## STAFF REPORT: APPEAL – SUBSTANTIAL ISSUE

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<tr>
<th>Appeal Number:</th>
<th>A-5-NPB-18-0006</th>
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<td>Applicant:</td>
<td>Nicholson Construction</td>
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<td>Local Government:</td>
<td>City of Newport Beach</td>
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<td>Local Decision:</td>
<td>Approval with Conditions</td>
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<td>Appellant:</td>
<td>James M. Mosher</td>
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<td>Project Location:</td>
<td>2607 Ocean Boulevard</td>
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<td>Project Description:</td>
<td>Appeal of City of Newport Beach decision granting Coastal Development Permit No. CD2017-080 with conditions for demolition of a 3-level, 2,260 sq. ft. single-family home, and construction of a 4-level, 4,500 sq. ft. (approx.) single-family home with rooftop deck and 3-car garage</td>
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<td>Staff Recommendation:</td>
<td>Substantial Issue</td>
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**IMPORTANT NOTE:** The Commission will not take testimony on this “substantial issue” recommendation unless at least three commissioners request it. The Commission may ask questions of the applicant, any aggrieved person, the Attorney General, or the executive director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally and at the discretion of the Chair limited to 3 minutes total per side. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo hearing will occur at a future Commission meeting, during which time the Commission will take public testimony.
SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission determine that a **substantial issue exists** with respect to the grounds on which appeal number A-5-NPB-18-0006 has been filed because the locally approved development cannot be found consistent with the City of Newport Beach certified Local Coastal Program (LCP).

The appellant claims various inconsistencies with the certified Local Coastal Program: 1) the project has not been designed to minimize impacts to public coastal views or to minimize impacts to natural landforms; 2) the project privatizes public land where coastal public views are available; 3) the project was approved with variances that result in inconsistencies with the certified LCP; and 4) even if the proposed development was approved without the need for variances, the project would still be inconstant with the certified LCP.
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EXHIBITS
Exhibit 1 – James M. Mosher Appeal
Exhibit 2 – Newport Beach Resolution No. 2075
Exhibit 3 – Project Plans
Exhibit 4 – Vicinity Map
Exhibit 5 – Letter from John P. Ramirez dated February 5, 2018
I. MOTION AND RESOLUTION

Motion:

I move that the Commission determine that Appeal No. A-5-NPB-18-0006 raises No Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

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

Resolution:

The Commission hereby finds that Appeal No. A-5-NPB-18-0006 presents SUBSTANTIAL ISSUE with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the City of Newport Beach certified Local Coastal Program and/or the public access policies of the Coastal Act.

II. APPELLANT’S CONTENTIONS

On January 22, 2018, an appeal by James M. Mosher was filed alleging the project’s failure to comply with the City of Newport Beach’s certified Local Coastal Program (LCP) (Exhibit No. 1). The contentions of that appeal are summarized as follows:

(1) The Project is inconsistent with the City’s recently certified LCP.

(2) The project has not been designed or sited to minimize impacts to public coastal views (CLUP Policy 4.4.1-2) or impacts to natural landforms. In addition, the project proposes to privatize, through city gating, a significant amount of public view land above and to the west of the property (at the top of the bluff) inconsistent with the Coastal Act.

(3) The oversized development was made possible by granting “variances” to the setback standard in the City’s certified LCP, even though no such authority exists in the LCP, and a request to include such authority in the LCP is pending before the CCC as a request for a major LCP amendment.

(4) Even without the variances, this development would be problematic, but with them, the City has made possible building in the presently undeveloped western half of the lot/bluff face, as well as construction higher than would otherwise be allowed.
III. LOCAL GOVERNMENT ACTION

On November 9, 2017, the City of Newport Beach Planning Commission held a duly noticed public hearing for the permit for the proposed development. During the public hearing, the Planning Commission expressed concerns with the overall size, bulk/mass and height of the proposed residence. At the conclusion of the public hearing, the Planning Commission continued the item for the applicant to consider the concerns expressed during the meeting.

On December 7, 2017, the City of Newport Beach Planning Commission held another public hearing for the permit for the proposed development. At the conclusion of the public hearing, the Planning Commission adopted Resolution No. 2075, Variance No. VA2016-005 and Coastal Development Permit No. CD2017-080 approving the development of a new 4,500 square foot, single-family residence inclusive of the required parking area that exceeds the maximum floor area and encroaches 10 feet into the 10-foot rear yard setback along Way Lane and 7 feet into the 10-foot front yard setback along Ocean Boulevard (Exhibit No. 2). Also, the design of the proposed project was changed by the applicant to address the bulk/massing concerns of the Planning Commission. The changes include: increasing the open volume area of the setback areas; increasing the setback of the elevator housing on the roof and modifying it so it no longer exceeded the height limit, pulled back the game room on the second floor to provide more visual depth from Way Lane; reduced the width and height of the screen wall around the rooftop deck; removed a horizontal privacy screen on the roof deck; added siding to the building; and reduced the size of glass elements and building columns to reduce bulk/mass. James M. Mosher participated in both Planning Commission hearings.

On December 21, 2017, James M. Mosher filed an appeal with the City of Newport Beach regarding the Planning Commission’s approval action.

On January 2, 2018, the City of Newport Beach returned James. M. Mosher’s appeal for lack of payment of a fee to process the appeal of the Planning Commission’s approval action.

Following the action by the Planning Commission, and the City’s rejection of the appellant’s appeal, the City issued a Notice of Final Action related to the Planning Commission’s action on Local CDP2017-080, as required by both the Coastal Act and City’s Local Coastal Program (LCP). The City’s Notice of Final Action was received in the Coastal Commission’s South Coast Area Office in Long Beach on January 8, 2018. A Notification of Appeal Period was provided to the City by Coastal Commission staff, dated January 10, 2018, indicating an expiration of the ten (10) working day appeal period on January 23, 2018.

On January 22, 2018, James M. Mosher filed the appeal of Local Coastal Development Permit No. CD2017-080 in the Coastal Commission’s South Coast Area Office in Long Beach.

IV. APPEAL PROCEDURES

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

Section 30603 of the Coastal Act states in relevant part:

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

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

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

Section 30603(a)(1) of the Coastal Act establishes the project site as being appealable by its location between the sea and first public road, and within 300 feet of the beach.

Section 13111(a) of Title 14 of the California Code of Regulations allows an appeal of a local government's decision on a coastal development permit application once the local appeal process has been exhausted. In accordance with Section 13573(a) of Title 14 of the California Code of Regulations, an appellant shall be deemed to have exhausted local appeals once the appellant has pursued his or her appeal to the local appellate body, except that exhaustion of all local appeals shall not be required if:

(1) The local government or jurisdiction require an appellant to appeal to more local appellate bodies than have been certified as appellate bodies for permits in the coastal zone, in the implementation section of the Local Coastal Program.

(2) An appellant was denied the right of the initial local appeal by a local ordinance which restricts the class of persons who may appeal a local decision.

(3) An appellant was denied the right of local appeal because local notice and hearing procedures for the development did not comply with the provisions of this Article.

(4) The local government jurisdiction charges an appeal fee for the filing or processing of appeals.

In this case, the City of Newport Beach does charge a fee to file an appeal of a local coastal development permit. Therefore, the appellant does not need to exhaust the local appeal process prior to submitting an appeal to the Coastal Commission.
The grounds for appeal of an approved local CDP in the appealable area are stated in section 30603(b)(1) of the Coastal Act, which states:

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

The grounds listed for the current appeal includes various contentions that the approved development does not conform to the standards set forth in the certified LCP. Section 30625(b)(2) of the Coastal Act requires a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed pursuant to Section 30603. If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered moot, and the Commission will proceed to the de novo public hearing on the merits of the project. If the Commission finds substantial issue, the de novo hearing will be scheduled at a subsequent Commission hearing. A de novo public hearing on the merits of the project uses the certified LCP as the standard of review. In addition, for projects located between the first public road and the sea, findings must be made that any approved project is consistent with the public access and recreation policies of the Coastal Act. The project is located between the first public road paralleling the sea (Ocean Boulevard) and the sea and thus if a CDP is ultimately approved on de novo for the development, the proposed development must be reviewed for consistency with the public access and recreation policies of the Coastal Act. (Pub. Res. Code § 30604(c).) Sections 13110-13120 of Title 14 of the California Code of Regulations further explain the appeal hearing process.

Qualifications to Testify before the Commission
If the Commission decides to hear arguments and vote on the substantial issue question, those who are qualified to testify at the hearing, as provided by Section 13117 of Title 14 of the California Code of Regulations, will typically have three minutes per side at the discretion of the Chair to address whether the appeal raises a substantial issue. The only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local government (or their representatives), or those who, for good cause, were unable to oppose the application before the local government, and the local government. Testimony from other persons must be submitted in writing. The Commission will then vote on the substantial issue matter. It takes a majority of Commissioners present to find that the grounds for the appeal raise no substantial issue.

Exhaustion of Local Appeal Processes
The appellant has indicated that he attempted to exhaust the local appeal process by submitting an appeal to the City on December 21, 2017. However on January 2, 2018, the City returned the appeal with a letter stating that no action would be taken due to failure to pay the required appeal fees.

The exhaustion of all local appeals is discussed in City of Newport Beach Implementation Plan (IP) Section 21.64.035(C), which also references Section 13573(a) of the California Code of Regulations. Section 21.64.035(C) states that an appellant shall be deemed to have exhausted
local appeals once the appellant has pursued his or her appeal to the local appellate body, except that exhaustion of all local appeals shall not be required for four reasons. One of those reasons is if the local government jurisdiction charges an appeal fee for the filing or processing of appeals. Thus, because the City charges a fee to file an appeal, appellants do not have to exhaust all local appeal processes before they file an appeal with the Coastal Commission.

V. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION
The project site is a 4,257 square foot irregularly shaped with an approximately 35-foot grade difference, containing a slope that varies from 15%-45% for most of the lot, that is located on the bluff on the seaward side of Ocean Boulevard in the City of Newport Beach (Orange County) (Exhibit No. 4). The property is 110 feet wide with a depth ranging from 35 to 53 feet. The certified LCP designates the site as a Single-Unit Residential (R-1) zone. The City-approved development is the demolition of a 3-level, 2,260 square foot single-family home, and construction of a 4-level, 4,500 square foot single-family home with rooftop deck and 3-car garage (Exhibit No. 3). The property takes vehicular access from Way Lane, on the lowest portion of the site. There is also a pedestrian accessway to the property from Ocean Boulevard comprised of an existing private gated walkway that connects the property to the public sidewalk that runs along Ocean Boulevard on top of the bluff.

Immediately north (landward) and west of the project site rising vertically is city property that is largely undeveloped and vegetated bluff face. Landward of this City property, running down the bluff face, is the Fernleaf Ramp right-of-way, which is accessed from Ocean Boulevard. The Fernleaf Ramp turns into Way Lane and provides public access to China Cove Beach. Landward of the Fernleaf Ramp is additional City property on the bluff that is undeveloped and vegetated, and landward of this City property on top of the bluff is the Ocean Boulevard right-of-way (Exhibit No. 4). The project site takes its address from Ocean Boulevard, even though the site is situated below Ocean Boulevard between the Fernleaf Ramp and Way Lane. South of the project site at the bottom of the bluff is Way Lane, which ends at the beach. To the east of the site are two developed residential lots and then Fernleaf Avenue, which transitions from the Fernleaf Ramp right-of-way (Exhibit No. 4).

The front yard (Ocean Boulevard) setback requirement is 10 feet and the rear yard (Way Lane) setback requirement is 10 feet as well. The side yard setback requirements are 4 feet. The existing home has a (legal nonconforming) setback from 0-4-feet along Way Lane and a (legal nonconforming) setback of 7 feet along the Ocean Boulevard.

B. LOCAL COASTAL PROGRAM
The City of Newport Beach LCP was effectively certified on January 13, 2017. This is the first Coastal Commission appeal since certification of the City’s LCP.

C. FACTORS TO BE CONSIDERED IN SUBSTANTIAL ISSUE ANALYSIS
Section 30625(b)(2) of the Coastal Act states that the Commission shall hear an appeal of a local government action carried out pursuant to a certified LCP unless it finds that no substantial issue exists with respect to the grounds on which the appeal was filed. The term “substantial issue” is not defined in the Coastal Act or its implementing regulations. Section 13115(b) of the Commission’s regulations simply indicates that the Commission will hear an appeal unless it
“finds that the appeal raises no significant question.” In previous decisions on appeals, the Commission had been guided by the following factors:

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

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

3. The significance of the coastal resources affected by the decision;

4. The precedential value of the local government’s decision for future interpretations of its LCP; and,

5. Whether the appeal raises local issues, or those of regional or statewide significance.

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

Staff is recommending that the Commission find that substantial issue exists with respect to whether the local government action conforms to the policies of the certified LCP and the public access policies of the Coastal Act for the reasons set forth below.

D. SUBSTANTIAL ISSUE ANALYSIS

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

In making that assessment, the Commission will consider whether the appellant’s contentions regarding the inconsistency of the local government action with the certified LCP or the public access policies raise significant issues in terms of the extent and scope of the approved development, the factual and legal support for the local action, the precedential nature of the local action for interpretation of the LCP, whether a significant coastal resource would be affected, and whether the appeal has statewide or regional, as opposed to local, significance.

The grounds for this appeal relate to the proposed project’s alleged inconsistency with a number of policies and standards of the certified LCP. The appellant’s contentions are discussed and analyzed below.

(1). The appellant claims that the project is inconsistent with the City’s certified LCP. More specifically, the appellant claims that the project has not been designed to minimize impacts to coastal views that would be inconsistent with CLUP Policy 4.4.1-2. Also, the appellant claims that the project has not been designed to minimize impacts to natural landforms. In addition, the appellant claims that the project proposes to privatize, through city gating, a significant amount of public view land above and to the west of the property (at the top of the bluff) inconsistent with the Coastal Act.
The primary issue here is whether the proposed project adheres to the visual resource policies of the City’s certified LCP. Located immediately north (landward) and west of the project site rising vertically on the bluff face is city property that is largely undeveloped and vegetated. Landward of this City property is the Fernleaf Ramp right-of-way, which is accessed from Ocean Boulevard on top of the bluff. Landward of the Fernleaf Ramp is additional City property that is undeveloped and vegetated and landward of this City property is the Ocean Boulevard right-of-way (Exhibit No. 4). The project site takes its address from Ocean Boulevard, even though the site is situated below Ocean Boulevard between Fernleaf Ramp and Way Lane. South of the project site at the bottom of the bluff is Way Lane, which provides vehicular access to the project’s 3-car garage, and the beach. The project site is approximately 30 feet south of the Ocean Boulevard right-of-way to the north, which the City’s certified CLUP (CLUP Policy 4.4.1-6) identifies as a roadway where coastal public views shall be protected:

4.4.1-6. Protect public coastal views from the following roadway segments:

- Ocean Boulevard.

Because of Ocean Boulevard’s importance as a roadway that provides public coastal view opportunities, the CLUP also includes Policy 4.4.2-4:

4.4.2-4. Prohibit projections associated with new development to exceed the top of curb on the bluff side of Ocean Boulevard. Exceptions for minor projections may be granted for chimneys and vents provided the height of such projections is limited to the minimum height necessary to comply with the Uniform Building Code.

The City’s certified IP also includes policies that protect public coastal view opportunities along Ocean Boulevard:

CHAPTER 21.18 RESIDENTIAL COASTAL ZONING DISTRICTS (R-A, R-1, R-BI, R-2, and RM)
21.18.030 Residential Coastal Zoning Districts General Development Standards

TABLE 21.18-2
DEVELOPMENT STANDARDS FOR SINGLE-UNIT RESIDENTIAL COASTAL ZONING DISTRICTS

Notes

(2) On the bluff side of Ocean Boulevard, the maximum height shall not exceed the elevation of the top of the curb abutting the lot.

CHAPTER 21.30 PROPERTY DEVELOPMENT STANDARDS
21.30.060 Height Limits and Exceptions

B. Height of Structures and Measurement.

4. Structures on Ocean Boulevard. New structures and additions/changes to existing structures on the bluff side of Ocean Boulevard in Corona del Mar shall not be
constructed to a height greater than the elevation of the adjacent curb. The top of curb height limit shall be established by a plane created by the extension of the top of curb line across each lot.

Consistent with these LCP policies, the project has been designed so that it is restricted to a maximum height of 24 feet and 29 feet for flat and sloped roofs respectively and does not exceed the curb height of Ocean Boulevard. However, besides the LCP policies identified above, there are additional policies in the LCP that protect scenic and visual resources and also minimize natural landform alteration that must also be adhered to in order to protect public coastal view opportunities. These LCP policies and standards are set forth in the CLUP and IP and consist of the following:

**COASTAL LAND USE PLAN (CLUP)**

4.4 Scenic and Visual Resources

4.4.1 Coastal Views

4.4.1-1. Protect and, where feasible, enhance the scenic and visual qualities of the coastal zone, including public views to and along the ocean, bay, and harbor and to coastal bluffs and other scenic coastal areas.

4.4.1-2. Design and site new development, including landscaping, so as to minimize impacts to public coastal views.

4.4.1-3. Design and site new development to minimize alterations to significant natural landforms, including bluffs, cliffs and canyons.

4.4.1-4. Where appropriate, require new development to provide view easements or corridors designed to protect public coastal views or to restore public coastal views in developed areas.

4.4.1-5. Where feasible, require new development to restore and enhance the visual quality in visually degraded areas.

4.4.1-7. Design and site new development, including landscaping, on the edges of public coastal view corridors, including those down public streets, to frame and accent public coastal views.

4.4.1-10. Where feasible, provide public trails, recreation areas, and viewing areas adjacent to public coastal view corridors.

4.4.2 Bulk and Height Limitation

4.4.2-2. Continue to regulate the visual and physical mass of structures consistent with the unique character and visual scale of Newport Beach.

4.4.2-3. Implement the regulation of the building envelope to preserve public views through the height, setback, floor area, lot coverage, and building bulk regulation of the Zoning Code in effect as of October 13, 2005 that limit the building profile and maximize public view opportunities.
IMPLEMENTATION PLAN (IP)
CHAPTER 21.30 PROPERTY DEVELOPMENT STANDARDS
21.30.100 Scenic and Visual Quality Protection

B. Initial Evaluation. Any coastal development permit application for development involving the construction of a new building or the expansion of an existing building and having one or more of the characteristics listed below shall be reviewed to evaluate the development’s impact to a public viewshed or the scenic and visual qualities of the coastal zone.

1. The development site is located between the first public roadway paralleling ocean, bay, harbor, channels, estuary, marsh, or slough.
2. The development site is located on a coastal bluff or canyon.
3. The development site is adjacent to, or within the viewshed of, a public view point, coastal view road, public park or beach, or public accessway, as identified on Coastal Land Use Plan Map 4-3 (Coastal Views).
4. The development site contains significant natural landforms or natural vegetation.

C. Visual Impact Analysis. Where the initial evaluation indicates that a proposed development has the potential to significantly impact a public view or viewshed, or the scenic and visual qualities of the coastal zone, a view impact analysis shall be prepared at the project proponent’s expense. The analysis shall include recommendations to avoid or minimize impacts to public views from the identified public view points and corridors identified in Policy 4.4.1-6 and Map 4-3 of the Coastal Land Use Plan.

D. Siting and Design. Development shall be sited and designed in accordance with the following principles, where applicable in order to meet the purpose of section:

1. Avoid or minimize impacts to public coastal views and, where feasible, restore and enhance the scenic and visual qualities of the coastal zone.
2. Development on the edges of public coastal view corridors, including those down public streets, shall be designed and sited to frame and accent public coastal views.
3. Clustering of buildings to provide open view and access corridors to the harbor.
4. Modulation of building volume and mass.
5. Variation of building heights.
6. Inclusion of porticoes, arcades, windows, and other “see-through” elements in addition to the defined open corridor.
7. Minimization of landscape, fencing, parked cars, and other nonstructural elements that block views and access to the harbor.
8. Prevention of the appearance of the harbor being walled off from the public right-of-way.

9. Inclusion of setbacks that in combination with setbacks on adjoining parcels cumulatively form functional view corridors.

10. Encourage adjoining property owners to combine their view corridors to achieve a larger cumulative corridor than would be achieved independently.

11. Where feasible, development along coastal view roads shall prevent an appearance of the public right-of-way being walled off from the public viewsheds.

E. Landform Alteration. Development shall be sited and designed to minimize the alteration of gullies, ravines, rock outcroppings, and other natural landforms and the removal of native vegetation. Site design and construction techniques include, but are not limited to, the following:

1. Siting development on the flattest area of the site, except when an alternative location is more protective of coastal resources.

2. Utilizing existing driveways and building pads to the maximum extent feasible.

3. Clustering building sites.

4. Shared use of driveways.

5. Designing buildings to conform to the natural contours of the site, and arranging driveways and patio areas to be compatible with the slopes and building design.

6. Utilizing special foundations, such as stepped, split level, or cantilever designs.

7. Detaching parts of the development, such as a garage from a dwelling unit.

8. Requiring any altered slopes to blend into the natural contours of the site.

F. Landscape Standards. Landscape improvements shall be installed and maintained to ensure that landscape materials do not unnecessarily obstruct public views at maturity. Landscaping at the edges of roads from which there is an identified public view should be designed, planted and maintained to frame and accent public views.

I. View Protection Easement. The review authority shall require applicants to provide public view protection through deed restriction and/or public view protection easements. (Ord. 2016-19 § 9 (Exh. A)(part), 2016)

These above-stated policies and standards were included in the LCP in order to protect coastal public view opportunities. The project site is located adjacent to a public sidewalk that is part of Ocean Boulevard, which affords the public coastal views of the bay, ocean and surrounding areas. While the project has been designed to be below the top of curb of Ocean Boulevard as required by the LCP, the height and design of the project may still adversely impact public coastal view opportunities protected by the LCP by extending into the view lines from Ocean Boulevard to the bay. The appellant claims that the project is inconsistent with the City’s
certified LCP and specifically claims that the project has not been designed to minimize impacts to coastal views that would be inconsistent with CLUP Policy 4.4.1-2:

4.4.1-2. Design and site new development, including landscaping, so as to minimize impacts to public coastal views.

A stated by the City, the project site is an irregularly shaped sloped lot with an approximately 35-foot grade difference. The property is shallow with a lot depth ranging from 35 to 53 feet and the lot is also 110-feet wide. The lot depth is limited and after applying the 10-foot front and rear yard setback requirements it results in a sloping building pad that is approximately 15 to 33-feet deep. The standard 10-foot front and rear setbacks comprise approximately 51 percent of the total lot area. Furthermore, the City states that unusual lot shape and topography of this lot do not generally apply to other properties in the vicinity under the same R-1 zoning classification and that strict application of the City’s development standards including setbacks and floor area limit results in a buildable area of 1,910 square feet and a new residence of approximately 2,865 square feet in size. The City states that this is significantly diminished compared to other properties in the vicinity and same zone that have an average of 4,200 to 4,500 square feet in size.

In order to construct a residence that exceeds the City standard requirements of the property, the owner applied for a variance from the City and was approved (Variance No. VA2016-005). The City determined that the condition of the property directly impacts the allowable floor area for the lot, and the ability to comply with setback requirements. Furthermore, the site constraints create challenges to design a residence of comparable size and position to other properties along Way Lane without providing relief from these code standards. In its variance approval, the City allowed a development consisting of a total of 4,500 square feet to construct a single-family residence inclusive of the required parking area. The Variance allowed the development to do the following:

1. Exceed the maximum floor area
2. Encroach 10 feet into the 10-foot rear yard setback along Way Lane (for a 0-foot setback); and;
3. Encroach 7 feet into the 10-foot front yard setback along Ocean Boulevard (for a 3-foot setback).

Along with the variance, the City approved a coastal development permit (CDP) for the project, CD2017-080. In its approval of a CDP, the City determined that the proposed design, bulk and scale of the development was consistent with the pattern of development in the area consisting of single-family residences and expected future development. Furthermore, the City determined that with the granting of the requested variance, the development complied with applicable residential development standards including, but not limited to, floor area limitation, setbacks, height, and parking. Additionally, the City again acknowledged that the proposed development is below the curb line of Ocean Boulevard.

During the Planning Commission review process for the variance, the applicant was required to place story poles on site that provided an idea of the location and massing of the proposed project. Located below are two photos of the site with story poles that were provided by the applicant. The first photo (Figure 1) is taken from the seaward side of Ocean Boulevard. It
shows the Fernleaf Ramp, the project site and then part of the coastal public view. The second photo (Figure 2) is taken from the landward side of Ocean Boulevard. It shows the project site and then the coastal public view.

Figure 1. Photo taken from the seaward side of the Ocean Boulevard.
Both photos show that portions of the public coastal view opportunities are impacted by the massing of the proposed development. Also taking into account that the City approved a variance that allowed a larger development on site, which specifically allowed the development to exceed the maximum floor area and the front and rear yard setbacks that otherwise would have been a smaller development if it were instead to comply with the City requirements without a variance, leads to a development approved by the City that impacts coastal public view opportunities. Thus, the appeal does raise a substantial issue in regards to consistency with the City’s certified LCP, including CLUP Policies 4.4.1-2 and 4.4.2-3 and IP standards 21.30.100(B)(3) and (D)(1-2).

Besides impacts to coastal public views, the appellant has stated that the project has also not been designed to minimize impacts to natural landforms. With approval of the variance, the City allowed potential impacts upon natural landforms that would not otherwise be allowed with a project that did obtain a variance. Thus, the appeal does raise a substantial issue in regards to consistency with the City’s certified LCP, including CLUP Policy 4.4.1-3 and IP standards 21.30.100(B)(4) and (E).

Located immediately north (landward) and to the west of the project site rising vertically is City property on the bluff face that is largely undeveloped and vegetated. This City property currently contains portions of a private gated pedestrian walkway that extends from the northwest portion of this City property connected to an existing public sidewalk fronting Ocean Boulevard that connects to a portion of an existing private deck that continues on to the single-family residence on the project site (Exhibit No. 3 and No. 4). This pedestrian walkway and
deck are locked for the private use of the single-family residence on the project site. The proposed project will demolish the portions of the private pedestrian walkway and deck on the City property and replace it with a new gated private pedestrian walkway that connects similarly with the existing public sidewalk at Ocean Boulevard as it did previously. Resolution No. 2075 by the City of Newport Beach Planning Commission that approved the variance and CDP includes language that states that the walkway including stairs, guardrails and etc. will need separate approval from the Newport Beach City Council: “The proposed walkway, stairs, guardrails, retaining walls (to support walkway and landings only), landing, drain lines and landscaping within the Ocean Boulevard public right-of-way shall require approval by the City Council. If approved by City Council, an encroachment agreement between the City and property owner shall be required.” Thus, this portion of the proposed project actually has not yet obtained final local approval from the City and is still pending.

The public sidewalk along Ocean Boulevard that the existing and proposed private pedestrian walkway connects to provides a location where public coastal view opportunities are available. However, the applicant is proposing private development on this city property that may potentially impact public view opportunities from the Ocean Boulevard public sidewalk. The appellant claims that the project proposes to privatize this City property area, by installing a gate and restricting public access, a significant amount of public view land above and to the west of the property (at the top of the bluff) inconsistent with the Coastal Act. Development that results in impacts to coastal public views must be avoided, especially since there are LCP policies in place that protect such views along Ocean Boulevard location. Thus, the appeal does raise a substantial issue in regards to consistency with the City’s certified LCP, including CLUP Policies 4.4.1-2 and 4.4.2-3 and IP standards 21.30.100(B)(3) and (D)(1-2).

Therefore since the development impacts coastal public views and includes natural landform alteration, the appellant’s claim that the project impacts coastal public views and does not minimize landform alteration inconsistent with the City’s certified LCP does raise a substantial issue with respect to project consistency with the certified LCP.

(2) The appellant claims that the development is oversized and that was made possible by the City granting variances to the setback standard in the City’s certified LCP, even though no such authority exists in the LCP and a request to include such authority in the LCP is pending before the CCC as a request for a major LCP amendment.

The issue here is whether the City has authority to approve a project that is inconsistent with its Certified LCP. The City approved a variance for the proposed development citing that the site constraints create challenges to design a residence of comparable size and position to other properties along Way Lane without providing relief from these code standards. The variance allowed the construction of a 4,500 square foot single-family residence, inclusive of the required parking area, that allowed: 1) the development to exceed the maximum floor area; 2) to encroach 10 feet into the 10-foot rear yard setback along Way Lane (for a 0-foot setback); and; 3) to encroach 7 feet into the 10-foot front yard setback along Ocean Boulevard (for a 3-foot setback). The City’s Implementation Plan LCP includes a policy (IP Policy 21.12.020(A)) that allows the Planning Director to interpret provisions in the IP:
IMPLEMENTATION PLAN (IP)
CHAPTER 21.210 INTERPRETATION OF IMPLEMENTATION PLAN PROVISIONS
21.12.020 Rules of Interpretation

A. Authority. The Director has the authority to interpret the meaning of provisions of this Implementation Plan, including maps, and to apply and/or enforce the Implementation Plan. The Director may also refer any interpretation to the Commission for input or a determination. An interpretation made by the Director may be appealed or called for review to the Commission in compliance with Chapter 21.64 (Appeals and Calls for Review).

While this policy allows the Planning Director to interpret the standards of the IP, the LCP has no provisions for minor modifications and variances when special circumstances result in hardships or the loss of property rights. In this case, the Planning Commission allowed such deviation from the provisions in the City’s certified LCP through the approval of a variance that results in a development that is inconsistent with the visual resource and natural landform policies of the LCP.

The appellant references a pending City LCP amendment that includes review of a provision to allow minor modifications and variances, similar to the proposed project. The City does have a pending LCP Amendment, LCP-5-NPB-17-0084-1, to include such a provision in the certified LCP. However, the LCP amendment is still pending and has not been heard by the Commission. Thus, the City currently does not have any explicit authority to allow such deviation from the certified LCP, but has done so in this case. It is a substantial issue in this case because the granting of the variances resulted in a larger development which is inconsistent with the visual resource and natural landform policies of the certified LCP.

(3) The applicant claims that even without the variances, the proposed development would be problematic, but with them, the City has made possible building in the presently undeveloped western half of the lot/bluff face, as well as construction higher than would otherwise be allowed.

The issue here again is whether the proposed project adheres to the visual resource policies of the City’s certified LCP. Even without the variances, the proposed 4-level single-family residence would still impact the public view from Ocean Boulevard, even if the height of the building does not exceed the elevation of the street. This is because the beach and bay are at a lower elevation than the street, so the public view of the bay is a downward view, not a horizontal view straight across the top level of the house.

In addition, the City-approved project covers a much larger footprint than the existing house, and would encroach into an existing public view of the bay from Ocean Boulevard. Currently, the existing development on the project site is located along the eastern and middle portion of the site with the western portion undeveloped (Exhibit No. 3 and No. 4). Development on the western portion of the property may be allowed, as long as it adheres to the 4-foot sideyard development standard which the proposed development does, and it conforms to the other LCP
requirements regarding view protection and public access. The proposed new residence will encompass the entire lot and not just the eastern and middle portions. The issue that needs to be reviewed here is how the City-approved development affects public views and public access, and if it is consistent with the provisions of the LCP. With approval of the variance, the City allowed potential impacts to visual resources and natural landforms that would not have otherwise been allowed with a project that did obtain a variance and was consistent with the certified LCP. Thus, the appeal does raise a substantial issue in regards to consistency with the City’s certified LCP, including CLUP Policy 4.4.1-2, 4.4.2-3 and 4.4.1-3 and IP standards 21.30.100(B)(3) and (D)(1-2) and 21.30.100(B)(4) and (E).

**Significance of Issues Raised by Appeal**

Applying the five factors listed in the prior section clarifies that the appeal raises “substantial issue.”

The first factor is the degree of factual and legal support for the local government’s decision that the developments are consistent or inconsistent with the relevant provisions of the certified LCP. The City’s action in approving Local CDP2017-080 does not provide adequate factual and legal support for the finding of consistency with the relevant portions of the certified LCP as discussed above. The appellant’s appeal contentions do raise significant issues with respect to project consistency with the City’s certified LCP when considering the City’s factual and legal bases for approving the project. This factor supports a finding of substantial issue because the City did not further review the project’s impacts on public views even after the project’s bulk/massing was reduced, even though the LCP requires such analysis in order to protect public views.

The second factor is the extent and scope of the development as approved or denied by the local government. The extent and scope of the development is a total of 4,500 square feet to construct a single-family residence inclusive of the required parking area that through a City approved variance allows: 1) the development to exceed the maximum floor area; 2) to encroach 10 feet into the 10-foot rear yard setback along Way Lane (for a 0-foot setback); and; 3) to encroach 7 feet into the 10-foot front yard setback along Ocean Boulevard (for a 3-foot setback). The development results in impacts to visual resources and natural landforms inconsistent with the City’s certified LCP. This factor supports a finding of substantial issue.

The third factor is the significance of the coastal resources affected by the decision. One of the main objectives of the certified LCP is to Protect public coastal views from ... Ocean Boulevard. The impacts of the proposed project, as approved by the City, would impact scenic views from Ocean Boulevard and Fernleaf Ramp which are both public view points. Therefore, the City-approved project, would significantly and adversely affect coastal resources. This factor supports a finding of substantial issue.

The fourth factor is the precedential value of the local government’s decision for future interpretations of its LCP. The City’s action on this project would prejudice future interpretations of its certified LCP including interpretations relating to visually intrusive developments and the granting of variances that create added impacts to coastal resources. The City’s failure to identify and require an alternative project design which would preserve public views could set an adverse precedent for future projects and the cumulative effect of other tall
structures blocking public views would adversely affect coastal resources. This factor supports a finding of substantial issue.

The final factor is whether the appeal raises local issues, or those of regional or statewide significance. Visual resources and landforms are coastal resources of regional and statewide concern and the proposed project potentially impacts those significant resources. Therefore, the appeal raises issues of definite regional, if not, statewide significance. This factor supports a finding of substantial issue.

Therefore, in conclusion, the Commission finds that the local government’s action does raise substantial Local Coastal Plan or Chapter 3 public access policy issues. Therefore, substantial issue exists with respect to the approved project's consistency with the LCP or Chapter 3 public access policies.