

**CALIFORNIA COASTAL COMMISSION**

SAN DIEGO DISTRICT OFFICE  
7575 METROPOLITAN DRIVE, SUITE 103  
SAN DIEGO, CA 92108-4402  
VOICE (619) 767-2370  
FAX (619) 767-2384



# Th16a

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Staff: CH-SD  
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## STAFF REPORT: DE NOVO

**Application No.:** A-6-ENC-13-0210

**Applicant:** James & Karla Lindstrom

**Location:** 132 Neptune Avenue, Encinitas, San Diego County.  
(APN: 256-371-14)

**Project Description:** Request by James and Karla Lindstrom to set aside the July 13, 2016 approval and either revise or delete Special Condition 3(b), regarding removal of structures in the event of hazardous situations, in compliance with remand by the Superior Court of California, San Diego County (Case No. 37-2016-00026574-CU-WM-NC), to allow construction of a new 2-story, 3,553 sq. ft. home with a 950 sq. ft. garage over a 1,355 sq. ft. basement on an existing 6,776 sq. ft. vacant lot; installation of 17 (12 inch diameter) piers at a depth of 18 inches to support planter boxes; above ground spa.

**Staff Recommendation:** Approval with conditions on de novo.

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### STAFF NOTE

On July 13, 2016, the Coastal Commission approved coastal development permit (CDP) No. A-6-ENC-13-0210 with several special conditions. In August 2016, the applicant sued the Commission, objecting to three of the special conditions. Litigation continued until September 2019, when the Fourth District Court of Appeal issued a published

opinion<sup>1</sup>. The opinion upheld all special conditions with the exception of **Special Condition 3(b)**, regarding removal of the development authorized by the permit in the situation of extreme hazards ([Exhibit 9](#)). The court held that while Special Condition 3(b) was consistent with the City's LCP, the condition was too vague and not authorized by the Coastal Act. In July of 2020, the Commission and the Lindstroms stipulated to an order by the court for the Commission to set aside the July 2016 approval and either revise or delete Special Condition 3(b). Thus, this action follows the court's order. On remand, the Commission is directed to set aside its original approval and revise or delete Special Condition 3(b) ([Exhibit 9](#)). While the Commission retains its discretion over the matter, today's action must be in accordance with the court's opinion.

## SUMMARY OF STAFF RECOMMENDATION

Staff recommends that as part of its action, the Commission approve certain revisions to Special Condition 3(b). The revisions more explicitly tie removal of the structure to coastal hazards and make other changes to ensure the legality of removal. The applicant has agreed to the revised Special Condition as proposed in this report. This staff report remains largely unmodified since it was prepared for the July 2016 hearing, but has been updated to reflect relevant actions since July of 2016.

With the Commission's July 2016 decision being upheld by the Court with the exception of Special Condition No. 3(b), the Commission prevailed in two holdings of statewide significance: the calculation of erosion plus the factor of safety to determine a bluff setback, and the imposition of a waiver of any rights to construct shoreline protection devices in the future. Staff does not recommend any changes to those conditions as approved in July 2016 and does not recommend any other changes to special conditions.

As approved in July 2016, Special Condition No. 3(b) required the applicant to agree, on behalf of themselves and all successors and assigns, that the landowner shall remove the development authorized by the permit, including the residence and foundation, if any government agency ordered that the structures were not to be occupied due to threat from hazards including waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. Additionally, as approved in July 2016, Special Condition No. 3(b) required that the landowner obtain a CDP to remove any recoverable debris from portions of the development that falls onto the beach, and to dispose of the materials in an approved location.

As revised, Special Condition No. 3(b) clarifies when the applicant or any successors and/or assigns are required to remove all or a portion of the development authorized by this permit and restore the site. Specifically, the revised SC No. 3(b) requires removal of

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<sup>1</sup> *Lindstrom v. California Coastal Com.* ((2019) 40 Cal.App.5th 73. A published opinion means the holdings are controlling law for the state. (See Cal. Rules of Court, rule 8.1105(b) and (c); see *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 704, 710 [rules regarding publication provide a uniform and reasonable procedure to assure changes to existing precedential decisions are applicable to all litigants.])

development authorized by this permit and restoration of the site if the City or any other government agency with jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that the structures are currently and permanently unsafe for occupancy or use due to damage or destruction from waves, flooding, erosion, bluff retreat, landslides, or other hazards related to coastal processes, and that there are no feasible measures that could make the structures suitable for habitation or use without the use of bluff or shoreline protective devices ([Exhibit 9](#)).

The proposed project involves the construction of a 2-story, 3,553 sq. ft. home with a 1,355 sq. ft. basement and a 950 sq. ft. attached garage on a 6,776 square foot vacant blufftop property. The project site is a coastal blufftop lot located on the west side of Neptune Avenue, approximately two blocks north of Moonlight State Beach. The existing property is vacant, and no shoreline armoring fronts the site. The basement and first floor are proposed to be located approximately 40 feet from the coastal bluff edge and the second floor is proposed to be cantilevered 8 feet west to within approximately 32 feet of the bluff edge.

The City of Encinitas' certified LCP requires that new development on bluff top lots be set back such that it will be safe from failure and erosion over its lifetime. In order to find the appropriate geologic setback, the Certified LCP requires that not only must an adequate factor of safety of 1.5 be shown under present conditions, but that it must also demonstrate an adequate factor of safety of 1.5 will be maintained over 75 years and cover all types of slope failure. The LCP defines the economic life of new development as 75 years.

The proposed project includes a large basement area and shoring beams located as close as 40 feet from the bluff edge. Although the proposed large basement area and shoring beams would initially be buried under the home, the basement area and shoring beams may become exposed in the future as the bluff erodes. Thus, as proposed at 40 feet from the bluff edge, shoring beams and the western wall of the basement have the potential to create adverse visual impacts if exposed by erosion in the future. The applicants are also proposing to grade within 40 feet of the bluff edge to support planter boxes and an above ground spa. To ensure bluff stability, the LCP prohibits improvement within 40 feet of the top edge of the coastal bluff except for minor at grade improvements.

Staff recommends that the Commission **approve** the de novo permit with several special conditions. The primary issue raised by the subject development relates to the appropriate siting of the home. The Commission's staff geologist and coastal engineer have reviewed the project and have determined that in order for the residence to be reasonably expected to be safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization, the foundation and the proposed basement and shoring beams must be sited 60 to 62 feet from the bluff edge. The setback required to assure geologic stability would still allow for a reasonably sized home to be constructed on the site. The average size of bluff top homes on the same block as the subject site is approximately 2,900 sq. ft. As conditioned, the applicant would be able to construct a new home that is approximately 3,500 sq. ft. Thus, Special Condition 1 requires that the applicant submit revised plans incorporating a 60 to 62-foot foundation

setback from the bluff edge and that all grading within 40 feet of the coastal bluff edge be eliminated.

Special Condition 2 also requires that the applicants provide side yard view corridors. In addition, Special Condition 3 has been included that requires the applicant to waive any rights to construct shoreline armoring in the future to protect the new home and requires the applicants to acknowledge that the development must be removed if threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. Special Condition 4 requires that the applicant submit an amendment to this CDP to remove any cantilevered portions of the home if a portion ever becomes located seaward of the bluff edge as a result of future erosion.

Commission staff recommends that the Commission **APPROVE** de novo coastal development permit application A-6-ENC-13-0210, as conditioned. The motion is on page 6. The standard of review is the certified City of Encinitas Local Coastal Program and the public access policies of the Coastal Act. It is staff's understanding that the applicant is in agreement with the revised special condition.

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## EXHIBITS

[Exhibit 1 – Project Location](#)

[Exhibit 2 – Site Photo 1](#)

[Exhibit 3 – Site Photo 2](#)

[Exhibit 4 – Nearby Shoreline Armoring](#)

[Exhibit 5 – Size of Blufftop Homes on Same Block as Subject Site](#)

[Exhibit 6 – City’s Resolution of Approval](#)

[Exhibit 7 – Appeals](#)

[Exhibit 8 – Fourth District Court of Appeal Remand Order](#)

[Exhibit 9 – Special Condition No. 3, as Revised in Strikeout/Underline](#)

## MOTION AND RESOLUTION

### Motion:

I move that the Commission **approve** Coastal Development Permit A-6-ENC-13-0210 subject to the staff recommendation.

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of Commissioners present.

### Resolution:

The Commission hereby approves the Coastal Development Permit for the proposed project and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

## I. STANDARD CONDITIONS

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the applicant or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the applicant to bind all future owners and possessors of the subject property to the terms and conditions.

## II. SPECIAL CONDITIONS

1. **Revised Final Plans.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit for review and written approval of the Executive Director, revised final plans in substantial conformance with the submitted plans dated December 15, 2012, by Wolf Design Build Inc. The revised final plans shall be approved by the City of Encinitas and include the following:
  - a) The foundation of the proposed home and the proposed basement and shoring beams shall be located no less than 60 to 62 ft. feet landward of the existing upper bluff edge on the northern and southern portions of the site, respectively.
  - b) The residence may include a reduced front yard setback, if approved pursuant to a variance from the City of Encinitas.
  - c) The proposed development shall be specifically designed and constructed such that it could be removed in the event of endangerment of the residential structure.
  - d) All grading and excavation shall be prohibited within 40 ft. of the existing bluff edge and all references to the 17 piers on all plans shall be eliminated.
  - e) All runoff from impervious surfaces on the top of the bluff shall be collected and directed away from the bluff edge towards the street.
  - f) Approved accessory improvements (i.e., decks, patios, walls, windscreens, etc.) located on the bluff top property shall be detailed and drawn to scale on the final approved site plan and shall include measurements of the distance between the accessory improvements and the bluff edge taken at three or more locations. The locations for these measurements shall be identified through permanent markers, benchmarks, survey position, written description, or other method that enables accurate determination of the location of all structures on the site. The plans shall indicate that the approved accessory improvements are not entitled to protection from shoreline armoring. Any new Plexiglas or other glass wall shall be detailed on the final plans and shall be non-clear, tinted, frosted or incorporate other elements to inhibit bird strikes.

The permittee shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

- 2. Revised Landscape Plans.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit to the Executive Director for review and written approval, final landscaping and fence plans approved by the City of Encinitas. The landscaping and fence plans shall include the following:
- a) A view corridor a minimum of 5 feet wide shall be created in the north and south side yards of the subject site. All proposed landscaping in this yard area shall be maintained at a height of three feet or lower (including raised planters) to preserve views from the street toward the ocean. All landscape materials within the identified side yard setbacks shall be species with a growth potential not to exceed three feet at maturity.
  - b) Any fencing or gates within the side yard setbacks shall permit public views and have at least 75 percent of its surface area open to light.
  - c) All landscaping shall be drought-tolerant and native or non-invasive plant species. No plant species listed as problematic or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California, may be employed or allowed to naturalize or persist on the site. No plant species listed as noxious weed by the State of California or the U.S. Federal Government may be utilized within the property.
  - d) New permanent irrigation systems on the blufftop property are prohibited.
  - e) A written commitment by the applicants that, five years from the date of the issuance of the coastal development permit for the residence, the applicants will submit for the review and written approval of the Executive Director, a landscape monitoring report prepared by a licensed Landscape Architect or qualified Resource Specialist, that certifies whether the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

If the landscape monitoring report indicates the landscaping is not in conformance with or has failed to meet the performance standards specified in the landscaping plan approved pursuant to this permit, the applicants, or successors in interest, shall submit a revised or supplemental landscape plan for the review and written approval of the Executive Director. The revised landscaping plan must be prepared by a licensed Landscape Architect or Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

The permittee shall undertake the development in accordance with the approved landscape plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Commission-



approved amendment to the permit unless the Executive Director determines that no such amendment is legally required

**3. No Future Bluff or Shoreline Protective Device.**

- a) By acceptance of this Permit, the applicants agree, on behalf of themselves and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-6-ENC-13-0210 including, but not limited to, the residence and foundation in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. By acceptance of this Permit, the applicants hereby waive, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235.
- b) By acceptance of this Permit, the applicants further agree, on behalf of themselves and all successors and assigns, that they are required to remove all or a portion of the development authorized by this permit and restore the site, if:
  - 1) The City or any government agency with jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that the structures are currently and permanently unsafe for occupancy or use due to damage or destruction from waves, flooding, erosion, bluff retreat, landslides, or other hazards related to coastal processes, and that there are no feasible measures that could make the structures suitable for habitation or use without the use of bluff or shoreline protective devices.
- c) In the event the edge of the bluff recedes to within 10 feet of the principal residence but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed coastal engineer and geologist retained by the applicants, that addresses whether any portions of the residence are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the principal residence without shore or bluff protection, including but not limited to removal or relocation of portions of the residence. The report shall be submitted to the Executive Director and the appropriate local government official. If the geotechnical report concludes that the residence or any portion of the residence is unsafe for occupancy, the permittee shall, within 90 days of submitting the report, apply for a coastal development permit amendment to remedy the hazard, which shall include removal of the threatened portion of the structure.

**4. Monitoring and Future Removal of the Cantilever Portion of the Structure.**

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit to the Executive Director for review and written approval, a

plan prepared by a licensed geologist or geotechnical engineer for a bluff monitoring plan which includes the following:

- a) Current measurements of the distance between the cantilevered portion of the home and the bluff edge (as defined by Section 13577 of Title 14 of the California Code of Regulations), and provisions for these measurements to be taken every five years after completion of construction for the life of the project. The locations for these measurements shall be identified through permanent markers, benchmarks, survey position, written description, etc. so that annual measurements can be taken at the same location and comparisons between years can provide information on bluff retreat.
- b) Provisions for submittal of a report to the Executive Director of the Coastal Commission on June 1<sup>st</sup> every five years beginning on the date of Commission approval of this CDP. Each report shall be prepared by a licensed geologist or geotechnical engineer. The report shall contain the measurements and evaluation required by subsection a) of this Special Condition. The report shall also summarize all measurements and provide analysis of trends, annual retreat or rate of retreat, and the stability of the overall bluff face and the impact of the cantilevered portion of the home on the natural bluff. The report shall include recommendations on how to remove any cantilevered portion of the home that is seaward of the bluff edge.
- c) An agreement that if after inspection, it is apparent that any cantilevered portion of the home is seaward of the bluff edge, the permittee shall apply for a Coastal Development Permit amendment within 90 days of submittal of the monitoring report to remove the cantilevered portion of the home located seaward of the bluff edge.

The permittee shall undertake monitoring in accordance with the approved plan. Any proposed changes to the approved plan shall be reported to the Executive Director. No changes to the plan shall occur without a Coastal Commission approved amendment to this coastal development permit amendment unless the Executive Director determines that no amendment is legally required.

**5. Best Management Practices and Construction Responsibilities.** The permittee(s) shall comply with the following construction-related requirements:

- a) All debris resulting from demolition and construction activities shall be removed and disposed of at an authorized disposal site.
- b) Temporary sediment control Best Management Practices (BMPs) such as straw bales, fiber rolls, or silt fencing shall be installed prior to, and maintained throughout, the construction period to intercept and slow or detain runoff from the construction, staging, and storage/stockpile areas, allow entrained sediment and other pollutants to settle and be removed and prevent discharge of sediment and pollutants toward the bluff edge. When no longer required, the temporary

sediment control BMPs shall be removed. Fiber rolls shall be 100% biodegradable and shall be bound with non-plastic biodegradable netting such as jute, sisal, or coir fiber; photodegradable plastic netting is not an acceptable alternative. Rope used to secure fiber rolls shall also be biodegradable, such as sisal or manila.

- 6. Assumption of Risk, Waiver of Liability and Indemnity Agreement.** By acceptance of this permit, the applicants acknowledge and agree (i) that the site may be subject to hazards from erosion and coastal bluff collapse; (ii) to assume the risks to the applicants and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.
- 7. Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit to the Executive Director for review and approval, documentation demonstrating that the landowner has executed and recorded a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property (hereinafter referred to as the "Standard and Special Conditions"); and (2) imposing all Standard and Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the applicants' entire parcel. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.
- 8. Bluff Deed Restriction.**

  - a) No development, as defined in Section 30106 of the Coastal Act, shall occur in the open space area between the bluff edge and the western property line without an amendment to CDP A-6-ENC-13-0210, unless the Executive Director determines an amendment is not legally required. The western property line is currently located approximately 10 ft. seaward of the existing bluff edge.
  - b) PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall execute and record a deed restriction in a form and content acceptable to the Executive Director, reflecting the above restrictions on

development in the designated open space area. This prohibition on development shall apply to the bluff face as the location of the bluff edge (“bluff edge” as defined in Section 30.04 of the certified Encinitas Implementation Plan) changes over time, due to the landward retreat of the bluff edge. The current location of the bluff face shall be described and depicted in an Exhibit attached to the Notice of Intent to Issue Permit (NOI) that the Executive Director issues for this permit.

- c) The deed restriction shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner in perpetuity.

### III. FINDINGS AND DECLARATIONS

#### A. Project Description and Background

The coastal permit approved by the City of Encinitas allows for the construction of a 2-story, 3,553 sq. ft. home with a 1,355 sq. ft. basement and a 950 sq. ft. attached garage on a 6,776 sq. ft. vacant blufftop lot. The basement and first floor are proposed to be located approximately 40 feet from the coastal bluff edge and the second floor is proposed to cantilever within 32 feet of the bluff edge. The basement is proposed to be constructed using 24 steel shoring beams that will be excavated down to a maximum elevation of 14.5 feet below existing grade, which is also the proposed depth of the basement foundation. In addition, the applicants propose to install 17 (12-inch diameter) piers at a depth of 18 inches, located from 7 feet to 40 feet from the bluff edge, to support planter boxes and an above ground spa.

The subject site is located on the west side of Neptune Avenue, approximately ¼ mile north of the Moonlight State Beach in the City of Encinitas ([Exhibit 1](#)). The subject property is currently not protected by any shoreline armoring ([Exhibits 2-3](#)) and there is no Commission permit history for the site.

Staff recommends that as part of its action, the Commission approve certain revisions to Special Condition 3(b). The revisions more explicitly tie removal of the structure to coastal hazards and make other changes to ensure the legality of removal. The applicant has agreed to the revised Special Condition as proposed in this report. This staff report remains largely unmodified since it was prepared for the July 2016 hearing, but has been updated to reflect relevant actions since July of 2016.

With the Commission’s July 2016 decision being upheld by the Court with the exception of Special Condition No. 3(b), the Commission prevailed in two holdings of statewide significance: the calculation of erosion plus the factor of safety to determine a bluff setback, and the imposition of a waiver of any rights to construct shoreline protection devices in the future. Staff does not recommend any changes to those conditions as approved in July 2016 and does not recommend any other changes to special conditions.

The standard of review is the certified City of Encinitas Local Coastal Program and the public access policies of the Coastal Act.

## **B. Geologic Stability/Blufftop Development**

The project approved by the City is located within the City's Coastal Blufftop Overlay Zone. The following policies are applicable:

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

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

Public Safety Policy 1.6 of the City's Land Use Plan requires, in part, that:

*The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*

[ . . . ]

*e. Permitting pursuant to the Coastal Bluff Overlay Zone, bluff repair and erosion control measures on the face and at the top of the bluff that are necessary to repair human-caused damage to the bluff, and to retard erosion which may be caused or accelerated by land-based forces such as surface drainage or ground water seepage, providing that no alteration of the natural character of the bluff shall result from such measures, where such measures are designed to minimize encroachment onto beach areas through an alignment at and parallel to the toe of the coastal bluff, where such measures receive coloring and other exterior treatments and provided that such measures shall be permitted only when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply; and*

*f. Requiring new structures and improvements to existing structures to be set back 25 feet from the inland blufftop edge, and 40 feet from coastal blufftop edge with exceptions to allow a minimum coastal blufftop setback of no less than 25 feet. For all development proposed on coastal blufftops, a site-specific geotechnical report shall be required. The report shall indicate that the coastal setback will not result in risk of foundation damage resulting from bluff erosion or retreat to the principal structure within its economic life and with other engineering evidence to justify the coastal blufftop setback. [ . . . ]*

[ . . . ]

***In all cases, all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and***

*the applicants shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City. [Emphasis added]*

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

Public Safety Policy 1.6g of the City's certified LUP states, in part:

*The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:*

[ . . . ]

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

Section 30.34.020(B)1a of the City's certified IP states, in part:

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

*a. Principal and accessory structures closer than 40 feet but not closer than 25 feet from the top edge of the coastal bluff, as reviewed and approved pursuant to subsection C "Development Processing and Approval" below. This exception to allow a minimum setback of no less than 25 feet shall be limited to additions or expansions to existing principal structures which are already located seaward of the 40 foot coastal blufftop setback, provided the proposed addition or expansion is located no further seaward than the existing principal structure, is setback a minimum of 25 feet from the coastal blufftop edge and the applicant agrees to remove the proposed addition or expansion, either in part or entirely, should it become threatened in the future. Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment...*

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

*DEVELOPMENT PROCESSING AND APPROVAL. In addition to findings and processing requirements otherwise applicable, the following establishes specific processing and finding requirements for proposed development within the Coastal Bluff Overlay Zone...*

*1. Development and improvement in compliance with the development standards in paragraph B "Development Standards," proposing no structure or facility on or within 40 feet of the top edge of the coastal bluff (except for minor accessory structures and improvements allowed pursuant to Section*

*30.34.02(B)1b, and proposing no preemptive measure as defined below, shall be subject to the following: submittal and acceptance of a site-specific soils report and geotechnical review described by paragraph D "Application Submittal Requirements" below. The authorized decision-making authority for the proposal shall make the findings required based on the soils report and geotechnical review for any project approval. A Second Story cantilevered portion of a structure which is demonstrated through standard engineering practices not to create an unnecessary surcharge load upon the bluff area may be permitted 20% beyond the top edge of bluff setback if a finding can be made by the authorized agency that no private or public views would be significantly impacted by the construction of the cantilevered portion of the structure.*

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

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

- 1. Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site;*
- 2. Historic, current and foreseeable-cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;*
- 3. Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features, such as bedding, joints and faults;*
- 4. Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;*
- 5. Impact of construction activity on the stability of the site and adjacent area;*

6. *Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);*
7. *Potential erodibility of site and mitigating measures to be used to ensure minimized erosion problems during and after construction (i.e., landscaping and drainage design);*
8. *Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data;*
9. *Potential effects of seismic forces resulting from a maximum credible earthquake;*
10. *Any other factors that might affect slope stability;*
11. *Mitigation measures and alternative solutions for any potential impacts.*

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

*In addition to the above, each geotechnical report shall include identification of the daylight line behind the top of the bluff established by a bluff slope failure plane analysis. This slope failure analysis shall be performed according to geotechnical engineering standards, and shall:*

- ***Cover all types of slope failure.***
- ***Demonstrate a safety factor against slope failure of 1.5.***
- ***Address a time period of analysis of 75 years... [Emphasis added]***

Policy 23.24.020 of the City's certified Implementation Plan (IP) states, in part:

*23.24.020 - Purpose and Goals. The purpose of this Chapter is to establish minimum requirements for grading, excavating and filling of land, to provide for the issuance of grading permits and to provide for the enforcement of the requirements. This Chapter is adopted pursuant to, and to implement provisions of, the Encinitas General Plan and certified Local Coastal Program Land Use Plan (LUP). It is the intent of the City to protect life and property and promote the general welfare; enhance and preserve the physical environment of the community; and maintain the natural scenic character of the City. The provisions of*



*this Chapter shall be administered to achieve, to the extent possible, appropriate goals and policies of the General Plan/LUP as well as the following goals: Ord. 94 - 06)*

[...]

*U. Grading: Any land disturbance or land fill, or removal and recompaction, or combination thereof that results in the displacement, removal, excavation, import, export or recompaction of soil. (Ord. 2008- 03)*

Policy 23.24.090 of the City's certified Implementation Plan (IP) states, in part:

*23.24.090 - General Exemptions. All land -disturbing or land-filling activities or soil storage shall be undertaken in a manner designed to minimize surface runoff, erosion and sedimentation and to safeguard life, limb, property, and the public welfare. A person performing such activities need not apply for a permit pursuant to this Chapter, if all the following criteria are met:*

[...]

*G. The activity does not take place on an inland or coastal bluff, within 100 feet by horizontal measurement from the top of an inland or coastal bluff, the bank of a watercourse, the mean high water mark (line of vegetation) of a body of water or within the wetlands associated with a watercourse or water body, whichever distance is greater. (Ord. 2008 -03)*

The project approved by the City consists of the construction of a nearly 6,000 sq. ft. two-story single-family home including a basement and attached garage on a coastal bluff that is subject to erosion. The residence would be located within the City's Coastal Bluff Overlay Zone and the home's foundation would be sited 40 feet from the edge and a cantilevered second floor would be sited 32 feet from the bluff edge of an approximately 65-foot-high coastal bluff, subject to marine erosion.

Coastal bluffs in Encinitas are subject to a variety of erosive forces and conditions (e.g. wave action, reduction in beach width, block failures and landslides). As a result, the bluffs and blufftop lots in the Encinitas area are considered a hazard area. Furthermore, in 1986 the Division of Mines and Geology mapped the entire Encinitas shoreline as an area susceptible to landslides, i.e. mapped as either "Generally Susceptible" or "Most Susceptible Areas" for landslide susceptibility (ref. Open File Report, "Landslide Hazards in the Encinitas Quadrangle, San Diego County, California," dated 1986). The Encinitas shoreline has been the subject of numerous Commission and City approved permits for shoreline armoring. Although the subject site does not currently have coastal armoring, a 13 ft. high, approximately 80 ft. long seawall was approved by the Commission in 1998 to protect two existing homes on the same block as the subject site at 164 and 172 Neptune Avenue (CDP #6-98-039) ([Exhibit 4](#)); and, in 1994 and 1995, the Commission approved seawalls two blocks north of the subject site at 312 Neptune Avenue, 354 Neptune Avenue, 370 Neptune Avenue, 378 Neptune Avenue, and 396

Neptune Avenue (Ref: CDP Nos. 6-93-085/Auerbach & 6-95-066/Han). Thus, the subject site is clearly subject to risk from erosion.

Section 30.34.020(D) of the City's certified IP and Public Safety Policy 1.6 of the LUP require that an applicant provide extensive geotechnical information documenting that any new development on the coastal bluff top will be safe over its lifetime from the threat of erosion so as to not require shoreline protection. In documenting that information, the geotechnical report must evaluate many factors including an estimate of the long-term erosion rate at the site. In determining the long-term erosion rate, the applicant's geotechnical report states that the erosion rate along this reach of coastline is expected to be 0.4 feet per year. At a rate of 0.4 feet per year, approximately 30 feet of bluff retreat would be expected over a 75-year period. However, the estimated average bluff recession rate that the Coastal Commission has often applied to the calculation of setbacks for new blufftop development in this portion of Encinitas is 0.49 feet per year. The erosion rate used by the Commission is also the upper bound of the historic rate (1932-1994) measured by Benumof and Griggs (1999) in a peer-reviewed, FEMA-funded study making use of photogrammetric analysis of historical aerial photos. In this case, the upper bound historical erosion rate is used as a proxy for the average rate expected over the life of proposed new blufftop development (75 years) to account for increases in bluff retreat rate due to sea level rise. The estimated bluff recession over a period of 75 years at a rate of 0.49 feet per year is approximately 37 feet.

In order to find the appropriate geologic setback for the bluff top home, the Certified LCP requires not only that a long-term erosion rate be adequately identified but also that the geotechnical report demonstrate an adequate factor of safety against slope failure (i.e., land sliding) of 1.5 will be maintained over 75 years (See Section 30.34.020(D) above). The applicant's geotechnical report of October 23, 2015 identified that a 1.5 factor of safety under present conditions is located at approximately 23 to 25 feet from the bluff edge. Thus, applying the estimated 37 feet of erosion over the next 75 years to the 23 to 25-foot location of the current 1.5 factor of safety would establish a minimum setback for new development at approximately 60 to 62 feet (37 feet + (23 to 25 feet)) from the coastal bluff.

The applicants do not agree that the certified Encinitas LCP requires new bluff top homes to obtain a Factor of Safety of 1.5 after 75 years of expected erosion. In a letter dated May 26, 2016, the applicants' representative made various contentions about how the geologic setback policies of the LCP should be interpreted. The applicants contend that the LCP only requires a "...40-foot setback, supported by a site-specific soils report that meets certain criteria..." and "...the report must contain a qualified engineer's certification that the home will be safe as proposed and not contribute to bluff instability or give rise to the need for bluff retention devices." In addition, the applicants argue that requiring a new home to obtain a Factor of Safety of 1.5 after 75 years of expected erosion is not required by the California Building Code. The applicants also assert that the setback required to obtain a Factor of Safety of 1.5 after 75 years of expected erosion would result in a "take" of a portion of their property.

The Commission's geologist reviewed the applicants' assertion in relation to the California Building Code, which is guidance and not the standard of review for this application and determined that it is without merit. The requirements of the California Building Code are for static slopes, not for dynamic coastal bluffs.

Coastal Act section 30253 requires new development to be stable for its economic life, and the industry standard for stability is a factor of safety of 1.5. This is the approach that has been applied throughout the state wherever the Coastal Act is the standard of review, or the Local Coastal Plan includes similar language to the Coastal Act regarding geologic hazards. For many past projects in Encinitas, geotechnical reports that include recommended setbacks not based on these criteria have proven to be flawed, such that shoreline protection was required after construction of the blufftop homes (Ref. CDP #F6360 (in 1977)/Pate residence at 638 Neptune and #6-93-36/Clayton seawall; 6-86-570/Richards duplex at 524 Neptune and #6-93-131/Richards seawall; #F3891 (in 1976)/Bardacos residence at 378 Neptune and #6-93-85/Auerbach et al seawall; #F5473 (in 1977)/Bardacos residence at 402 Neptune and #6-93-85/Auerbach, et al seawall and; #F9833 (1981)/Canter residence at 172 Neptune, #6-84-461 (1985) Denver residence at 164 Neptune and #6-98-39/Denver, Canter seawall). The reason that many of the geotechnical reports submitted by the applicants for new development in Encinitas did not accurately assess the risk to new development consistent with the requirement of the LCP is that the 1.5 factor of safety against sliding was not being calculated over the life of the structures in addition to determining the rate of erosion. The language of Policy Section 30.34.020(D) of the LCP is very specific:

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

- Cover all types of slope failure.
- Demonstrate a safety factor against slope failure of 1.5.
- Address a time period of analysis of 75 years.

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

However, the Commission has interpreted the City's LCP as requiring development look at all of these elements for at least the past 19 years (Ref: CDP A-6-ENC-02-003/Berg). The Commission generally considers 75 years as the economic life of new single-family homes. Thus, a factor of safety of 1.5 must be maintained throughout the 75-year life of the home to be consistent with Coastal Act section 30253. The easiest way to assure this is to find the distance from the bluff edge necessary to achieve a factor of safety of 1.5 today and add to that the expected bluff retreat over the next 75 years. The Encinitas LCP explicitly states that new development must achieve a factor of safety of 1.5 and that 75 years is the length of time to be considered. Any other interpretation of

this policy would result in a significant underestimate of the setback necessary to ensure development will be safe from failure and erosion over its lifetime. The applicant may not arbitrarily select a single standard and ignore the other two.

Taking into account either the factor of safety or the erosion rate, but not both, would also set a significant adverse precedence for siting blufftop development in Encinitas. At the Commission's July 2016 hearing, the same hearing that this item was first heard, the Commission found Substantial Issue for a blufftop project that raised similar issues as the subject project located in Encinitas, including not fully assessing stability factors: (A-6-ENC-16-0060/Martin, 444 Neptune Avenue). At the Commission's August 2016 hearing, the Commission also found Substantial Issue two other projects in Encinitas that raised similar issues as the subject project: (A-6-ENC-16-0068/Hurst, 808 Neptune Avenue) and (A-6-ENC-16-0067/Meardon, 438 Neptune Avenue). Since then, the Commission has denied a project that failed to correctly account for the combination of factor of safety and erosion rate (CDP #A-6-ENC-16-0068/Hurst, December 2018). If the potential for bluff erosion in Encinitas is not accurately and fully evaluated, many new developments along the shoreline will likely be placed at risk, resulting in the need for shoreline protection in the future along significant stretches of the City's coastline.

There have been limited circumstances in the past where the Commission has not required development to be set back the sum of the factor of safety and the erosion rate over 75 years. Many of these analyses did not correctly apply the 1.5 Factor of safety for the life of the new structure according to current Commission practice. Other homes were situated on blufftop sites with a less steep bluff face and did not require as large a setback as needed at the subject site to ensure safety for the life of the structure. In addition, four of the homes had constrained lots and a reasonably sized home could not be built on the sites consistent with the appropriate geologic setback. In these situations, the Commission either approved the use of caisson foundations (Ref: CDPs 6-ENC-09-002 & 003/Wellman and A-6-ENC-06-101/Albani) or allowed homes to be built with the expectation that they may not be safe for 75 years and would need to be removed if threatened in the future (A-6-ENC-09-040 & 041/Okun).

The applicant also contends that the new home, as proposed to be located 40 feet from the bluff edge, is expected to result in a Factor of Safety of 1.29 after 75 years of erosion (assuming an erosion rate of 0.40 ft./yr.). The applicants argue that with a 1.29 Factor of Safety the home will be safe throughout its 75-year economic life and will not require protection from shoreline armoring. However, the LCP requires a Factor of Safety of 1.5 at 75 years. Thus, the applicants' argument is not consistent with the requirements of the LCP. In addition, if the erosion rate accepted by the Commission in its 2016 approval were used in the applicants' stability analysis, the resulting factor of safety would be significantly lower than 1.29 and after 75 years the home would most likely require shoreline armoring. The industry standard for new development is a Factor of Safety of 1.5. Therefore, to establish a safe setback from slope stability from the edge of a coastal bluff, a new home must be sufficiently setback from the bluff edge to ensure that the 1.5 Factor of Safety is maintained throughout the economic life of the structure.

However, in the case of the proposed project there is sufficient room to site a home such that it will be safe for 75 years and have enough room to construct a reasonably sized single-family residence. The subject lot from edge of the bluff to the street is an average of approximately 155 feet in length and 40 feet in width. Therefore, a 60 to 62-foot geologic setback would still leave approximately 1,725 sq. ft. of buildable area (69 ft. x 25 ft.), subject to front yard and side yard setbacks.<sup>2</sup> For context, in June 2016, the Commission approved a home in the adjacent City of Solana Beach that was constrained to an 800 sq. ft. development envelope (Ref: 6-15-1717/Barr).

A building footprint of 1,725 sq. ft. would allow the applicants to construct an approximately 3,500 sq. ft. 2-story home, including the garage, taking into consideration the City's required setbacks. A reduction in floor area would likely need to occur to design a home with reasonable articulation and design (rather than just a box). However, the applicant could also construct a 12-foot by 25-foot second floor cantilever on the western side of the home, which would result in an additional 300 sq. ft. of floor area and would potentially cancel out floor area lost from articulation. In addition, there is space on the site for the applicants to also construct a basement landward of the 60 to 62-foot geologic setback. A potential variance from the City to allow a reduction of the front yard setback would result in an even larger building envelope.

Commission staff analyzed approximate square footage of existing single-family residences on the seaward side of Neptune Avenue on the same block as the subject site by using the figures for property square footage listed on the website [www.zillow.com](http://www.zillow.com). This analysis of 13 similarly situated residences demonstrates that the surrounding residential developments in the immediate area average approximately 2,900 sq. ft. floor area ([Exhibit 5](#)). Accordingly, the Commission finds that a development envelope allowing a home that is similar in size to surrounding residential development is reasonable.

Thus, the applicants' assertion that the required setback would constitute a "take" is without merit, as the setback required to assure geologic stability would still allow for a reasonably sized home to be constructed on the site. Coastal Act section 30010 bars the Commission from taking private property for public use without payment of just compensation; however, the intention of the section is not to "increase or decrease" the rights of the landowner. (Pub. Resources Code, § 30010.) Conditioning approval on the home to be built smaller than the proposed size does not constitute a taking, in which a landowner uses all or nearly all economic value of the land. (See *Penn Central Transportation Co. v. New York City* ((1978) 438 U.S. 104, 130 [finding claim "untenable" that interference with an undeveloped property interest, while viable economic uses continued, constituted a taking].) The Commission has previously required homes to be built on a modest scale to minimize impacts to coastal resources

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<sup>2</sup> The required front yard setback is 25 ft. from the street and the required side yard setbacks are 5 ft. and a 10 ft.

while allowing economic use of the land. (See e.g., CDP Nos. 1-12-023/Winget and 6-15-1717/Barr; Appeal No. A-2-SMC-11-040/Hodge). It may be that for bluff top properties in Encinitas with smaller sites, building homes smaller than existing surrounding homes will be necessary in order to meet the geologic setback requirements. But on the subject site, there is a building envelope that allows the applicant enough room and flexibility, taking into consideration the City's required side yard setbacks, to design a home with reasonable articulation and design (rather than just a box) at similar bulk and scale to surrounding development. Special Condition 1 allows the applicant to seek a reduction in the City's required front yard setback to achieve an even larger building envelope in which to construct the residential development.

As stated previously, the bluffs along the Encinitas shoreline are known to be hazardous and unpredictable. Given that the applicant has chosen to construct a residence in this location despite these risks, the applicant must assume the risks. Accordingly, Special Condition 6 requires the applicant to acknowledge the risks and indemnify the Commission against claims for damages that may occur as a result of its approval of this permit. In addition, the Commission's staff geologist and coastal engineer have reviewed the submitted geotechnical reports and as conditioned to require a 60 to 62-foot setback, to prohibit the use of shoreline protective devices, and to remove all or a portion of the structure(s) if the City or any government agency with jurisdiction makes a final determination that the structure(s) are threatened by coastal hazards, they concur that the proposed development can be constructed without the need for shoreline protection in the future. It should be noted that the bluff erosion retreat rate for 2016 approval of this project relied on SLR projections from a 2012 National Research Council report, which was recommended as the "best available science" in the *Sea Level Rise Policy Guidance* document, adopted by the Commission at its August 12, 2015 hearing. On November 7, 2018, the Commission adopted a *Science Update to the Sea Level Rise Policy Guidance* document. The updated 2018 SLR document recommends the use of new SLR projections, developed by the California Ocean Protection Council, which span a wider range of future sea level rise scenarios. Specifically, the 2018 Guidance recommends that projects with limited adaptive capacity – including blufftop residential development – consider a "medium-high risk aversion scenario" with potential SLR of up to seven feet by 2100 when determining setbacks and siting new development. In comparison, the 2015 SLR guidance document recommended that projects consider SLR scenarios of up to 5.5 feet by 2100 when siting new development for 75 years. It is reasonable to expect that a greater amount of bluff retreat would occur in response to a greater amount of SLR. Thus, if this project were to be submitted as a new project today, it is likely that the Commission would require a setback larger than a 60- to 62-foot setback. However, the 60- to 62-foot setback would provide a substantial amount of protection against future bluff erosion, and would assure stability for 75 years under all but the highest future sea level rise scenarios. In combination with future action to remove the proposed structure in the event it becomes threatened by erosion, a 60- to 62-foot setback would allow the new development to remain reasonably safe from failure and erosion over its lifetime while avoiding the need for future shoreline protection.

Special Condition 3 requires that the applicants waive any rights that may exist under Public Resources Code Section 30235 or under the certified Encinitas LUP to construct new shoreline protection to protect the new blufftop residence. In addition, the condition states that the residence may remain only as long as it is reasonably safe from failure and erosion without having to propose any shore or bluff stabilization to protect the residence in the future.

Special Condition 3 also requires that if the bluff recedes to within 10 feet of the foundation of the blufftop residence, the applicants must submit a geotechnical investigation to determine whether any portions of the blufftop residence are threatened and identify measures to stabilize the blufftop residence without new shoreline armoring, including, but not limited to, removal or relocation of portions of the blufftop residence. If the Executive Director determines based on the geotechnical investigation that any portion of the blufftop residence is no longer sited in a safe location, the applicant must submit an application to resolve the hazard, which could include removal of the entire blufftop residence or the threatened portion of the blufftop residence.

As approved in July 2016, Special Condition No. 3(b) required the applicant to agree, on behalf of themselves and all successors and assigns, that the landowner shall remove the development authorized by the permit, including the residence and foundation, if any government agency ordered that the structures were not to be occupied due to threat from hazards including waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. Additionally, as approved in July 2016, Special Condition No. 3(b) required that the landowner obtain a CDP to remove any recoverable debris from portions of the development that fall onto the beach, and to dispose of the materials in an approved location.

The revised Special Condition No. 3(b) clarifies when the applicant or any successors and/or assigns are required to remove all or a portion of the development authorized by this permit and restore the site, and does not modify the recommended setback. Specifically, the revised SC No. 3(b) requires removal of development authorized by this permit and restoration of the site if the City or any other government agency with jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that the structures are currently and permanently unsafe for occupancy or use due to damage or destruction from waves, flooding, erosion, bluff retreat, landslides, or other hazards related to coastal processes, and that there are no feasible measures that could make the structures suitable for habitation or use without the use of bluff or shoreline protective devices ([Exhibit 9](#)).

Thus, as conditioned, approval of the existing blufftop residence will not precipitate the need for any new shoreline armoring in the future and will allow the Commission to make various adaptation decisions in the future for the subject site.

Since the applicant has submitted conceptual plans based only on a 40-foot geologic setback, Special Condition 1 requires the submission of revised final plans that conform to a 60 to 62-foot setback for the foundation, basement, and shoring beams.

With regard to the proposed basement, in recent actions on projects proposing construction of a basement on a blufftop lot in Encinitas, the Commission has found the basement raises a substantial issue (CDP #A-6-ENC-20-0022/Hanlon), August 2020) or must be denied (CDP #A-6-ENC-16-0060/Martin, August 2018) due to concerns that a basement would not be able to be removed if threatened as required by the LCP, or would function as shoreline protection within the lifetime of the structure. However, the court's opinion analyzed the project as approved in 2016, including the basement and the 60 to 62-foot setback, and upheld that Commission's condition for the setback. Therefore, in order to ensure the Commission's action is not inconsistent with the Court's direction, in this particular case, the Commission finds that as conditioned to be setback at least 60 to 62 feet from the bluff edge, the proposed basement is not expected to be exposed by erosion or landslides within the 75-year economic life of the structure. Without the increased setback required by Special Condition 1, the basement wall and shoring beams could become exposed within the economic life of the structure if bluff retreat proceeds slightly more rapidly than anticipated or the bluff collapses. The exposure of the basement wall and shoring beams would be inconsistent with the LCP policies requiring structures visible from public vantage points to be protective of the natural scenic qualities of the surrounding natural bluffs, which are for the most part un-armored. Public Safety Policy 1.6 of the City's Land Use Plan requires that all new construction be designed and constructed such that it could be removed in the event of endangerment. Special Condition 1 requires revised plans be submitted that include this requirement. In future projects, the Commission will review any proposals for development on blufftop lots against the LCP requirements regarding hazards. Implementation of those policies could result in a requirement that a proposed project include a removal plan for new development that indicates how the project has been designed and can be constructed such that the new development could be removed in the event of endangerment.

As currently proposed, the home would have an 8-foot second-story cantilever on the western side. The LCP allows for the construction of a second story cantilever of up to 20% of the distance of the bluff edge setback. Thus, the applicant has the option to construct an approximately 12-foot second-story cantilever. Special Condition 4 is required to ensure that the proposed cantilevered portion of the home does not project over the bluff edge at any time in the future. Special Condition 4 requires that the applicants submit a monitoring program which includes current measurements of the distance between the cantilevered portion of the home and the bluff edge. Monitoring plans are then required to be submitted to the Commission every five years. The subsequent five-year monitoring plans must summarize all measurements and provide analysis of trends, annual rate of retreat, and the stability of the overall bluff face and the impact of the cantilevered portion of the home on the natural bluff. The report shall include recommendations on how to remove any cantilevered portion of the home that is seaward of the bluff edge. Furthermore, Special Condition 4 requires that if after inspection, it is apparent that any cantilevered portion of the home is seaward of the bluff edge, the permittee shall apply for a Coastal Development Permit amendment within 90 days of submittal of the monitoring report to remove any portion of the home located seaward of the bluff edge.



As described previously, the applicants are proposing to grade within 40 feet of the bluff edge to support planter boxes and an above ground spa. As detailed in Policy 30.34.20.B.1 of the City's IP, only at grade accessory structures and improvements are allowed within 40 feet of the bluff edge. Policy 23.24.020 of the City's IP clarifies that any land disturbance or land fill is defined as grading. Policy 23.24.090.G describes that grading within 100 feet of a coastal bluff is not exempt. Grading seaward of the 40-foot bluff edge setback has the potential to substantially alter the natural landform of the coastal bluff. Furthermore, grading in such close proximity to the bluff edge may destabilize the eroding coastal bluff. Thus, Special Condition 1 prohibits grading within 40 feet of the existing bluff edge. Drought-tolerant landscaping and accessory improvements, including walkways, patios, patio covers, cabanas, windscreens, sundecks, lighting standards, walls, and temporary accessory buildings not exceeding 200 square feet in area, are permitted within 40 feet of the bluff edge, as long as they do not involve grading.

In addition, Special Condition 8 requires the applicant to record an open space restriction over the portion of the face of the bluff that is owned by the applicant, which prohibits future development on such bluff face, including as its location changes over time without an amendment to this CDP. In this way, existing and any future property owner(s) will be made aware of the prohibition against the placement or erection of any structure on the bluff face. Special Condition 7 requires the applicant to record a deed restriction imposing the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property.

In summary, the proposed development, as conditioned, has been sited and designed to be safe over its lifetime so as to not require shoreline protective devices. With conditions to assure that no future shoreline devices will be constructed and that provide protection against adverse impacts to geologic stability, the proposed development is consistent with Section 30.34.020(D), P.S. Policy 1.6 and RM Policy 8.5 of the Certified LCP.

### **C. Water Quality**

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

Resource Management Policy 2.1 of the LCP states:

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

Resource Management Policy 2.3 of the LCP states in part:

*To minimize harmful pollutants from entering the ocean environment from lagoons, streams, storm drains and other waterways containing potential*

*contaminants, the City shall mandate the reduction or the elimination of contaminants entering all such waterways . . .*

The proposed development will be located at the top of the bluffs overlooking the Pacific Ocean. As such, drainage and run-off from the development could potentially affect water quality of coastal waters as well as adversely affect the stability of the bluffs. To reduce the risk associated with unattended running or broken irrigation systems, Special Condition 2 restricts the property owner from installing permanent irrigation devices anywhere on the subject lot. In addition, Special Condition 1 requires that all runoff be directed away from the bluffs and toward the street. In order to protect coastal waters from the adverse effects of polluted runoff, the Commission has typically required that all runoff from impervious surfaces be directed through landscaping as a filter mechanism prior to its discharge into the street. In this case, however, directing runoff into blufftop landscape areas could have an adverse effect on bluff stability because increasing the amount of ground water within the bluff material can lead to bluff failures. Therefore, in this case, reducing the potential for water to be retained on the site and directing the runoff toward the street, will be more protective of coastal resources. In addition, the requirement of Special Condition 2 that limits landscaping to native, drought-tolerant plants along with the restriction on irrigation will minimize the amount of polluted runoff from the property to the extent feasible. Therefore, the Commission finds the proposed project consistent with Resource Management Policies 2.1 and 2.3 of the Certified LCP.

#### **D. Public Access**

The project site is located on the blufftop on the seaward side of Neptune Avenue in Encinitas, which is designated as the first public roadway along this section of coastline. As the proposed development will occur between the first public roadway and the sea, pursuant to Section 30.80.090 of the City's LCP, a public access finding must be made that such development is in conformity with the public access and public recreation policies of the Coastal Act. Additionally, Coastal Act section 30604(c) requires that a CDP issued for development between the first public road and the sea shall include specific findings that the development is in conformity with the Coastal Act public access and public recreation policies.

Section 30210 of the Coastal Act states:

*In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

In addition, Section 30212 of the Act is applicable and states, in part:

*(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:*

*(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,*

*(2) adequate access exists nearby....*

Additionally, Section 30220 of the Coastal Act provides:

*Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

The beach fronting this location is used by local residents and visitors for a variety of recreational activities. As proposed, the development at the top of the bluff will not affect existing public access to the shoreline, since no public access across the property to the beach currently exists because of the hazardous nature of the approximately 65 ft. high coastal bluff. In addition, public access to beach is currently available approximately 2 blocks south of the subject site at the Moonlight State Beach. By siting and designing the proposed development at a safe location so as to not require shoreline protection in the future and as conditioned to require the conservation of the bluff face in open space and a waiver of future shoreline protection, the Commission can be assured that no future shoreline devices will be constructed at this location that might otherwise impact public access and recreation along the shoreline or affect the contribution of sand to the beach from the bluff. Therefore, as conditioned, the proposed development is consistent with the public access and recreation policies of the certified Local Coastal Program and Sections 30210, 30212 and 30220 of the Coastal Act.

## **E. Visual Resources**

The LCP contains several policies relating to the requirement that new development be designed to be compatible with existing development and the visual resources of the area. The following policies are applicable:

Section 30.34.020B.8 of the Implementation Program states:

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

Land Use Policies 6.5 and 6.6 of the LUP state as follows:

*The design of future development shall consider the constraints and opportunities that are provided by adjacent existing development. (LU Policy 6.5)*

*The construction of very large buildings shall be discouraged where such structures are incompatible with surrounding development. The building height of both residential and non-residential structures shall be compatible with*

*surrounding development, given topographic and other considerations, and shall protect public views of regional or statewide significance. (LU Policy 6.6)*

Resource Management Policy 8.5 of the LUP states, in part, that:

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

The proposed residence will be located in a residential neighborhood containing one to two story single-family residences. As conditioned, the proposed home does not exceed the height, bulk and scale of the existing surrounding development and is consistent with all of the City's development standards. However, because the project has been conditioned to be sited approximately 20 feet landward of its proposed location, revised project plans are required. Special Condition 1 requires the applicant to submit final plans that have been approved by the City prior to release of the subject coastal development permit. In this way, the City will assure that any proposed changes to the design continue to be consistent with the development and design standards of the City.

The subject site slopes upward from east to west. The elevation of the sidewalk fronting the site is approximately 17 ft. lower in elevation than the rear yard of the site and thus there is no potential for public views of the ocean through the side yards of the property. However, the home is located directly between the first public road and the sea, and requiring open fencing will prevent a walling off effect of the area from Neptune Avenue. Therefore, Special Condition 2 requires that 5-foot wide view corridors shall be created in the north and south side yards of the subject site. The condition requires that any fencing or gates within the side yard setbacks shall permit public views and have at least 75% of its surface area open to light. Furthermore, to preserve public views from the street, all proposed landscaping in these yard areas must be maintained at a height of three feet or lower (including raised planters) and landscape materials within the view corridors shall be species with a growth potential not expected to exceed three feet at maturity. Five years from the date of issuance of this coastal development permit, the applicants are required to submit a monitoring report to the Executive Director that certifies whether the on-site landscaping and fencing is in conformance with the landscape plan approved pursuant to Special Condition 2.

In addition, to assure that the bluff face at the subject site remains in its natural state, Special Condition 8 has been attached to require the bluff face on the subject property be protected by the application of a deed restriction. Most of the bluff at the subject site is already in public ownership. However, the applicants' western property line extends approximately 10-feet seaward of the current bluff edge. The deed restriction required by Special Condition 8 applies to the bluff face as the location of the bluff edge ("bluff edge" as defined in Section 30.04 of the certified Encinitas Implementation Plan) changes over time, due to the landward retreat of the bluff edge. In this way, the applicant and all future property owners will be advised that no development including landscape walls or other structures are permitted on the bluff face. As such, the visual

quality of these natural bluffs will be protected. Therefore, as conditioned, the Commission finds that potential visual impacts associated with the proposed development have been reduced to the maximum extent feasible; the proposed development will not adversely affect visual resources, and is consistent with LUP Policies 6.5 and 6.6, RM Policy 8.5, and Section 30.34.020B.8 of the City's IP.

## **F. Local Coastal Planning**

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

Based on specific policy and ordinance language requirements placed in the LCP by the Commission, the City of Encinitas is in the process of developing a comprehensive program addressing the shoreline erosion problem in the City. The intent of the plan is to look at the shoreline issues facing the City and to establish goals, policies, standards and strategies to comprehensively address the identified issues. To date, the City has conducted several public workshops and meetings on the comprehensive plan to identify issues and present draft plans for comment. However, at this time it is uncertain when it will be scheduled for local review by the Encinitas City Council or when the plan will come before the Commission as an LCP amendment.

Based on the above findings, the proposed residence, only as conditioned to require it be sited no closer than 60 to 62 feet inland of the bluff edge, can the project be found consistent with the Sections 30.34.020(D) of the City's Certified IP and Public Safety Policy 1.3 and 1.6 of the LUP which prohibits development in hazardous locations that would require the construction of shoreline protective devices. Therefore, the Commission finds that approval of the proposed residence, as conditioned, would not prejudice the ability of the City of Encinitas to continue to implement its certified LCP or to prepare a comprehensive plan addressing the City's coastline as required in the certified LCP.

## **G. California Environmental Quality Act**

Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment. The City of Encinitas found that the proposed project is categorically exempt from environmental review pursuant to Section 15303(a) of the CEQA Guidelines [construction of small structures].

The proposed project has been conditioned in order to be found consistent with the Chapter 3 policies of the Coastal Act. As conditioned, is consistent with the policies of

the City's LCP relating to geologic stability, water quality, public access and visual resources. In addition, as conditioned, the project is consistent with all applicable Chapter 3 policies of the Coastal Act. Mitigation measures including a required waiver of future shoreline protection will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned, is the least environmentally damaging feasible alternative and is consistent with the requirements of the City's LCP and the public access and recreation policies of the Coastal Act to conform to CEQA.

## **APPENDIX A – SUBSTANTIVE FILE DOCUMENTS**

### **SUBSTANTIVE FILE DOCUMENTS:**

- Appeal applications by Commissioner Mary Shallenberger and Commission Esther Sanchez
- Johnsson, M.J., 2005, Establishing development setbacks from coastal bluffs, in Magoon, O.T., Converse, H., Baird, B., Jines, B., and Miller-Henson, M., eds., California and the World Ocean '02: Revisiting and revising California's Ocean Agenda: Reston, Virginia, American Society of Civil Engineers, p. 396-416.
- City of Encinitas Certified LCP
- Report of Preliminary Geotechnical Exploration and Coastal Bluff Stability Evaluation dated December 5, 2012 by Geotechnical Exploration, Inc.
- Response to California Coastal Commission Letter dated 4/18/2013 by Geotechnical Exploration, Inc.
- Coastal Bluff Stability Analysis dated October 23, 2015 by TerraCosta Consulting Group
- City CDP 12-201
- Project Plans received May 22, 2013 by BHA Inc., Wolf Design Build Inc., and Hayward Baker
- Open File Report, "Landslide Hazards in the Encinitas Quadrangle, San Diego County, California", dated 1986
- CDP Nos:
  - 1-12-023/Winget
  - 6-15-1717/Barr
  - 6-84-461/Denver
  - 6-86-570/Richards
  - 6-93-085/Auerbach
  - 6-93-131/Richards
  - 6-93-36/Clayton
  - 6-95-066/Han
  - 6-98-039
  - 6-98-39/Denver
  - 6-ENC-16-0619/Hurst
  - 6-ENC-16-0624/Meardon
  - A-2-SMC-11-040/Hodge
  - A-6-ENC-00-193/Robinson
  - A-6-ENC-01-047/Conway & Associates
  - A-6-ENC-02-003/Berg
  - A-6-ENC-06-101/Albani
  - A-6-ENC-09-002/Wellman
  - A-6-ENC-09-003/Wellman
  - A-6-ENC-09-040/Okun

- A-6-ENC-09-041/Okun
- A-6-ENC-16-0060/Martin
- F3891/Bardacos
- F5473/Bardacos
- F6360/Pate
- F9833/Cantor