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**CALIFORNIA COASTAL COMMISSION**

South Coast District Office  
301 E Ocean Blvd., Suite 300  
Long Beach, CA 90802-4302  
(562) 590-5071



# W12a

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Staff: V. Lee-LB  
Staff Report: 04/28/21  
Hearing Date: 05/12/21

## STAFF REPORT: REGULAR CALENDAR

**Application No.:** 5-20-0057

**Co-applicants:** YG III, LLC and Cotton Point Homeowner's Association (CPHOA)

**Agents:** Gaines & Stacey, LLP and Cane & Harkins, LLP

**Location:** 4125 Calle Isabella, San Clemente, Orange County (APN: 060-311-08 & 060-311-09)

**Project Description:** Construct a 205 ft. long, 4 ft. high retaining wall and backfill behind the wall to restore pre-existing grade within a 15 ft. wide vertical public access easement along the eastern boundary of a property developed with an unpermitted single family residence, remove existing obstructions within the easement area, construct a 72-inch high iron fence on top of the proposed retaining wall, partially demolish block walls within the vertical public access easement on the northern and southern property boundary, and install two 6 ft. wrought iron fences across the easement where the block walls are proposed to be demolished.

**Staff Recommendation:** Approval with conditions.

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## SUMMARY OF STAFF RECOMMENDATION

The proposed project is to construct a 205 ft. long, 4 ft. high retaining wall and backfill behind the wall to restore pre-existing grade within a 15 ft. wide vertical public access easement along the eastern boundary of a property developed with an unpermitted single family residence. The proposed project also includes the removal of existing obstructions (4 tennis court light poles, underground irrigation and drainage, air conditioning units, accent lighting on trees, and irrigation for trees) within the easement area, construction of a 72-inch high iron fence on top of the proposed retaining wall, partial demolition of the northern and southern block walls within the vertical public access easement, and installation of two 6 ft. wrought iron fences across the easement where the block walls are proposed to be demolished<sup>1</sup> ([Exhibit 2](#)).

There are two co-applicants for the permit, YG III, LLC and Cotton Point Homeowner's Association ("CPHOA"), owners of Lot 9 and Lot B, respectively. As owners of separate parcels, the roles and powers of the co-applicants in this application diverge slightly. In addition, and significantly, the interests of the co-applicants also diverge substantially. For these reasons, among others, the applicants will be referred to individually as "YG III, LLC" and "CPHOA," except where they are referred to collectively as the "co-applicants."

The subject parcels (Lot 9 and Lot B of City of San Clemente Tract No. 10909) include a parcel owned by the Cotton Point Homeowner's Association ("CPHOA") (Lot B) and one of the 17 single family residential lots created as a result of Coastal Development Permit P-81-7789 (Lot 9). CDP P-81-7789 approved the subdivision of 19.2 acres of blufftop property in this area, known as the former Nixon estate ([Exhibit 3](#)). P-81-7789 was approved subject to four special conditions. Special Condition No. 2 of the permit required the recordation of an irrevocable offer of dedication for an easement 15 ft. wide along the eastern boundary of the tract to the City of San Clemente. The Regional Coastal Commission's approval of P-81-7789 was appealed to the State Coastal Commission (A-148-81). On June 17, 1981, the Commission heard the appeal and approved the project subject to a clarification of Special Condition No. 2, which allowed the offer to be accepted by a public agency acceptable to the Executive Director. On February 26, 2004, the offer was accepted by the Coastal Conservancy. The condition also restricted the accessway from opening until the "Trestles" accessway (across the Coast Guard property to the south of the project site) is no longer available to the public or is unreasonably restricted for public use. The Trestles accessway is part of the 50-year lease agreement between the California Department of Parks and Recreation and the Marine Corps which was set to expire on August 31, 2021. In 2020, the lease was extended for 3 years to 2024, as an interim solution intended to provide the Marine

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<sup>1</sup> As explained further in the Public Access section of this report, the proposed wrought iron fences across the easement constitute obstruction of the access easement and must be excluded from this application.

Corps with additional time to complete the work necessary to execute a succeeding long-term lease.

On February 1, 2019, the Commission issued a notice of violation (ref: V-5-19-0002) to YG III, LLC. The notice describes unpermitted development at the subject parcel, including (1) placement of solid materials in the public access easement, including, but not necessarily limited to a wall, and installation of landscaping; (2) grading within a public access easement (consisting of removing soil from the access easement in order to lower the elevation of the access easement) thereby significantly impairing the walkability of the easement; (3) change in access to the coast through placement of private development in a public access easement; and (4) construction of a single-family residence and accessory structures, including, but not limited to, a pool, volleyball and basketball court and associated hardscaping.

The proposed project is an application to remedy the violations within the 15 ft. wide public access easement that were described in the February 1, 2019 Notice of Violation letter. Approval of this application pursuant to the staff recommendation, issuance of the permit, and the co-applicants' subsequent performance of the work authorized by the permit in compliance with all of the terms and conditions therein will result in resolution of the above described violations within the public access easement. At staff's suggestion, a request to authorize the single-family residence after the fact was separated from this application in order to expedite a resolution of the violations within the public access easement. The owner of the residential property (YG III, LLC) has indicated that it will remedy the unpermitted construction of the single-family residence and associated structures in a separate permit. Coastal Commission enforcement staff will work with YG III, LLC to ensure that process proceeds.

The primary issue raised by this project concerns the project's potential impact on public access. As further described in the Project Description and Background section of this report, the currently existing unpermitted single-family residence and associated structures sit on Lot 9 (owned by the applicant (YG III, LLC)) and Lot B (owned by CPHOA) of San Clemente Tract No. 10909 ([Exhibit 3](#)). The proposed access easement restoration project involves the easternmost 15 ft. along both Lot 9 and Lot B.

As part of the project, YG III, LLC proposes to partially demolish the unpermitted block walls within the public access easement and install 6 ft. high wrought iron fences on the northern and southern border of the property within the easement, and construct a 4 ft. high retaining wall along the western side of the easement (entirely within the easement area), thereby blocking and undermining the access easement from future public use. According to Special Condition 2 of the subdivision permit P-81-7789, which was modified by A-148-81, any permanent improvements within the 15 ft. wide public accessway are prohibited. Even though YG III, LLC has argued that the proposed wrought iron fences within the easement area are not a permanent improvement, the proposed fences are inconsistent with P-81-7789 and A-148-81. Also, placing the proposed retaining wall entirely within the easement area will impede the required 15 ft. easement width, and the proposed retaining wall will constitute a permanent improvement within the easement.

Therefore, Staff recommends the Commission impose **Special Condition 1**, requiring the applicants to submit a revised plan which demonstrates that 1) no improvements other than landscaping are located with the 15 ft. wide vertical access easement and that proposed landscaping shall not regulate, restrict, inhibit, interfere and/or discourage the public's right of access to the sea, 2) the exclusion of the 6 ft. high wrought iron fences across the easement on the northern and southern borders of the existing development footprint, and 3) the siting of the entirety of the proposed retaining wall shall be outside the vertical access easement.

Although the CPHOA is a co-applicant on this permit, previously submitted correspondence indicates that CPHOA is not in agreement with the development proposed on Lot B<sup>2</sup>. Thus, Staff recommends that the Commission also impose **Special Condition 2**, which requires the co-applicants to demonstrate the authority to conduct the proposed development, or submit revised plans limiting the scope of work to Lot 9 of City of San Clemente Tract No. 10909 if YG III, LLC fails to demonstrate its authority to conduct the proposed project within 6 months of the date of Commission action, and complete all work authorized by this permit within 1 year of the date of Commission action. Additional recommended special conditions include **Special Condition 3** (Future Improvements), **Special Condition 4** (Landscaping Plan), and **Special Condition 5** (Construction BMPs).

Commission staff recommends that the Commission **APPROVE** coastal development permit application 5-20-0057 with five special conditions. The motion and resolution can be found on **Page 6**.

Section 30600(c) of the Coastal Act provides for the issuance of coastal development permits directly by the Commission in regions where the local government having jurisdiction does not have a certified Local Coastal Program. The City of San Clemente only has a certified LUP and has not exercised the options provided in 30600(b) or 30600.5 to issue its own permits. Therefore, the Coastal Commission is the permit issuing entity and the standard of review is Chapter 3 of the Coastal Act. San Clemente's certified LUP may be used for guidance.

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<sup>2</sup> Prior to publication of this staff report, CPHOA has submitted a separate application that proposes to restore the original flat elevation of the entire Lot B. Commission staff is currently reviewing this application to determine its completeness.

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## **EXHIBITS**

[Exhibit 1 – Vicinity Map and Project Site](#)

[Exhibit 2 – Project Plans](#)

[Exhibit 3 – Lot 9 and Lot B of San Clemente Tract No. 10909](#)

## MOTION AND RESOLUTION

### Motion:

I move that the Commission approve Coastal Development Permit 5-20-0057 pursuant 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.

## 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 applicants 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 or 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 applicants to bind

all future owners and possessors of the subject property to the terms and conditions.

## **SPECIAL CONDITIONS**

**1. Submittal of Revised Plan.** PRIOR TO THE COMMENCEMENT OF WORK, YG III, LLC shall submit for the review and approval of the Executive Director, two (2) full size sets of revised plans that have been reviewed and approved by the City of San Clemente, which demonstrate the following:

- A. No improvements other than landscaping and grading are located within the 15' wide vertical access easement.
- B. The proposed 6-ft wrought iron fences across the easement on the northern and southern border of the property are prohibited and shall be removed from the revised plans.
- C. The entirety of the proposed retaining wall shall be located entirely outside the vertical access easement.
- D. The configuration of landscaping shall be such that it does not regulate, restrict, inhibit, interfere and/or discourage the public's right of access to the sea.

YG III, LLC shall undertake development in accordance with the approved plans within 90 days of the Executive Director's approval of said plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

**2. Demonstration of Authority to Conduct Proposed Development .** PRIOR TO THE SUBMITTAL OF REVISED PLANS PURSUANT TO SPECIAL CONDITION 1, YG III, LLC shall demonstrate its authority to conduct the proposed development . The demonstration shall take place within 6 months of the date of Commission action. If, within 6 months of the approval of this permit, YG III, LLC cannot demonstrate its authority to conduct the proposed work on Lot B , the revised plans it submits pursuant to Special Condition 1 shall, in addition to the requirements of that condition, also indicate that the access easement restoration work will be limited to Lot 9 of City of San Clemente Tract No. 10909. All work authorized by this permit shall be completed within 1 year of the date of Commission action.

**3. Future Improvements.** This permit is only for the development described in coastal development permit (CDP) No. 5-20-0057. Pursuant to Title 14 California Code of Regulations (CCR) Section 13253(b)(6), the exemptions otherwise provided in Public Resources Code (PRC) Section 30610(b) shall not apply to the development governed by the CDP No. 5-20-0057. Accordingly, any future improvements to this

structure authorized by this permit shall require an amendment to CDP No. 5-20-0057 from the Commission or shall require an additional CDP from the Commission or from the applicable certified local government. In addition, an amendment to CDP No. 5-20-0057 from the Commission or an additional CDP from the Commission or from the applicable certified local government shall be required for any repair or maintenance identified as requiring a permit in PRC Section 30610(d) and Title 14 CCR Sections 13252(a)-(b).

#### **4. Landscaping Plan.**

**A.** Vegetated landscaped areas shall only consist of native plants or non-native drought tolerant plants, which are non-invasive. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Exotic Pest Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property. The applicants shall incorporate Best Management Practices (BMPs) into the construction and post-construction phases of the subject development.

**B.** Any proposed changes to the approved plan shall be reported to the Executive Director. No changes to the approved plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

#### **5. Storage of Construction Materials, Mechanized Equipment, and Removal of Construction Debris.** The permittees shall comply with the following construction-related requirements:

**A.** No demolition or construction materials, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion;

**B.** No demolition or construction equipment, materials, or activity shall be placed in or occur in any location that would result in impacts to environmentally sensitive habitat areas, streams, wetlands or their buffers;

**C.** Any and all debris resulting from demolition or construction activities shall be removed from the project site within 24 hours of completion of the project;

**D.** Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters;

**E.** All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day;



- F.** The permittees shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction;
- G.** Debris shall be disposed of at a legal disposal site or recycled at a recycling facility. If the disposal site is located in the Coastal Zone, a coastal development permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required;
- H.** All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil;
- I.** Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems;
- J.** The discharge of any hazardous materials into any receiving waters shall be prohibited;
- K.** Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible;
- L.** Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or construction-related materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity; and
- M.** All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

## **FINDINGS AND DECLARATIONS**

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

#### **Project Background / Coastal Act Violation**

The subject parcels (Lot 9 and Lot B of City of San Clemente Tract No. 10909) include a parcel owned by the CPHOA (Lot B) and one of the 17 single family residential lots created as a result of coastal development permit P-81-7789 (Lot 9), which approved the subdivision of 19.2 acres of blufftop property in this area, known as the former Nixon estate. P-81-7789 was approved subject to four special conditions. Special Condition No. 2 of the permit required the recordation of an irrevocable offer of dedication for an

easement 15 ft. wide along the eastern boundary of the tract to the City of San Clemente.

The Regional Coastal Commission's approval of P-81-7789 was appealed to the State Coastal Commission(A-148-81) on the contention that the project delegated the lowest priority use (single-family residential) to one of the few undeveloped coastal parcels in Orange County prior to approval of San Clemente's Local Coastal Program; that there was a total lack of public access to the coast and to the number one desired visitor destination point (the Nixon home and grounds); and that there was a lack of a substantial public benefit for the approval of the low-priority use (residential development) of this valuable coastal resource. On June. 17, 1981, the Commission heard the appeal and approved the project subject to a clarification of Special Condition No. 2 (Vertical Access). The vertical access condition language was modified to read as follows [emphasis added]:

## 2. Vertical Access

Prior to issuance of permit the applicant shall submit evidence of an agreement, the form and content of which has been approved by the Executive Director, offering to dedicate to a public agency or private association acceptable to the Executive Director, an easement for public access allowing the public to pass and repass over a strip of the applicant's property 15 ft- in width and running along the entire eastern boundary of the project site, from the northern property line to the railroad right-of way. The offer of dedication shall contain a clause restricting the agency accepting the offer from opening up the accessway to the public unless and until the "Trestles" accessway across the Coast Guard property to the south is no longer available to the public or is unreasonably restricted for public use. The offer shall be made free of prior liens and encumbrances except for tax liens. The offer shall be irrevocable for a period of 21 years, running from the date of recordation and shall run with the land in favor of the people of the State of California, binding successors and assigns of the applicant.

**In addition, prior to sale of any of the lots, the applicant shall submit evidence that the CC&Rs of the subdivision note the existence of the accessway and prohibit any permanent improvements within the accessway.**

In early March 1983, the Cotton Point CC&Rs were adopted. The CC&Rs properly identify the existence of the accessway easement and prohibit any permanent improvements within the accessway.

On April 11, 1983, the irrevocable offer of dedication across the easternmost 15 ft. of the property was recorded in Orange County document no. 83-151464. On February 26, 2004, the offer was accepted by the Coastal Conservancy and recorded in document no. 2004000148786.

From April 12, 1990 to November 24, 1990, the prior owner of Lot 9 obtained four building permits (90-468, 90-554, 90-1506, 90-1529) from the City of San Clemente, which in aggregate authorized the currently existing single-family residence, pool and spa, and block walls on the north boundary of Lot 9 and the south boundary of Lot B. On April 24, 1990, the prior property owner entered into an Agreement and Grant of Easement with the Cotton Point Homeowner Association (“CPHOA”), which granted perpetual non-exclusive easement for pedestrian ingress, egress, landscaping purposes, and for emergency vehicles over Lot B of San Clemente Tract No. 10909. Lot B is located directly south of the privately owned Lot 9, and is a 4,000 sq. ft. common area owned by the CPHOA ([Exhibit 3](#)). At some point in time since 1990, the prior property owner constructed private sports court that sits on both Lot 9 and Lot B. However, none of the above-described developments by the prior property owner ever received a CDP from the Coastal Commission, and therefore constitute unpermitted developments in violation of the Coastal Act. In December 1999, YG III, LLC purchased Lot 9.

On February 1, 2019, the Commission issued a notice of violation (ref: V-5-19-0002) to YG III, LLC. Commission staff notified YG III, LLC that any development activity conducted in the coastal zone without a valid coastal development permit constitutes a violation of the Coastal Act, and that placement of permanent improvements within the easement constitutes non-compliance with Special Condition No. 2 of CDP No. A-148-81, which prohibited such improvements in the public access easement. Specifically, the notice describes unpermitted development on Lot 9, including (1) placement of solid materials, including, but not necessarily limited to a wall, and installation of landscaping, in a public access easement; (2) grading within a public access easement (consisting of removing soil from the access easement in order to lower the elevation of the access easement); (3) change in access to the coast through placement of private development in a public access easement; and (4) construction of a single-family residence and accessory structures, including, but not limited to, a pool, volleyball and basketball court and associated hardscaping.

### **Project Description**

The proposed project is an application to remedy the violations within the 15 ft. wide public access easement that are described in the February 1, 2019 Notice of Violation letter. YG III, LLC proposes to construct a 4 ft. high retaining wall and backfill behind the wall to restore pre-existing grade within the 15 ft. wide vertical public access easement along the eastern boundary of the property, remove existing landscaping and obstructions (4 tennis court light poles, underground irrigation and drainage, air conditioning units, accent lighting on trees, and irrigation for trees) within the easement area, construct a 72-inch high iron fence on top of the proposed retaining wall, partially demolish the northern and southern block walls within the public access easement area, and install two 6 ft. wrought iron fences across the easement where the block walls are proposed to be demolished ([Exhibit 2](#)).

### **Standard of Review**

The Commission certified the City of San Clemente's LUP in 1988, and approved a comprehensive update most recently in 2018. However, the City does not yet have a certified Local Coastal Program (LCP). Therefore, the Chapter 3 policies of the Coastal Act constitute the standard of review for the project, with the certified LUP used as guidance.

## **B. Public Access**

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.”

Section 30211 of the Coastal Act states:

“Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.”

Section 30212 of the Coastal Act states, in pertinent part:

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

City of San Clemente certified LUP states, in pertinent parts:

**PUB-37 Preserving Public Coastal Access.** Review proposals for coastal land use changes and development to ensure they do not interfere with the public's right of access to the coast by ensuring that:

...

h. Gates, guardhouses, barriers, or other structures that would inhibit public access to and along the shoreline and to beaches, coastal parks, trails, or coastal bluffs are generally not permitted, with the exception of devices associated with safe access along and across the railroad.

**PUB-45 New Development Restrictions on Limiting Public Access.** New development shall not incorporate gates, fences, walls, guardhouses, barriers or other structures designed to regulate or restrict access where they would inhibit, interfere and/or discourage the public's right of access to the sea where such right was acquired through use, legislative authorization, or other operation of law, including, but not limited to, the public's right of access to and along the shoreline and to beaches, coastal parks, trails or coastal bluffs.

**PUB-47 Maximizing Public Access and Recreation.** Consistent with the LUP policies, provide maximum public access, which shall be conspicuously posted, and recreational opportunities for all the people from the nearest public roadway to the shoreline and along the shoreline consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

The subject site is located approximately 500 ft. inland of the public beach. As discussed previously, the subject property is one of the lots created as a result of coastal development permit P-81-7789 and A-148-81, which required recordation of an irrevocable offer of dedication for an easement 15 ft. wide along the eastern boundary of the tract.

The said easement is not currently open to the public, as there is an existing public accessway nearby. The nearest public access to the coast exists at the Trestles Beach Trail, approximately 900 ft. to the south of the project site. The trail was part of the 50-year lease agreement between the California Department of Parks and Recreation and the Marine Corps which was set to expire on August 31, 2021. In 2020, the lease was extended for 3 years to 2024, as an interim solution intended to provide the Marine Corps with additional time to complete the work necessary to execute a succeeding long-term lease. The Department of Parks and Recreation is currently in a negotiation process with the Marine Corps in order to secure the long-term lease and keep the Trestles Beach Trail open to the public. However, the Trestles Beach Trail may or may not continue to provide public access to the coast in this area as a result of that negotiation. Therefore, the access easement at the project site must be restored in conservative anticipation that the Trestles Beach Trail closes soon.

The currently existing grade within the access easement slopes down from the eastern property boundary towards the sports court, thereby significantly impairing the walkability of the access easement. The project proposes to restore the easement area by erecting a 4 ft. high retaining wall, backfilling behind the wall to restore preexisting grade within the 15 ft. vertical public access easement, and removing existing obstructions in the easement area ([Exhibit 2](#)). However, the project also proposes to partially demolish the block walls within the public access easement and install 6 ft. high wrought iron fencing on the northern and southern border of the property.

Special Condition No. 2 of the subdivision permit P-81-7789 required the recordation of an irrevocable offer of dedication for an easement 15 ft. wide along the eastern boundary of the tract to the City of San Clemente, subject to the following stipulations [emphasis added in bold]:

- a) The offer shall be valid until the year 2021 at which time it may be cancelled on three years prior written notice to City by Developer or its successors or assigns;
- b) Developer, through Title Insurance and Trust Co. or such other entity approved by the City Attorney, shall provide notice to the City of the existence of

the offer on or about 1-1-2021 or upon termination of the access described in (c) below;

c) The City agrees not to accept the offer until the existing public access to the beach across the San Clemente Point Coast Guard property or other adequate public access in the immediate area is no longer available to the public or unreasonably restricted for public use;

d) Upon acceptance of the offer, the improvement of the easement shall be at the City's expense;

**e) No permanent improvements other than landscaping shall be placed within the easement area unless until the offer is cancelled pursuant to (a) above;**

j) The existence of the offer shall be noted in the deeds and initial CC&Rs for the property subject to the offer;

g) The easement shall be used exclusively for beach access

According to subsection 2 of Special Condition 2 of the subdivision permit P-81-7789, any permanent improvement within the public accessway is prohibited. Even though the applicant has argued that the proposed wrought iron fences within the easement area are not a permanent improvement, the Commission finds the proposed fences to be inconsistent with the intent of this condition that provides for unobstructed vertical public access in the subdivided lots pursuant to P-81-7789 and A-148-81.

In addition, the City of San Clemente LUP, which was certified in 2018, contains specific policies to restrict the use of fences or other structures designed to regulate or restrict access. Policy PUB-45 of the certified San Clemente LUP states that new development shall not incorporate gates, fences, walls, guardhouses, barriers or other structures designed to regulate or restrict access where they would inhibit, interfere and/or discourage the public's right of access to the sea where such right was acquired through use, legislative authorization, or other operation of law, including, but not limited to, the public's right of access to and along the shoreline and to beaches, coastal parks, trails or coastal bluffs. Policy PUB-37 provides a similar restriction on new developments that limit public access by incorporating structures that would inhibit public access to and along the shoreline. Therefore, the Commission finds the proposed 6 ft. high wrought iron fences across the easement are inconsistent with these LUP policies.

The submitted site plan received by the Commission on January 29, 2020 illustrates the proposed 4 ft. high retaining wall to be located entirely within the easement area ([Exhibit 2, page 3](#)). As discussed previously, CDP No. P-81-7789, which has been clarified by CDP No. A-148-81, requires the access easement to be 15 ft. in width and clear of any permanent improvements. Placing the proposed retaining wall entirely within the easement area will not assure this 15 ft. width requirement, and the proposed

retaining wall counts as a permanent improvement within the public accessway. Therefore, the Commission finds the proposed retaining wall inconsistent with the condition of this underlying permit.

The submitted landscaping plan received by the Commission on January 29, 2020 proposes landscaping consisting of various shrubs in the entire easement area as shaded region ([Exhibit 2, page 7](#)). The submitted plan is unclear to determine whether the proposed landscaping will appear to prohibit, interfere or otherwise discourage the public from using the accessway.

For the reasons described above, the Commission imposes **Special Condition 1**, requiring the applicant to submit a revised plan which demonstrates that 1) no improvements other than landscaping are located within the 15 ft. wide vertical access easement, 2) the exclusion of the 6 ft. high wrought iron fences across the easement on the northern and southern borders of the existing development footprint, 3) the entirety of the proposed retaining wall shall be located outside the vertical access easement, and 4) the exact locations of the proposed shrubs shall be specified. The configuration of the shrubs shall be such that it does not regulate, restrict, inhibit, interfere and/or discourage the public's right of access to the sea.

### **Applicants' Legal Interest and Authority to Conduct Development**

As described above, the currently existing unpermitted single-family residence and associated structures sit on both Lot 9 and Lot B of San Clemente Tract No. 10909 ([Exhibit 3](#)). Therefore, the proposed access easement restoration project necessarily involves the easternmost 15 ft. along both Lot 9 (owned by YG III, LLC) and Lot B (owned by the CPHOA).

Section 30601.5 of the Coastal Act states:

Where the applicant for a coastal development permit is not the owner of a fee interest in the property on which a proposed development is to be located, but can demonstrate a legal right, interest, or other entitlement to use the property for the proposed development, the commission shall not require the holder or owner of any superior interest in the property to join the applicant as coapplicant. All holders or owners of any other interests of record in the affected property shall be notified in writing of the permit application and invited to join as coapplicant. In addition, prior to the issuance of a coastal development permit, the applicant shall demonstrate the authority to comply with all conditions of approval.

Although the CPHOA is a co-applicant on this permit, previously submitted correspondence indicates that it will not allow the proposed development on Lot B to proceed, leading to continued obstruction of the public access easement in violation of

the Coastal Act.<sup>3</sup> Thus, the Commission imposes **Special Condition 2** (Demonstration of Authority to Conduct Proposed Development), requiring YG III, LLC to demonstrate its authority to conduct the proposed project within 6 months of the date of Commission action. If YG III, LLC fails to demonstrate its authority within 6 months, YG III, LLC must submit revised plans indicating how the access easement restoration would take place only on its property (Lot 9 of City of San Clemente Tract No. 10909). All work authorized by this permit must be completed within 1 year of the date of Commission action.

The proposed development, as conditioned, will not have any adverse impact on public access to the coast. However, considering that the subject parcels provide an access easement that may be critical for public coastal access in the future if the nearby Trestles Beach Trail closes, the proposed project raises concerns that future development of the project site potentially may result in a development which is not consistent with the public access policies of the Coastal Act. The Commission imposes **Special Condition 3**, which requires an amendment to CDP No. 5-20-0057 or an additional CDP from the Commission for any future improvements.

As conditioned, the proposed project can be found consistent with the terms and conditions of CDP Nos. P-81-7789 and A-148-81 by ensuring that the vertical public access easement is 15 ft. wide and clear of any permanent improvements. The proposed project, as conditioned, is consistent with Sections 30210, 30211 and 30212 of the Coastal Act and PUB-37, 45, and 47 of the certified LUP because the project provides for the required public access to the shoreline without any structures designed to regulate, restrict, inhibit, interfere and/or discourage the public's right of access to the sea.

## C. Visual Resources

Section 30251 of the Coastal Act states, in pertinent part:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

City of San Clemente LUP states, in pertinent part:

**VIS-1 Visual Character and Aesthetic Resources Preservation.** New development shall be designed to preserve the visual character and aesthetic resources of the City's coastal zone including preservation of the physical features

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<sup>3</sup> Prior to publication of this staff report, CPHOA has submitted a separate application that proposes to restore the original flat elevation of the entire Lot B. Commission staff is currently reviewing this application to determine its completeness.



of coastal bluffs and canyons, and where feasible, enhance and restore scenic and visual qualities of the coastal zone, including to and along the ocean and coastal bluffs, visually significant ridgelines, and coastal canyons, open spaces, prominent, mature trees on public lands, and designated significant public views (as identified on Figure 6-1 Scenic Gateways and Corridors, Figure 6-2-A Public View Corridors and Figure 6-2-B Public View Corridors). Where protection of visual character and aesthetic resources is not feasible, impacts should be mitigated.

**VIS-10 Development Review.** Review and require changes to development proposals, as needed, to minimize obstructions of designated significant public views and designated Public View Corridors, and to ensure public and private development projects in the Coastal Zone use high-quality materials and are designed to be attractive and aesthetically compatible with adjacent structures, site improvements, utilities and landscape features.

**VIS-16 Development Design.** Development shall be designed and sited to maintain the natural topographic and physiographic characteristics of the project site including the:

- a. Minimization of the building pad area and height of cuts and fills;
- b. Encouragement of the "stair stepping" of structures to conform to slopes (by use of retaining walls and other elements); and
- c. Configuration of sites to reflect natural topography, by the clustering of sites and units on lesser slope and avoiding extensive fragmentation of steeper slope and/or other techniques.

The project proposes to remedy the unpermitted grading that took place along the eastern boundary of the property by erecting a 4 ft. high retaining wall and backfilling behind the wall to restore the pre-existing grade within the 15 ft. wide vertical public access easement area ([Exhibit 2](#)). The project, which is designed to conform with the visual character of the surrounding area by restoring the public access easement, is consistent with Section 30251 of the Coastal Act.

In addition, the project site is not located within or in close proximity to designated significant public views or designated Public View Corridors as prescribed in policies VIS-1 and VIS-10 and identified on Figures 6-1, 6-2-A, and 6-2-B of the certified San Clemente LUP. Therefore, the proposed development is not anticipated to have any new adverse impact on visual resources in this area. The project is also designed to maintain the natural topographic and physiographic characteristics of the project by using retaining wall to conform to slopes and restoring the unpermitted grading within the easement area back to the pre-existing condition, consistent with VIS-16 of the LUP.

Therefore, the Commission finds the proposed project consistent with the visual resource policies of the Coastal Act and the certified San Clemente LUP.

## D. Water Quality

Section 30230 of the Coastal Act states:

“Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.”

Section 30231 of the Coastal Act states:

“The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.”

Section 30232 of the Coastal Act states:

“Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.”

### Construction Impacts to Water Quality

The above policies of the Coastal Act require protection of marine resources, including the protection of coastal waters by controlling runoff and preventing spillage of hazardous materials.

Storage or placement of construction materials, debris, or waste in a location subject to erosion and dispersion or which may be discharged into coastal water via rain or wind would result in adverse impacts upon the marine environment that would reduce the biological productivity of coastal waters. For instance, construction debris entering coastal waters may cover and displace soft bottom habitat. Sediment discharged into coastal waters may cause turbidity, which can shade and reduce the productivity of foraging avian and marine species' ability to see food in the water column. In order to avoid adverse construction-related impacts upon marine resources, the Commission imposes **Special Condition 5**, which outlines construction-related requirements to provide for the safe storage of construction materials and the safe disposal of construction debris. This condition requires the applicants to remove all debris resulting from construction activities within 24 hours of completion of the project. In addition, all

construction materials, excluding lumber, shall be covered and enclosed on all sides, and stored as far away from a storm drain inlet and receiving waters as possible.

### **Post-Construction Impacts to Water Quality**

The applicants have submitted a landscaping plan that consists of non-invasive, drought tolerant vegetation. While the proposed landscaping consists of non-invasive and drought tolerant plants, future landscaping may not consist of such plants. For water conservation, any plants in the landscape plan should only be drought tolerant to minimize the use of water (and preferably native to coastal Orange County). In order to make sure that any onsite landscaping minimizes the use of water and the spread of invasive vegetation, the Commission imposes **Special Condition 4**, which imposes landscape controls that require that all vegetated landscaped areas shall only consist of native plants or non-native drought tolerant plants, which are non-invasive.

Thus, as conditioned, the Commission finds that the proposed project is consistent with Sections 30230, 30231 and 30232 of the Coastal Act.

### **E. Coastal Act Violations**

Violations of the Coastal Act exist on the subject properties including, but not limited to, (1) placement of solid materials, including, but not necessarily limited to walls, and installation of landscaping, in a public access easement; (2) grading within a public access easement (consisting of removing soil from the access easement in order to lower the elevation of the access easement); (3) change in access to the coast through placement of private development in a public access easement; and (4) construction of a single-family residence and accessory structures, including, but not limited to, a pool, volleyball and basketball court and associated hardscaping.

This application has been submitted at the direction of Commission staff for the purpose of resolving the violations within the public access easement. The conditions of approval pursuant to the staff recommendation will require the co-applicants to restore the public access easement to its pre-violation condition and remove impediments to access.

Issuance of the CDP, and subsequent performance of the work authorized by the permit in compliance with all of the terms and conditions of this permit will result in resolution of the aforementioned violations of the Coastal Act that are located within the public access easement. At staff's suggestion, a request to authorize the single-family residence after the fact was separated from this application in order to expedite a resolution of the violations within the public access easement. The owner of the residential property (YG III, LLC) has indicated that it will remedy the unpermitted construction of the single-family residence and associated structures in a separate permit.

Although development has taken place prior to submission of this permit application, consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act. 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, undertaken on the subject site without a coastal development permit. In fact, approval of this permit is possible only because of the conditions included herein, and the co-applicants' presumed subsequent compliance with said conditions. Failure to comply with these conditions would also constitute a violation of this permit and of the Coastal Act. Accordingly, the co-applicants remain subject to enforcement action just as they were prior to this permit approval for engaging in unpermitted development, unless and until the conditions of approval included in this permit are satisfied.

## **F. Local Coastal Program**

Coastal Act Section 30604(a) states that, prior to certification of a local coastal program ("LCP"), a coastal development permit can only be issued upon a finding that the proposed development is in conformity with Chapter 3 of the Act and that the permitted development will not prejudice the ability of the local government to prepare an LCP that is in conformity with Chapter 3. The Commission certified the Land Use Plan (LUP) for the City of San Clemente on May 11, 1988, and certified an amendment approved in October 1995. On April 10, 1998, the Commission certified with suggested modifications the Implementation Plan (IP) portion of the Local Coastal Program. The suggested modifications expired on October 10, 1998. The City re-submitted an IP on June 3, 1999, but withdrew the submittal on October 5, 2000. Most recently in 2018, the City certified an LUP amendment for a comprehensive update of the LUP. The City is currently also working on resubmittal of an IP, however, there is no certified LCP at this time.

As conditioned, the proposed development is consistent with Chapter 3 of the Coastal Act and with the certified LUP for the area. Approval of the project, as conditioned, will not prejudice the ability of the local government to prepare an LCP that is in conformity with the provisions of Chapter 3 of the Coastal Act.

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

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by findings showing the approval, 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 Commission's regulatory program for reviewing and granting CDPs has been certified by the Resources Secretary to be the functional equivalent of CEQA. (14 CCR § 15251(c).)

In this case, the City of San Clemente is the lead agency and the Commission is a responsible agency for the purposes of CEQA. However, Section 13053(a) of Title 14 of the California Code of Regulations provides that the executive director may waive the requirement for preliminary approval by other federal, state or local governmental agencies for good cause, including when the project is for a public purpose. Because the proposed project to restore public access easement within the property serves a public purpose, the Commission waived the requirement for preliminary local approval of the application, including the CEQA determination.

As conditioned, there are no feasible alternatives or additional feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment, either individually or cumulatively with other past, present, or reasonably foreseeable probable future projects. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, 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**

- Coastal Development Permit Application No. 5-20-0057 and associated file documents.
- Coastal Development Permit Application No. 5-19-0306 and associated file documents
- Coastal Development Permit Application No. P-81-7789 and associated staff report.
- Coastal Development Permit Application No. A-148-81 and associated staff report.
- City of San Clemente Certified Land Use Plan, Certified by the Commission in 2018.
- Notice of Violation of the California Coastal Act, Violation File Number V-5-19-0002