

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



F22a

Filed:	1/22/18
49 th Working Day:	Waived
Staff:	F. Sy – LB
Staff Report:	7/26/2018
Hearing Date:	8/10/18

STAFF REPORT: APPEAL – SUBSTANTIAL ISSUE

Appeal Number:	A-5-NPB-18-0006
Applicant:	Nicholson Construction
Local Government:	City of Newport Beach
Local Decision:	Approval with Conditions
Appellant:	James M. Mosher
Project Location:	2607 Ocean Boulevard, Corona del Mar, City of Newport Beach
Project Description:	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.
Staff Recommendation:	Substantial Issue

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

The City-approved development is the construction of a four-level house below Ocean Boulevard on the face of a developed coastal bluff. The project may adversely impact public views of Newport Bay and China Cove Beach from Ocean Boulevard. 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 had been approved without the need for variances, the project would still be inconsistent with the certified LCP.

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 may adversely impact a public shoreline view from Ocean Boulevard that is protected by the City of Newport Beach certified Local Coastal Program (LCP).

TABLE OF CONTENTS

I. MOTION AND RESOLUTION.....	4
II. APPELLANT’S CONTENTIONS.....	4
III. LOCAL GOVERNMENT ACTION.....	5
IV. APPEAL PROCEDURES.....	5
V. FINDINGS AND DECLARATIONS.....	7
A. PROJECT DESCRIPTION	7
B. LOCAL COASTAL PROGRAM.....	8
C. FACTORS TO BE CONSIDERED IN SUBSTANTIAL ISSUE ANALYSIS	8
D. SUBSTANTIAL ISSUE ANALYSIS.....	9

EXHIBITS

[Exhibit No. 1 – James M. Mosher Appeal](#)

[Exhibit No. 2 – Newport Beach Resolution No. 2075](#)

[Exhibit No. 3 – Project Plans](#)

[Exhibit No. 4 – Vicinity Map](#)

[Exhibit No. 5 – Letter from John P. Ramirez dated February 5, 2018](#)

[Exhibit No. 6 – Letter from City of Newport Beach dated February 22, 2018](#)

[Exhibit No. 7 – Letter from John P. Ramirez dated March 22, 2018](#)

[Exhibit No. 8 – Letter from City of Newport Beach dated March 22, 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 a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the 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 LCP-required 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, pulling back the game room on the second floor to provide more visual depth from Way Lane; reducing the width and height of the screen wall around the rooftop deck; removing a horizontal privacy screen on the roof deck; adding siding to the building; and reducing the size of glass elements and building columns to reduce bulk/mass. The appellant 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 District 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 at 5:00 p.m. 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 District 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.

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.*

Under Section 30603(a)(1) of the Coastal Act, the City's approval of the project is appealable to the Commission because it is located between the sea and first public road, and within 300 feet of the beach.

Exhaustion of Local Appeal Process

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 appellant has indicated that he attempted to exhaust the local appeal process by submitting an appeal to the City on December 21, 2017, but, 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 fee. Under Section 13111(a), the appellant does not need to exhaust the local appeal process prior to submitting an appeal to the Coastal Commission because the City of Newport Beach does charge a fee to file an appeal of a local coastal development permit.

Hearing Procedure and Grounds for an Appeal

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].

As stated above, the project is located in the appealable area. 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. Under Section 13115 of Title 14 of the California Code of Regulations, 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 is 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. 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.

V. FINDINGS AND DECLARATIONS

A. PROJECT DESCRIPTION

The project site is a 4,257 square foot irregularly shaped lot 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.

North (landward) and west of the project site rising vertically is city property that is largely undeveloped and vegetated bluff face ([Exhibit No. 3, pages 1-2](#)). Landward of this City property, running down the bluff face, is the Fernleaf Ramp right-of-way, which descends the bluff 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 and the Fernleaf Ramp, 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](#)).

Under the LCP, 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-to-4 feet along Way Lane and a (legal nonconforming) setback of 7 feet along the Ocean Boulevard/Fernleaf Ramp side.

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.

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. The project site takes its address from Ocean Boulevard which is approximately 30 feet north of the project site, even though the site is situated below Ocean Boulevard between Fernleaf Ramp and Way Lane ([Exhibit No. 4](#)). The City's certified CLUP (CLUP Policy 4.4.1-6) identifies Ocean Boulevard as a roadway where coastal public views shall be protected:

COASTAL LAND USE PLAN (CLUP)

4.4 Scenic and Visual Resources

4.4.1 Coastal Views

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:

COASTAL LAND USE PLAN (CLUP)

4.4 Scenic and Visual Resources

4.4.2 Bulk and Height Limitation

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:

IMPLEMENTATION PLAN (IP)

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.*

IMPLEMENTATION PLAN (IP)

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, the top of the City-approved residence may still impact public views of the shoreline, and the structure includes a roof deck that will likely be furnished with objects that would further obstruct the public's shoreline views.

The LCP sets forth additional policies that protect scenic and visual resources and also require new development to minimize natural landform alteration. These policies 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, beach, ocean and surrounding areas. While the project has been designed to be below the top of curb of Ocean Boulevard as required by some of the policies in the LCP, the height and design of the project may still adversely impact public coastal view opportunities protected by other policies of the LCP by extending into the view lines from Ocean Boulevard to the bay and beach below.

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.

As 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).

During the course of obtaining approval from the City, the applicant was aware that the visual impact was a significant concern so the applicant worked with the City to design a project that would minimize the impact on the public's view of the shoreline. Thus, visual simulations and site observations at the project site (including the use of story-poles) were prepared and analyzed and ultimately the Planning Commission determined that the project as modified would not significantly impact public views. The Planning Commission modifications included reduction in square footage, removal of project elements, reduction of the height of a proposed rooftop screen wall to the minimum necessary to provide a required guardrail for the rooftop deck, and that the guardrail is constructed of transparent materials.

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 by almost 2 feet (22 inches). It should be noted that because the beach and bay are at a lower elevation than the street Ocean Boulevard, the public view of the bay is a downward view, not a horizontal view straight across the top level of the house.

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 photographs of the site, one with the story poles included and the

other with a visual simulation of the building that were provided by the applicant. **Photo No. 1** is the existing view taken from one point on the seaward side of Ocean Boulevard that includes the story poles connected with a string of small pink flags. It shows the Fernleaf Ramp in the foreground, the project site, and then the coastal public view. **Photo No. 2** is taken from the same location as the first photo (Photo No. 1), but instead of the story poles it includes a visual simulation of the City-approved building.



Photo No. 1. Existing view from the seaward side of the Ocean Blvd.



Photo No. 2. Proposed view from the seaward side of the Ocean Blvd.

Photo No. 1 and **No. 2** both show that visual impacts are avoided since the views the proposed structure obscures are those of the existing buildings only. However because of the inclusion of the visual simulation in the second photograph, **Photo No. 2** shows it better. The applicant also points out that the tallest structures located on the western (the right side of the picture) top of the building are roof top deck glass guardrail screens and are not solid structures and instead are to be made of transparent materials and thus views of the coast will be available through them

(Exhibit No. 3, page 9). These glass guardrail screens were the structures that the Planning Commission required to be reduced in size and made of a clear material.

The Commission has concerns with glass guardrail screens in general as coastal views through them are difficult and problematic since views are not clearly available through them. The glass screens material, even though transparent, and supporting structures for these screens can impact the view through them, especially over time as the material becomes more opaque. In addition, roof top elements, such as chairs, tables, BBQ, etc., behind these glass screens located on the rooftop can also intrude into the protected public view. Elimination of such glass guardrail screens and other roof top elements better protects public views from obstruction. In these two photographs (above) no public views are impacted by the deck or its guardrails. However, the photographs above were taken from only one point on Ocean Boulevard.

In addition to the still pictures, the applicant provided a video taken from a car traveling along Ocean Boulevard passing the project site with the story poles still in place and showing the views through the project site. Commission staff has provided stills from the video below. **Photo No. 3** shows coastal views from the western section of the project site and **Photo No. 4** shows coastal views from the eastern section of the project site. The top of the story poles shown in the pictures represent the highest point of the proposed roof top transparent guardrail screens.



Photo No. 3. Proposed west view while traveling in a car along the seaward side of Ocean Blvd.



Photo No. 4. Proposed east view while traveling in a car along the seaward side of Ocean Blvd.

Unlike the **Photos No 1** and **No. 2**, these video stills show open water public views are impacted by the proposed project. The view of China Cove Beach below would be completely obscured by the City-approved structure. It is unclear if the views impacted are only from the transparent glass guardrail screens or also from other building elements below the top of the screens. Either way, these video stills show that public views of the water and shoreline are impacted by the development. This is a different impact than the impact shown by **Photos No. 1** and **No. 2**, where it did not appear that public views would be impacted by the proposed project. The difference is in the point on Ocean Boulevard from where the images were taken. Thus, because the visual analysis does show that the public's view of the shoreline will be obstructed, 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. The size of the lot is not typical since it has a lot depth ranging from 35 feet to 53 feet and a width of 110 feet. The Planning Commission City took this into account in its review of the project and determined that the

proposed development could be concentrated within the existing footprint, but to be built out to a size similar to other development in the surrounding area, development would have to either be higher, exceeding the top of curb of Ocean Boulevard, or cut deeper into the bluff, causing more landform alteration. The City also looked into revising the design of the project to minimize landform alteration, including a design with detached development components, but the shape of the lot was too small and irregularly shaped. Ultimately, the residence was reduced in size, lowered in height, designed to use the existing structure's foundation and retaining walls, which have a stepped design and also to reduce the amount of new cuts into the slope. The front and rear yard setback variances are instrumental in making this proposed design alternative feasible. Even though the City approved a variance, the City's action resulted in a project that minimizes the impacts upon the natural landforms consistent with the LCP. Therefore, the project has minimized landform alteration, and this portion of the appeal does not raise a substantial issue. However, as noted above, since public views are impacted by the proposed project, inconsistent with the certified LCP, the City-approved development does raise a substantial issue

Located 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 existing 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, although the CDP authorizing the construction of these improvements has been issued by the City, this portion of the proposed project still needs additional authorization from the City, so it has not actually obtained all final non-CDP local approvals from the City.

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. The property upon which the applicant is proposing to install gate is public property. While the gate only leads to a pathway to the proposed private residence and does not lead to a public accessway, it is nonetheless a private gate placed on public property that will impact public access to public view opportunities. Thus, because the installation of the gate will impact public view opportunities and public access, the appeal does raise a substantial issue in regards to consistency with the Chapter 3 public access policies of the Coastal Act.

In order to better analyze the potential view impacts from the Ocean Boulevard public sidewalk, the applicant has provided **Photo No. 5** with story poles included in the picture from this location. Another photograph shows the same view, but instead of story poles it includes a visual simulation of the City-approved building, which are located below. **Photo No. 5** is the existing view taken from the public sidewalk along Ocean Boulevard that also includes the story poles. It shows the downcoast (east) public view with the existing residential development in the background. **Photo No. 6** is taken from the same location as the first, but instead of the story poles it includes a visual simulation of the building.



Photo No. 5. Existing view from the Ocean Boulevard Public Sidewalk.



Photo No. 6. Proposed view from the Ocean Boulevard Public Sidewalk.

Photo No. 5 and **No. 6** both show that visual impacts are avoided since the proposed structure obscures only the views of the buildings in the background. However because of the inclusion of the visual simulation in the other photograph, **Photo No. 6** shows it better. While these photographs show that there are no visual impacts at this location as a result of the project, there are still potential visual impacts from another point on Ocean Boulevard as previously identified in the applicant's video submittal and video stills discussed earlier in the staff report (Photo Nos. 3 & 4).

Therefore since the development impacts coastal public views and public access, the appellant's claim that the project impacts coastal public views inconsistent with the City's certified LCP does raise a substantial issue with respect to project consistency with the certified LCP and the Chapter 3 public access policies of the Coastal Act.

- (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 the floor area ration and setback requirements of 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 in the certified LCP; 2) to encroach 10 feet into the 10-foot rear yard setback along Way Lane required by the LCP (for a 0-foot setback); and; 3) to encroach 7 feet into the 10-foot front yard setback along Ocean Boulevard required by the LCP (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 allowing modifications to, or variances from, the requirements contained in the certified LCP. Here, application of the certified LCP policies to the proposed project results in a development that is smaller than neighboring homes. This result is not inconsistent with any provision in the LCP, nor is there a provision of the LCP that allows exceptions to LCP requirements in such circumstances. Therefore, the project as approved is inconsistent with the floor area ratio and setback requirements, so this allegation raises a substantial issue of conformity with the LCP. The Commission will review the proposed project de novo, including the reduced yard areas, should it find that the appeal raises a substantial issue, as staff is recommending.

The appellant references a pending City LCP amendment request 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 Request, LCP-5-NPB-17-0084-1, to include such a provision in the certified LCP. However, the LCP amendment request is still pending and has not been heard by the Commission. The proposed amendment to the LCP, therefore, is not part of the certified LCP or the standard of review for determination of whether this appeal raises a substantial issue.

- (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.

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](#)). The existing house on the project site, as seen in the photographs above, does not obstruct public shoreline views from Ocean Boulevard. Development on the western portion of the property may be allowed, as long as it adheres to the 4-foot side yard development standard which the proposed development does, and it conforms to the other LCP requirements, including 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 and Chapter 3 policies of the Coastal Act that protect coastal resources.

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).

Significance of Issues Raised by Appeal

Applying the five factors listed in the prior section establishes that the appeal raises a "substantial issue," and the staff recommends the Commission accepts the appeal and hold a de novo hearing on the permit application.

The first factor is 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 certified LCP. The City's analysis does not support a finding of consistency with the view protective provisions the City's 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 approved by the City is a 4,500 square foot 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). Thus, the development does not comply with the LCP's requirements limiting the size of new development, and it causes impacts to visual resources in an area where coastal views are explicitly protected by 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, which is a significant public view. Therefore, the City-approved project would

significantly and adversely affect coastal resources protected by the City's LCP. 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 LCP has no provisions for minor modifications and variances when special circumstances result in hardships to specific property owners. Approving a City decision here to allow a variance to the LCP's mandatory setbacks and floor area limits would set a precedent for allowing exceptions to other LCP provisions in the future, when there are no standards in the LCP for determining when variances are appropriate. Especially as the LCP was just recently certified, this precedent could affect approval of projects for years to come. In addition, 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. 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 are coastal resources of regional and statewide concern and the proposed project potentially impacts those significant resources. The Coastal Act and LCP protect coastal views and visual resources. In addition, while the issues raised by this project do involve local issues relating to visual resources in Newport Beach, it also raises important statewide concerns related to enforcement of certified LCP provisions. 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 issues with respect to the approved project's consistency with the Newport Beach LCP and Chapter 3 public access policies, and the Commission will accept the appeal and set the matter for a de novo hearing on the permit application.