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## STAFF REPORT AND RECOMMENDATION ON APPEAL SUBSTANTIAL ISSUE & DE NOVO

**Local Government:** City of Coronado

**Local Decision:** Approved with Conditions

**Appeal Number:** A-6-COR-20-0045

**Applicant:** Brent C. Berge

**Location:** 621 First Street, Coronado, San Diego County (APN No. 536-030-11)

**Project Description:** After-the-fact approval of construction of 15 in. tall retaining wall, 24 in. tall retaining wall, and 17 ft. long, 11 ft. wide deck on a 10,680 sq. ft. bayfront lot.

**Appellants:** Commissioners Steve Padilla and Donne Brownsey

**Staff Recommendation:** Substantial Issue and Approval with Conditions on De Novo

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### IMPORTANT HEARING PROCEDURE 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 at the discretion of the Chair limited to three minutes total per side. Only the applicant, persons who opposed the

application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will follow, unless it has been postponed, during which the Commission will take public testimony.

## **SUMMARY OF STAFF RECOMMENDATION**

Staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed.

The project site is a bayfront lot in the City of Coronado with a new single-family residence, two retaining walls, and a deck ([Exhibit 3](#)). The site is protected by a scattered riprap revetment on San Diego Unified Port District (Port) property to the north ([Exhibit 2](#)).

In October 2017, the applicant received approval from the City to demolish the existing residence and construct a new residence on the subject property. Section 86.70.052 of the City's Implementation Plan (IP) exempts the construction of single-family residences from coastal development permit (CDP) requirements, so approval of the residence was not reviewed by the Commission. In May 2019, Commission and City staff received a complaint that during the construction of the new residence, the applicant had also constructed two new retaining walls and a new deck, neither of which were included in the approval from the City. In response to the complaint and at the direction of Commission staff, the applicant applied to the City for a CDP to authorize the work after-the-fact. The item was placed on the City Planning Commission's December 10, 2019 agenda for approval; however, Commission staff requested that the City postpone their approval since staff did not agree that the project was consistent with the City's Local Coastal Program (LCP). Staff advised the City in an email and site visit to the property that the retaining walls should be denied since the residence onsite was newly constructed and the retaining walls appeared to be functioning as a shoreline protective device based on the information provided. Following the site visit, staff also emailed the City to advise that the deck should be pulled back so that it did not extend over the existing riprap north of the project site. The City did not reach out to Commission staff again to coordinate regarding this project prior to approving it on July 14, 2020. The City's action authorized, after-the-fact, construction of the two retaining walls and required the deck to be pulled back 14 inches in order to not extend over the riprap per Commission staff's direction ([Exhibit 4](#)). Since the filing of the appeal, the applicant has indicated that the deck has been pulled back 14 inches, as required in the City's permit and previously recommended by Commission staff.

Section 86.76.10 B of the City's IP allows shoreline protective devices to protect existing structures or coastal dependent uses. In this case, the residence onsite was built in 2017 and is new development that is not entitled to shoreline protection. Following the filing of the appeal, Commission staff requested that the applicant provide additional information regarding the approved retaining walls. The Commission's engineers reviewed the new information and concluded that, based on the shallow depth and

height of the walls, it is unlikely that the retaining walls will function as shoreline armoring now or throughout the life of the development.

Section 86.76.010 of the City's IP requires development to minimize extensions or projections into the bay that could cover the surface of the water and result in bay coverage impacts, such as a reduction in the habitat available to foraging piscivorous birds or a change in character within the marine biological communities, including a potential decrease in primary productivity due to shading. In this case, the City's approval requires the applicant to pull the deck back 14 inches in order to not extend over the existing riprap. However, it is unclear if the deck footings extend into the riprap.

In its approval, the City found that the "platform overlooking the San Diego Bay is a coastal dependent use." Coastal dependent uses are significant under the City's LCP and the Coastal Act since they are one of the few developments that qualify for shoreline protection. However, Section 30101 of the Coastal Act defines coastal-dependent development or use as "any development or use which requires a site on, or adjacent to, the sea to be able to function at all." Decks can be built anywhere and do not require a site on or adjacent to the sea in order to function; as such, a deck is not a coastal dependent use. Finding that decks are coastal dependent uses would set a negative precedent for future interpretations of the City's LCP given that nearly every shorefront home in Coronado contains a deck and all decks would therefore qualify for shoreline protection under the City's interpretation. As such, the City's finding that the deck is a coastal dependent use raises a substantial issue.

In addition, Section 30604(c) of the Coastal Act requires all CDPs issued for developments between the nearest road and the sea to contain findings that the development is in conformity with the public access and recreation policies of Chapter 3. In this case, the project site is a bayside lot located between the first public road and the San Diego Bay. However, the City failed to find the development in conformance with the public access and recreation policies of Chapter 3, which also raises a substantial issue.

Because of the above-described inconsistencies with the City's certified LCP, staff recommends that the Commission determine that the project raises a **substantial issue**.

Commission staff further recommends **approval** of the application on de novo with special conditions.

Because there is existing unpermitted development onsite that would be authorized as after-the-fact development, **Special Condition No. 1** identifies that the CDP would be deemed issued upon the Commission's approval, and notifies the applicant that failure to comply with the special conditions of the permit may result in enforcement action. **Special Condition No. 2** requires the applicant to submit final plans that reflect the current condition of the deck, conform to the plans approved by the City and pull back the deck footings so that they do not extend into the existing riprap. **Special Condition No. 3** notifies the applicant that the permit is only for the development described herein, and that any future modifications to the deck or retaining walls will require an

amendment or a new CDP from the Commission. Because periodic storm and flood events occur throughout Coronado and the subject site is located in a Federal Emergency Management Agency (FEMA) Special Flood Hazard Area, **Special Condition No. 4** requires the applicant to acknowledge and assume the risk of building in a hazardous location and ensures that the risks of property damage or loss arising from sea level rise or other changed circumstances are borne by the applicant enjoying the benefits of its private new development, and not the public.

Approval of a retaining wall to protect a new home and patio would not be consistent with Section 86.76.010 of the City's IP, which does not allow retaining walls or other shoreline protective devices to protect new development. The applicant must therefore acknowledge that the new development onsite is not entitled to shoreline protection and waive any right to construct a shoreline protective device for the property in the future, as outlined in **Special Condition No. 5**. **Special Condition No. 6** reinforces that the applicant must comply with Special Condition No. 3 of the City's CDP No. 2019-08, which prohibits the placement of development, structures, fences, or material of any type beyond the rear property line, onto existing public property or beach area. Finally, **Special Condition No. 7** requires the applicant to record a deed restriction against the property that imposes the conditions of the permit for the purpose of providing notice to future property owners. As conditioned, the project conforms to the coastal hazards policies contained in the City's LCP.

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

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## EXHIBITS

[Exhibit 1 – Appeals by Commissioners Padilla and Brownsey](#)

[Exhibit 2 – Project Location](#)

[Exhibit 3 – Photos of Existing Development](#)

[Exhibit 4 – Project Plans Approved by the City](#)

## **I. APPELLANTS CONTEND**

The project as approved by the City of Coronado does not conform to the City's certified Local Coastal Program (LCP) because 1) the retaining walls would protect a new single family residence, which is not a structure that merits shoreline protection; instead the new residence should be sited and designed to be safe from flooding and sea level rise throughout its economic life in order to avoid the need for a new retaining wall; 2) the retaining wall should be set back from the shoreline to avoid impacts to the natural shoreline erosion process; 3) it is unclear why a new retaining wall is necessary, given the site is protected by an existing riprap revetment; 4) even if the retaining walls were permitted, the LCP requires them to connect in a straight line with retaining walls on neighboring properties; 5) it is unclear whether the new deck and associated footings minimize extensions or projections into the bay; 6) in its approval, the City found that the deck is a coastal dependent use; and 7) although the development is between the nearest public road and the sea, the City failed to find the development in conformance with the public access and recreation policies of Chapter 3 of the Coastal Act.

## **II. LOCAL GOVERNMENT ACTION**

The project was approved, with conditions, by the City of Coronado's Planning Commission on July 14, 2020.

## **III. APPEAL PROCEDURES**

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits.

Section 30603(b)(1) of the Coastal Act states:

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

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the commission after certification of a local coastal program that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to the de novo portion of the hearing on the merits of the project, then, or at a later date. If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, those allowed to testify at the hearing will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will

proceed to a full public hearing on the merits of the project then, or at a later date, reviewing the project de novo in accordance with Sections 13057-13096 of the Commission's regulations. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable standard of review for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program (LCP).

In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act. In other words, in regard to public access questions, the Commission is required to consider not only the certified LCP, but also applicable Chapter 3 policies when reviewing a project on appeal.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

The Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603. (§ 30625(b)(2).) Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP;
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 only local issues, or those of regional or statewide significance.

The Commission may, but need not, assign a particular weight to a factor.

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

The City of Coronado has a certified Local Coastal Program (LCP), and the subject site is located in an area where the Commission retains appeal jurisdiction because it is

located between the first public road and the sea. Therefore, before the Commission considers the appeal de novo, the appeal must establish that a substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603. In this case, for the reasons discussed further below, the Commission exercises its discretion to determine that the development approved by the City raises substantial issue with regard to the appellants' contentions regarding coastal resources.

## **IV. SUBSTANTIAL ISSUE MOTION AND RESOLUTION**

### **Motion:**

I move that the Commission determine that Appeal No. A-6-COR-20-0045 raises NO substantial issue with respect to the grounds on which the appeal has been filed under Section 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 affirmative vote of a majority of Commissioners present.

### **Resolution:**

The Commission hereby finds that Appeal No. A-6-COR-20-0045 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

## **V. SUBSTANTIAL ISSUE FINDINGS AND DECLARATIONS**

### **A. Project Description and Background**

The project site is a bayfront lot in Coronado with a new single-family residence, two retaining walls, and a deck ([Exhibit 3](#)). The site is protected by a scattered riprap revetment on San Diego Unified Port District (Port) property to the north ([Exhibit 2](#)). Although the site fronts the shoreline, there is no beach at the site and a formal public trail is not available along the shoreline. On July 14, 2020, the City of Coronado Planning Commission approved Coastal Development Permit (CDP) No. 2019-08 for after-the-fact construction of a 15 in. tall retaining wall, 24 in. tall retaining wall, and a 17 ft. long, 11 ft. wide deck ([Exhibit 4](#)) with special conditions that, among other things, required the applicant to pull back the deck by 14 inches so that it no longer extends over the riprap seaward of the project site.

In October 2017, the applicant received approval from the City to demolish the existing residence and construct a new residence on the subject property. Section 86.70.052 of the City's Implementation Plan (IP) exempts the construction of single-family residences from CDP requirements, so approval of the residence was not reviewed by the



Commission. In May 2019, both Commission and City staff received a complaint that, during the construction of the new home, the applicant had also constructed new retaining walls and a new deck, neither of which were included in the approval from the City. In response to the complaint, the applicant applied for a CDP to authorize the work after-the-fact. The item was placed on the City Planning Commission's December 10, 2019 agenda for approval; however, Commission staff requested that the City postpone its approval since staff did not agree that the project was consistent with the City's LCP. In an email and during a site visit to the property, staff advised the City that the retaining walls should be denied since a new residence had been built onsite and the retaining walls appeared to function as shoreline protective devices. Following the site visit, staff also emailed the City to advise that the northernmost portion of the deck should be removed so that it did not extend over the riprap. The City did not reach out to Commission staff again to coordinate regarding this project prior to approving it on July 14, 2020.

The Commission has appealed two other similar projects in the City of Coronado within the past two years. The appeals at 311 First Street (Appeal No. A-6-COR-19-0028) and 409 First Street (Appeal No. A-6-COR-19-0027) both included the approval of a retaining wall to protect new homes. The project application for the retaining wall at 311 First Street was withdrawn by the applicant on May 21, 2019 and the appeal was subsequently withdrawn. Regarding the appeal at 409 First Street, a Substantial Issue and De Novo hearing was scheduled in December 2020 and the staff recommendation was to find that there was a substantial issue and deny the project on De Novo.<sup>1</sup> However, the applicant requested to postpone the hearing and then withdrew the application on January 15, 2021. Following these appeals, Commission staff requested a meeting with the City to discuss the issue of retaining walls approved for new development in order to avoid future appeals; while the City has yet to provide availability to meet, City staff has indicated that they now advise applicants for shoreline protection to protect new homes that any approval will likely be appealed by the Commission.

On June 23, 1981, the City of Coronado's Land Use Plan (LUP) was deemed effectively certified, following the incorporation of modifications suggested in the Commission's March 13, 1981 action. Those modifications pertained to Shoreline Access, Recreation and Visitor-Serving Facilities, Visual Resources and Special Communities, Public Works and Locating and Planning New Development components of the City's LUP. The IP was certified with suggested modifications on September 28, 1983. The suggested modifications addressed exemptions from coastal permit requirements, definitions of several terms, procedures for recordation of documents, and minor corrections to the Coastal Permit Ordinance. The ordinances were amended, and the City assumed permit authority on January 11, 1984. There have been 22 amendments to the LCP since that time.

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<sup>1</sup> The staff report for A-6-COR-19-0028 can be accessed on the Commission's website at the following link: [W17a-12-2020-report.pdf \(ca.gov\)](https://www.coronado.ca.gov/Portals/0/Planning/CDP/2019/12/10/W17a-12-2020-report.pdf).

## **B. Shoreline Protection and Coastal Hazards**

Relevant policies in the City of Coronado's certified LUP include:

### E. Diking, Dredging, Filling and Shoreline Structures

1. Require that new development shall assure coastal stability and structural integrity, and neither create nor contribute significantly to erosion or geologic instability.
2. Permit revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. [...]
4. Require that any permanent building, or other structure proposed for construction be set back from an eroding beach coastline a distance sufficient to assure that the development will not be threatened by natural erosion processes during the lifetime of the structure without requiring shoreline protection structures. The builder, at the discretion of the City, shall provide a certification by a civil engineer that the proposed construction site meets this criteria.
5. Require that shoreline structures be planned and constructed so that they serve the purpose intended, and do not result in a substantial or potentially substantial, adverse change in any of the physical conditions within the area affected by the activity including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.
6. Require that shoreline protection structures be designed to minimize their intrusion into public vistas by being unobtrusive and aesthetically pleasing when viewed from public streets, walk or bicycle ways, or waterways.
7. Require that shoreline protection structures be designed to minimize their own breakdown and disintegration to thereby minimize water pollution and the silting of coastal water ways.

### G. Hazard Areas

1. Require that new development in areas of high geologic, flood or fire hazard be designed in such a way to minimize risks to life and property.
2. Require that new development be designed in such a way to assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

3. Reaffirm the City's environmental policies (as presented in the City's LCP report for Policy Group 103) and shoreline structures policies (as presented in the City's LCP report for Policy Group 104) as they relate to shoreline erosion.

In addition, the certified IP includes the following:

#### 86.74.030 Waterfront Development Setbacks

A. Development setbacks shall be calculated from the parcel's property line subject to the provisions of subsections B and C of this section, which may require a greater setback.

B. New development shall assure coastal stability and structural integrity, and neither create nor contribute significantly to erosion or geologic instability.

C. Permanent buildings, or other structures proposed for construction (excluding refurbishment, renovation or addition to existing structures that do not extend the structures seaward or bayward) shall be set back from an eroding beach or coastline a distance sufficient to assure that the development will not require mitigation measures to protect the development from the natural erosion process during the economic lifetime of the structures. The builder, at the request of the City Coastal Permit Administrator, shall provide a certification by a civil engineer acceptable to the City that the proposed construction site meets these criteria.

D. The City Coastal Permit Administrator may request through the City Council, the opinion of the Corps of Engineers, Scripps Oceanography Institute, or other qualified experts with regard to the possible erosion of beach area in the vicinity of the proposed construction in making a determination of required setbacks.

#### 86.76.010 Coastal Permit Required

A. The construction or placement of any improvement which may significantly affect the natural erosion process resultant from the interaction of water bodies upon their shores, or cause significant adverse alteration of the bay or ocean environment shall require a coastal permit from the City. Without limitation, buildings, harbor channels, breakwaters, groins, piers, retaining walls, revetments, riprap, sea walls and similar items shall be governed by this chapter.

B. An improvement or activity requiring a coastal permit under this chapter shall only be allowed when it serves coastal dependent uses, protects existing structures, removes public hazards, or protects public beaches in danger of erosion.

C. In order for an improvement or activity requiring a coastal permit under this chapter to qualify for such a permit, the improvement or activity must be designed and constructed as follows:

1. To neither create nor contribute significantly to erosion or geologic instability;

2. To minimize their own breakdown and disintegration;
3. To minimize water pollution and the silting of coastal waterways;
4. To not result in a substantial or potentially substantial, adverse change in any of the physical conditions within the area affected by the coastal permit requiring activity including land, air, water, minerals, flora, fauna, ambient noises and objects of historic or aesthetic significance;
5. To not preclude the public's right of access to (including without limitation) the ocean, bay or public beach where acquired through use, custom, legislative authorization, purchase, condemnation, judicial action, gift, bequeath or escheat;
6. To encourage or facilitate, where feasible, the phasing out or upgrading of marine structures causing water stagnation contributing to pollution problems or fish kills;
7. To minimize their intrusion into public vistas by being unobtrusive and aesthetically pleasing when viewed from public streets, walk or bicycle ways or waterways;
8. To minimize extensions or projections into the bay or ocean;
9. To facilitate public access where appropriate and feasible; and
10. To minimize or mitigate resultant adverse environmental impacts.

D. The applicant, at the determination of the Coastal Permit Administrator, shall provide a certification by a civil engineer acceptable to the City indicating that the proposed improvement or activity conforms to the above criteria. (Ord. 1533)

#### 86.76.020 Repair and Maintenance of Ocean and Bay Shore Improvements

Repair and maintenance activities or ocean and bay shore improvements which require City issuance of a building permit, encroachment permit or City review of an initial study shall require City issuance of a coastal permit. The coastal permit shall only be issued after certification that the repair or maintenance activities are necessary, appropriate, and designed, when feasible, to minimize or mitigate resultant adverse environmental impacts. The applicant, at the request of the City Coastal Permit Administrator, shall provide a certification by a civil engineer acceptable to the City that the proposed activities meet these criteria.

#### 86.76.040 Waterfront Land – Permitted Improvements

For waterfront land recorded on Miscellaneous Map 121 (Rancho Peninsula), Record of Survey 563, 2372, and Map 2544 (Bay View Estates), Record of Surveys 5191, 6014 and 6958, retaining walls, revetments, riprap, sea walls and similar development shall be permitted, with a coastal permit, subject to all other

standards of this chapter, with the provision that such improvements may be situated in a manner so that the improvements' bayward faces may connect in a straight line the bayward faces of similar improvements on adjoining property.

Section 86.76.010 of the City's IP allows shoreline armoring when it serves coastal dependent uses, protects existing structures, removes public hazards, or protects public beaches in danger or erosion. Policy E.4 of the City's LUP requires that structures "be set back from an eroding beach coastline a distance sufficient to assure that the development will not be threatened by natural processes during the lifetime of the structure without requiring shoreline protection structures" and Section 86.74.030 requires that new development "assure coastal stability and structural integrity and neither create nor contribute significantly to erosion or geologic instability."

The project site is located on a bayfront lot, and is therefore vulnerable to erosion, flooding, boat wake runup, and storm hazards. Sea level rise is expected to exacerbate existing coastal hazards by raising mean water levels and extending flood zones inland. As noted in the Commission's 2018 Sea Level Rise Guidance Science Update and other studies, increased sea level is expected to cause increased inundation of beaches, reduced accretion or increased erosion of beaches. Historically, the most common societal response to coastal hazards has been to construct shoreline protective devices in order to slow the erosion of beaches and bluffs, retain unstable slopes, and prevent flooding. However, shoreline protective devices can cause adverse impacts to coastal resources including displacing or modifying prior uses of coastal land (e.g., beach recreation, habitat, etc.); the narrowing or loss of sensitive marine habitats such as eelgrass, which provides areas for fish egg laying, juvenile fish rearing, and waterfowl foraging, by preventing the inland migration of these habitats; and changing wave reflection patterns, causing scour or winnowing of beach sediments along the shoreline, and increasing erosion rates at unarmored locations up- and down-coast of the structure ("end effects").

In its approval, the City found that the "platform overlooking the San Diego Bay is a coastal dependent use.". Coastal dependent uses are significant under the City's LCP and the Coastal Act since they are one of few uses that qualify for shoreline protection. The City's LCP does not define "coastal dependent use"; however, Section 30101 of the Coastal Act defines a "coastal-dependent development or use" as "any development or use which requires a site on, or adjacent to, the sea to be able to function at all." Decks are an accessory structure, can be built anywhere, and do not require a site on or adjacent to the sea in order to function; as such, a deck is not a coastal dependent use. Finding that decks are coastal dependent uses would set a negative precedent for future interpretations of the City's LCP given that nearly every shorefront home in Coronado contains a deck and all decks would therefore qualify for shoreline protection under the City's interpretation. Further, such an interpretation raises the issue to one of regional or statewide significance, as many homes along the entire California coast contain decks. As discussed above, decks are ancillary structures that do not merit shoreline protection. As such, the City's finding that the deck is a coastal dependent use raises a substantial issue.

Because the project site contains a new residence, the construction of a retaining wall to protect the new residence at the site would be inconsistent with the LCP. As such, following the filing of the appeal, Commission staff requested that the applicant provide additional information regarding the approved retaining walls, including the depth and elevations of the foundations for the retaining walls in order to determine if the retaining walls were functioning as a shoreline protection device. The information provided by the applicant indicated that the retaining walls were both 12 inches deep. The Commission's coastal engineers reviewed the new information and concluded that, based on the shallow depth of the walls, combined with the short heights of the retaining walls (15 in. and 24 in.), it is unlikely that the retaining walls will function as shoreline armoring now or throughout the life of the residence. While it is possible that the future water level will reach these retaining walls under the projected medium-high risk aversion sea level rise scenario of seven feet by the end of the structure's lifetime (~2100), the walls are not deep enough to prevent scouring or erosion of the shoreline. Since there appears to be a two- to three-foot gap between the walls and the existing rip rap, it does not appear that the walls would function jointly with the riprap as one tall structure. As such, it does not appear that the retaining walls are acting as shoreline protection to protect the new home.

Section 86.76.010 of the City's IP allows retaining walls to be permitted with a provision that they may be situated in a manner so that the improvements' bayward faces connect in a straight line to the bayward faces of similar improvements on adjoining property. In this case, the retaining walls are curved and do not appear to connect to the neighboring retaining walls. However, it appears that the neighboring retaining walls are located seaward of the subject retaining walls; as such, connecting the retaining walls in a straight line may cause portions of the retaining walls to be moved seaward of their existing location. That scenario would conflict with Policy E.4 of the City's LUP, which requires structures to "be set back from an eroding beach coastline a distance sufficient to assure that the development will not be threatened by natural processes during the lifetime of the structure...", and also might change the functionality of the retaining walls so that they do act in concert with the riprap below to function as a shoreline protection device.

### **C. Biological Resources and Water Quality**

Relevant policies in the City of Coronado's certified LUP include:

#### **86.76.010 Permit Required**

A. The construction or placement of any improvement which may significantly affect the natural erosion process resultant from the interaction of water bodies upon their shores, or cause significant adverse alteration of the bay or ocean environment shall require a coastal permit from the City. Without limitation, buildings, harbor channels, breakwaters, groins, piers, retaining walls, revetments, riprap, sea walls and similar items shall be governed by this chapter.

B. An improvement or activity requiring a coastal permit under this chapter shall only be allowed when it serves coastal dependent uses, protects existing

structures, removes public hazards, or protects public beaches in danger of erosion.

C. In order for an improvement or activity requiring a coastal permit under this chapter to qualify for such a permit, the improvement or activity must be designed and constructed as follows: [...]

8. To minimize extensions or projections into the bay or ocean; [...]

Section 86.76.010 of the City's LCP allows decks and other permanent structures requiring a CDP only if they minimize extensions or projections into the bay which could cover the surface of the water resulting in bay coverage impacts. The increase in bay coverage could result in a reduction in the habitat available to foraging piscivorous birds or a change in character within the marine biological communities, including a potential decrease in primary productivity associated with shading. In this case, the City's approval requires the applicant to pull the deck back 14 inches as to not extend over the riprap north of the project site. However, it is unclear if the deck footings extend into the riprap as well. As such, a substantial issue exists in regard to the deck construction as approved by the City.

#### **D. Public Access and Recreation**

Relevant policies in the Coastal Act include:

Section 30604(c) of the Coastal Act states:

Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that the development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200). The Coastal Act requires the finding to be made in order to protect public access from impacts that may result from shoreline development.

Section 30604(c) of the Coastal Act requires all CDPs issued for developments between the nearest road and the sea to contain findings that the development is in conformity with the public access and public recreation policies of Chapter 3. In this case, the project site is a bayside lot located between the first public road and the San Diego Bay. However, the City failed to find the development in conformance with the public access and recreation policies of Chapter 3, per the requirement of Section 30604(c) of the Coastal Act for development between the nearest public road and the sea or shoreline. The City's failure to find the development in conformance with the public access and recreation policies of Chapter 3 raises a substantial issue.

#### **E. Substantial Issue Factors**

As discussed above, there is inadequate factual and legal support for the City's determination that the proposed development is consistent with the certified LCP. While the extent and scope of the particular development is after-the-fact authorization of two

retaining walls and a deck, the objections to the project by the appellants, including the City's finding that the deck is a coastal dependent use, the failure to find the development consistent with the public access and recreation policies of Chapter 3, and the possible extension of the deck footings into the existing riprap raise substantial issues of regional and statewide significance due to increasing shorefront development and potential effects on the shoreline and public access. The decision creates an adverse precedent with respect to the future interpretation of the City's LCP and allow shoreline protective structures for decks on the First Street corridor. Therefore, the Commission finds that the local government's action does raise substantial issues of consistency with the Local Coastal Program and the public access provisions of the Coastal Act.

## VI. DE NOVO MOTION AND RESOLUTION

### Motion:

I move that the Commission approve Coastal Development Permit A-6-COR-20-0045 for the development proposed by the applicant.

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.

## VII. 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. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
3. **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.



4. **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.

## VIII. SPECIAL CONDITIONS

1. **Permit Expiration & Condition Compliance.** Because there is existing unpermitted development on the site that would be approved after-the-fact by this permit, this coastal development permit shall be deemed issued upon the Commission's approval and will not expire. Failure to comply with the special conditions of this permit may result in the institution of an action to enforce those conditions under the provisions of Chapter 9 of the Coastal Act.
2. **Revised Final Plans.** WITHIN 30 DAYS OF COMMISSION ACTION ON THIS CDP, the applicant shall submit, for the review and written approval of the Executive Director, one full-size set of the project plans that reflect the current condition of the deck and conforms with the plans approved by City of Coronado CDP No. 2019-08 except that the deck footings shall be pulled back as to not extend into the existing riprap.

The permittee shall undertake development in conformance with the approved final plans unless the Commission amends this permit or the Executive Director provides a written determination that no amendment is legally required for any proposed minor deviations.

3. **Future Permit Requirement.** This permit is only for the development described in coastal development permit (CDP) A-6-COR-20-0045. Any future development to the structures authorized by this permit including, but not limited to, reconstruction or alteration of the structures, shall require an amendment to CDP No. A-6-COR-20-0045 from the Coastal Commission.
4. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the applicant acknowledges and agrees: (i) that the site may be subject to hazards from flooding, sea-level rise, erosion and wave uprush; (ii) to assume the risks to the applicant 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.

**5. Waiver of Rights to Future Shoreline Protective Device.**

- (a) By acceptance of this permit, the applicant acknowledges and agrees that the residence onsite constitutes new development under the Coastal Act and is therefore not entitled to a shoreline protective device under PRC Section 30235 or City of Coronado Municipal Code Section 86.76.010. Thus, by acceptance of this permit, the applicant hereby waives any rights to construct such devices that may exist under applicable law.
- (b) By acceptance of this permit, the applicant further acknowledges and agrees, on behalf of themselves and all successors and assigns, that the landowner is required to remove the development authorized by the permit if the City of Coronado or any other government agency with legal jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that both (1) the structure or structures are currently and permanently unsafe for occupancy or use due to coastal hazards and (2) that there are no measures that could make the structures suitable for habitation or use without the use of bluff or shoreline protective devices. The applicant also further acknowledges and agrees, on behalf of themselves and all successors and assigns, that the landowner may be required to remove or relocate the development, or portions of the development, pursuant to certified policies of the Local Coastal Program.
- (c) In the event that portions of the development fall to the beach before they are removed, the landowner(s) shall remove all recoverable debris associated with the development from the beach and bay and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit.

**6. Compliance with Special Condition No. 3 of the City of Coronado CDP No. 2019-08.** By acceptance of this permit, the applicant agrees to comply with Special Condition No. 3 of the City of Coronado CDP No. 2019-08 which prohibits the placement of development, structures, fences, or material of any type beyond the rear property line, onto existing public property or beach area in accordance with section 86.74.020 of the Zoning Ordinance.

**7. Deed Restriction.** WITHIN 180 DAYS OF APPROVAL OF THIS CDP, the applicant shall submit to the Executive Director for review and written approval documentation demonstrating that the applicant has executed and recorded against the parcel(s) governed by this permit 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; and (2) imposing the 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 entire parcel

or parcels governed by this permit. 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.

## **IX. DE NOVO FINDINGS AND DECLARATIONS**

### **A. Project Description and Background**

The detailed project description and history is described above within the Substantial Issue findings of this report and is incorporated herein by reference. Since the filing of the appeal, the applicant has indicated that the deck has been pulled back 14 inches, as required in the City's permit and previously recommended by Commission staff.

Because there is existing unpermitted development on this site and the Commission's action would authorize after-the-fact development, **Special Condition No. 1** identifies that the CDP would be deemed issued upon the Commission's approval and will not expire, and notifies the applicant that failure to comply with the special conditions of the permit may result in enforcement action.

The standard of review is the certified City of Coronado Local Coastal Program and the public access and recreation policies of Chapter 3 of the Coastal Act.

### **B. Shoreline Protection and Coastal Hazards**

The Shoreline Protection and Coastal Hazards findings and the relevant shoreline protection and coastal hazard policies of the City of Coronado's certified LCP cited in the Substantial Issue findings of the staff report are incorporated herein.

Section 86.76.010 of the City's IP allows retaining walls, revetments, riprap, seawalls and similar improvements when it serves coastal dependent uses, protects existing structures, removes public hazards, or protects public beaches in danger or erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Policy E.4 of the City's LUP requires that structures "be set back from an eroding beach coastline a distance sufficient to assure that the development will not be threatened by natural processes during the lifetime of the structure without requiring shoreline protection structures" and Section 86.74.030 requires that new development "assure coastal stability and structural integrity and neither create nor contribute significantly to erosion or geologic instability."

The project site is located on a bayfront lot, and is therefore vulnerable to erosion, flooding, boat wake runup, and storm hazards. The seaward portion of the home is also located in a Special Flood Hazard Area (SFHA) as designated on the Federal Emergency Management Agency (FEMA) Federal Insurance Rate Map (FIRM). Sea level rise is expected to exacerbate existing coastal hazards by raising mean water

levels and extending flood zones inland. As noted in the Commission's 2018 Sea Level Rise Guidance Science Update and other studies, increased sea level is expected to cause increased inundation of beaches, reduced accretion or increased erosion of beaches. Historically, the most common societal response to coastal hazards has been to construct shoreline protective devices in order to slow the erosion of beaches and bluffs, retain unstable slopes, and prevent flooding

As expressed by the certification of the LCP, the Chapter 3 policies of the Coastal Act discourage shoreline protective devices because they generally cause adverse impacts to coastal resources and can constrain the ability of the shoreline to respond to dynamic coastal processes. Shoreline protection devices are physical structures that take up space and displace or modify prior uses of coastal land (e.g., beach recreation, habitat, etc.); this effect is often referred to as encroachment. Seawalls and, in particular, revetments, may have large horizontal footprints, displacing what would otherwise be sandy beach, and resulting in a long-term loss of beach area for public access, recreation and other uses. In addition to encroaching onto the beach, shoreline protection devices, by slowing or stopping natural processes of shoreline retreat, also prevent the future creation of new beach and eliminate a supply of new sand that would otherwise have resulted from shoreline erosion. Shoreline protection devices establish a fixed landward boundary of the back beach ("fixing the back beach"), and prevent the natural, on-going inland adjustment of the beach that occurs on an eroding coast; over time, this restriction of a beach's adaptive capacity can result in the narrowing or loss of the beach ("passive erosion"), as well as the narrowing or loss of sensitive marine habitats such as eelgrass if the habitat cannot naturally migrate landward. In this case, eelgrass habitat, which provides areas for fish egg laying, juvenile fish rearing, and waterfowl foraging, could be prevented from migrating landward. Future sea level rise is expected to result in the drowning or "pinching out" of many California beaches (Vitousek et al. 2017), an effect that will only be exacerbated in locations with extensive shoreline protection.

By substituting hard materials (e.g., rock, concrete) in place of more erodible natural substrates (e.g., sand, soils, terrace deposits, sedimentary rocks), shoreline protection devices can also change wave reflection patterns, cause scour or winnowing of beach sediments along the shoreline, and increase erosion rates at unarmored locations up- and down-coast of the structure ("end effects"). In certain locations, shoreline protection devices may also interrupt or interfere with longshore and cross-shore sediment transport, resulting in deposition of sand in one location at the expense of other locations further "down drift" along the coast. Broader effects of shoreline protection devices include changes to the recreational and beach use experience, impacts to beach and other coastal ecosystems, and impairment of the aesthetic and visual character of the coast.

Because shoreline protection devices, such as seawalls and revetments, can create adverse impacts on coastal processes, the City's LUP Policy G.2 specifically prohibits development that could "...create [or] contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." However, Section 86.76.010 B of the City's IP recognizes that existing

development may be protected by shoreline protective devices subject to certain conditions. This limitation is particularly important when considering new development, because if it is known that a new development may need shoreline protection in the future, it would be unlikely that such development could be found to be consistent with Policy G.2 of the City's LUP, which requires new development to minimize risks to life and property.

In this case, the existing residence onsite was demolished and the new residence was built in 2017; thus, it is considered new development. Approval of a retaining wall to protect the new home would not be consistent with Section 86.76.010 of the City's IP, which does not allow retaining walls or other shoreline protective devices for new development. The City's LCP requires new homes be sited to be safe from coastal hazards; as such, the City should not have approved the new home without finding that it would not require a shoreline protection device at some point in the future. However, as previously indicated, new homes do not require a CDP in the City of Coronado so it is unclear whether coastal hazards were analyzed by the City in its review of the project. Although riprap exists today that provides some protection of the site, the riprap is on Port property and is not guaranteed to be maintained in the future. The Commission finds that the new development onsite is not entitled to shoreline protection. To ensure that the applicant and future permittees do not rely on the potential of hard armoring, which would not be approved on this site, **Special Condition 5** requires that the applicant waive any right to construct a shoreline protective device for the property in the future. Further, the landowner must remove the development if any government agency has ordered that the structures are not to be occupied due to coastal hazards, or if any public agency requires the structures to be removed.

Because periodic storm and flood events occur throughout Coronado and the subject site is located in a FEMA Special Flood Hazard Area, **Special Condition No. 4** requires the applicant to acknowledge the risk of building in a hazardous location and ensures that the risks of property damage or loss arising from sea level rise or other changed circumstances are borne by the applicant enjoying the benefits of the private new development, and not the public.

Given that the subject development is located directly adjacent to the bay, the retaining walls and deck should not be modified or replaced as future erosion occurs as doing so may cause impacts to sensitive habitats, including eelgrass habitat that is located seaward of the site. With anticipated sea level rise and associated erosion of the shoreline, the mean high tide line will migrate further landward and will eventually likely extend under the deck, at which point replacement of the deck would be inconsistent with the City's LCP policies. If the applicant would like to propose any future modifications to the deck or retaining walls, those modifications should come before the Commission, even if these activities would typically be exempt. **Special Condition No. 3** notifies the applicant that the permit is only for the development described herein, and that any future modifications to the deck or retaining walls will require an amendment to this CDP or a new CDP from the Commission.

**Special Condition No. 6** requires the applicant to comply with Special Condition No. 3 of the City of Coronado CDP No. 2019-08, which prohibits the placement

of development, structures, fences, or material of any type beyond the rear property line, onto existing public property or beach area. This Special Condition provides additional notice to the applicant of the restriction in order to ensure that public access or habitat impacts do not occur. Finally, **Special Condition No. 7** requires the applicant to record a deed restriction against the property that imposes the special conditions of the permit for the purpose of providing notice to future property owners. As conditioned, the project conforms to the coastal hazards policies contained in the City's LCP.

### **C. Biological Resources and Water Quality**

The Biological Resources and Water Quality findings and the relevant biological resources and water quality policies of the City of Coronado's certified LCP cited in the Substantial Issue findings of the staff report are incorporated herein.

Section 86.76.010 of the City's LCP allows decks and other permanent structures requiring a CDP, only if they minimize extensions or projections into the bay which could cover the surface of the water resulting in bay coverage impacts. The increase in bay coverage could result in a reduction in the habitat available to foraging piscivorous birds or a change in character within the marine biological communities, including a potential decrease in primary productivity associated with shading. In this case, the City's approval requires the applicant to pull the deck back 14 inches as to not extend over the riprap north of the project site. However, it is unclear if the deck footings extend into the riprap. As such, **Special Condition No. 2** requires the applicant to submit final plans that reflect the current condition of the deck and conform to the plans approved by City of Coronado CDP No. 2019-08, except that the deck footings shall be pulled back so that they do not extend into the riprap north of the project site.

### **D. Violations**

Violations of the LCP and Coastal Act have occurred at the site including, but not necessarily limited to, the unpermitted construction of a deck and two retaining walls. Commission review and action on the CDP will resolve the violation identified in this section going forward.

Commission review and action on this permit does not constitute a waiver of any legal action with regard to the alleged violations (or any other violations), nor does it constitute an implied statement of the Commission's position regarding the legality of the development undertaken on the subject site without a coastal permit, or of any other development, other than the development approved herein, undertaken on the subject site without a coastal permit. Approval of this permit is possible only because of the conditions included herein, and the applicant's presumed subsequent compliance with said conditions, and failure to comply with these conditions in conjunction with the exercise of this permit would also constitute a violation of this permit and of the Coastal Act.

## **E. Local Coastal Planning**

Section 30604(a) requires that a coastal development permit shall be issued only if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act. The City of Coronado has a certified LCP. Based on the preceding discussion in this report, the Commission finds that the proposed development is consistent with all applicable provisions of the certified LCP and would not result in adverse impacts to sensitive coastal resources. The Commission also finds, that based on the above, the proposed development would not prejudice the ability of the City of Coronado to continue to implement its certified local coastal program.

## **F. 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 found the development to be exempt under Section 15302 regarding replacement or reconstruction and Section 15303 pertaining to new construction or the conversion of small structures.

The proposed project has been conditioned in order to be found consistent with the Chapter 3 policies of the Coastal Act. Mitigation measures, including conditions addressing coastal hazards and biological resources 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 is the least environmentally-damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

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

City of Coronado CDP No. 2019-08