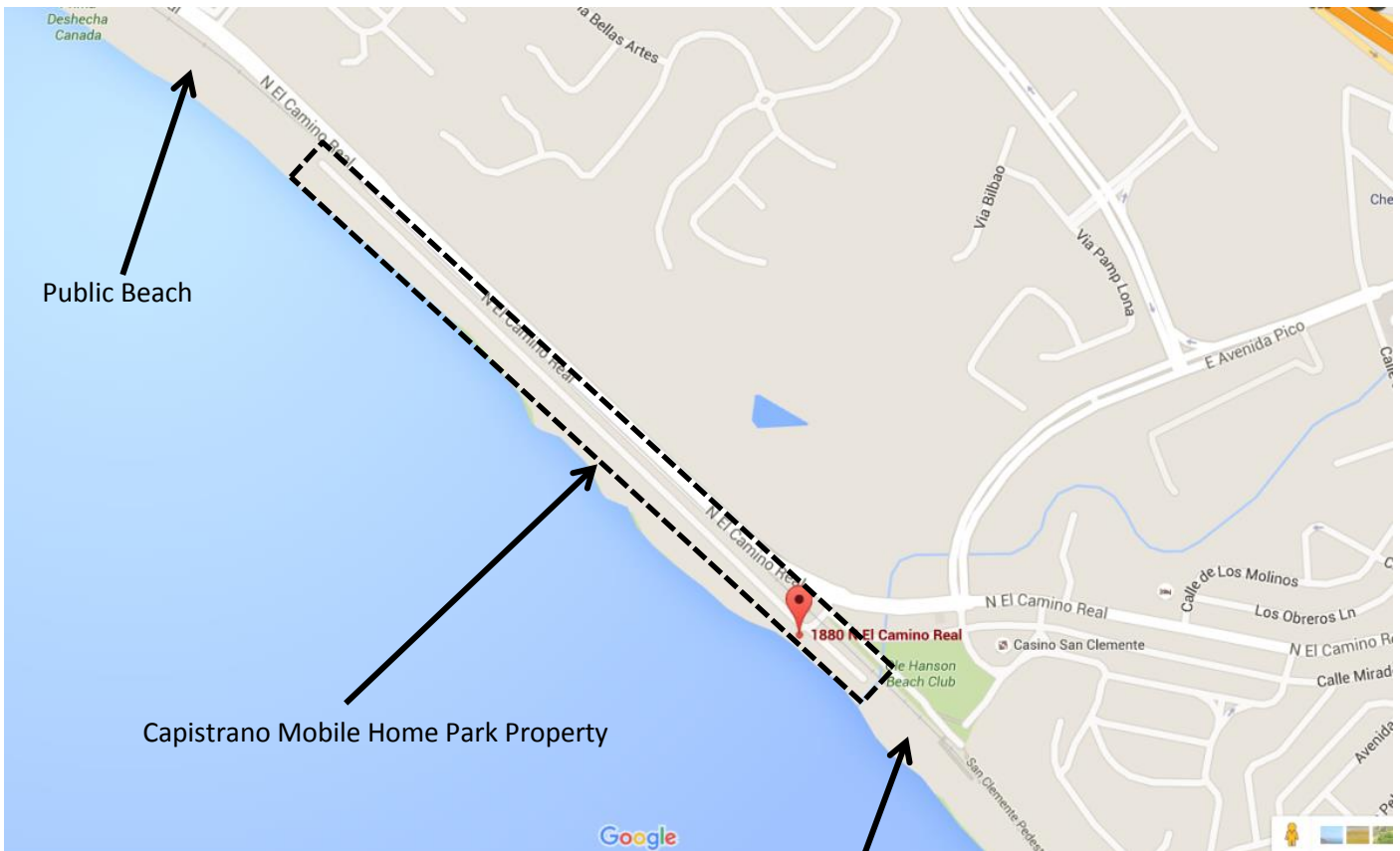
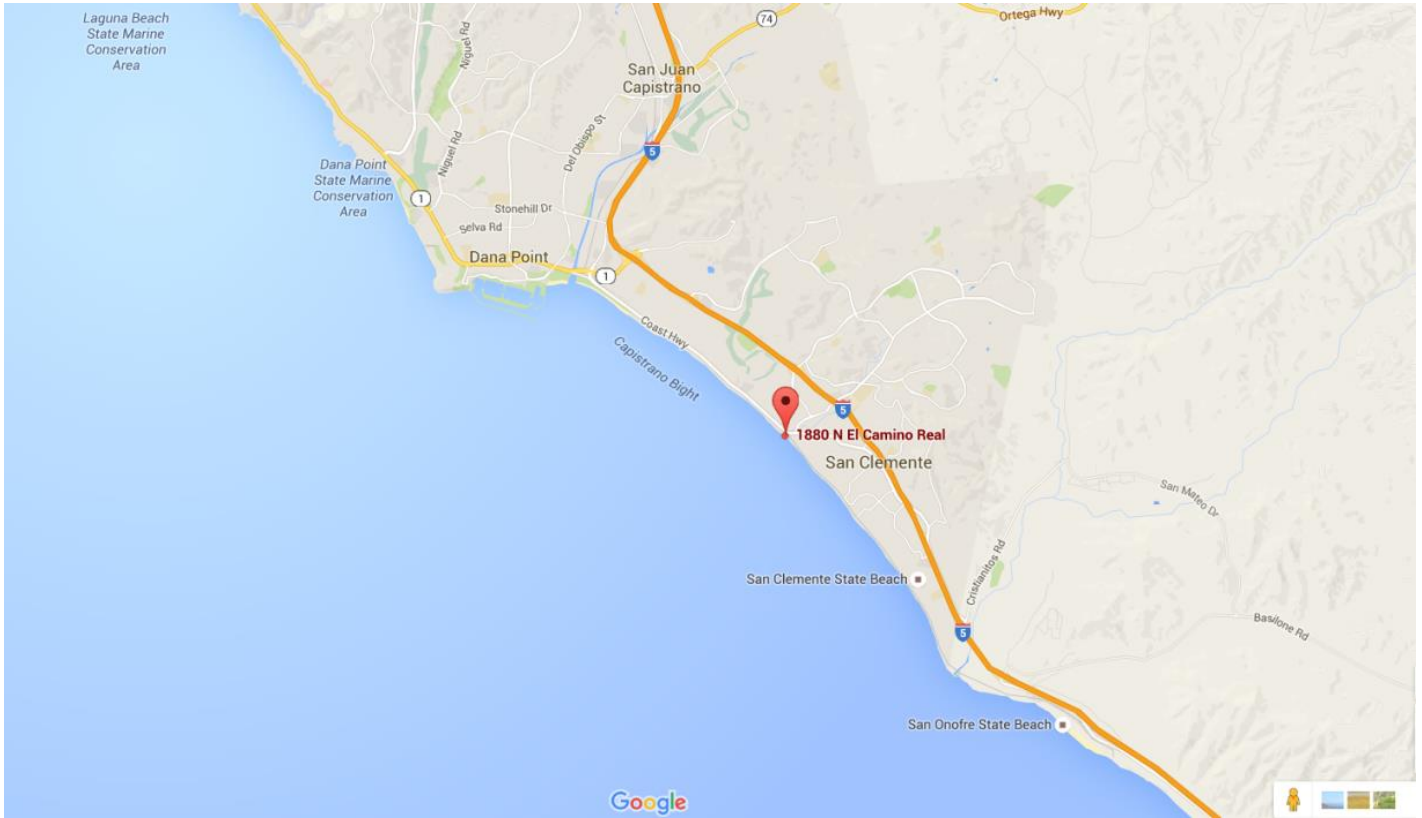
Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Under the CEQA Guidelines, Commission's regulatory program concerning consideration and approval of coastal development permits has been certified as the function equivalent of CEQA (14 CCR § 15251(c).). 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.

As stated in the previous sections of this report, the proposed development will be sited and designed with a height that will avoid significant adverse visual impacts and will protect the public views from nearby public trails, parks and a major roadway (Avenida Pico) that leads to the public beach and El Camino Real, which is the first public road parallel to the sea.

In addition, in order to ensure compliance with resource protection policies of the Coastal Act, the proposed development is conditioned to mitigate any potential adverse impacts to coastal resources and public access. The conditions are: **1)** Assumption of Risk; **2)** Future Response to Erosion/No Automatic Right to Protective Shoreline Construction; **3)** Future Improvements; **4)** Permit Compliance; **5)** Construction Best Management Practices; **6)** Landscaping; **7)** Bird Strike Prevention; **8)** Proof of Legal Ability to Comply with Conditions; and **9)** Occupancy Agreement. As conditioned, the proposed development is consistent with the visual resource protection, hazards, public access, and water quality 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 development, as conditioned, 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. CDP Application No. 5-16-0265
3. *Wave Runup and Coastal Hazard Study, and Shore Protection Observation, 1880 N. El Camino Real, Unit 36, San Clemente, California*, by GeoSoils Inc., dated May 31, 2016.
4. CDP Nos.: 5-09-179 (Hitchcock); 5-09-180 (Hitchcock); 5-14-1582 (Capistrano Shores Property, LLC); 5-10-180 (Barth); 5-11-033 (Christian)
5. De Minimis Waiver Nos.: 5-08-070-W, 5-08-069-W, 5-08-076-W, and 5-08-106-W



COASTAL COMMISSION

Public Beach

EXHIBIT # 1
PAGE 1 OF 2



Marblehead Site

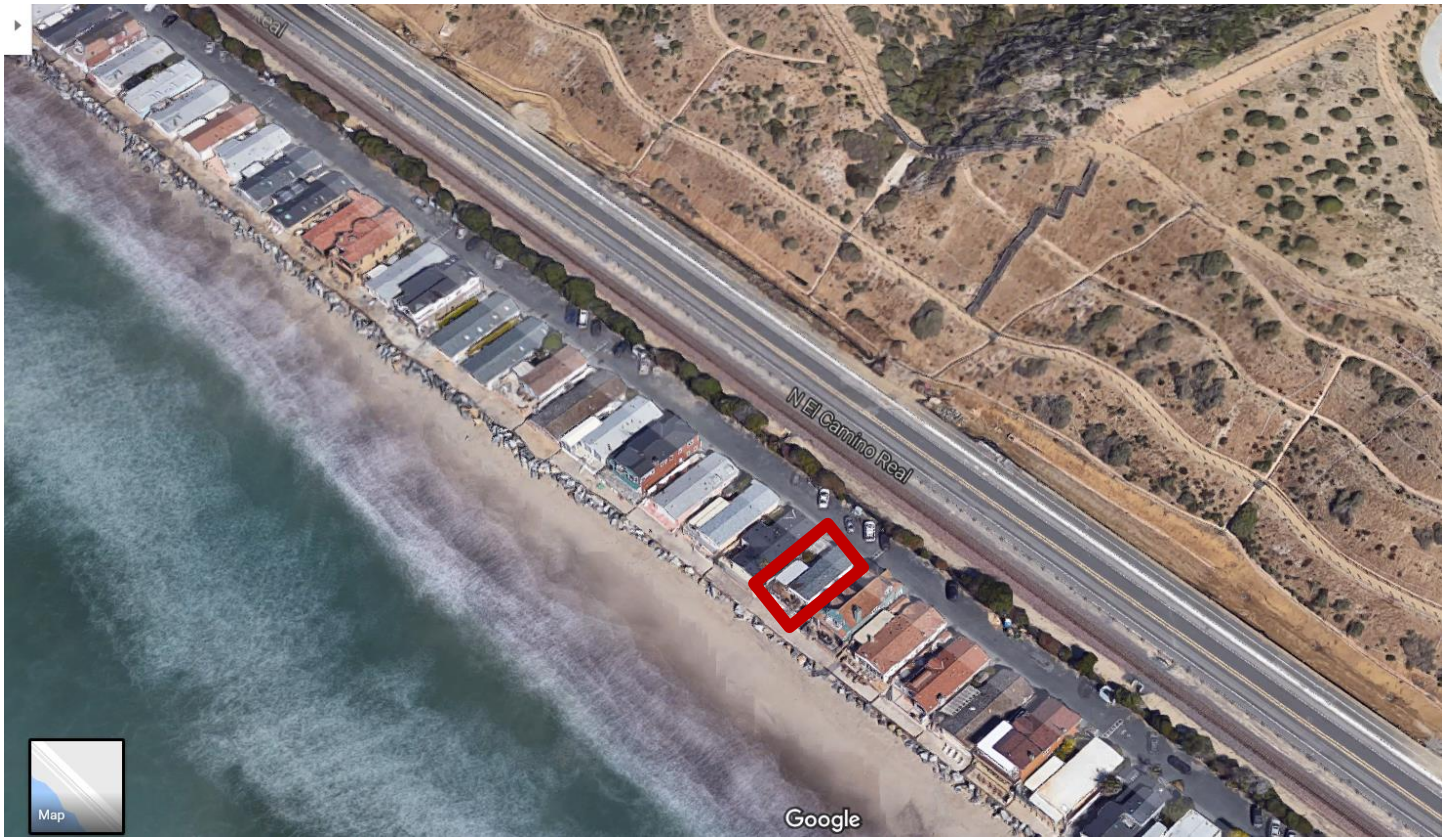
Capistrano Shores Mobile Home Park

Railroad tracks

Public trail path in
canyon at
Marblehead site

COASTAL COMMISSION

EXHIBIT # 1
PAGE 2 OF 2



COASTAL COMMISSION

EXHIBIT # 2
PAGE 1 OF 1

PETERS ASSOCIATES

33662 BRIDGEHAMPTON DRIVE
DANA POINT, CA 92629
949-412-4428
williamspears@yahoo.com

Seal / Signature:

Structural Engineer
D.E.J. ENGINEERING

949-497-6810, FAX: 949-497-6819
dejanengineering@yahoo.com

CACHIA RESIDENCE

1880 N. El Camino Real
Unit 36 Capistrano Shores
San Clemente,
California

H.C.D. Approval

Revisions:		
No.	Date	Revision
△		
△		
△		
△		
△		

Date: 3 / 20 / 2016

Job No.:

Association Submittal:

Bldg. Dept. Submittal:

Bid Issue:

Construction Issue:

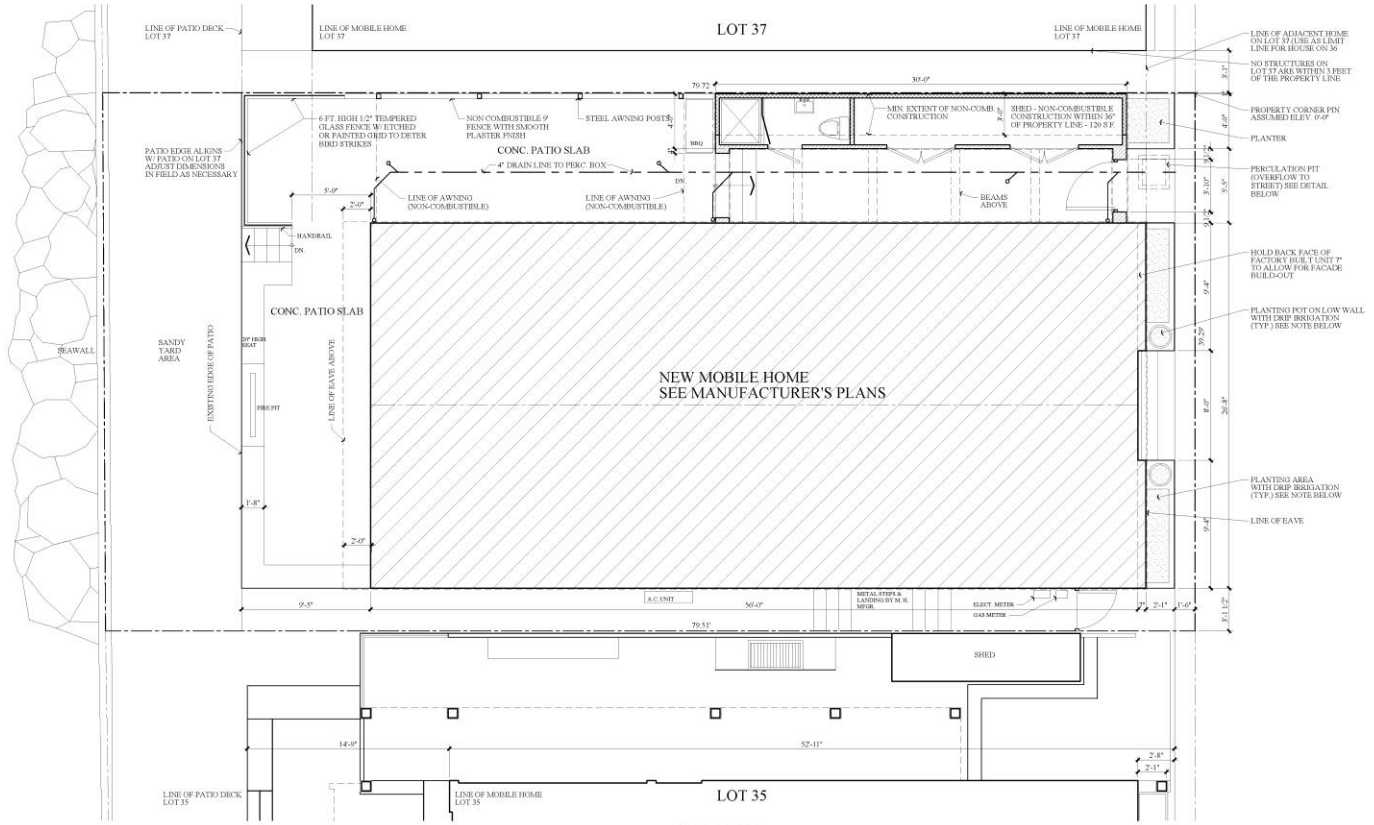
Sheet Title:
SITE PLAN +
ASSESSORY STRUCT.

Sheet No.:

A - 1

COASTAL COMMISSION

EXHIBIT # 3
PAGE 1 OF 2



SITE PLAN
1/4" = 1'-0"

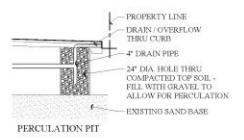
NOTE:
ALL SITE WORK CONSTRUCTION IS CHATTEL -
TEMPORARY & REMOVABLE.

SITE DATA	
LOT SIZE	3,128 S.F.
TRAILER FOOTPRINT	1,493 S.F.
SHED	120 S.F.
PATIO COVER + EAVES	95 S.F.
TOTAL COVERAGE	1,708 S.F.
PERCENT OF COVERAGE	55 %
BUILDING DATA	
MOBILE HOME	1,493 S.F.
SHED	120 S.F.

LANDSCAPING AREA

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

AUTOMATIC IRRIGATION ON TIMER



PERCOLATION PIT

PETERS
ASSOCIATES

3362 BRIDGEHAMPTON DRIVE
DANA POINT, CA 92629
949-412-4428
williamspeters@yahoo.com

Seal / Signature:

Structural Engineer
D.E.J. ENGINEERING

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

CACHIA
RESIDENCE

1880 N. El Camino Real
Unit 36 Capistrano Shores
San Clemente,
California

H.C.D. Approval

Revisions:

No.	Date	Revision
1		
2		
3		
4		
5		

Date: 8 / 12 / 2016

Job No.:

Association Submittal:

Bldg. Dept. Submittal:

Bid Issue:

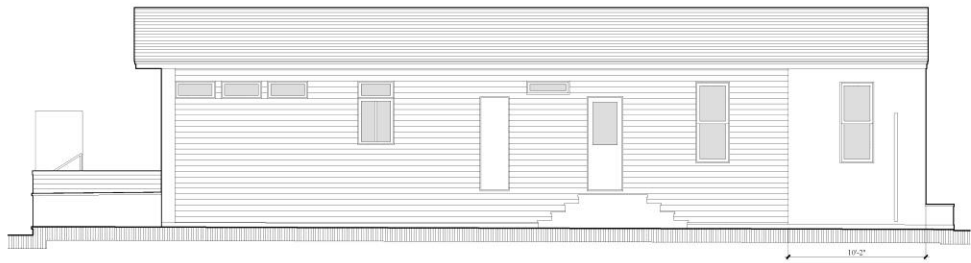
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Sheet Title:

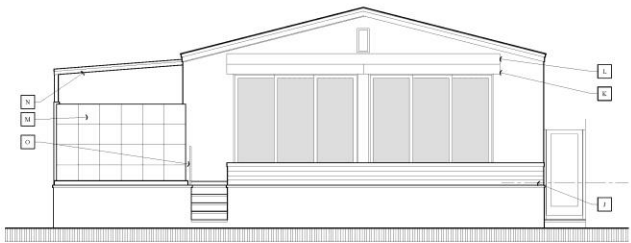
ELEVATIONS

Sheet No.:

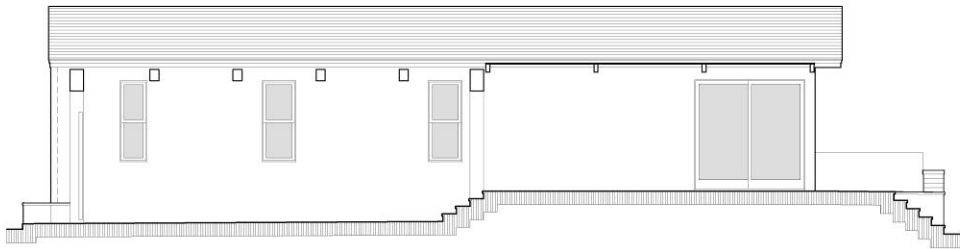
A - 2



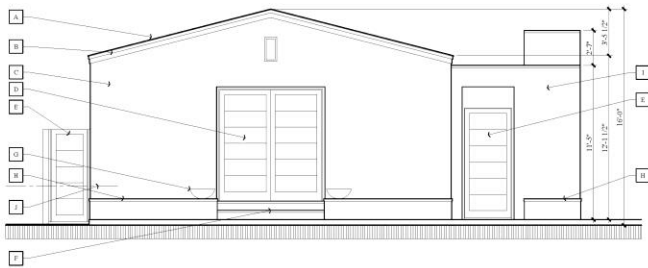
SOUTH ELEVATION



WEST ELEVATION (OCEAN)



NORTH ELEVATION



EAST ELEVATION (STREET)

ELEVATION KEYNOTES

- A ASPHALT SHINGLE ROOF
- B WOOD OR FAUX WOOD FASCIA
- C SMOOTH STUCCO FINISH
- D WOOD OR FAUX WOOD PANEL DOORS (NON-OPERABLE)
- E GATE
- F STEPS
- G PLANTER POT W/ DRIP IRRIGATION
- H PLANTER W/ AUTOMATIC IRRIGATION
- I BIRD-IMPERMEABLE CONSTRUCTION WITHIN 3 FT. OF PROPERTY LINE
- J FLOOR LINE OF COACH
- K STORM SHUTTERS
- L ELECTRIC CANVAS AWNING
- M 4 FT. HIGH 1/2" TEMPERED GLASS FENCE W/ CYCLED OR PAINTED ORB TO DETER BIRD STRIKES
- N NON-COMBUSTIBLE AWNING / PATIO COVER
- O 30" HIGH STAINLESS STEEL OR ALUM. HANDRAIL

NOTES:

1. SEE MOBILE HOME MANUFACTURER'S DRAWINGS FOR FURTHER DETAILS AND INFO.

COASTAL COMMISSION

EXHIBIT # 3
PAGE 2 OF 2

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:

ATTORNEY GENERAL OF CALIFORNIA
HAYLEY.PETERSON@DOJ.CA.GOV

PACIFIC LEGAL FOUNDATION
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PACIFIC LEGAL FOUNDATION
TAE@PACIFICLEGAL.ORG

COASTAL COMMISSION

Clerk of the Court, by: Kathya Penza, Deputy

EXHIBIT # 4
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 # 4

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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 # 4

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(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

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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

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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 # 4
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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.

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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

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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

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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

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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

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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF ORANGE

10
11 CAPISTRANO SHORES PROPERTY, LLC, a
California limited liability company,

12 Petitioner,

13 v.

14 CALIFORNIA COASTAL COMMISSION, and DOES
15 1 through 30, inclusive,

16 Respondent.
17
18

No. 30-2015-00785032-CU-WM-CJC

~~PROPOSED~~ PEREMPTORY
WRIT OF MANDATE

Dept. C18
Action Filed: April 29, 2015

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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