

CALIFORNIA COASTAL COMMISSION

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**W12a**

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STAFF REPORT: APPEAL – SUBSTANTIAL ISSUE AND DE NOVO

Appeal Number: A-5-LGB-16-0098

Applicant: Charles Kinstler

Agent: Horst Nopenberger

Local Government: City of Laguna Beach

Local Decision: Approval with Conditions

Appellant: Mark Fudge

Project Location: 31505 Bluff Drive, City of Laguna Beach, Orange County;
 APN# 658-092-47

Project Description: Appeal of City of Laguna Beach local coastal development permit for the remodel and addition to a 2,946 sq. ft. single-family residence with an attached garage. Project work includes a net 1,274 sq. ft. (approx.) addition to the residence, new decks totaling 190 sq. ft., new 1,054 sq. ft. covered patio, new 26.7-ft. by 12.1-ft. pool and spa with catch basin, interior renovations and modifications, and new landscaping.

Staff Recommendation: Determine that a substantial issue exists. Deny on de novo.

IMPORTANT NOTE

The Commission will not take testimony in the “substantial issue” recommendation unless at least three commissioners request it. The Commission may ask question of the applicant, any aggrieved person, the Attorney General or the executive director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally and at the discretion of the Chair limited to 3 minutes total per side. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will follow, unless it has been postponed, during which the Commission will take public testimony.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission, after a public hearing, determine that a **substantial issue exists** with respect to the grounds on which appeal number A-5-LGB-16-0098 has been filed because the City-approved development is on the bluff face and retention and expansion of a nonconforming structure on the bluff face raises substantial issues as to the project's consistency with the City of Laguna Beach certified Local Coastal Program (LCP).

The primary issue raised by the locally approved development is consistency with the LCP and the negative precedent of approving new development (e.g. proposed additions and major accessory structures) on the bluff face, which negatively affects the natural landform and visual resources. In addition, although the LCP allows for the repair and maintenance of oceanfront bluff homes that are legally nonconforming as to the oceanfront bluff edge setback, it prohibits improvements that increase the size or degree of the nonconformity. In this case, the proposed additions and major accessory structures on the bluff face would increase the degree of nonconformity of the principal residence inconsistent with the LCP policies.

Therefore, staff also recommends that the Commission **deny** the de novo permit.

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APPENDICES

Appendix A – Substantive File Documents

EXHIBITS

- Exhibit 1 – Project Location
- Exhibit 2 – Project Plans
- Exhibit 3 – Elevations and Renderings
- Exhibit 4 – Appeal
- Exhibit 5 – Design Review Board Case 16-0840
- Exhibit 6 – City Resolution for local CDP 16-0841
- Exhibit 7 – CCC Memo: Bluff Edge
- Exhibit 8 – Letter from Applicant’s Agent Responding to Appeal
- Exhibit 9 – Letter of Opposition from Daniel Haspert

I. MOTION AND RESOLUTION - SUBSTANTIAL ISSUE

Motion: *I move that the Commission determine that Appeal No. A-5-LGB-16-0098 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

Resolution to Find Substantial Issue:

*The Commission hereby finds that Appeal No. A-5-LGB-16-0098 presents a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access policies of the Coastal Act.*

II. APPELLANT’S CONTENTIONS

The Commission received a notice of final local action for City of Laguna Beach Local Coastal Development Permit (CDP) 16-0841 on November 18, 2016. Local CDP No. 16-0841 approves the construction of additions totaling 1,274 sq. ft.¹ to an existing single-family residence located on the face of a coastal bluff. The project also includes elevated deck additions (786 sq. ft.), a covered patio (1,054 sq. ft.), grading retaining walls, pool and spa, air conditioning units and landscaping.

On December 1, 2016 the appeal was filed by Mr. Mark Fudge (**Exhibit 4**). Mr. Fudge contends that the City’s approval does not comply with the City’s certified LCP. More specifically, his concerns regard:

- 1) The proposed new development is sited on the bluff face and does not conform to the LCP’s required bluff setbacks;
- 2) The project exceeds the threshold of a major remodel and should be considered new development;
- 3) Because the existing structure does not conform to the required yard setbacks, the proposed new development should be brought to conformity;
- 4) There is a possible environmental sensitivity with respect to the proposed development’s close proximity to archeological/paleontology resources;

¹ The 1,274 sq. ft. area calculation is inclusive of the “habitable” and “mechanical” area of the residence.

- 5) Because the residence is more than 45 years old, its historicity should be evaluated (as required by CEQA);
- 6) The City did not require an initial study, which is required under Land Use Element (LUE) polices for “proposed development in an environmentally sensitive area,” such as the subject site; and because there was no initial study, the Design Review Board did not make the required findings in the LCP, which led to the City’s improper approval of the local CDP.

III. LOCAL GOVERNMENT ACTION

On October 13, 2016, the City of Laguna Beach Design Review Board held a public hearing on the proposed project and approved with conditions local Coastal Development Permit (CDP) No. 16-0841 (**Exhibit 6**) and Design Review 16-0840 (**Exhibit 5**) for the remodel and addition to an existing residential development including new seawards decks, covered patio, pool and spa, and landscaping.

The City’s approval of local CDP No. CA 16-0841 includes the following conditions:

- 1) The south facing wall be pulled back twelve inches at both the upper and lower levels;
- 2) The lower deck glass railing to be opaque; and
- 3) The exterior lighting to be a maximum of three watt LED fixtures.

Moreover, a CEQA Categorical Exemption was adopted by the Review Board. The Coastal Commission’s South Coast District Office received the notice of final action on November 18, 2016. On December 1, 2016 the appeal was filed by Mr. Mark Fudge (**Exhibit 4**) during the ten (10) working day appeal period. No other appeals were received.

IV. APPEAL PROCEDURES

After certification of Local Coastal Programs (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits. Development approved by cities or counties may be appealed if they are located within certain geographic appealable areas, such as those located between the sea and the first public road paralleling the sea or within 100-feet of any wetland, estuary, or stream, or within 300-feet of the top of the seaward face of a coastal bluff. Furthermore, developments approved by counties may be appealed if they are not a designated "principal permitted use" under the certified LCP. Finally, any local government action on a proposed development that would constitute a major public work or a major energy facility may be appealed, whether approved or denied by the city or county [Coastal Act Section 30603(a)].

Section 30603 of the Coastal Act states in relevant part:

(a) After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.

(2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

Section 30603(a)(1) of the Coastal Act establishes the project site as being in an appealable area because it is located between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach (**Exhibit 1**). The project site would also qualify as an appealable area based on Section 30603(a)(2) as well because of its location on the bluff. The issues raised in the subject appeal, on which the Commission finds there is a substantial issue as described further below, apply to proposed development located in the appeals area.

Grounds for Appeal

The grounds for appeal of an approved local CDP in the appealable area are stated in Section 30603(b)(1), which states:

(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in this division.

Section 30625(b)(2) of the Coastal Act requires a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603(a) of the Coastal Act. If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered presumed, and the Commission will proceed to the de novo public hearing on the merits of the project. The de novo hearing will be scheduled at the same hearing or a subsequent Commission hearing. A de novo public hearing on the merits of the project uses the certified LCP as the standard of review. (Coastal Act section 30604(b).) In addition, for projects located between the first public road and the sea, findings must be made at the de novo stage of the appeal that any approved project is consistent with the public access and recreation policies of the Coastal Act. (*Id.* section 30604(c).) Sections 13110-13120 of Title 14 of the California Code of Regulations further explain the appeal hearing process.

Qualifications to Testify before the Commission

If the Commission, by a vote of 3 or more Commissioners, decides to hear arguments and vote on the substantial issue question, proponents and opponents will have an opportunity to address whether the appeal raises a substantial issue. The time limit for public testimony will be set by the chair at the time of the hearing. As noted in Section 13117 of Title 14 of the California Code of Regulations, the only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicant(s), persons who opposed the application before the local government (or their representatives), and the local government. In this case, the City's record reflects that Mr. Mark Fudge opposed the project in writing and in person at local hearings. Testimony from other persons must be submitted in writing.

Upon the close of the public hearing, the Commission will vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project. If the Commission finds that the appeal raises a substantial issue, the

de novo phase of the hearing will follow, unless it has been postponed, during which the Commission will take public testimony.

IV. FINDINGS AND DECLARATIONS – SUBSTANTIAL ISSUE

A. PROJECT DESCRIPTION

The applicant proposes a remodel and addition to a 2,585 sq. ft., 13.1-ft. high (as measured above centerline of Bluff Drive), two-story single-family residence above existing basement level. The project work includes net additions totaling 1,274 sq. ft. (including conversion of approximately 107 sq. ft. of living space into garage space, increasing size of 365 sq. ft. garage to 472 sq. ft.); elevated deck additions totaling approximately 790 sq. ft., new approximately 1,054 sq. ft. covered patio on grade, 26.7-ft. by 12.1-ft. pool and spa, interior renovations and modifications, air conditioning units, and landscaping (**Exhibits 2 & 3**). The net 1,274² sq. ft. addition consists of: 1,326 sq. ft. addition to the basement level (with 425 cu. yd. of grading), and conversion of 171 sq. ft. of living space into garage space resulting in a net reduction in living space by 52 sq. ft. addition on the main level. No work is proposed to the upper level (second-story above street level).

The oceanfront site is located at 31505 Bluff Drive, Laguna Beach, Orange County. The site is a 6,692 sq. ft. bluff-top lot that is currently developed with a pre-Coastal Act 2,585 sq. ft. single-family residence (1955) with an attached 365 sq. ft. two-car garage. A 500 sq. ft. addition to the residence was permitted in 1961. Oceanfront and bluff top single-family residences characterize the surrounding area. Public access to the beach is available via a public access stair way located approximately 200 feet up coast of the project site.

B. LOCAL COASTAL PROGRAM CERTIFICATION

The City of Laguna Beach Local Coastal Program was certified on January 13, 1993. The City's LCP is comprised of a variety of planning documents including the Land Use Element (LUE), Conservation/Open Space Element, and Safety Element of the City's General Plan. The Implementation Plan (IP) portion is Title 25, the City's Zoning Code.

C. FACTORS TO BE CONSIDERED IN SUBSTANTIAL ISSUE ANALYSIS

Section 30625(b)(2) of the Coastal Act requires a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal has been filed pursuant to Section 30603(a) of the Coastal Act. The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. Section 13115(b) of the Commission's regulations simply indicates that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." In previous decisions on appeals, the Commission has considered the following factors.

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the relevant provisions of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;

² The 1,274 sq. ft. area calculation is inclusive of the "habitable" and "mechanical" area of the residence.

4. The precedential value of the local government’s decision for future interpretations of its LCP; and,
5. Whether the appeal raises local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government’s coastal permit decision by filing petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

Staff is recommending that the Commission find that a substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603(a) of the Coastal Act.

D. SUBSTANTIAL ISSUE ANALYSIS

As stated in Section IV of this report, the local Coastal Development Permit (CDP) may be appealed to the Commission on the grounds that the proposed development does not conform to the standards set forth in the certified Local Coastal Program (LCP) or the public access policies of the Coastal Act. Pursuant to Section 30625(b)(2) of the Coastal Act, the Commission must assess whether the appeal raises a substantial issue with respect to the grounds on which the appeal has been filed pursuant to Section 30603(a) of the Coastal Act.

Relevant LCP Policies and Definitions

Land Use Element Glossary

43. Environmentally Sensitive Lands/Resources – Land or resources that have been identified in the City's General Plan as having one or more of the following characteristics: 1) high- or very-high-value biological habitat, as described in the Open Space/Conservation Element; 2) **located on the oceanfront**; 3) a City-mapped watercourse; 4) geologic conditions such as slide-prone formations, potentially active fault, inactive fault, landslide potential, liquefaction potential, and soft coastal headlands; 6) hillside slopes greater than 45%; 7) adjacent wildland area, which requires fuel modification; and 8) major or significant ridgelines (**emphasis added**).

89. Major Remodel – alteration of or an addition to an existing building or structure that increases the square footage of the existing building or structure by 50% or more; or demolition, removal, replacement and/or reconstruction of 50% or more of the existing structure; greater specificity shall be provided in the Laguna Beach Municipal Code.

101. Oceanfront Bluff Edge or Coastal Bluff Edge – The California Coastal Act and Regulations define the oceanfront bluff edge as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the bluff is rounded away from the face of the bluff, the bluff edge shall be defined as that point nearest the bluff face beyond which a downward gradient is maintained continuously to the base of the bluff. In a case where there is a step like feature at the top of the bluff, the landward edge of the topmost riser shall be considered the bluff edge. Bluff edges typically retreat over time as a result of erosional processes, landslides, development of gullies, or by grading (cut). In areas where fill has been placed near or over the bluff edge, the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.

102. Oceanfront Bluff/Coastal Bluff -A bluff overlooking a beach or shoreline or that is subject

to marine erosion. Many oceanfront bluffs consist of a gently sloping upper bluff and a steeper lower bluff or sea cliff. The term "oceanfront bluff" or "coastal bluff" refers to the entire slope between a marine terrace or upland area and the sea. The term "sea cliff" refers to the lower, near vertical portion of an oceanfront bluff.

Land Use Plan, Land Use Element Policies –
Policy 7.3

Design and site new development to protect natural and environmental sensitive resources, such as areas of unique scenic quality, public views, and visual compatibility with surrounding uses and to minimize natural landform alterations.

Action 7.3.2 Review all applications for new development to determine potential threats from coastal and other hazards.

Action 7.3.3 Design and site new development to avoid hazardous areas and minimize risks to life and property from coastal and other hazards

Action 7.3.5 Prohibit development on oceanfront bluff faces, except public improvements providing public access, protecting coastal resources, or providing for public safety. Permit such improvements only when no feasible alternative exists and when designed and constructed to minimize landform alteration of the oceanfront bluff face, to not contribute to further erosion of the oceanfront bluff face and to be visually compatible with the surrounding area to the maximum extent feasible.

Action 7.3.7 Require swimming pools located on oceanfront bluff properties to incorporate leak prevention and detection measures.

Action 7.3.9 Ensure that new development, major remodels and additions to existing structures on oceanfront and oceanfront bluff sites do not rely on existing or future bluff/shoreline protection devices to establish geologic stability or protection from coastal hazards. A condition of the permit for all such new development on bluff property shall expressly require waiver of any such rights to a new bluff/shoreline protection device in the future and recording of said waiver on the title property as a deed restriction.

Action 7.3.10 Allow oceanfront and oceanfront bluff homes, commercial structures, or other principal structures, that are legally nonconforming as to the oceanfront and/or oceanfront bluff edge setback, to be maintained and repaired; however, improvements that increase the size or degree of nonconformity, including but not limited to development that is classified as a major remodel pursuant to the definition in the Land Use Element Glossary, shall constitute new development and cause the pre-existing nonconforming oceanfront or oceanfront bluff structure to be brought into conformity with the LCP.

Policy 7.4

Ensure that development, including subdivisions, new building sites and remodels with building additions, is evaluated to ascertain potential negative impacts on natural resources. Proposed development shall emphasize impact avoidance over impact mitigation. Any mitigation required due to an unavoidable negative impact should be located on-site, where feasible. Any off-site

mitigation should be located within the City’s boundaries close to the project, where feasible.
(Similar to Policies 5.2 and 10.3)

Action 7.4.2 Continue preparation of initial studies, pursuant to the California Environmental Quality Act (CEQA), for any proposed development, including single-family residences located within environmentally sensitive areas. *(Same as Action 10.3.1.)*

Policy 7.7

Protect marine resources by implementing methods to minimize runoff from buildings sites and streets to the City’s storm drain system (e.g. on-site water retention).

Policy 10.2

Design and site new development to protect natural and environmentally sensitive resources such as areas of unique scenic quality, public views, and visual compatibility with surrounding uses and to minimize landform alterations. *(Same as Policy 7.3)*

Action 10.2.6 Require all new development located on an oceanfront bluff top to be setback from the oceanfront bluff edge a sufficient distance to ensure stability, ensure that it will not be endangered by erosion, and to avoid the need for protective devices during the economic life of the structure (75 years). Such setbacks must take into consideration expected long-term bluff retreat over the next 75 years, as well as slope stability. The predicted bluff retreat shall be evaluated considering not only historical bluff retreat data, but also acceleration of bluff retreat made possible by continued and accelerated sea level rise, future increase in storm or El Niño events, and any known site-specific conditions. To assure stability, the development must maintain a minimum factor of safety against landsliding of 1.5 (static) or 1.2 (pseudostatic, $k=0.15$ or determined through analysis by the geotechnical engineer) for the economic life of the structure.

Action 10.2.7 Require all new development located on oceanfront bluffs to be sited in accordance with the stringline but not less than 25 feet from the bluff edge. This requirement shall apply to the principal structure and major accessory structures such as guesthouses and pools that require a structural foundation. The setback shall be increased where necessary to ensure geologic safety and stability of the development.

Action 10.2.8 On oceanfront bluffs, require new minor accessory structures such as decks, patios and walkways that do not require structural foundations to be sited in accordance with stringline but not less than 10 feet from the bluff edge. Require accessory structures to be removed or relocated landward when threatened by erosion, geologic instability or other coastal hazards.

Policy 10.3

Ensure all new development, including subdivisions, the creation of new building sites and remodels that involve building additions, is evaluated to ascertain potential negative impacts on natural resources, ESHA and existing adjacent development. Proposed development shall emphasize ESHA impact avoidance over impact mitigation. Any mitigation required due to unavoidable negative impact should be located on-site rather than off-site, where feasible. Any

off-site mitigation should be located within the City’s boundaries and in close proximity to the project. *(Similar to Policies 7.4 and 5.2.)*

Action 10.3.1 Continue preparation of initial studies, pursuant to the California Environmental Quality Act (CEQA), for any proposed development, including single-family residences, located within environmentally sensitive areas. *(Same as Action 7.4.2.)*

Open Space/Conservation Element Policies –
Policy 12A

Promote the conservation of land having archaeological and/or paleontological importance, for its value to scientific research and to better understand the cultural history of Laguna Beach and environs.

Policy 12C

Development adjacent to a place, structure or feature found to be of historical significance shall be designed so that the uses permitted and the architectural design will protect the visual setting of the historical site.

Policy 12D

Preserve cultural/scientific sites, including geologically unique formations having archaeological significance.

Laguna Beach Municipal Code, Title 25 Zoning, Chapter 25.07 Coastal Development Permits –
Section 25.07.006 Definitions:

(F) “Environmentally sensitive area” means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and development.

Section 25.07.012 Procedures:

Each coastal development permit application shall be processed in accordance with the following requirements.

(G) Findings. A coastal development permit application may be approved or conditionally approved only after the approving authority has reviewed the development project and made all the following findings:

- (1) The project is in conformity with all the applicable provisions of the general plan, including the certified local coastal program and any applicable specific plans;
- (2) Any development located between the sea and the first public road paralleling the sea is in conformity with the certified local coastal program and with the public access and public recreation policies of Chapter 3 of the Coastal Act;
- (3) The proposed development will not have any significant adverse impacts within the meaning of the California Environmental Quality Act,

Staff is recommending that the Commission find that a substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603(a) of the Coastal Act.

Appellant’s Argument: This project qualifies as a Major Remodel.

The appellant argues that the city-approved project for the remodel of an existing non-conforming residence exceeds the threshold of a major remodel as defined in the certified LCP and, therefore, should be considered as new development. Moreover, he maintains that the new development should be brought to conformity since the existing residence is currently non-conforming with setback requirements.

The significance of this distinction between a minor remodel and a major remodel is that existing non-conformities for a minor remodel, such as existing development within the setback area or on the bluff face, may be retained as legal non-conforming development only if the proposed development does not constitute a major remodel. A major remodel is substantial new development, and as such, any existing non-conformities cannot be permitted to remain. The 50% demolition threshold provides one consistent and objective method of dealing with existing non-conformities associated with extensive major remodel projects.

The certified Land Use Element defines a “Major Remodel” as:

Alteration of or an addition to an existing building or structure that increases the square footage of the existing building or structure by 50% or more; or demolition, removal, replacement and/or reconstruction of 50% or more of the existing structure; greater specificity shall be provided in the Laguna Beach Municipal Code.

Ord. 1543 has not been certified and this new definition should not be used by city.

The certified Laguna Beach Municipal Code 25.10.008 of the Implementation Plan (IP) states, in relevant part:

A major remodel is a structural renovation and/or addition, which equals or exceeds fifty percent of the original gross floor area of the structure on the lot.

According to the plans in the City’s record, the proposed net 1,274 sq. ft. addition to the residence is less than 50% of the original gross floor area of the structure. Moreover, less than 50% of the exterior walls, floors, and the roof are proposed for demolition when considered individually and cumulatively. Based solely on this information, the City characterized the locally-approved development as a minor remodel. However, foundation plans were not provided to the City. The City, therefore, failed to consider the amount of demolition proposed to the existing foundation. Because a foundation is an essential structural component of any structure, demolitions and improvements to a foundation should be considered when determining whether or not a remodel/reconstruction of an existing structure is considered major or minor. The City, therefore, did not have an adequate degree of factual support for its decision that the development is consistent with the LCP’s characterization of minor remodel. Consequently, there is a potential that the locally-approved development is in fact a major remodel/reconstruction of an existing structure per applicable LCP policies. For the foregoing reasons, the Commission finds that a substantial issue exists with respect to the grounds on which the appeal was filed pursuant to section 30603 of the Coastal Act as to this specific issue.

Appellant’s Argument: The approved development is sited on the bluff face.

The appellant contends that the City-approved development is sited on the bluff face and does not conform to the required bluff setbacks, which is inconsistent with the City’s LCP and could adversely impact coastal resources.

The Land Use Element, a component of the City of Laguna Beach certified LCP, contains the following definition of Oceanfront Bluff Edge or Coastal Bluff Edge:

The California Coastal Act and Regulations define the oceanfront bluff edge as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the bluff is rounded away from the face of the bluff, the bluff edge shall be defined as that point nearest the bluff face beyond which a downward gradient is maintained continuously to the base of the bluff. In a case where there is a step like feature at the top of the bluff, the landward edge of the topmost riser shall be considered the bluff edge. Bluff edges typically retreat over time as a result of erosional processes, landslides, development of gullies, or by grading (cut). In areas where fill has been placed near or over the bluff edge, the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.

Based on the City’s record for the locally-approved development, the applicant’s bluff edge analysis is based on where the topographic profile transitions to greater than 1:1 (horizontal/vertical). Commission staff’s Senior Coastal Engineer, Dr. Lesley Ewing, and Senior Environmental Scientist, Dr. Joseph Street, have reviewed the applicant’s geotechnical analysis, bluff edge determination, topographic survey, cross-section, and proposed architectural plans, and have determined that the applicant’s bluff edge determination is not consistent with the definition of bluff edge of the LUE of the certified LCP.

Based on the LUE definition, the bluff edge is located at an elevation of approximately 113 to 114 feet above mean sea level (MSL) as depicted in **Exhibit 7**, at the topmost terrace or “riser” resulting from the grading cuts made construction of the existing residence and at the level of Bluff Drive. Accordingly, the existing residence appears to be located entirely on the bluff face and does not conform to required bluff setbacks.

Action 10.2.7 and 10.2.8 (cited above) of the LUE require that development be sited to meet a building stringline but not less than a 25-ft. setback from the bluff edge for principal structures (i.e. house) and major accessory structures (pool) that require a structural foundation and a 10-ft. setback from the bluff edge for minor accessory structures (i.e. decks, patios). The City’s action is inconsistent with Action 10.2.7 and 10.2.8 because it approved new additions to a principal structure (house), new seaward pool and spa requiring structural foundation, and accessory structures (decks, covered patios) with zero setback from the bluff edge.

The city-approved development is also inconsistent with Action 7.3.5 of the LUE (cited above), which explicitly prohibits private developments on ocean front bluff faces. In addition, although Action 7.3.10 of the LUE (cited above) allows for the repair and maintenance of oceanfront bluff homes that are legally nonconforming as to the oceanfront bluff edge setback, it prohibits improvements that increase the size or degree of the nonconformity. In this case, the proposed additions and major accessory structures on the bluff face would only increase the degree of nonconformity of the principal residence inconsistent with the LCP policies. The city did not follow the LCP requirements limiting development occurring on a coastal bluff. Therefore, this contention raises a substantial issue.

Additionally, the appellant contends that the approved development is not sited in the most suitable area of the lot to preserve visual resources and minimize natural landform alteration, and the City did not condition the permit to minimize future natural landform alteration. The locally-approved pool, patios and decks are proposed seaward of the principal residence and encroach further onto the bluff face. Development on the bluff face could impact visual resources. Viewing the bluff from the public beach, the approved improvements have the potential to obscure a portion of the natural landform, which would be inconsistent with the LCP policies to protect visual resources.

Moreover, the City's action to approve the development without conditioning it to minimize future landform alteration is inconsistent with Policy 7.3 and 10.2 of the LCP (cited above). Additionally, in its approval, the City did not impose conditions requiring the applicant to waive the right to future shoreline protective device(s) for new development, it did not require the approved swimming pool to incorporate leak prevention and detection measures, and it did not require a strong construction best management practices plan to minimize runoff from the project site, which is inconsistent with numerous LCP policies (Action 7.3.7, 7.3.9, Policy 7.7; cited above). City's LCP Implementation Plan (IP) establishes review criteria and permit procedures required to be applied when considering approval of permits, including coastal development permits. Section 25.07.012(G) of Chapter 25.07 of the IP provides that in approving an application for a coastal development permit, the approving body may impose conditions necessary to enable the required findings to be made. The appellant contends that, for the reasons described above, the finding cannot be made that the project approved by the City is consistent with the certified LCP. In addition, the City has the authority to impose conditions as necessary to ensure consistency with the certified LCP, but did not do so in this case. By failing to condition its approval to minimize landform alteration in the form of erosion, runoff, and potential future shoreline protective device(s), the City's action was inconsistent with its LCP. Therefore, the Commission finds that the project does raise a substantial issue regarding conformity with LCP.

APPELLANT'S CONTENTIONS THAT DO NOT RAISE SUBSTANTIAL ISSUE

CEQA Compliance

The appellant contends that the project site is located within an environmentally sensitive area, and therefore the City should have required the preparation of an Initial Study pursuant to CEQA requirements. This contention, however, does not raise a substantial issue. The City did consider whether to require an Initial Study or a CEQA Categorical Exemption, and determined a Categorical Exemption was appropriate

Normally, CEQA arguments are not valid bases for an appeal under the Coastal Act as the only question before the Coastal Commission at this stage of an appeal is whether the development conforms to the standards set forth in the certified local program or the public access policies of the Coastal Act. (Cal. Pub. Resources Code section 30603(b)(1). However, here LUE Policy 7.4, Action 7.4.2 actually specifies that an initial study should be prepared for development proposed within ESAs. Normally, CEQA requires that a responsible agency (such as the Coastal Commission here) accept the CEQA review conducted by a lead agency (here, the City). The Commission recognizes the conflict raised by this principle and LUE Policy 7.4, Action 7.4.2 which calls for preparation of an initial study for development proposed within ESAs, and due to that conflict could find that the appellants' contention raises a substantial issue if the development site is within an ESA. In this case, there is no evidence that the already developed site is an ESA, even though the City's Public Hearing Notice indicates otherwise

because of its oceanfront location. The Design Review Board apparently made an error when found that this oceanfront residential lot is in an environmentally sensitive area.

The LCP LUE Glossary defines an Environmentally Sensitive Habitat Area (ESHA) as:

“The Coastal Act defines environmentally sensitive area as any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.”

The City’s use of the term ESA in its LCP mimics the term Environmentally Sensitive Area as that term is defined in Section 30107.5 of the Coastal Act. Both the ESA description in Policy 8F of the OSC and the definition of ESHA in the LUE Glossary specifically reference the Coastal Act definition of ESA. The term Environmentally Sensitive Land/Resource is specifically defined separately, as a distinct entity, in the LCP LUE Glossary. It is the term Environmentally Sensitive Land/Resource that specifically references land or resources located on the “*oceanfront*.” Neither the LCP LUE Glossary nor OSC Policy 8F includes the term “*oceanfront*.” Moreover, the subject site is not mapped as habitat on the City’s Biological Resources Values Map (under any of the three habitat value categories of Very High, High, or Moderate), is not identified as a stream on the Major Watersheds and Drainage Courses Map, and it is not identified as a stream on the USGS 7.5 Quadrangle Series. Nothing in the project record indicates that the site supports significant habitat. There is no biological assessment of the site in the project record. Therefore, oceanfront land, such as the subject site, is accurately called an Environmentally Sensitive Land/Resource, not automatically ESA. Oceanfront land may also constitute ESA, but that would need to be based on site specific information.

The area is recognized in the LCP as environmentally sensitive land/resource. Consequently, as described previously, the LCP requires that the project site should be *evaluated* for the presence of natural resources on the site, including sensitive habitat. Moreover, the appellant did not identify any coastal resources, including sensitive habitat, that may be affected by the City-approved development.

Notwithstanding the language on the City’s Notice of Public Hearing, the term ESA (environmentally sensitive area) is not appropriate for this site. So, the requirement of LUE Policy Actions 7.4.2 and 10.3.1 to conduct an initial study do not apply to the subject site. Therefore, the appellant’s contention that a CEQA Initial Study is required because the subject site is an ESA is in error and so does not raise a substantial issue with regard to conformance with the certified Local Coastal Program.

The appellant also cited LUP Policy 7.4, Action 7.4.1 as a basis for requiring an initial study for the proposed development. Action 7.4.1 states: “*Prepare and adopt California Environmental Quality Act (CEQA) thresholds of significance tailored to address the City's natural resources, such as marine resources, streams, drainage courses, ESHA and high-and very-high habitat.*” This action however, requires the City to prepare, in the future, a general document, applicable citywide. It is intended to assist the City in carrying out CEQA in a more uniform manner. The policy does not require that the City complete the document as a function of considering a specific project proposal.

In the interim, the City will apply CEQA using other thresholds of significance to each development as it arises. Thus, this policy is not applicable to the current project.

So, the City is under no obligation pursuant to Policies 7.4.2 and 10.3.1 of the certified LUE to conduct an initial study because the project is not within an environmentally sensitive area. The City's position to not conduct an initial study does not raise a substantial issue because the oceanfront site is an environmentally sensitive land/resource not subject to policies 7.4.2 and 10.3.1 of the certified.

The appellant also contends that the project may have effects on archaeological and/or paleontological resources due to its close proximity to archeological/paleontological resources at 31461 Coast Highway (site: P-30-000842), which is located less than 100 ft. northwest of the project site. Due to this proximity to Site P-30-000842, the appellant states that mitigations should have been required although he acknowledges that the subject project "... will most likely not have any effects on that known Coast Hwy. In support of this allegation, the appellant cites discussion text from the LCP Open Space/Conservation Element (OSCE) from Topic 12 Archaeology/Paleontology acknowledging that issues relating to cultural/scientific resources focus on the need for proper mitigation measures, including preservation of archaeological sites.

Policy 12-C of the OSCE requires that development adjacent to a historically significant site be sited and designed to protect the visual setting of the site. Policy 12-D of the OSCE requires preservation of cultural/scientific sites. However, the City's LCP does not contain policies identifying when a project must provide an archaeological analysis. Nonetheless, the applicant provided to the City an archeological letter dated July 16, 2016 by Macko Archaeological, which determined that "... proposed ground disturbance has a low probability of damaging significant deposits" but also recommended on-site monitoring during construction and a California Historical Resource Information System (CHRIS) assessment. Consequently, the City approved the subject development with following conditions pursuant to the archeologist's recommendation:

- 1) *the nature of the highly disturbed archaeological materials should be submitted to California Historical Resource Information System (CHRIS) with an assessment of Ineligibility to the California Register of Historical Resources (CRHR), and*
- 2) *require a County-certified archaeological with paleontological background to monitor the limited ground disturbing activities conducted during construction*

By thusly conditioning the permit, the Commission finds this contention does not raise a substantial issue.

The appellant also indicates that no local Native Americans were consulted for the proposed project, even though a member of the Tongva Ancestral Territorial Tribal Nation had requested to be added to the City's tribal consultation list. This Tongva Nation member will be included on the public hearing notice list for this appeal.

Additionally, the appellant argues that the City failed to evaluate the existing residence potential historic significance since the structure is over 45 years old.

Under the definition of “historic preservation” the LUE states:

Destruction or alteration of properties with historic significance, as identified in the City’s historic resources inventory or historic register, should be avoided whenever possible. Special preservation consideration should also be given to any structure over 45 years old.

According to Community Development Department, the City gave “special consideration” to the structure because it was constructed in 1955 and is over 45 years old. The City found that the existing structure is not associated with any historically significant features. Therefore, this contention does not raise a substantial issue.

SUBSTANTIAL ISSUE FACTORS:

Applying the five factors listed in the prior section clarifies that the appeal raises a “substantial issue”, and therefore, does meet the substantiality standard of Section 30625(b)(2).

1. The degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the relevant provisions of the Coastal Act.

The action of the local government (City of Laguna Beach Design Review Board and City Council) was inconsistent with numerous policies of certified LCP and numerous provisions of the Coastal Act. The facts provided in the application file and the plans for the approved development clearly demonstrate that the local government’s decision was inconsistent with the legal provisions of the LCP and the Coastal Act. Therefore, there is a low degree of factual and legal support for the local government’s decision.

2. The extent and scope of the development as approved or denied by the local government.

The local government approved a net 1,274 sq. ft. addition and a 323 sq. ft. pool/spa on the bluff face, as well as potentially a major remodel of a principal nonconforming structure on a bluff face. In aggregate, this could represent complete development of the subject site (as it appears to exceed the 50% threshold for determining redevelopment under the LCP). Thus, the scope of the approved development is substantial.

3. The significance of the coastal resources affected by the decision. California’s coastal bluffs are a significant resource. They represent a rare and visually pleasing landform which California citizens and governments have historically sought to preserve. Coastal bluffs are dynamic geologic formations that raise, and development on them increases the potential for geologic hazards. Development on coastal bluffs also can have significant impacts on scenic resources and public access opportunities. The Coastal Act provides coastal bluffs with special protections.

4. The precedential value of the local government’s decision for future interpretations of its LCP. Allowing the local government’s decision to approve new development (potential major remodel, and additions and major accessory structure requiring structural foundation) on a bluff face would set a negative precedence for future interpretations of its LCP. If local Coastal Development Permit No. 16-0841 is found to be consistent with the LCP, there is a potential that future applicants will reference this permit if they wish to develop other oceanfront bluff sites, of which there are hundreds in Laguna Beach.

5. Whether the appeal raises local issues, or those of regional or statewide significance
Bluff face development are issues of statewide significance. Requiring consistency with the

certified LCP and the public access and recreation provisions of the Coastal Act is significant to all the people of California who wish to enjoy the public beaches of California.

In conclusion, staff recommends that the Commission find that a substantial issue exists with respect to whether the local government action conforms with the visual resources, geologic hazards, setbacks, and nonconforming structures policies of the City’s certified LCP.

V. MOTION AND RESOLUTION – DE NOVO PERMIT

Motion: *I move that the Commission **approve** Coastal Development Permit No. A-5-LGB-16-0098 for the development proposed by the applicant.*

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution:

The Commission hereby denies a Coastal Development Permit for the proposed development and adopts the findings set forth below on grounds that the development would not be in conformity with the certified Local Coastal Plan and/or the public access and recreation policies of the California Coastal Act.

VI. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION

The project description and location is hereby incorporated by reference from Section IV of the Substantial Issue portion of this staff report on page 7.

B. LCP CONFORMITY (STANDARD OF REVIEW)

Relevant Policies of the City of Laguna Beach certified LCP are hereby incorporated by reference from Section VI. D. of the Substantial Issue portion of this staff report on pages 8-11.

Extent of Demolition

Where existing and/or proposed development is undertaken under the premise of a ‘remodel’ or ‘remodel-addition’ it’s important to determine the quantity and location where work is occurring on the existing structure. This is needed in order to assess whether the extent of the development actually constitutes a replacement structure that requires the applicant to address all heretofore existing non-conformities, such as inadequate or absent bluff edge setback, and to ensure that the entire proposed development complies with all applicable policies of the City of Laguna Beach’s certified Local Coastal Program (LCP). To the maximum extent possible it is also important to avoid creating new nonconformities, especially where they may interfere with bringing the structure into conformity in the future.

The term ‘major remodel’ is defined by the City’s certified Land Use Element, a component of the City of Laguna Beach certified LCP, as:

Alteration of or an addition to an existing building or structure that increases the square footage of the existing building or structure by 50% or more; or demolition, removal, replacement and/or reconstruction of 50% or more of the existing structure; greater specificity shall be provided in the Laguna Beach Municipal Code.

The significance of this distinction between a minor remodel and a major one is that existing non-conformities for a minor remodel, such as existing development potentially within the setback area or on the bluff face, can be considered for retention, whereas major redevelopment triggers review as if the development was completely new. The 50% demolition threshold provides one consistent and objective method of dealing with existing non-conformities associated with extensive major remodel projects.

Pursuant to the Land Use Element (LUE), one way the Commission can determine whether a ‘major remodel’ or substantial redevelopment of a site is occurring, thereby constituting a replacement structure, is to look at the extent of the addition proposed. The proposed project includes a net 1,274 sq. ft. addition to an existing, pre-Coastal Act 2,585 sq. ft., two-story residence (1955) above basement level. Therefore, the proposed addition is less than 50% of the original gross floor area of the structure.

The Commission can also look at the extent of demolition occurring to the existing structure and the location within the existing structure where such demolition is taking place. Land Use Element (LUE) states that 50% or more demolition/reconstruction of an existing residence constitutes a major remodel. According to the project plans, less than 50% of the exterior walls, floors, and the roof are proposed for demolition when considered individually and cumulatively. However, because a foundation is an essential structural component of any structure, demolitions and improvements to foundation should be considered when determining whether or not a remodel/reconstruction of an existing structure is considered major or minor.

The applicant has indicated that the existing slab, retaining walls, and foundations of the basement level will be retained, and that the existing foundation at the main level will be underpinned. However, the proposed enlargement of the basement level by 443 sq. ft. will require significant excavation within the existing structure’s footprint, and significant alteration of the existing lower level and foundation. The applicant has only submitted a conceptual foundation plan that fails to provide the detailed information necessary to calculate the amount of alteration and/or demolition proposed to the foundation or to show all the new foundational elements proposed (i.e. caissons) for the proposed remodel and addition. Consequently, the Commission does not have the information necessary to support a decision that the development is consistent with the LCP’s standards for a minor remodel.

Setbacks

Defining the bluff edge can be complicated: by the presence of irregularities in the bluff edge, a rounded bluff edge, a sloping bluff top, or previous grading or development near the bluff edge. In this case, previous grading and development has created a steplike feature at the top of the cliff face. Where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser should be taken to be the cliff edge consistent with the certified LUE of the LCP.

The applicant’s geotechnical consultant based the bluff edge analysis on where the topographic

profile transitions to greater than 1:1 (horizontal/vertical), which placed the bluff edge at the 55-ft. and 58-ft. Mean Sea Level (MSL) elevation contour lines (see **Exhibit 7**).

Commission staff's Senior Coastal Engineer, Lesley Ewing, and Environmental Scientist, Joseph Street have reviewed the applicant's geotechnical analysis, bluff edge determination, topographic survey, cross-section, and proposed architectural plans, and have determined that the applicant's bluff edge determination is not consistent with the definition of bluff edge of the LUE of the certified LCP.

The Land Use Element, a component of the City of Laguna Beach certified LCP, contains the following definition of Oceanfront Bluff Edge or Coastal Bluff Edge:

The California Coastal Act and Regulations define the oceanfront bluff edge as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the bluff is rounded away from the face of the bluff, the bluff edge shall be defined as that point nearest the bluff face beyond which a downward gradient is maintained continuously to the base of the bluff. In a case where there is a step like feature at the top of the bluff, the landward edge of the topmost riser shall be considered the bluff edge. Bluff edges typically retreat over time as a result of erosional processes, landslides, development of gullies, or by grading (cut). In areas where fill has been placed near or over the bluff edge, the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.

Based on the LUE definition, Commission staff's Senior Coastal Engineer, Dr. Lesley Ewing, and Senior Environmental Scientist, Dr. Joseph Street have determined that the bluff edge is located at an elevation of approximately 113-ft. to 114- ft. MSL as depicted in **Exhibit 7**, at the topmost terrace or "riser" resulting from the grading cuts made construction of the existing residence and at the level of Bluff Drive. Accordingly, the existing residence appears to be located entirely on the bluff face and does not conform to required bluff setbacks.

Action 10.2.7 of the Land Use Element states:

Require all new development located on oceanfront bluffs to be sited in accordance with the stringline but not less than 25 feet from the bluff edge. This requirement shall apply to the principal structure and major accessory structures such as guesthouses and pools that require a structural foundation. The setback shall be increased where necessary to ensure geologic safety and stability of the development.

Action 10.2.8 of the Land Use Element states:

On oceanfront bluffs, require new minor accessory structures such as decks, patios and walkways that do not require structural foundations to be sited in accordance with stringline but not less than 10 feet from the bluff edge. Require accessory structures to be removed or relocated landward when threatened by erosion, geologic instability or other coastal hazards.

Action 10.2.7 and 10.2.8 of the LUE require that development be sited to meet a building stringline but not less than a 25-ft. setback from the bluff edge for principal structures (i.e. house) and major accessory structures (i.e., pool) that require a structural foundation and a 10-ft. setback from the bluff edge for minor accessory structures (i.e. decks, patios). The proposed project is inconsistent with Action 10.2.7 and 10.2.8 because it includes additions to a principal structure (house), new seaward pool and spa

requiring structural foundation, and accessory structures (decks, covered patios) with zero setback from the bluff edge.

Action 7.3.5 of the Land Use Element states:

Prohibit development on oceanfront bluff faces, except public improvements providing public access, protecting coastal resources, or providing for public safety. Permit such improvements only when no feasible alternative exists and when designed and constructed to minimize landform alteration of the oceanfront bluff face, to not contribute to further erosion of the oceanfront bluff face and to be visually compatible with the surrounding area to the maximum extent feasible.

Action 7.3.10 of the Land Use Element, state:

Allow oceanfront and oceanfront bluff homes, commercial structures, or other principal structures, that are legally nonconforming as to the oceanfront and/or oceanfront bluff edge setback, to be maintained and repaired; however, improvements that increase the size or degree of nonconformity, including but not limited to development that is classified as a major remodel pursuant to the definition in the Land Use Element Glossary, shall constitute new development and cause the pre-existing nonconforming oceanfront or oceanfront bluff structure to be brought into conformity with the LCP.

The proposed project is also inconsistent with Action 7.3.5 of the LUE (cited above), which explicitly prohibits private developments on ocean front bluff faces. In addition, although Action 7.3.10 of the LUE (cited above) allows for the repair and maintenance of oceanfront bluff homes that are legally nonconforming as to the oceanfront bluff edge setback, it prohibits improvements that increase the size or degree of the nonconformity. In this case, the proposed additions and major accessory structures on the bluff face would increase the degree of nonconformity of the principal residence inconsistent with the LCP policies.

Additionally the proposed development is not sited in the most suitable area of the lot to preserve visual resources and minimize natural landform alteration, and does not minimize natural landform alteration. The applicant is proposing to install a 323 sq. ft. pool, decks totaling 790 sq. ft., and a 1,054 sq. ft. covered patio further seaward than the principal residence; thereby, these ancillary structures will encroach further seaward on the bluff face.

Visual Resources

Development on the bluff face would impact visual resources. Viewing the bluff from the public beach, the approved improvements have the potential to obscure a portion of the natural landform, which would be inconsistent with the LCP policies on visual resources.

Hazards

In addition, the approved pool, patios and decks, encroach onto the bluff and will likely require substantial grading and deepened foundations. Without a detailed foundation plan, some of the proposed foundation elements are unknown.

Conclusion

The proposed development is not consistent with the policies of City of Laguna Beach certified LCP as detailed above; and therefore, the Commission denies the project.

APPENDIX A

SUBSTANTIVE FILE DOCUMENTS:

1. City of Laguna Beach Local Coastal Program (LCP)
2. CCC Staff Report for CDP# 5-99-432, 109 South La Senda Drive, Laguna Beach, Proposed stabilization of a portion of a coastal bluff by installing a rock anchor system consisting of a 288 sq. ft. shotcrete wall with tiebacks.
3. Geofirm, February 23, 2000, Discussion of Options Regarding Bluff Slope Instability, 109 South La Senda, Three Arch Bay, South Laguna, California.
4. Morris Skenderian & Associates, A.I.A, February 28, 2017, Niednagel Residence, 109 S. La Senda, Laguna Beach, California, Site Plan and Site Section, CCC-1.
5. Geofirm, February 3, 2017, Supplemental Investigation of Bluff Slope Stability, Proposed Residence Remodel and Additions, 109 South La Senda, Laguna Beach, California.
6. Geofirm, August 21, 2015, Preliminary Geotechnical Investigation, Proposed Residence Remodel and Additions, 109 South La Senda, Laguna Beach, California.
7. GeoSoils, August 11, 2015. Wave Runup and Bluff/Shoreline Erosion Analysis for Remodel Project, 109 S. La Senda Drive, Laguna Beach, Orange County, California.