

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



F18a

A-6-COR-20-0045 (Berge)

April 16, 2021

CORRESPONDENCE



AANNESTAD ANDELIN & CORN LLP

160 CHESTERFIELD DRIVE • SUITE 201
CARDIFF-BY-THE-SEA • CALIFORNIA 92007
www.aac.law • (760) 944-9006

Coastal Property Rights, Land Use & Litigation

April 9, 2021

Honorable Chair Steve Padilla and Commissioners
California Coastal Commission, San Diego Area
7575 Metropolitan Drive, Suite 103
San Diego, CA 92018-4421

**Re: Substantial Issue and Approval with Conditions on De Novo Determination:
Appeal No. A-6-COR-20-0045 (621 First Street, Coronado/Berge Residence)**

Dear Hon. Chair Padilla and Commissioners:

Our firm represents Brent C. Berge, owner of a single-family residence located at 621 First Street, Coronado, San Diego County (APN No. 536-030-11), which is the subject of Appeal No. A-6-COR-20-0045, to be considered by the California Coastal Commission (“Commission”), scheduled for a substantial issue and approval with conditions on de novo hearing on Friday, April 16, 2021.

The project description includes after-the-fact approval of the construction of a 15-inch tall retaining wall, 24-inch tall retaining wall, and 17 foot-long, 11 foot-wide deck on a 10,680 square foot bayfront lot located within the City of Coronado. The site is *already protected* by an existing riprap revetment.

Background

In October 2017, Mr. Berge received approval from the City of Coronado 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 the Commission did not review the residence’s approval.

In May 2019, Commission and City Staff received a complaint that the applicant had also constructed two new retaining walls and a new deck during the new residential construction. In response to the complaint, Mr. Berge provided a civil engineer analysis and eelgrass survey, updated plans, and submitted the corresponding CDP application. This item was placed on the December 10, 2019 Planning Commission agenda, and public notices were provided. City staff was contacted by Coastal Commission staff expressing potential concerns with the project and requesting that the applicant postpone the hearing to allow them to have a better understanding

of the project and the project site. To be collaborative, Mr. Berge agreed to postpone the December 2019 hearing and had Coastal Commission staff visit the site. After visiting the project site, Coastal Commission staff requested that the deck be pulled back to be no longer located on top of the existing rip rap.

The City then approved the project on July 14, 2020. The City's action authorized the construction of the two retaining walls and required the deck to be pulled back 14 inches to not extend over the riprap per Commission staff's direction.

Consistency with the City of Coronado's LCP and the California Coastal Act

Mr. Berge has great respect for the City and the Commission's work, and for this reason, he applied for an after-the-fact application to the City for a Coastal Development Permit (CDP) to authorize the work after-the-fact. Mr. Berge has provided a complete and thorough application package. He provided certification from Coastal Environments, Inc., which was found to be acceptable to the Community Development Department that the proposed improvements conform to the criteria of CMC Section 86.76.010. The certification was prepared by Hany Elwany, Ph.D., Oceanographer and Coastal Engineer, and David Skelly, P.E., Principal Engineer. The certification includes findings that the platform and curb wall are located landward of the highest tide, with an elevation above +10 feet MLLW. **All improvements are entirely on private property and landward of any influence of San Diego Bay waves and/or erosion. The curb retaining walls will prevent site surface drainage from impacting bay waters and prevent the existing site and adjacent sites from erosion.**

Additionally, an eelgrass study was prepared by Keith Merkel of Merkel and Associates, which found that there would be no shading impacts to any adjacent eelgrass. The nearest eelgrass was found 42 feet away from the subject platform/deck, and due to the platform/deck's elevation and location, the longest shadow would project out only 4.9 feet. Before the proposal, this analysis was done to reduce the deck's length by 14 inches less than the 4.9 feet cited. It was also found that the existing rubble shoreline prevents any shoreward migration of the eelgrass bed. **Therefore, the project has no impact on eelgrass beds or habitat.**

Finally, the project is entirely consistent with the requirements of Section 86.76.010(C) Coastal permit required of the Coronado Municipal Code (CMC) to protect the Natural Ocean and bay processes. These requirements include measures to limit erosion and water pollution, ensure no substantial adverse physical change, ensure public access and public vistas are maintained, minimize projections into the ocean, and mitigate any adverse environmental impacts.

The Project has no impact on public access. The Project is located at the bank of San Diego Bay at high elevation and inside the property boundary. There is no development on public property or sand beaches. The Project does not impact public access along the shoreline.

The subject project will not have a significant adverse effect either individually or cumulatively on coastal resources or public access to, or along, the coast, as detailed in the project plans, the certification from a coastal engineer, and the eelgrass study.

Additional Facts

It is essential to point out that the new residence **was designed and approved by the City** to be safe from flooding and sea-level rise throughout its economic life to avoid a new shoreline protection device. The City would have never approved the recent CDP without having been required.

The retaining walls' objective was to reduce water pollution to San Diego Bay by minimizing the drainage from rains and watering the plants, and stabilizing the soil using artificial turf that does not require irrigation. To this respect, Mr. Berge constructed a retaining curb 15 inches high at the edge of the propriety with a footing 24" x 12" and a 24" high curb surrounding the planter with footing about 20" x 12". Additionally, the project included rebuilding the platform and reducing the extension by 4.12 feet as a courtesy to Mr. Berge's neighbor to the east.

Simply put, the retaining walls in question were installed to terrace the backyard, providing flat, usable surfaces; to improve the aesthetics by providing visual variation; to create planting areas for landscaping; and to retain the existing soil (as any retaining wall would do) and prevent soils from polluting the bay. As the staff report correctly recognizes, this is not a shoreline protection device.

The curb type walls are located behind the existing shore protection, at high elevation, and will not interact with the bay waters. The walls prevent site surface drainage from impacting the Bay and ensure the adjacent properties' geologic stability. The curbs are at a high elevation from the water level and behind the top of the riprap by about 2 to 3 feet. Therefore, it is expected to have no impact on coastal processes. Also, these curbs were constructed in an area where other houses are already built, and these buildings show no signs of subsidence or cracks. This evidence indicates that the project area is on stable soil, and therefore, the curbs would not have significant impacts on the geologic stability of the site.

The constructed walls are not substantial enough in height or width to serve as a shoreline protection device. Commission staff admitted in the notice of appeal (page 8 of 21): "*It is also unclear why new retaining walls are necessary, given that the site is protected by existing riprap.*" This confirms that the site is already protected by existing riprap; therefore, the retaining walls at most retain the soil landward as does any standard retaining wall.

Regarding the platform deck in question, we concur with the City that it serves as a coastal-dependent use. To the extent the deck is used for observation of the bay, this is another coastal-dependent use. The deck is located in the same location as the pre-existing deck. Nevertheless,

Mr. Berge, again in an show of good faith, has pulled back the deck by over a foot (14 inches) to avoid any potential contact with the existing riprap.

In concurrence with the findings of the City of Coronado and the recommendations of the Commission staff report, we firmly believe that the proposed project is wholly consistent with the City of Coronado LCP policies and regulations.

The Coastal Commission does not have appeal jurisdiction for this project.

Though we agree with staff's recommendation of approval, this project should not have been subject to any CDP requirement and should not have been appealed in the first place. As noted by staff, this project was performed concurrently and in connection with the construction of the single-family residence that was approved in 2017. Under the City of Coronado's certified LCP, "[i]mprovements to existing single-family dwelling buildings" are exempt from any CDP requirement. (Coronado Mun. Code, § 86.70.052, subd. A.) "Construction of a single-family dwelling building on a legal lot of record in conformance to all applicable requirements of [the city's zoning code]" is also exempt. (*Id.*, § 86.70.052, subd. H.) Thus, whether the work is considered an improvement to the residence or part of the construction of the residence, it is exempt.

Furthermore, under the Coronado LCP, "[a]ctivities not requiring either an initial study under CEQA, an environmental assessment under NEPA, a Planning Commission or City Council interpretation, or issuance of a special use permit or variance; and provided the activities as reviewed within the policies of the Coastal Act shall not create a potential for any adverse effect either individually or cumulatively on coastal resources and the activities conform with all provisions of the LCP land use plan" are also exempt from any CDP requirement. (Coronado Mun. Code, § 86.70.052, subd. K.) The Coronado Planning Commission found, and no one has disputed, that this project is exempt from CEQA, and NEPA does not apply. The project did not require any interpretation, special use permit, or variance by the Coronado Planning Commission. And the Coronado Planning Commission found based on the uncontroverted evidence submitted by Mr. Berge, and staff agrees, that the project creates no adverse effect on coastal resources and conforms with the LCP. Therefore, the project is exempt on this basis as well.

Given that there is no requirement for a CDP, and the City of Coronado had no jurisdiction to require or issue a CDP, there is likewise no jurisdiction for the Commission to hear this appeal, and the appeal must be dismissed.

"The grounds for an appeal" to the Commission "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." (Pub. Res. Code, § 30603, subd. (b)(1).) As set forth above, this project is exempt, and there is no impact on public access. Thus, if the Commission believes it does have jurisdiction, then the Commission should find no substantial

issue and find the development exempt from any CDP requirement and allow the city-approved development to remain in place without conditions.

Proposed Condition 5(a) is an unconstitutional taking.

The United States Constitution and the California Constitution both prohibit the taking of private property by the government without just compensation. In the *Nolan/Dolan* line of cases, courts have held: “Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.” (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 385; see also *Dolan v. City of Tigard* (1994) 512 U.S. 374; *Nollan v. Cal. Coastal Comm’n* (1987) 483 U.S. 825.) Thus, the government must establish that an “‘essential nexus’ exists between the ‘legitimate state interest’ and the permit condition exacted by the” government. (*Ibid.*) Then, the government must establish the “the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development.” (*Id.* at 388.) In other words, there must be “rough proportionality” between the condition and the legitimate government interest.

Proposed Condition 5(a) fails both elements of this test. First, if the Commission accepts jurisdiction of this appeal, then it must be that project at issue was not part of the construction of, or any improvement to, the single-family dwelling. Furthermore, the undisputed facts are that the terrace walls do not serve to protect the dwelling and do not have any negative impact on coastal processes. Therefore, there is no connection, or nexus, between the development and the condition requiring waiver of the right to protect the dwelling.

Second, the condition lacks proportionality. The burden of the condition—the waiver of any right to protect a home valued at millions of dollars—grossly outweighs any impact of the project, which is essentially a minor landscaping improvement. The undisputed evidence submitted by the applicant, the findings of the Coronado Planning Commission, and the recommendation of staff all concur that this development has no impact, let alone a substantial impact, on coastal processes or any conceivable government interest.

Proposed Condition 5(a) is thus unconstitutional and would be stricken by a court of law. The condition should be removed entirely.

Conclusion

Under Section 30603(b) of the Coastal Act, the Commission’s appeal jurisdiction is “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 [of the Coastal Act].” (Pub. Res. Code, § 30603, subd. (b).) The Commission lacks jurisdiction, and there is no evidence before the Commission to support a finding that the City’s approval of Mr. Berge’s after-the-fact CDP does not conform with the City’s LCP such that the appeal presents a substantial issue. Furthermore,

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proposed Condition 5(a) is unconstitutional. It would be an abuse of discretion for the Commission to find a substantial issue with this project.

Sincerely,

AANNESTAD ANDELIN & CORN LLP



Anders T. Aannestad