CALIFORNIA COASTAL COMMISSION
SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4421
(619) 767-2370

Th21d

Appeal Filed:	7/12/16
Action Deadline:	None
Staff:	E. Stevens-SD
Staff Report:	11/28/2018
Hearing Date:	12/13/2018

STAFF REPORT: DE NOVO HEARING

Local Government:	**City of Encinitas**
Decision:	**Approved with Conditions**
Appeal Number:	**A-6-ENC-16-0068**
Applicant:	**Andre and Jennifer Hurst**
Location:	808 Neptune Avenue, Encinitas, San Diego County (APN #256-11-011)
Project Description:	Demolition of an existing 1,319 sq. ft. single family residence and construction of a new, 2-story, 2,818 sq. ft. home over a 1,156 sq. ft. basement with a 244 sq. ft. attached garage on an 8,624 sq. ft. vacant coastal bluff lot
Appellants:	Commissioner Steve Kinsey and Commissioner Mary Shallenberger
Staff Recommendation:	Denial on De Novo

SUMMARY OF STAFF RECOMMENDATION

Commission staff recommends **denial** of coastal development permit application A-6-ENC-16-0068. The subject application consists of demolition of an existing home and construction of a significantly larger home including a basement on a blufftop lot. There is an existing seawall and a below-grade upper bluff caisson retention system on the subject site. Staff recommends the Commission deny the proposed project on the grounds that the project is inconsistent with the blufftop development provisions of the City's LCP. The applicant has not demonstrated the proposed residence will be reasonably safe over its design life of 75 years without reliance on future shoreline or bluff protection. Additionally the applicant has not demonstrated that the home, in particular the proposed

basement, would be designed and constructed so that it could be safely removed in the event of endangerment.

The primary issue raised by the subject development relates to whether there is a safe location for the proposed new development on the blufftop lot. As proposed, the single-family home would be set back approximately 40 ft. from the bluff edge, with a cantilevered second floor extending an additional 8 ft. closer to the bluff edge. The applicants have argued that relying on existing shoreline protection to site new development is consistent with the certified Local Coastal Program and with past Commission precedents in Encinitas.

However, allowing new development to rely on shoreline protection is not consistent with the LCP or past Commission action. Seawalls and bluff stabilization measures, while formidable, are not permanent structures and have a finite life. Moreover, at the time the seawall fronting the site was permitted, the applicant indicated the design life of the existing seawall was 22 years; as it was constructed 18 years ago, the seawall is nearing the end of its design life. When the Commission approves shoreline armoring, as it did on the subject site, it is with the intent of protecting a specific existing structure. Relying on the presence of existing shoreline armoring to assure stability for the new development cannot ensure safety for the life of the project, and is the functionally the same as proposing future shoreline armoring to provide protection for the life of the new development. New development must be designed to not need shoreline protection, which means that it must be sited safely without reliance on existing or future shoreline protective devices. The fact that the proposed residence would rely on protection by existing and potentially additional shoreline armoring is inconsistent with the certified LCP policies, as well as Section 30253 of the Coastal Act from which the policies were derived.

Based on the geotechnical information provided by the applicants' technical experts, Commission staff has determined that there is no safe location to site new development on this blufftop lot without relying on shoreline protection. Furthermore, like the coastal bluffs elsewhere in Encinitas, the bluff at the project site is actively eroding, as evidenced by visible rilling, small to moderate failure scarps, and active sand flows in the upper bluff materials. In addition, with future sea level rise, large storm waves will more frequently strike the unprotected weak terrace materials above the existing approximately 17 ft. high seawall. There remains also a possibility that direct wave attack on the lower terrace deposits above the existing seawall could accelerate bluff retreat at the site, potentially leading to erosion behind the seawall, and in the extreme case, undermining of the upper bluff piers. Thus, if new development is allowed to be sited on this hazardous location, the likelihood that additional shoreline protection will be necessary within the life of the structure is reasonably foreseeable.

In past projects, when the Commission has been faced with a site where there is no safe place to build a new home on a blufftop site, the Commission has approved construction of a new home setback only to the current "factor of safety" line, where the home would be safe currently, in order to allow some reasonable use of the site (ref: 6-15-1717/Barr in Solana Beach). In that case, the Commission was able to find approval of a new home on the site consistent with the Coastal Act because the setback of the new home was significantly further landward than the existing structures on the site (46 ft. vs. 0 ft.), the

new home would be sited landward of the location of the 1.5 factor of safety setback, and the home did not include a basement or caisson foundation, such that the home could be removed in the event of endangerment in the future. The Commission has also allowed construction of new homes to depend on buried caissons (Ref: CDPs 6-ENC-09-002 & 003/Wellman and A-6-ENC-06-101/Albani, both in Encinitas). However, more recently, the Commission has found that caissons supporting new development would function as a protective device, and would likely cause significant impacts to the bluff on removal, and therefore that the use of caissons is not consistent with the Coastal Act. Here, the proposed basement foundation would not be able to be removed without impacting the bluff, in conflict with the LCP.

The applicants have argued that previous Commission actions to approve demolition of existing homes and construction of new homes on blufftop lots in Encinitas should be considered precedential and that future bluff top development in Encinitas should be entitled to rely on existing shoreline armoring in perpetuity to meet bluff stability requirements. The applicant specifically references the Commission approval of the new homes at 824 and 828 Neptune Avenue.

In 2011, the Commission approved new development on a site two properties to the north at 824 and 828 Neptune Avenue (A-6-ENC-09-040 & 041/Okun) (Exhibit 15). In that case, extensive shoreline armoring had previously been approved and constructed to protect an existing home, which was proposed to be demolished and replaced with two new homes. On appeal, the Commission found that substantial issues existed due in part to a geotechnical analysis that failed to adequately demonstrate the new homes would be safe over their lifetimes so as to not require shoreline protection. On de novo review, based on a site-specific analysis, the Commission subsequently approved the demolition of the existing home and construction of two new homes with 40 ft. setbacks from the reconstructed bluff edge and numerous other special conditions to ensure that the new homes would not result in further adverse impacts to coastal resources.

The applicants assert that the Commission's action at 824 and 828 Neptune Avenue allowed the new homes to rely on existing shoreline protection. However, the Commission did not determine that it is acceptable to rely on existing shoreline protection to site new development, but rather, the Commission acknowledged that given the existing protection on that site, it is likely that those particular proposed homes would be safe if set back 40 feet. The Commission's action did not establish a standard for all future bluff top development in Encinitas. Furthermore, there are significant differences between the current proposal and the previous approval at 824 and 828 Neptune Avenue. First, an approximately 300 sq. ft. portion of the existing home at 824 and 828 Neptune Avenue was destroyed when it fell off of the bluff after a significant bluff failure in 1996, resulting in a setback of 10 ft. from the reconstructed bluff edge, while the home at the subject site has an existing setback of 25-30 ft. from the natural bluff edge. Second, the home at 824 and 828 Neptune Avenue was nearly 15 years older (constructed 1929) than the home on the subject site (constructed 1949). Third, an upper bluff wall had already been constructed at 824 and 828 Neptune Avenue. Thus, the need for additional armoring fronting the approved homes at 824 and 828 Neptune Avenue was unlikely. In contrast,

the upper bluff at the subject site is still unaltered from a visual standpoint (the existing upper bluff caisson retention system is entirely below-grade); and based on the Commission's experience with the home directly adjacent to the north of the subject site at 816 Neptune Avenue, it is likely that upper bluff erosion will continue to occur and an upper bluff wall may be requested in the future.

To carry out certain actions, the Commission may consider if the action constitutes a "taking" of private property without just compensation, which is barred by the U.S. and California Constitutions, and specifically for Commission matters by Section 30010 of the Coastal Act. In this case the applicant may assert that the denial recommended by staff constitutes a taking. However, no taking would occur as a result Commission action to deny. The project proposed is redevelopment. The applicant is currently enjoying the use of a single family home and associated development on the site. In addition, the applicant is continuing to receive economic benefits from increasing values of the property over and above the use or any improvements. Thus the Commission's denial cannot result in a categorical "*Lucas*" taking, which deprives a landowner of all economic use. Neither would the Commission's denial constitute a regulatory taking under the "*Penn Central*" factors of economic impact, investment-backed expectations, and the character of the government action, because the applicant would continue to enjoy the uses and profits deriving from the existing house and land, and because the denial is based on the protection of coastal resources. Consequently, the Commission's denial of the projects would be consistent with Coastal Act Section 30010.

In the future, it may be the case that the home on the subject site, either through the passage of time or continued erosion of the bluff, will reach the end of its useful life and the applicants will no longer have reasonable use of the home. At that point, the Commission may be required to consider options to potentially redevelop the site and construct a home with a significantly larger setback from the bluff edge than currently exists. However, at the present time, there is an existing home on the site which currently provides for reasonable use of the site. Therefore, staff recommends that the proposed development be denied.

Standard of Review: Certified City of Encinitas Local Coastal Program and the public access and recreation policies of Chapter 3 of the Coastal Act.

Communication and Action History

- As part of early coordination efforts by Commission staff, on January 11, 2016, Commission staff provided City staff with a comment letter on the subject project and two other similar projects in Encinitas that identified the LCP and Coastal Act inconsistencies that are raised in this appeal (Exhibit 13).
- The coastal development permit was approved by the City of Encinitas Planning Commission on June 2, 2016 (Exhibit 9).
- On July 12, 2016, the project was appealed to the Coastal Commission (Exhibit 10) and at its August 11, 2016 hearing, the Commission found Substantial Issue exists with respect to the grounds on which the appeal was filed.
- Subsequent to the Substantial Issue hearing, On August 31, 2016, staff sent the applicant (via email) a request for additional information that would be required

in order to adequately review the proposed development and to schedule the De Novo hearing. The requested information included a site specific slope stability analysis assuming that the existing shoreline armoring was not in place, an alternatives analysis that examines revised project designs that would allow a new home to be sited safely on the site, and a plan to remove the basement along with other portions of the home, or incrementally retreat from the bluff edge should erosion cause a reduction in the geologic setback in the future.

- On June 29, 2017, the applicant provided staff with a Geotechnical Report, dated May 30, 2017, which analyzed the factor of safety setback that would be required for the site assuming that the existing shoreline armoring was not in place.
- On December 7, 2017, Commission staff met with the applicant and his representative. At that meeting, staff indicated to the applicant that the proposed project was inconsistent with the City's certified LCP and staff would be recommending denial of the project.
- On August 24, 2018, Commission staff met with the applicant and his representative (via conference call). At that meeting, staff again indicated to the applicant that staff would be recommending denial of the project. The applicant requested that the item be scheduled for the Commission's next southern California hearing, which was the Commission's October 2018 hearing in San Diego. Staff explained that October was not a realistic goal to bring this to hearing. Staff further indicated that the November 2018 hearing location was in the North Central District of California, and that the project would be tentatively scheduled the December 12-14 hearing in Newport Beach.
- On September 14, 2018, Commissions staff requested (via email) that the applicant provide information related to the current state of the home related to the structural stability or habitability. The applicant did not respond to the request.

TABLE OF CONTENTS

APPENDICES

EXHIBITS

STAFF RECOMMENDATION ON THE COASTAL PERMIT

I. MOTION AND RESOLUTION ON DE NOVO

The staff recommends the Commission adopt the following resolution:

MOTION: ***I move that the Commission approve Coastal Development Permit No. A-6-ENC-16-0068 pursuant to the staff recommendation.***

STAFF RECOMMENDATION OF APPROVAL:

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 TO DENY THE PERMIT:

The Commission hereby denies a coastal development permit for the proposed development on the ground that the development will not conform with the certified LCP and the public access policies of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. PROJECT DESCRIPTION/HISTORY

The project approved by the City of Encinitas on June 2, 2016 allows for the demolition of an existing 1,319 sq. ft. single family residence with an existing detached garage that is proposed to be incorporated into the new structure, and construction of a new, 2-story, 2,818 sq. ft. home over a 1,156 sq. ft. basement with a 244 sq. ft. attached garage on a 8,624 sq. ft. coastal bluff lot (Exhibits 5 & 6). As approved by the City, the applicant is required to provide only one garage parking space and one unenclosed parking space due to the retention of the previously conforming garage. The parking spaces will have a tandem configuration. If the garage was not proposed to be retained, the applicant would be required to provide two garage parking spaces and one unenclosed parking space. The basement and first floor are proposed to be located approximately 40 ft. from the coastal bluff edge and the second floor is proposed to cantilever within 32 ft. of the bluff edge. The basement is proposed to provide the foundation for the house, where the finished floor elevation would be approximately 8 feet below existing grade (Exhibits 7 & 8).

The subject site is located on the west side of Neptune Avenue, approximately one mile north of the Moonlight Beach Park and approximately 500 ft. south of Beacon's Beach, in the City of Encinitas (Exhibit 1).

The existing home on the site was constructed in approximately 1949, prior to passage of the Coastal Act. The existing residence is currently located approximately 25-30 feet from the bluff edge (Exhibit 2). In 1996, there was a major landslide that affected the northern edge of the bluff fronting the subject site and also involved the bluff fronting the six lots to the north. In 2000, following a bluff sloughage that threatened the structure at the top of the bluff at the subject site, the Executive Director approved an emergency permit for a 42 ft. long, 17 ft. high, reinforced concrete seawall on the beach and the construction of a below grade, approximately 40 ft. long concrete reinforced upper bluff retention system. The retention system is located approximately 0 to 22 ft. inland of the bluff edge and consists of steel reinforced concrete caissons to a depth of 40 ft., placed approximately 8 ft. on center with tiebacks and capped by a steel and concrete plate (6-00-146-G/Brem) (Exhibit 3). Both the seawall and upper bluff retention system authorized by the emergency permit were subsequently constructed.

In 2003, the City of Encinitas approved a follow up Coastal Development Permit (CDP) for the upper bluff retention system on the subject site and an upper bluff retention system on the property adjacent to north, which was also approved via emergency permit (6-01-062-G/Sorich) (6-ENC-03-042/Sorich & Gault). The City's follow up CDP was not appealed to the Commission.

In 2004, the Commission approved a regular follow up CDP for the seawall at the base of the bluff fronting the subject site and the site adjacent to the north (ref. CDP #6-03-048/Sorich & Gault). Special Condition #1 of the CDP required a $24,140.53 in-lieu fee for partial sand supply mitigation, which the permittees paid to SANDAG. Special Condition #1 also required the permittees or successors to apply for and obtain a permit amendment that either 1) requires the removal of the seawall within its initial design life (22 years) or 2) requires re-approval subject to additional mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life.

On July 12, 2016, the subject project was appealed to the Coastal Commission (Exhibit 10) and at its August 11, 2016 hearing, the Commission found Substantial Issue exists with respect to the grounds on which the appeal was filed.

Adjacent Shoreline Armoring

The three properties adjacent to the north of the subject site at 816, 824, and 828 Neptune Avenue have existing seawalls. The property at 816 Neptune Avenue has an upper bluff retention system with an upper bluff wall. The properties at 824 and 828 Neptune Avenue have upper bluff walls. The three properties to the south of the subject site at 794, 796, and 798 Neptune have existing seawalls and upper bluff retention systems. The property at 794 Neptune Avenue constructed an upper bluff wall seaward of the upper bluff retention system (Exhibit 4).

Standard of Review

In its "de novo" review of this application, the Commission's standard of review for the proposed development is whether it conforms with the policies and provisions of the City of Encinitas Local Coastal Program (LCP), which was certified by the Commission in November of 1994, and the public access and recreation policies of the Coastal Act. The LCP consistency issues raised by the proposed development are discussed in the following sections.

B. GEOLOGIC STABILITY/BLUFFTOP DEVELOPMENT

The project approved by the City is located within the Coastal Bluff Overlay Zone. The pertinent LCP policies are below:

Public Safety Policy 1.3 of the City's Land Use Plan (LUP) requires that:

> *The City will rely on the Coastal Bluff and Hillside/Inland Bluff Overlay Zones to prevent future development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse.*

Public Safety Policy 1.6 of the City's LUP requires that:

> *The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*
>
> *[…]*
>
> *e. Permitting pursuant to the Coastal Bluff Overlay Zone, bluff repair and erosion control measures on the face and at the top of the bluff that are necessary to repair human-caused damage to the bluff, and to retard erosion which may be caused or accelerated by land-based forces such as surface drainage or ground water seepage, providing that no alteration of the natural character of the bluff shall result from such measures, where such measures are designed to minimize encroachment onto beach areas through an alignment at and parallel to the toe of the coastal bluff, where such measures receive coloring and other exterior treatments and provided that such measures shall be permitted only when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply; and*
>
> *f. Requiring new structures and improvements to existing structures to be set back 25 feet from the inland blufftop edge, and 40 feet from coastal blufftop edge with exceptions to allow a minimum coastal blufftop setback of no less than 25 feet. For all development proposed on coastal blufftops, a site-specific geotechnical report shall be*

required. The report shall indicate that the coastal setback will not result in risk of foundation damage resulting from bluff erosion or retreat to the principal structure within its economic life and with other engineering evidence to justify the coastal blufftop setback.

On coastal bluffs, exceptions to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is set back a minimum of 25 feet from the coastal blufftop edge, and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future.

In all cases, ***all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment*** *and the applicants shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City. [Emphasis added]*

This does not apply to minor structures that do not require a building permit, except that no structures, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, temporary accessory buildings not exceeding 200 square feet in area, and similar structures shall be allowed within five feet from the bluff top edge; and

g. Permanently conserving the bluff face within an open space easement or other suitable instrument.

Policy 30.34.20.B.1 of the City's certified Implementation Plan (IP) states, in part:

1. With the following exceptions, no principal structure, accessory structure, facility or improvement shall be constructed, placed or installed within 40 feet of the top edge of the coastal bluff. Exceptions are as follows:

[…]

b. Minor accessory structures and improvements located at grade, including landscaping, shall be allowed to within 5 feet of the top edge of the coastal bluff. Precautions must be taken when placing structures close to the bluff edge to ensure that the integrity of the bluff is not threatened. For the purposes of the Coastal Bluff Overlay Zones, "minor accessory structures and improvements" are defined as those requiring no City approval or permit including a building or grading permit, and not attached to any principal or accessory structure which would require a permit. Grading for reasonable pedestrian access in and around a principal or accessory structure may be permitted by the City Engineer following review of a site specific soils report.

Section 30.34.020B.4 of the City's Local Coastal Program Implementation Plan states:

> *4. Existing legal structures and facilities within 40 ft. of a bluff edge or on the face of a bluff may remain unchanged. Interior remodeling of existing buildings that does not involve changes to the existing foundation is allowed, but no expansion of building square footage or addition of stories within the 40 ft. area shall be allowed except as permitted pursuant to Section 30.34.020(B)1a of this Code. Routine maintenance of existing facilities is allowed. (Ord. 95-04)*

Section 30.34.020(C) of the City's Implementation Plan (IP) states, in part:

> *DEVELOPMENT PROCESSING AND APPROVAL. In addition to findings and processing requirements otherwise applicable, the following establishes specific processing and finding requirements for proposed development within the Coastal Bluff Overlay Zone…*
>
> *1. Development and improvement in compliance with the development standards in paragraph B "Development Standards," proposing no structure or facility on or within 40 feet of the top edge of the coastal bluff (except for minor accessory structures and improvements allowed pursuant to Section 30.34.02(B)1b, and proposing no preemptive measure as defined below, shall be subject to the following: submittal and acceptance of a site-specific soils report and geotechnical review described by paragraph D "Application Submittal Requirements" below. The authorized decision-making authority for the proposal shall make the findings required based on the soils report and geotechnical review for any project approval. A Second Story cantilevered portion of a structure which is demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area may be permitted 20% beyond the top edge of bluff setback if a finding can be made by the authorized agency that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure.*

Section 30.34.020(D) of the IP states, in part:

> *APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. The review/report shall certify that the development proposed will have no adverse effect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion **over its lifetime** without having to propose any shore or bluff stabilization to protect the structure in the future*

[emphasis added]. *Each review/report shall consider, describe and analyze the following:*

1. *Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;*

2. *Historic, current and foreseeable cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;*

3. *Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features, such as bedding, joints and faults;*

4. *Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;*

5. *Impact of construction activity on the stability of the site and adjacent area;*

6. *Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);*

7. *Potential erodibility of site and mitigating measures to be used to ensure minimized erosion problems during and after construction (i.e., landscaping and drainage design);*

8. *Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data;*

9. *Potential effects of seismic forces resulting from a maximum credible earthquake;*

10. *Any other factors that might affect slope stability;*

11. *Mitigation measures and alternative solutions for any potential impacts.*

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability ***throughout the life span of the project*** *[emphasis added]. The report shall use a current acceptable engineering stability analysis method and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project.*

In addition to the above, each geotechnical report shall include identification of the daylight line behind the top of the bluff established by a bluff slope failure plane

analysis. This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:

a. Cover all types of slope failure.

b. Demonstrate a safety factor against slope failure of 1.5.

c. Address a time period of analysis of 75 years. *[emphasis added]*

The proposed project consists of the construction of an approximately 4,200 sq. ft., two-story single family home, including a basement and attached garage. The basement and first story would be located approximately 40 feet from the edge of a 90 ft.-high coastal bluff. The second story of the new home would be cantilevered 8 ft. seaward of the first floor, as close as 32 ft. from the bluff edge.

Coastal bluffs in Encinitas are subject to a variety of erosive forces and conditions (e.g., wave action, reduction in beach width, block failures and landslides). As a result, the bluffs and blufftop lots in the Encinitas area are considered a hazardous area. In 1986, the California Division of Mines and Geology mapped the entire Encinitas shoreline as an area susceptible to landslides, i.e., either "Generally Susceptible" or "Most Susceptible Areas" (Open File Report, "Landslide Hazards in the Encinitas Quadrangle, San Diego County, California," dated 1986). The Encinitas shoreline has been the subject of numerous Commission- and City-approved permits for shoreline armoring. As described previously, a lower bluff seawall and an upper bluff retention system has already been constructed at the site. Thus, the subject site is clearly in a hazardous location.

As cited above, the LCP contains several policies designed to reduce or avoid risk to new development. Public Safety Policy 1.3 of the LUP prevents new development that will represent a hazard to its occupants and which may require structural measures to prevent destructive erosion or collapse. In addition, Public Safety Policy 1.6 of the LUP and Section 30.34.020(D) of the IP require an applicant to provide extensive geotechnical information documenting that any new development on the coastal blufftop has an appropriate setback to ensure that the residence is reasonably safe from failure and erosion over its lifetime, without having to propose any shore or bluff stabilization to protect the structure in the future.

Safe siting of development is critical not only for the occupants of the development, but also to prevent permanent impacts to coastal resources. The LCP acknowledges that seawalls, revetments, cliff retaining walls, groins and other such structural or "hard" methods designed to forestall erosion, alter natural landforms and natural shoreline processes, resulting in a variety of negative impacts on coastal resources, including adverse effects on sand supply, public access and recreation, coastal views, natural landforms, and overall shoreline beach dynamics on and off site, including ultimately the loss of the beach.

The location where new development must be sited so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project (a period of 75 years) is known as the Geologic Setback Line (GSL). The GSL is determined by combining slope stability analyses with estimated bluff retreat at a site.

The factor of safety is an indicator of slope stability, where a value of 1.5 for static analysis and 1.1 for seismic analysis is the industry-standard value for geologic stability of new blufftop development. In theory, failure should occur when the factor of safety drops to 1.0. Therefore, the factor of safety at increasing values above 1.0 lends increasing confidence in the stability of the slope. To establish a safe setback for slope stability, the geotechnical analysis needs to establish the distance from the edge of a coastal bluff at which the factor of safety is equal to 1.5 (static)/1.1. (seismic).

In addition to this landslide potential, the bluff is also subject to erosion over time. As the bluff retreats by gradual erosion, the factor of safety for the development will gradually decrease. Thus, establishing the required GSL includes determining the setback to achieve a factor of safety of 1.5 (static)/1.1 (seismic) as well as estimating bluff retreat over 75 years. As discussed in greater detail below, it is critical to look at both slope stability and the predicted rate of erosion when determining the GSL, because as the bluff naturally continues to retreat, the location of a safe setback for slope stability will move inland.

Factor of safety

The applicants initially completed a slope stability analysis that included the existing shoreline armoring on the site (seawall and upper bluff retention system). The applicants' geotechnical consultant asserted that the location of the 1.5 (static) factor of safety on the site would be located at the inland edge of the retention system (TerraCosta 2015), which is shown on the project plans as being located between 0 and 22 ft. from the bluff edge. The 2015 geotechnical report states:

> *"…In this instance and as previously concluded by SEC, the entire upper-bluff pad landward of the existing stabilization measures has a computed factor of safety in excess of 1.5…"*

However, the Commission geologist and senior coastal engineer have reviewed the geotechnical analysis, and found that the data contained in it do not support a determination that the FOS would be between 0 and 22 feet from the bluff edge. The geotechnical analysis evaluated the potential for both circular (using the Modified Bishop method) and block-type (using the Simplified Janbu method) slope failures. The analyses yielded factors of safety in excess of 1.5 against block failure and circular failure well inland of the bluff edge (approx. 25 ft. and 50 ft., respectively) (Exhibit 18). Based on these results, using the Modified Bishop method, which is standard for this area of the coast, a new home located 40 ft. from the bluff edge would not meet the 1.5 factor of safety requirement even if allowed to rely on the existing bluff stabilization structures.

Furthermore, the City's certified LCP does not allow for new development to rely on existing shoreline armoring. (LUP Policy 1.6(e) [armoring solely for existing structures].) Thus, subsequent to the Commission's finding of Substantial Issue, the applicants completed a new slope stability analysis assuming that the existing armoring fronting the site was not in place (TerraCosta May 2017). The 2017 geotechnical report states:

> *"…Assuming that the existing armoring was not in place, the required setback is approximately 83 feet back from the top of the coastal bluff for a seismic factor of safety of 1.1 and 67 feet back from the top of the bluff for a static factor of safety of 1.5…"*

The supplemental analysis considered only block failures, using the Simplified Janbu method, and did not consider circular failures. However, the Commission geologist and senior coastal engineer have reviewed the project and determined that judging from the previous geotechnical analyses for the subject site, it is likely that the 1.5 and 1.1 factor of safety lines for circular slope failures (Modified Bishop method) would occur at even greater distances inland of the bluff edge than 67 and 83 feet (Exhibit 18). Furthermore, the Commission geologist and senior coastal engineer have determined that from a scientific and risk management standpoint, when siting new development, it is most appropriate to fully evaluate and minimize the risks from rotational landslides (circular failures) and from slope failures caused by groundshaking during earthquakes, which would point to use of the seismic FOS of 1.1. Use of the 67-foot setback could leave new development (without the existing protection) vulnerable to block failures during an earthquake. The less conservative 1.5 (static) factor of safety setback derived from the Janbu Method of 67 ft. likely underestimates the appropriate slope stability setback on the subject site. Regardless, even a minimum 67 foot setback is considerably larger than the 40 foot setback proposed by the applicant.

Erosion rate

The preliminary geotechnical evaluation for the subject site, submitted by the applicants, determined the long term erosion rate over 75 years would be 30 ft. (0.40 ft. /year) (TerraCosta 2015). To determine this rate, the applicants' geotechnical consultant relied on a USGS report that found a long-term erosion rate of 0.33 ft./year for the broad stretch of coast fronting the Oceanside littoral cell (approximately from Camp Pendleton to La Jolla) and increased that erosion rate to account for personal observations.

As further detailed in the attached technical memo by the Commission geologist and senior coastal engineer (Exhibit 12), Commission staff compared the results of two different erosion methods to evaluate the applicants' suggested 0.4 ft. /yr. bluff retreat rate against retreat rates that could be expected to occur in response to higher sea levels. The first method is based on future bluff retreat projections from the USGS Coastal Storm Modeling System (CoSMoS) 3.0 (Phase 2) cliff retreat dataset (Barnard et al. 2018), which includes projections of coastal bluff retreat along individual cross-shore transects for multiple sea level rise scenarios. The second method is based on a simple equation (Eqn. 1), derived from previous modeling

studies, which projects the future bluff retreat rate (R_2) as a function of the historical retreat rate (R_1), historical sea level rise rate (S_1), and projected future sea level rise rate (S_2):

$$R_2 = R_1 (S_2 / S_1)^{0.5} \qquad \textbf{(Equation 1)}$$ [1]

Equation 1 is necessarily an oversimplification of the complex processes that govern the response of a coastal bluff to changing sea level, but has been shown to accurately reproduce the projections of the full process-based model from which it is derived in simulations of soft rock (including clay), low beach volume coasts under equilibrium conditions (Ashton et al. 2011). Although both approaches have limitations, and all projections of responses to sea level rise have a high level of uncertainty, both CoSMoS and Eqn. 1 can provide useful information on the amounts and rates of bluff retreat that could result from rising sea levels in the future.

In order to evaluate the cliff retreat response to sea level rise, it is first necessary to select an applicable set of sea level rise projections. Staff based its long term erosion analysis for the site on the recommendations of two recent reports released by the California Ocean Protection Council (OPC) that, taken together, update the Commission's understanding of sea level rise science and best practices for planning for and adapting to sea level rise impacts. The first of these reports, *Rising Seas in California: An Update on Sea-Level Rise Science* (Griggs et al. 2017), synthesizes recent evolving research on sea level rise science, and provides new, California-specific projections of future sea level rise, under several GHG emissions scenarios, along with modeled probabilities of occurrence. For example, the *Rising Seas* report estimates that there is 50% probability that sea level rise along the San Diego coast will exceed 2 feet (0.6 m) under a "medium" emissions scenario (RPC 4.5), and 2.6 feet (0.8 m) under a "business as usual," high emissions scenario (RPC 8.5), by 2100. There is an estimated 5% (1-in-20) probability that sea level rise by 2100 will exceed 4.6 feet (1.4 m), and a 0.5% (1-in-200) probability that sea level rise will exceed 7.1 feet (2.16 m), assuming higher levels of emissions.

The second report, the *State of California Sea-Level Rise Guidance 2018 Update* (OPC 2018), builds on the science report and provides recommendations for how to plan for and address sea level rise impacts, including the recommendation that the new, region-specific sea level rise projects be used throughout the State. The 2018 State Guidance recommends that the 1-in-200 chance (0.5% probability) projections be used for "medium-high risk aversion" decisions, including the siting of residential development, for which the consequences of being wrong are higher, potentially risking life and property, and the range of adaptation options is more limited.

Using the CoSMoS erosion estimate nearest to the recommended 2.16 m SLR (2 m) results in an average bluff retreat rate between 2010 and 2100 of 0.52 ft./yr. and 39 ft. over the estimated 75 year design life of the proposed structure. Equation 1 and the recommended estimate of 7.1 feet SLR results in an average bluff retreat rate between 2018 and 2100 of 0.51 ft./yr., and 38 ft. over the estimated 75 year design life of the

[1] Equation 1 is a "best fit" equation derived from the Soft Cliff and Platform Erosion (SCAPE) model of Walkden and Hall (2005) and Walkden and Dickson (2008), a process-based numerical model developed to simulate cliff retreat in response to sea level changes.

proposed structure. Thus, the results of the methods reviewed by staff indicate that the proposed 30 ft. bluff setback to account for long-term erosion does not adequately reflect "foreseeable cliff erosion," as required in Section 30.34.020(D) of the IP. Based on this analysis, staff concludes that a greater long-term erosion setback of 38 feet is be necessary to address bluff retreat that could occur at the subject site over the 75 year design life of a new home.

GSL Determination

As noted above, the GSL is the setback at which new development must be sited in order to avoid the need for future bluff retention devices for the life of the structure. The combination of slope stability analyses and the estimated erosion rate determines the geologic setback. On the subject property, without shoreline armoring, by combining the approximately 67-ft. setback needed to achieve a factor of safety of 1.5 and the 38-ft. setback needed to accommodate 75 years of bluff retreat, the geologic setback would be a minimum of 105 feet (the subject site is only 105 ft. from the bluff edge to the inland property line) (Exhibit 18). Thus, the applicant's proposal to site the new home 40 feet back from the bluff edge does not assure stability throughout the life span of the project without having to propose any shore or bluff stabilization. Thus, the project must be denied. Given that the site is approximately 105 ft. in depth from the bluff edge to the eastern property line, there is not adequate room on the site to construct a new home.

Retention of the Existing Structure

There are alternatives that would allow the applicant to continue to enjoy reasonable use of the home. The applicant currently has reasonable use of the site with the existing home, and could continue to have use of the site without any of the proposed improvements. Furthermore, Section 30.34.020B.4 of the City's Local Coastal Program Implementation Plan allows for interior remodeling and routine maintenance. Examples of these types of projects may include, but are not limited to, replacement of existing roofing, replacement of siding or exterior stucco, replacement of exterior doors and windows within their existing openings, construction of new attached or detached shade structures, and non-structural interior improvements. However, Section 30.34.020B.4 would not allow projects that propose changes to the foundation or result in expansion of building square footage or addition of stories within 40 ft. bluff setback. Due to the location of the GSL on the subject site, it is unlikely that substantial structural changes or additions to the home could be found consistent with the certified LCP's requirements for development landward of 40 ft. from the bluff edge.

In past projects, when the Commission has been faced with a site where there is no safe place to build a new home on a blufftop site, the Commission has approved construction of a new home setback only to the current factor of safety line, where the home would be safe currently, in order to allow some reasonable use of the site (ref: 6-15-1717/Barr in Solana Beach). In that case, the Commission was able to find approval of a new home on the site consistent with the Coastal Act because the setback of the new home was significantly further landward than the existing structures on the site (46 ft. vs. 0 ft.), the

new home would be sited landward of the location of the 1.5 factor of safety setback, and the home did not include a basement or caisson foundation, such that the home could be removed in the event of endangerment in the future. In contrast, the proposed home on the subject site, while set back further than the existing home (40 ft. vs. 25-30 ft.), would still be located seaward of the 1.5 factor of safety setback.

The Commission has also allowed construction of new homes to depend on buried caissons (Ref: CDPs 6-ENC-09-002 & 003/Wellman and A-6-ENC-06-101/Albani, both in Encinitas). However, more recently, the Commission has found that caissons to support new development can function as a protective device and thus their use not consistent with the Coastal Act. The Commission's adopted sea level rise guidance promotes flexible approaches designed to enhance adaptability given unknown future conditions. The prospect of sea level rise reinforces the need for new development to be more resilient and able to adapt to changing conditions in hazardous areas; not the use of a caisson foundation that is structurally difficult to remove if threatened, and will result in permanent or long-term impacts on the public resources of the shoreline. Caissons are very difficult to remove without damaging the bluff, thus making it infeasible for either the house or the caissons to move inland if eventually threatened. In addition, although caissons would initially be buried under the home, the caissons may become exposed in the future. Exposed caissons essentially function as an upper bluff wall, limiting bluff retreat and impairing the visual quality of the natural landform of the bluff.

In the future, it may be the case that the home on the subject site, either through the passage of time or continued erosion of the bluff, will reach the end of its useful life and the applicants will no longer have reasonable use of the home. At that point, the Commission may be required to consider options to potentially redevelop the site and construct a smaller home with a significantly larger setback from the bluff edge than currently exists.

However, at this time, the applicant continues to have reasonable use of the site and there are feasible alternatives to the proposed project. Therefore, the Commission finds the permit application must be denied. Maintaining the home in its existing location also provides additional time for the City and the applicant to develop other long term, comprehensive approaches to development on hazardous blufftop lots.

Applicant Contentions

The applicants have identified two major points of disagreement with the above analysis. First, the applicants assert that the Encinitas LCP does not require that the 1.5 FOS be added to the 75 years of expected erosion, and that the Commission has not consistently required that development standard. Second, the applicants contend that the certified LCP allows new development to rely on existing shoreline protection.

LCP Setback Requirements

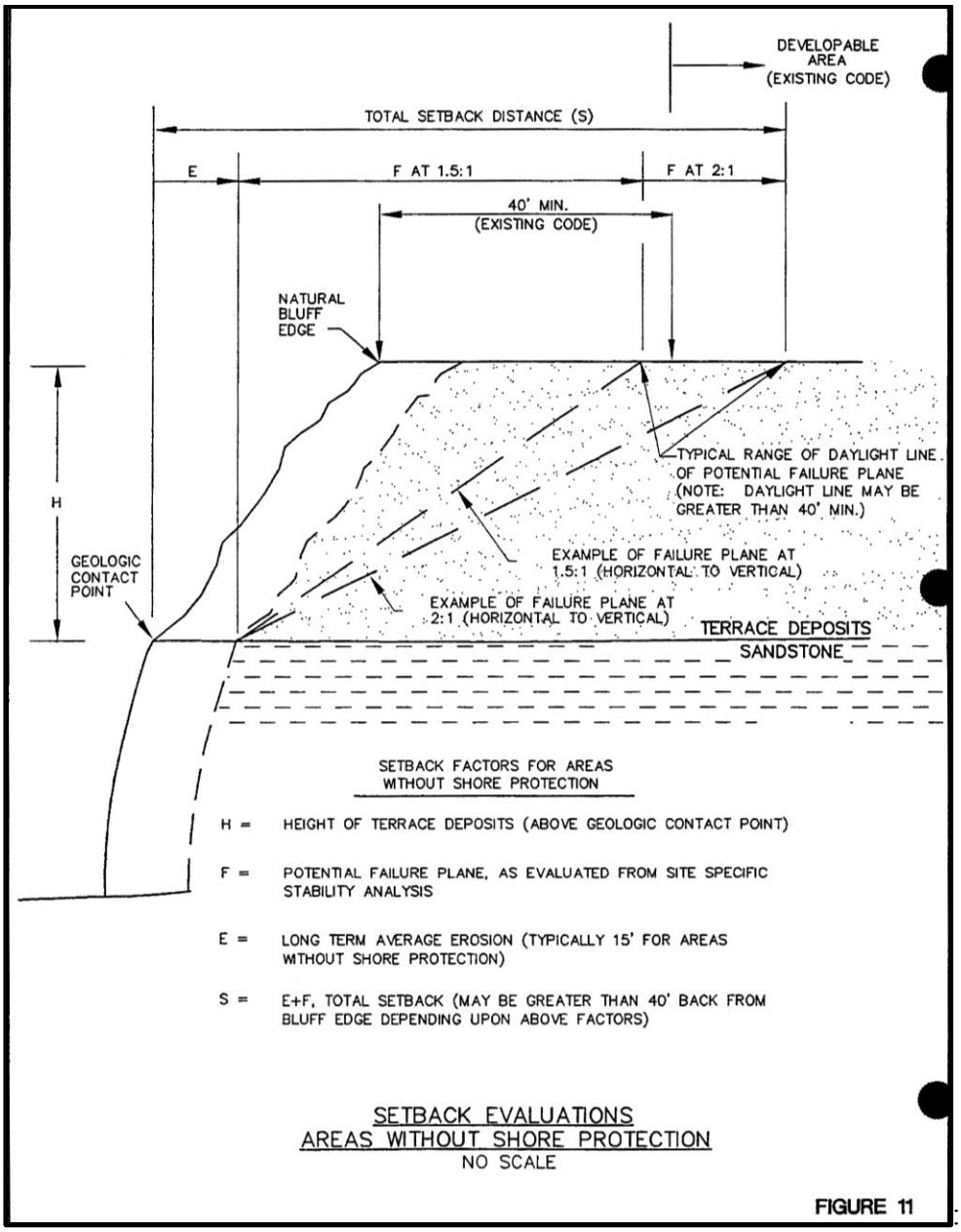
The applicants do not agree that the certified Encinitas LCP requires new blufftop homes to obtain a factor of safety of 1.5 after 75 years of expected erosion. Similarly, City staff have indicated that they interpret Section 30.34.020(D) to mean that the geologic setback

should be the setback needed to achieve a factor of safety of 1.5 today OR the expected amount of bluff retreat over the 75-year assumed life of the structure, whichever is greater, but not less than the City's minimum 40-ft. coastal bluff setback. However, the language of Section 30.34.020(D) of the LCP is very specific:

> *... This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:*
>
> *a. Cover all types of slope failure.*
> *b. Demonstrate a safety factor against slope failure of 1.5.*
> *c. Address a time period of analysis of 75 years.*

The applicant and City staff have suggested that this policy requires that the analysis cover all types of slope failure but then only take into account one of the two other factors; that is, that the project must demonstrate a factor of safety of 1.5, OR erosion over 75 years, rather than addressing all three considerations.

However, for at least the past 17 years, the Commission has interpreted the City's LCP as requiring that development look at all three of these factors (e.g., A-6-ENC-01-047/Conway and Associates, A-6-ENC-02-003/Berg, A-6-ENC-06-100/Zagara, A-6-ENC-06-101/Albani, A-6-ENC-09-002 & 003/Wellman, A-6-ENC-09-040 & 041/Okun, A-6-ENC-13-0210/Lindstrom, A-6-ENC-16-0060/Martin). The applicant and the City may not arbitrarily select some factors while ignoring the others. This policy does not present a menu of options for an applicant to choose from, but rather a list of the types of analysis necessary to identify where hazardous development conditions are located on the site. As an example, the City would not accept a geotechnical report that didn't analyze all types of slope failure on a site; if this policy was treated as a menu of options, an applicant could decide to conduct only one of the three types of analysis. In practice, the City requires all types of slope failure be assessed, AND the greater setback between a 1.5 factor of safety OR 75 years of erosion; however the policy does not contain language to allow for this discretion. Furthermore, in 1996, a technical report, commissioned by the City to provide recommendations related to coastal bluff and shoreline issues, recommended that the City require setbacks for new development be established by calculating the 75 year erosion rate AND the 1.5 FOS setback (Moffatt & Nichol 1996) (Exhibit 11). The technical report included the figure shown below to illustrate the correct way to establish bluff edge setbacks:



Thus, this approach has been recognized as the recommended approach for addressing bluff top siting issues in Encinitas for decades.

Interpretation of Section 30.34.020(D)

To further resolve the differing interpretations of slope failure analysis requirements in ordinance 30.34.020(D), the Commission turns to well-settled standards of statutory interpretation. Courts commonly use three steps in a particular order to ascertain the meaning of legislative language: reading the plain language in context, examining external sources such as the legislative history and canons of construction for further evidence of intent, and finally considering the consequences of a proposed interpretation, including the public policy implications. (See *Klein v. United States of America* (2010) 50 Cal.4th 68, 77, 83; *Alejo v. Torlakson* (2013) 212 Cal. App. 4th 768, 786-788; *MacIsaac v. Waste Mgmt.*

Collection & Recycling, Inc. (2005) 134 Cal.App.4th 1076, 1082-1084.)

Generally the second and third steps are used as the previous one fails to resolve the question. For purposes of this analysis, all these approaches are examined. In this case, all three favor the Commission's interpretation that the entire list – covering all types of slope failure, demonstrating a safety factor of 1.5, and analyzing safety for 75 years—is required for the applicant to demonstrate sufficient safety for the project to be built on the blufftop.

1. Plain language

While the words used in the LCP are the most useful guide to its intent, the Commission should not view the language in isolation but bear in mind the provision's purpose. (See *MacIsaac*, *supra,* 134 Cal.App.4th at p. 1083.)

Where a list of items lacks a connector, the reasonable reading of the ordinance is a consistent "and" to join all items on the list. This rationale has been applied in the context of criminal law, where the Supreme Court's interpretation of "and" into a list was literally a matter of life and death—the defendant had been sentenced to the death penalty. The court explained that jury instructions that lacked a connector between elements were not ambiguous, and thus the defendant's assertion that the jury was confused, failed:

> Absent the insertion of express disjunctives, the listing of three separate elements that must be proved clearly implied that proof of *each* was independently necessary. We therefore reject defendant's contention.

(*People v. Friend* (2009) 47 Cal.4th 1, 79 [emphasis in original].) A later case, equally serious, reached the same result to include all elements:

> We acknowledge the… written instruction was not a model of clarity, but even were we to assume it was ambiguous, there is no reasonable likelihood the jury applied it in an impermissible manner.

(*People v. Harris* (2013) 57 Cal. 4th 804, 854.)

Finally, a congressional guide to statutory interpretation[2] cites two federal cases where an *expressed* "or" was interpreted to be an "and," in order to effectuate the purpose of the law and to avoid meaningless clauses. (*United States v. 141st St. Corp.,* (2d Cir. 1990) 911 F.2d 870, 878; *De Sylva v. Ballentine* (1956) 351 U.S. 570, 573. In *De Sylva*, the U.S. Supreme Court noted the word "or" "is often used as a careless substitute for the word 'and'… and both are "context dependent." (*Ibid*; [internal quotation marks omitted].)

The City and the applicant would have the Commission interpret Section 30.34.020(D) as follows:

[2]Congressional Research Service, Statutory Principles and Recent Trends, 2014, pp. 9-10.

> *... This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:*
>
> a. *Cover all types of slope failure.* [and]
> b. *Demonstrate a safety factor against slope failure of 1.5.* [or]
> c. *Address a time period of analysis of 75 years.*

All three are "geotechnical engineering standards" qualifying the slope failure analysis; thus, there is no reason to disregard an element because it somehow does not fit on the list. Regarding the connection between (a) and (b), the City and applicant seem to agree with staff that the lack of a connector means "and." However, it is unusual, at the least, to read an "and" between (a) and (b), then turn around and read an "or" between (b) and (c); that is, to cherry pick two factors out of three and allow the applicant choose one of the latter at whim, especially without any supporting language to justify that interpretation.

Leaving out 75 years means the house could be sited safely with factor of 1.5 at the outset, but loses that safety with the first episode of bluff loss or more gradually with steady erosion. It would not be safe for the life of the development; it might not even be safe for a year. By contrast, leaving out the factor of 1.5 implies it would not be safe for even the first day of use. Further, analysis of 75 years without the industry standard factor of safety would be meaningless. Ordinary statutory construction bars superfluous language and forbids this result. (See, e.g., *City of San Jose v. Super. Ct.* (1993) 5 Cal.4th 47, 55.)

As for context, the overarching, and overwhelming, approach of the LCP is to ensure safety for the lifetime of the project. As cited above, Public Safety Policy 1.6 of the City's LUP requires the geotechnical report:

> … shall indicate that the coastal setback will not result in risk of foundation damage resulting from bluff erosion or retreat to the principal structure *within its economic life*… (Emphasis added.)

The geotechnical report shall "express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the *life span* of the project." (IP § 30.34.020, Subd. (D) [emphasis added].) The report shall certify that the proposed development will have "no" adverse effect on the stability of the bluff, will not endanger life or property, and that a proposed structure is expected to be "reasonably safe from failure and erosion *over its lifetime*" without a protective device. (*Ibid*., [emphasis added].) In cases of conflict, the more restrictive policy shall regulate. (Subd. (B).)

The LCP's purpose is clear that ensuring the safety of a home on dangerous bluffs requires a conservative approach – one that minimizes risk in alignment with the Coastal Act Section 30253.

2. Extrinsic aids: LCP history and canons of interpretation

If the plain language nevertheless raises questions, the certification history of the LCP supports requiring all three standards in the geotechnical report. The City submitted 30.34.020(D) as part of an IP proposal in 1995, and the Commission certified the subdivision without further modifications. In its report (Ref: LUP/IP Approval), staff recommended related modifications, including to Policy 1.6 and other parts of 30.34.20, that the Commission certified and the City accepted.[3] The resulting LCP appropriately reflects the mandate to minimize risk, consistent with the Coastal Act.

Nothing in the certification staff report suggests a far-fetched interpretation with a mix of "and" and "or" for section 30.34.020(D). Common sense informs the Commission now that the Commission then would not have certified a confusing set of standards that fly against the thrust of the LCP and likely would not have been found consistent with Coastal Act section 30253. The very lack of comment supports an ordinary interpretation: all three standards are required. This aligns with a popular canon of construction that bars creating absurdities where none need exist. As Justice Scalia noted, when the language creates an absurd result, it should be rejected. (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 527-528 (Scalia, J., concurring.) It follows that an interpretation that creates an absurd result should be rejected.

3. Public policy implications

Finally, "where uncertainty exists," consideration should be given to the "consequences" that flow from a particular interpretation. (*Klein*, *supra*, 50 Cal.4th 68, 77.) This consideration may include matters outside the words, such as the "context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction." (*Alejo, supra*, 212 Cal. App. 4th at pp. 787-788.) It is not an "abstract exercise in semantics" but an exploration to effectuate the purpose of the law. (*Ibid.*) The evil of a house falling off the bluff is to not only be remedied, but prevented. Cherry picking among the factors is not a safe interpretation.

Finally, as a matter of public policy, the Commission's interpretation is entitled to respect:

> The Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act. In fact, a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government.

[3] Moreover, a consultant to the City at the time recommended that erosion rates should be added to the factor of safety, not somehow be combined in the same setback. (See Exhibit 11 Encinitas Bluff and Shoreline Technical Report (1996), pp. 52, 54, 56 and Figure 11 on pp. 53.)

(*Charles A. Pratt Construction Co., Inc. v. Calif. Coastal Com.* (2008) 162 Cal.App.4th 1068, 1075.)

The Commission's position has been that the City's interpretation does not ensure that a 1.5 factor of safety (the industry-standard for new development for geologic stability against landsliding) will be maintained over the economic life of the development. Indeed, if the development is set back at the distance necessary to achieve a 1.5 factor of safety today, *any* bluff retreat will immediately reduce its stability below the factor of safety of 1.5. Thus, the City's interpretation of this policy would result in a significant underestimate of the setback necessary to ensure new development will be safe from failure and erosion over its lifetime, and almost guarantees that at least some structures will need either shoreline protection or have to be relocated or removed to maintain safety over the next 75 years.

The Commission's former staff geologist provided a policy memorandum for a workshop to the Commission in 2003 that detailed the methodology to determine the GSL. That memorandum was later published in 2005 (ref: Johnsson 2005). The Commission generally considers 75 years as the economic life of new single-family homes and that time period is also set by the LCP. Thus, a factor of safety of 1.5 must be maintained throughout the 75 year life of the home to be consistent with Coastal Act Section 30253 and IP Section 30.34.020(D). The best way to assure safe development is to find the distance from the bluff edge necessary to achieve a factor of safety of 1.5 today and add to that the expected bluff retreat over the next 75 years.

In addition, taking into account either the factor of safety or the erosion rate, but not both, would set a significant adverse precedent for siting blufftop development in Encinitas. The Commission found Substantial Issue for an additional project involving demolition of existing blufftop home and construction of new blufftop home in Encinitas (A-6ENC-16-0067/Meardon) that similarly did not fully assess geologic stability factors over 75 years. If the potential for bluff failure and erosion is not accurately and fully evaluated, multiple proposals for new residences that will likely need shoreline protection in the future can be expected.

Past Commission Approvals

The applicants have asserted that the Commission has not always required that the FOS be added to the erosion rate when reviewing bluff top development in Encinitas. The City's LCP was certified by the Commission in 1995, and since that time, the City has approved the construction of approximately 30 new bluff top homes. Following approval of the City's LCP, setbacks for Encinitas blufftop homes have ranged from 40 to 79 ft. from the bluff edge.

Between 1995 and 2000, the City approved seven new bluff top homes. None of these City approvals were appealed to the Commission. In the years directly following approval of the LCP, staff commonly accepted, where credible, general statements by applicants' representatives regarding the appropriate bluff edge setback. During this time period, the vast majority of geotechnical reports did not include the expected long term erosion rate or the location of the 1.5 Factor of Safety setback on a site. Thus, the

geotechnical claims made by these applicants may have been inconsistent with the requirements of the City's LCP and due to a lack of specific information, were not based on the cumulative setback needed to account for 75 years of expected erosion and the 1.5 Factor of Safety. In the early 2000s, the Commission began to require that more extensive geotechnical review be provided by applicants, including the expected long term erosion rate and the location of the 1.5 Factor of Safety setback on a site, in order to justify applicants' assertions that development would be safe for 75 years, as required by the City's LCP.

Since 2001, the City has approved 23 new bluff top homes and 16 of these approvals have been appealed to the Commission. The fact that the Commission did not review the remaining 14 new bluff home approvals since certification of the LCP on appeal does not mean that the Commission definitively agreed with the City action or the approved setback. In deciding whether to appeal a project, the Commission examines the particular circumstances; this discretion extends to the finding of that the local approval raises a significant issue.

The results of the 16 appeals of new bluff top homes are as follows:

- The Commission approved 9 appeals on De Novo
- The Commission found No Substantial Issue on 2 appeals
- The Commission found Substantial Issue on 2 appeals (including the subject appeal), but has not yet acted on the De Novo reviews
- 3 appeals were withdrawn prior to Commission action

The interpretation of how to correctly determine the appropriate bluff edge setback was an appeal contention in each of the 11 appeals that the Commission took a final action on (either approval on De Novo or No Substantial Issue and not withdrawn or still pending). In 10 of the 11 appeals, the Commission found that the correct way to determine the GSL is to find the distance from the bluff edge necessary to achieve a factor of safety of 1.5 today and add to that the expected bluff retreat over the next 75 years.

Five of the homes reviewed on appeal by the Commission were approved with an adequate setback to meet the LCP requirements of adding the 75 years of expected erosion to the 1.5 Factor of Safety setback (A-6-ENC-01-047/Conway and Associates, A-6-ENC-02-003/Berg, A-6-ENC-06-100/Zagara, A-6-ENC-13-0210/Lindstrom, A-6-ENC-16-0060/Martin).

Five of the other homes reviewed on appeal by the Commission had constrained lots and a reasonably sized home could not be built on the sites consistent with the appropriate geologic setback. In these situations, the Commission either approved the use of caisson foundations (Ref: CDPs 6-ENC-09-002 & 003/Wellman and A-6-ENC-06-101/Albani) or allowed homes to be built with the expectation that they may not be safe for 75 years and would need to be removed if threatened in the future (A-6-ENC-09-040 & 041/Okun). The

approval of the Okun project is discussed in detail below under Reliance on Existing Armoring.

The Commission found no substantial issue for one of the homes reviewed on appeal (A-6-ENC-04-081/Hendrick). On this appeal, staff recommended a larger setback than approved by the City in order to meet the LCP requirements of adding the 75 years of expected erosion to the 1.5 Factor of Safety setback. However, the Commission determined that the setback approved by the City was adequate and did not undertake a De Novo hearing.

Many geotechnical reports that have recommended setbacks not based on all these criteria in Encinitas have proven to be flawed, such that shoreline protection was required after construction of the blufftop homes. The table below details the blufftop homes in Encinitas approved after implementation of the Coastal Act that later applied for and were granted shoreline armoring to protect the new structures:

Name	Address	Street	Home Approval Year	New Home CDP #	Armoring Approval Year	Armoring CDP #
Bardacos	378	Neptune	1976	F3891	1994	6-93-085
Bardacos	402	Neptune	1977	f5473	1994	6-93-085
Pate	638	Neptune	1977	F6360	1993	6-93-36-G
Canter	172	Neptune	1981	F9833	1998	6-98-039
Denver	164	Neptune	1984	6-84-461	1998	6-98-039
Richards	524	Neptune	1986	6-86-570	1993	6-93-131

The reason that many of the geotechnical reports submitted by the applicants for new development in Encinitas did not accurately assess the risk to new development consistent with the requirement of the LCP is that the 1.5 factor of safety against landsliding was not being calculated in addition to bluff retreat predicted over the 75-year life of the structure.

Accordingly, for the subject site, the 75-year bluff retreat must be identified as 38 feet over the life of the structure, and when added to the recommended minimum 67-ft. factor of safety setback, the GSL is located approximately 105 feet from the bluff edge in order for the structure to have a factor of safety of 1.5 (static) for 75 years and to be sited so that it is reasonably safe from failure and erosion over its lifetime, without having to propose any shore or bluff stabilization to protect the structure in the future.

Reliance on Existing Armoring

The applicant asserts that the certified LCP allows new development to rely on existing shoreline armoring. The Commission disagrees. In addition to the LCP provisions cited above, Policy 1.3 of the LUP also prohibits "future development or redevelopment that will represent a hazard to its owner or occupants, and which may require structural measures to prevent destructive erosion or collapse." In addition, the Commission's adopted Sea Level Rise Guidance states:

> ***"Geologic Stability:*** *The CDP should analyze site-specific stability and structural integrity without reliance upon existing or new protective devices (including cliff-retaining structures, seawalls, revetments, groins, buried retaining walls, and caisson foundations) that would substantially alter natural landforms along bluffs and cliffs…"* (Chapter 6: Addressing Sea Level Rise in CDP's)

The applicant has not demonstrated that the proposed new residence, set as close as 32 ft. from the bluff edge, will be safe over its estimated lifetime without reliance on structural measures to protect it. As explained above, the calculated factor of safety and estimated long term erosion rate on the site indicate the proposed residence will not be safe for 75 years without reliance on structural measures, inconsistent with certified LCP standards. Thus, the proposed project is inconsistent with LUP Policy 1.3, and without demonstrating safety for the life of the project, additionally inconsistent with Municipal Code section 30.34.020(D) of the certified IP. Reliance on existing approved protective devices for new development is not permitted by the certified LCP.

For purposes of these policies, requiring the presence of existing shoreline armoring to assure stability is functionally the same as proposing shoreline armoring to provide protection for the life of the new development. The proposed residence will not be safe in the future without shoreline armoring. New development must be designed to not need shoreline protection, which means that it must be sited safely without reliance on existing or future shoreline protective devices. The fact that the proposed residence would rely on protection by existing and potentially additional shoreline armoring is inconsistent with the certified LCP policies, as well as Section 30253 of the Coastal Act from which the policies were derived.

Seawalls and bluff stabilization measures, while formidable, are not permanent structures and have a finite life. They are subject to erosion, wave scour and other forces that ultimately undermine and require repair and/or replacement of such structures. There are numerous examples in San Diego County of seawalls and other bluff stabilization devices collapsing and failing. Some recent examples include one in July of 2008, where a bluff retaining structure failed on a site a few blocks north of the subject site (1086/1086 Neptune Avenue) resulting in the issuance of emergency permit to build new bluff retaining structures (ref. 6-08-039-G/Blue Curl). Further examples occurred in December 2010 and January 2011 where a bluff retaining structure failed and then the seawall failed at 1500/1520 Neptune Avenue, resulting in the issuance of an emergency permit and then follow-up regular permit for new shore and bluff protection (ref. 6-11-3-G/Frick & Lynch and 6-88-464-A2).

Moreover, in this case, at the time the seawall was permitted, the applicant indicated the design life of the existing seawall was 22 years; the seawall was constructed 18 years ago and is nearing the end of its design life. The permit approving that seawall acknowledges the $24,140.53 payment was for partial mitigation for the impacts of the project on local shoreline sand supply, in-lieu of providing the total amount of sand to replace the sand and beach area that will be lost due to the impacts of the proposed protective structure. The required in-lieu fee mitigation covers certain impacts only through the identified 22-

year design life of the seawall. (ref. CDP #6-03-048 attached as Exhibit 14). The permit condition of approval requires the applicant or successor in interest to apply for and obtain an amendment that either requires removal of the seawall within its initial design life or requires mitigation for the effects of the seawall on shoreline sand supply for the expected life of the seawall beyond the initial 22 year design life. The seawall on this property will therefore be reevaluated and potentially removed in four years. The condition requiring reevaluation of seawalls approved with a beach sand mitigation fee, after the initial design life has passed, has been applied since the Commission has been administering the beach sand mitigation program, and is similar to the special condition requiring the beach sand mitigation fee applied for the seawall on the neighboring properties to the north (ref. CDP #6-05-030/Okun). The intent is to allow the Commission to reassess the seawall's condition, impacts and continued need, and to require additional mitigation if the seawall continues to be remain. In this particular case, the Commission could require removal of the seawall or allow it to remain as long as no reconstruction, additions or substantial alterations are required. Thus, there are potential limits to the life of the existing seawall in its current condition. To allow the proposed home to be sited in reliance on either existing or future shore/bluff protection is inconsistent with the LCP provisions cited above.

In 2011, the Commission approved new development on a site two properties to the north of the subject site at 824 and 828 Neptune Avenue (A-6-ENC-09-040 & 041/Okun) (Exhibit 15). The applicants assert that the Commission's Okun decision permitting the construction of two new homes allowed the two new homes to rely on existing shoreline protection. The Commission disagrees with this assertion. On the Okun site, extensive shoreline armoring had previously been approved and constructed to protect an existing home, which was proposed to be demolished and replaced with two new homes. On appeal, the Commission found that substantial issues existed due in part to a geotechnical analysis that failed to adequately demonstrate the new homes would be safe over their lifetimes so as to not require shoreline protection. On de novo review, based on a site-specific analysis, the Commission subsequently approved the demolition of the existing home and construction of two new homes with 40 ft. bluff edge setbacks and numerous other special conditions to ensure that the new homes would not result in further adverse impacts to coastal resources.

In those permits, the Commission did not determine that it is acceptable to rely on existing shoreline protection to site new development, but rather, the Commission acknowledged that given the existing protection on that site, it is likely that those particular proposed homes would be safe if set back 40 feet. The Commission action did not establish a standard for all future bluff top development in Encinitas. Furthermore, there are significant differences between the current proposal and the previous approval at 824 and 828 Neptune Avenue. First, an approximately 300 sq. ft. portion of the existing home at 824 and 828 Neptune Avenue was destroyed when it fell off of the bluff after a significant bluff failure in 1996, resulting in a setback of 10 ft. from the reconstructed bluff edge, while the home at the subject site has an existing setback of 25-30 ft. from the natural bluff edge. Second, the home which spanned the two lots at 824 and 828 Neptune Avenue was nearly 15 years older (constructed 1929) than the home on the subject site (constructed 1949). Third, an upper bluff wall had already been constructed at 824 and 828 Neptune Avenue. Thus, the existing house had been

significantly damaged and was near the end of its life, so maintaining the existing structure was less feasible. The amount of existing armoring on the site meant that the likelihood that additional armoring fronting the approved homes at 824 and 828 Neptune Avenue would be necessary throughout the lifetime of the new structures is low. In contrast, the upper bluff at the subject site is still unaltered from a visual standpoint; and based on the Commission's experience with the home directly adjacent to the north of the subject site at 816 Neptune Avenue, it is likely that upper bluff erosion will continue to occur and an upper bluff wall may be requested in the future.

The applicants have also identified two unrelated applications similar to the subject proposed development located approximately 5 blocks south of the subject site, which the City of Encinitas approved in 2005 (ref. Encinitas CDP Nos. 01-196 and 01-197/Bradley). These involved the demolition of an existing smaller home straddling the lot line of two lots and the subsequent construction of a new home on each of the blufftop lots. An existing seawall and mid and upper bluff walls protected the home and similar to the existing application, there was no safe location on the lots that would not require protection over the life of the structures. Those projects were not appealed to the Commission.

The LCP policies are clearly designed to allow shoreline protection solely to protect existing principal structures in danger from erosion. The proposed new residence would be relying on shoreline armoring to be present to stabilize this property for the life of the new development. To allow new structures to be sited and designed in reliance on existing or future shoreline protection would essentially allow applicants to use shoreline protection to protect new development and perpetuate the presence of shoreline armoring, inconsistent with the LCP. Thus, regardless of the presence of existing shoreline protection, the Commission must consider where to site the new development so that it will not need protection by shoreline protective devices.

Risk of Additional Shoreline Armoring

Like the coastal bluffs elsewhere in Encinitas, the bluff at the project site is actively eroding, as evidenced by visible rilling, small to moderate failure scarps, and active sand flows in the upper bluff materials (Exhibit 17). In addition, with future sea level rise, large storm waves will more frequently strike the unprotected weak terrace materials occurring on the bluff above elevation +19 feet MSL (above the existing approximately 17 ft. high seawall). Although no wave run-up analysis was provided for this project, Commission experience with analyses for other sites in the area suggests that run-up to above +19 feet is likely at present, and that run-up elevations are projected to increase with rising sea level. Direct wave attack on the lower terrace deposits above the existing seawall may accelerate bluff retreat at the site, potentially leading to erosion behind the seawall, and in the extreme case, undermining of the upper bluff piers, which appear to have been drilled into the terrace deposits only to an elevation of approximately +50 feet MSL (~40 ft. below ground surface). Thus, if new development is allowed to be sited on this hazardous location, the likelihood that additional shoreline protection will be necessary within the life of the structure is reasonably foreseeable.

Removal of Development in the Event of Endangerment

Finally, in addition to the concerns about the siting of the structure, LCP Public Safety Policy 1.6 requires that all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment. The proposed home includes construction of a basement. As stated previously, the bluffs along the Encinitas shoreline are known to be hazardous and unpredictable. Construction of a basement in a hazardous location is inconsistent with the policies of the LCP for several reasons. Although the proposed large basement area would initially be buried under the home, the basement walls may become exposed in the future due to the structure being at risk from failure and erosion if erosion is greater than anticipated. Removing the basement or relocating it to a safe location would require a great deal of alteration of the bluff and could even be infeasible, and the excavation could threaten the overall stability of the bluff. Thus, the applicants have failed to demonstrate that the proposed home is consistent with the LCP provision requiring that it be designed and constructed so that it could be removed in the event of endangerment.

Conclusion

The applicant's consultants assert that the proposed development can be located and constructed safely on the site due to the stability afforded by the existing upper bluff retention system and lower bluff seawall. However, shoreline protection devices are not permanent. When the Commission approves shoreline development, it is with the intent of protecting a specific existing structure. New development must be designed to not need shoreline protection, which means that new development must be sited safely without reliance on existing or future shoreline protective devices. The Commission staff geologist and senior coastal engineer have reviewed the site geology and the submitted analysis and determined that with the existing shore and bluff protection, the site is stable for purposes of constructing the proposed home from a geologist's perspective. However, they have also concluded that without the existing shore and bluff protection, there is no place on the subject site to construct a new home such that it would be safe for 75 years. Given that the existing shore and bluff protection is to protect the existing residence and that the LCP requires new development to be sited such that it not need protection in the future, the Commission finds that the proposed development is inconsistent with the above cited provisions of the certified LCP.

In summary, the proposed project is inconsistent with the certified LCP for the following reasons: 1) the applicants have not demonstrated the proposed residence will be reasonably safe over its design life without reliance on future shoreline protection; and 2) the applicants have failed to demonstrate that the proposed home and basement foundation could be removed in the event of endangerment. Because the new home could not be constructed consistent with the certified LCP at this time, the Commission denies the proposed development.

C. PUBLIC ACCESS/RECREATION

The project site is located on the blufftop west of Neptune Avenue in Encinitas, which is designated as the first public roadway. As the proposed development will occur between the first public roadway and the sea, pursuant to Section 30.80.090 of the City's LCP, a public access finding must be made that such development is in conformity with the public access and public recreation policies of the Coastal Act.

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.*

In addition, Section 30212 of the Act is applicable and 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:*
>
> *(l) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,*
>
> *(2) adequate access exists nearby....*

Additionally, Section 30220 of the Coastal Act provides that "Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses."

The beach fronting this location is used by local residents and visitors for a variety of recreational activities. As proposed, the development at the top of the bluff will not affect existing public access to the shoreline in two respects. No public access across the property to the beach currently exists because of the hazardous nature of the approximately 90 ft. high coastal bluff. In addition, public access to the beach below this home is currently available approximately nine lots north of the subject site, at the Beacon's Beach public access path. However, when new development is not sited in a safe location, future shoreline armoring devices required to protect that development will impact public access and recreation along the shoreline and affect the contribution of sand to the beach from the bluff. In this case, the proposed new development cannot be sited safely on the lot without reliance on shore/bluff protection. Therefore, the proposed development is inconsistent with the public access and recreation policies of the certified Local Coastal Program and Sections 30210, 30212 and 30220 of the Coastal Act, and must be denied.

D. VISUAL RESOURCES

The City's certified Land Use Plan contains several policies relating to the requirement that new development be designed to be compatible with existing development and the visual resources of the area. Land Use (LU) Policies 6.5 and 6.6 state as follows:

> *The design of future development shall consider the constraints and opportunities that are provided by adjacent existing development. (LU Policy 6.5)*
>
> *The construction of very large buildings shall be discouraged where such structures are incompatible with surrounding development. The building height of both residential and non-residential structures shall be compatible with surrounding development, given topographic and other considerations, and shall protect public views of regional or statewide significance. (LU Policy 6.6)*

In addition, RM Policy 8.5 of the LUP states, in part, that:

> *The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible.*

Finally, Section 30.34.020B.8 of the Implementation Program states:

> *The design and exterior appearance of buildings and other structures visible from public vantage points shall be compatible with the scale and character of the surrounding development and protective of the natural scenic qualities of the bluffs.*

The proposed project involves the demolition of an existing single-family residence and the construction of one large home (with a total building area of approximately 4,200 sq. ft). The proposed residence will be located in a residential neighborhood containing one to two story single- and multi-family residences. The proposed new home would not exceed the height, bulk and scale of the existing surrounding development and therefore could be found compatible with the surrounding neighborhood. In addition, public views of the shoreline or other coastal resources will be unaffected by the proposed residence.

The Commission finds that the proposed residence does not adversely affect visual resources and is consistent with Land Use Policies 6.5 and 6.6 of the City's LUP. Impacts to the visual quality of this scenic coastal area may result from the existing seawall for a longer time period than would otherwise occur, if the seawall was retained to protect the new structure, as proposed. However, because the seawall remains necessary at this point to protect the existing blufftop home and likely provides support for the adjacent blufftop development, the proposed project can be found consistent with Resource Management Policy 8.5 and IP Section 30.34.020B.8. Therefore, the Commission finds that the proposed residence is consistent with the visual resource protection policies of the certified LCP.

E. WATER QUALITY

Recognizing the value of protecting the water quality of oceans and waterways for residents and visitors alike, the City's LCP requires that preventive measures be taken to protect coastal waters from pollution. The following policies are applicable:

Resource Management Policy 2.1 of the LCP states:

> *In that the ocean water quality conditions are of utmost importance, the City shall aggressively pursue the elimination of all forms of potential unacceptable pollution that threatens marine and human health.*

Resource Management Policy 2.3 of the LCP states in part:

> *To minimize harmful pollutants from entering the ocean environment from lagoons, streams, storm drains and other waterways containing potential contaminants, the City shall mandate the reduction or the elimination of contaminants entering all such waterways . . .*

The proposed development will be located at the top of the bluff overlooking the Pacific Ocean. As such, drainage and run-off from the development could potentially affect water quality of coastal waters as well as adversely affect the stability of the bluffs. In order to protect coastal waters from the adverse effects of polluted runoff, the Commission has typically required that all runoff from impervious surfaces be directed through landscaping as a filter mechanism prior to its discharge into the street. In this case, however, directing runoff into blufftop landscape areas could have an adverse effect on bluff stability by increasing the amount of groundwater within the bluff material, which can lead to bluff failures. Therefore, in this case, reducing the potential for water to be retained on the site and directing the runoff toward the street will be more protective of coastal resources. Therefore, the Commission finds the proposed project could be found consistent with Resource Management Policies 2.1 and 2.3 of the Certified LCP with the proper water quality control measures and BMPs. However, given the remaining concerns associated with geologic safety, the project as a whole cannot be found consistent with the certified LCP, and must be denied.

F. TAKINGS

As detailed above, the project as proposed would be inconsistent with Encinitas LCP requirements to minimize risk; specifically that the home be sited in a location that will protect the home from failure and erosion hazards and safely avoid the use of shoreline protection devices throughout the lifespan of the project. The applicant may assert denial of the proposed redevelopment results in a potential takings claim. However, as discussed below, this claim is not viable.

The Coastal Act

Denial of all or substantially all economic use of a parcel without just compensation may result in an unconstitutional "taking" of a property. Coastal Act Section 30010 expressly forbids this result:

> *The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission… to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore.*

Consequently, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking. If the Commission concludes that its action does not constitute a taking, then it may deny the project on finding that its actions are consistent with Section 30010. If the Commission determines that its action could reasonably arise to a takings claim, then the Commission applies Section 30010 to consider how the project may be approved. In the latter situation, the Commission may propose modifications to the development to minimize any Coastal Act inconsistencies, while still allowing a reasonable amount of development.

Takings Case Law

Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation…has first been paid to, or into court for, the owner." The Fifth Amendment of the United States Constitution similarly provides that private property shall not be taken for public use, without just compensation. Once used solely for condemnation cases, the Fifth Amendment is now used to require compensation for other kinds of government actions. (See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393.) Since *Pennsylvania Coal*, most of takings cases have fallen into two categories. First, there are the cases in which government authorizes a physical occupation of property. (See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp*. (1982) 458 U.S. 419.) Second, there are the cases in which government regulates the use of property. (*Yee v. Escondido* (1992) 503 U.S. 519, 522-523). Because there is no physical occupation of the land at stake, a denial of the proposed home here would be evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two types of regulatory takings. The first is the "categorical" formulation identified in *Lucas v. South Carolina Coastal Council* ((1992) 505 U.S. 1003, 1014.) In *Lucas*, the Court held, without examining the related public interest, that regulation that denied all economically viable use of property was a taking. (*Id*. at p. 1014.) The *Lucas* Court emphasized, however, that this category is extremely narrow, applicable only "in the extraordinary circumstance when no productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" or rendered it "valueless." (*Id*. at pp. 1016-1017; see also *Riverside Bayview Homes* (1985) 474 U.S. 121, 126 [regulatory takings occur only under "extreme circumstances"].) Even where the challenged regulatory act falls into this category, government may avoid a takings result if the restriction inheres in the title of the property itself; that is,

background principles of state property and public nuisance law would have allowed government to achieve the results sought by the regulation. (*Lucas,* supra, 505 U.S. at pp. 1028-1036.) The redevelopment of a home without additional shoreline protection does not create a public nuisance; however, the inquiry into background principles is more opaque. Generally, a background principle is something that the owner did not acquire the right to use on buying the land. (*Id*. at p. 1029.)

The "background principles" here include the Coastal Act and the Encinitas certified LCP. Both were in existence at the time of the owner's purchase of the land in 2014. As the Supreme Court noted in a recent case, the owner "could have anticipated public regulation might affect their enjoyment of [the] property, as the [river] was a regulated area under federal, state, and local law long before petitioners possessed the land. (*Murr v. Wisconsin* (2017) 137 S.Ct. 1933, 1945-1946.) However, and regardless of whether the prior existence of the LCP would defeat a *Lucas* claim, denial of a CDP for the home as proposed would not amount to the "total wipeout" that usually constitutes a taking under *Lucas*. The existing home allows economic use of the land. (See *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 616 [rejecting the *Lucas* categorical test where property retained value following regulation, but remanding for further consideration under the *Penn Central* test].)

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124 ("*Penn Central*"). Under the *Penn Central* test, a takings analysis considers the economic impact of the regulation, the interference, if any, with reasonable or "distinct" (actual) investment-backed expectations, and the character of the government action. (*Id*. at p. 134; *Ruckelshaus v. Monsanto Co*. (1984) 467 U.S. 986, 1005.) Because this test examines something lesser than a complete economic deprivation, it is generally appropriate to examine whether denial of this CDP could constitute a taking under the *Penn Central* factors.

Analysis

Economic Impact of the Regulation

Denial of a redeveloped home would not create a substantial deprivation of economic use, as that use currently exists on the parcel. Redevelopment may cause some increase in value, but how much is unknown. The real estate website Zillow currently estimates the value of the land and improvement (the existing home) at $2.95 million. Trulia.com reports the value as $2.96 million. The vast majority of the value derives from the land (presumably due to its location above the ocean), rather than the home. In 2018, the San Diego County assessor estimated the land value as more than $2 million, while the improvement (the home) was valued at approximately $141,000. Although assessor's valuations tend to be under market, the overwhelming value here is represented by the land, rather than the development, or redevelopment, on top of the bluff.

Investment-Backed Expectations

The last conveyance for value was in July 2014. In that deed, Andre Hurst is described as the sole member of California Residential Health Group LLC, and the LLC is recorded as the buyer in document 2014.0295507. According to both Zillow and Trulia, the purchase price was $2.034 million, with the current market value close to $3 million. Thus, the owner has profited about a million dollars during the last four years. By any measure, investment-backed expectations have been met.

Character of the Government Action

This final prong of the *Penn Central* test has been downplayed in recent years. (See, e.g. *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 529 [governmental action that substantially advances a public purpose alone does not insulate the government from a takings claim]).[4] Nevertheless, it is still part of the *Penn Central* analysis, and the Coastal Commission advances a legitimate public interest when it regulates various uses according to the Chapter 3 policies of the Coastal Act, and as here, according to the policies and ordinances of the certified Encinitas LCP, specifically to ensure the safety of blufftop development and protection of the bluffs themselves. With the Coastal Act, the Legislature sought to protect natural resources and the ecological balance of the coastal zone while allowing for future development consistent with the Act's policies. (§ 30001(b), (c), (d).) The LCP in similarly, stresses safe development, while protecting natural resources. (E.g., LUP Policy 1.6, IP § 30.34.020.)

Denial Does Not Constitute a Potential Taking

As the applicants have not offered any evidence regarding structural or other habitability issues, and there is no sign the City has concerns, the existing use of the property is a reasonable and viable use. Further, the owner may conduct a variety of improvements to modernize the home. (See the previous section, "Retention of the Existing Structure.") Finally, investment-back expectations have been met with unusual speed, resolving the factor in *Penn Central* analysis that is most important to applicants, although the other factors also disfavor that a taking might occur. Therefore, the Commission determines that denial of the proposed redevelopment does not constitute a credible taking, and that the denial is consistent with Coastal Act Section 30010.

G. LOCAL COASTAL PLANNING

In November of 1994, the Commission approved, with suggested modifications, the City of Encinitas Local Coastal Program (LCP). Subsequently, on May 15, 1995, coastal development permit authority was transferred to the City. The project site is located within the City's permit jurisdiction and, therefore, the standard of review is the City's LCP.

[4] See also Lewyn, Michael, *Character Counts: The "Character of the Government Action" In Regulatory Takings Actions*, 40 Seton Hall L. Rev 597, 599 (2010) stating that *Lingle* holds that the existence of a valid public purpose *standing alone* may not justify an otherwise problematic regulation (emphasis in original).

Based on specific policy and ordinance language requirements in the LCP, the City of Encinitas is required to develop a comprehensive program for addressing the shoreline erosion problem in the City. The intent of the plan is to look at the shoreline issues facing the City and to establish goals, policies, standards and strategies to comprehensively address the identified issues. To date, the City has conducted several public workshops and meetings on the comprehensive plan to identify issues and present draft plans for comment. However, at this time, no action to adopt the plans has been scheduled for local review by the Encinitas City Council.

As discussed in the above findings, the proposed residential development is inconsistent with the policies of the LCP. When the Commission reviews a proposed project that is inconsistent with the certified LCP, there are several options available to the Commission. In most cases, the Commission will approve the project but impose reasonable terms and conditions to bring the project into conformance with the LCP. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission must deny the proposed project because the proposed project is significantly out of conformance with the LCP, due to the inadequate coastal blufftop setback. For this lot, there are no feasible conditions that could bring the project into conformance with the LCP. As an alternative, the applicant can retain the existing house. Another potential alternative could include rehabilitation of the existing residence. There may be other larger-scale potential options for the applicant and other bluff top property owners in similar circumstances in Encinitas that should be addressed in a comprehensive manner through the LCP process. Thus, the Commission is denying this project at this time due to its inconsistency with the certified LCP. The Commission finds that approval of the subject proposal would prejudice the City's ability to continue to implement its certified LCP and to prepare the comprehensive program for addressing the shoreline erosion problems in the City as called for in Public Safety Policy 1.7 of the certified LUP.

(G:\San Diego\Reports\Appeals\2016\A-6-ENC-16-0068 Hurst De Novo stf rpt.docx)

APPENDIX A

- Appeal applications by Commission Steve Kinsey and Commissioner Mary Shallenberger
- Johnsson, M.J., 2005, Establishing development setbacks from coastal bluffs, in Magoon, O.T., Converse, H., Baird, B., Jines, B., and Miller-Henson, M., eds., California and the World Ocean '02: Revisiting and revising California's Ocean Agenda: Reston, Virginia, American Society of Civil Engineers, p. 396-416.
- Certified City of Encinitas Certified Local Coastal Program
- Project Plans received June 28, 2016 by Design Decisions
- City of Encinitas 15-194 CDP dated June 2, 2016/Planning Commission Resolution PC 2016-35 dated June 2, 2016
- TerraCosta Consulting Group, Inc. (TerraCosta), 2015, "Geotechnical Investigation and Bluff Stability Study, 808 Neptune Avenue, Encinitas, California", report dated 28, 2015, and signed by W. F. Crampton (RCE 23792, RGE 245) and G. A. Spaulding (CEG 1863, CHG 351, RG 5892).
- TerraCosta, 2016, "Response to City Review Comments, 808 Neptune Avenue, Encinitas, California ", letter dated April 8, 2016, and signed by W. F. Crampton (RCE 23792, RGE 245).
- Soil Engineering Construction, Inc. (SEC), 2017, "Seawall and Coastal Bluff Monitoring Report, Coastal Development Permit 6-03-48", report dated May 24, 2017, and signed by J. Niven (RCE 57517) and B. Trettin.
- TerraCosta, 2017a, "Response to July 2016 Coastal Commission Appeal Coastal Bluff Stability Considerations, 808 Neptune Avenue, Encinitas, California", report dated May 30, 2017, and signed by W. F. Crampton (RCE 23792, RGE 245).
- TerraCosta, 2017b, "Response to December 6, 2017 Email Comments, Coastal Bluff Stability Considerations, 808 Neptune Avenue, Encinitas, California", letter dated December 13, 2017, and signed by M. W. Eckert (Ph.D., RCE 45171, RGE 2316).
- Zillow.com map of 808 Neptune and neighboring home values, accessed Nov. 20, 2018.
- CDP Nos:
  - F3891/Barcados
  - F5473/Bardacos
  - F6360/Pate
  - F9833/Canter
  - 6-86-570/Richards
  - 6-88-464-A2/Frick & Lynch
  - 6-84-461/Denver
  - 6-93-36-G/Pate
  - 6-93-085/Bardacos
  - 6-93-131/Richards
  - 6-98-039/Canter
  - 6-00-146-G/Brem
  - 6-01-062-G/Sorich

- A-6-ENC-01-047/Conway & Associates
- A-6-ENC-02-003/Berg
- 6-ENC-03-042/Sorich & Gault
- 6-03-048/Sorich & Gault
- A-6-ENC-04-081/Hendrick
- 6-05-030/Okun
- A-6-ENC-06-100/Zagara
- A-6-ENC-06-101/Albani
- 6-08-039-G/Blue Curl
- A-6-ENC-09-002/Wellman
- A-6-ENC-09-003/Wellman
- A-6-ENC-09-040/Okun
- A-6-ENC-09-041/Okun
- 6-11-3-G/Frick & Lynch
- A-6-ENC-13-0210/Lindstrom
- 6-15-1717/Barr
- A-6-ENC-16-0060/Martin
- A-6-ENC-16-0067/Meardon