CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
FAX (415) 904-5400
TDD (415) 597-5885

W12b

A-4-MAL-20-0046

JULY 7, 2021

EXHIBITS

Table of Contents

Exhibit 1
Vicinity Map
Appeal No. A-4-MAL-20-0046

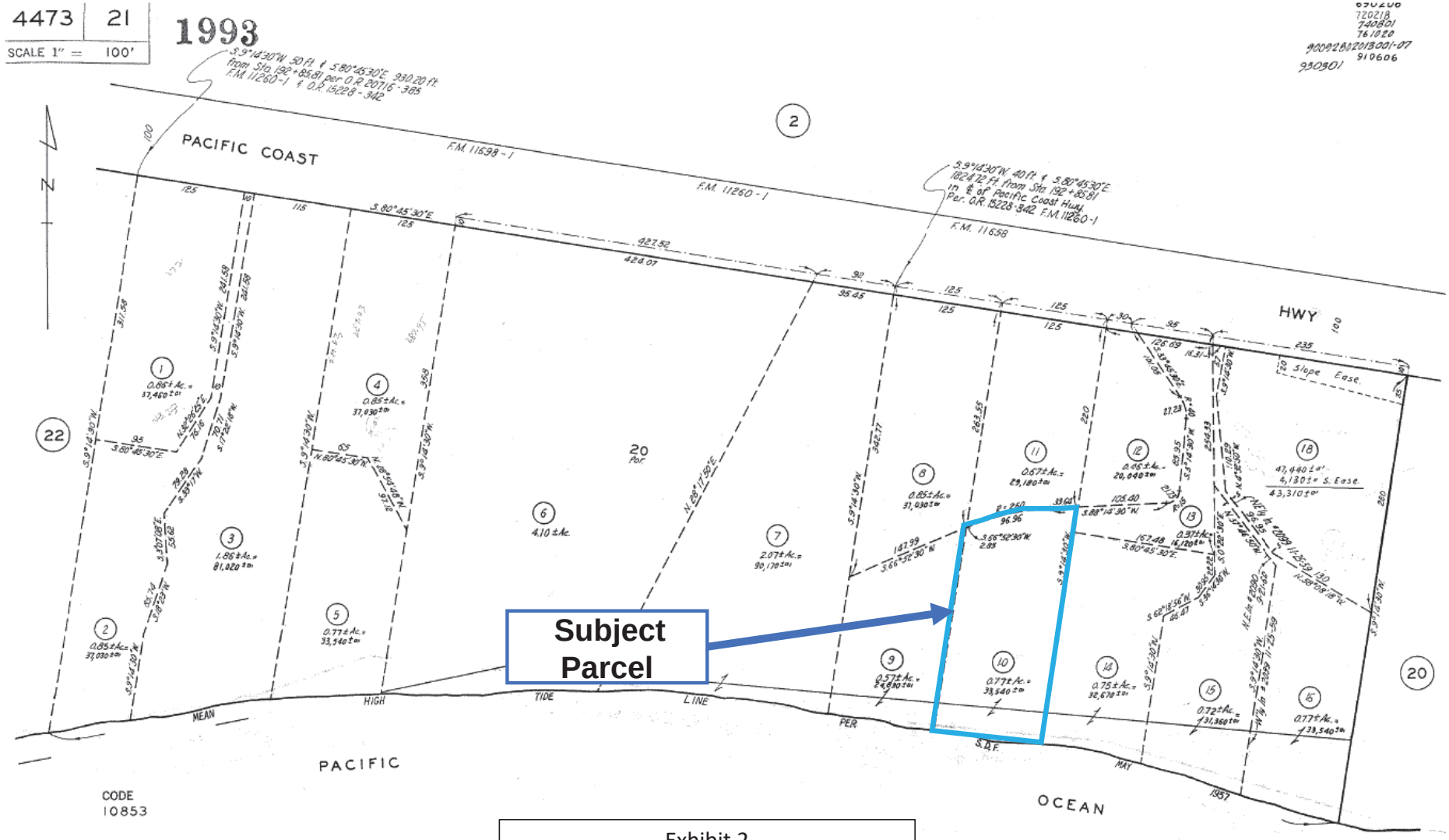
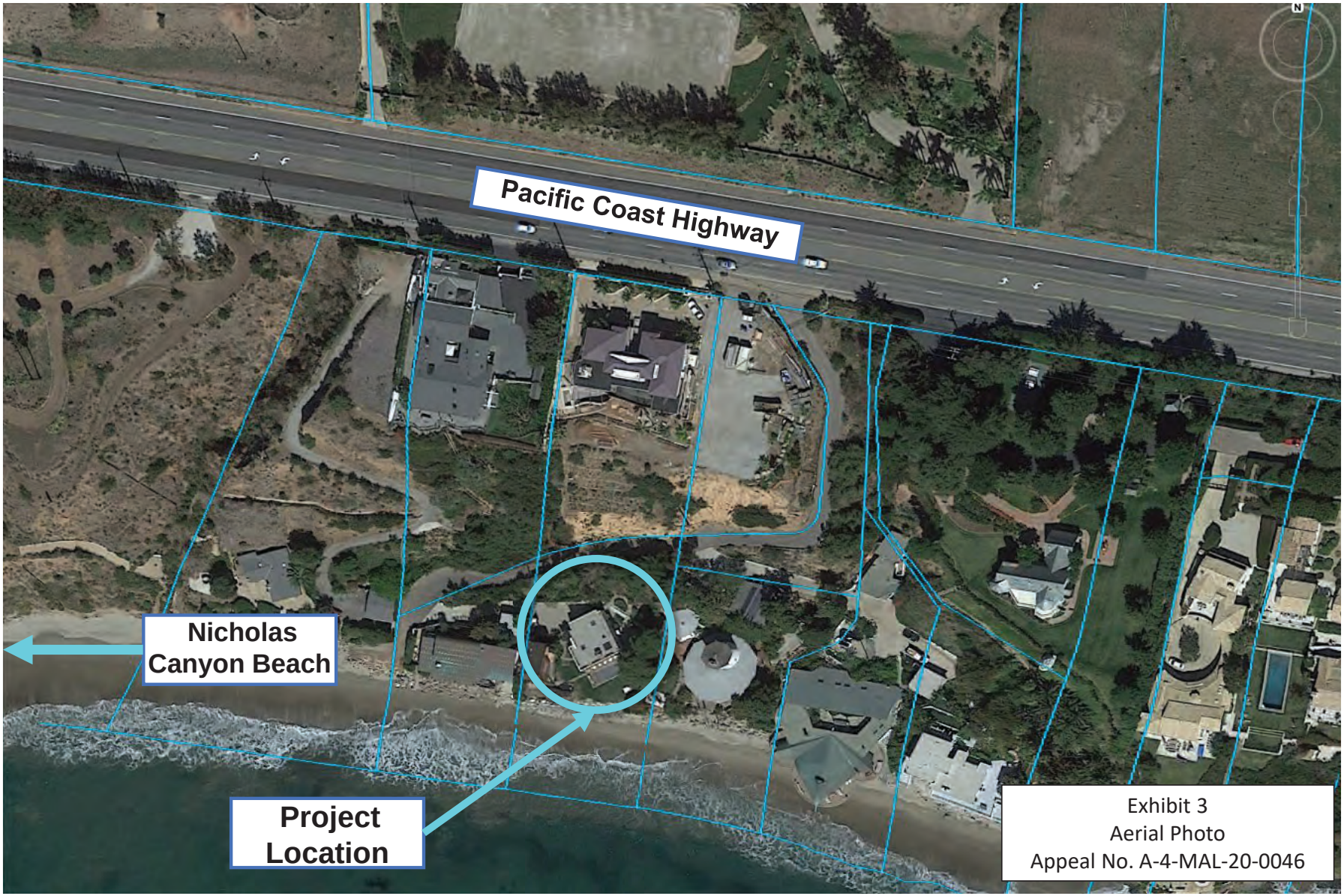
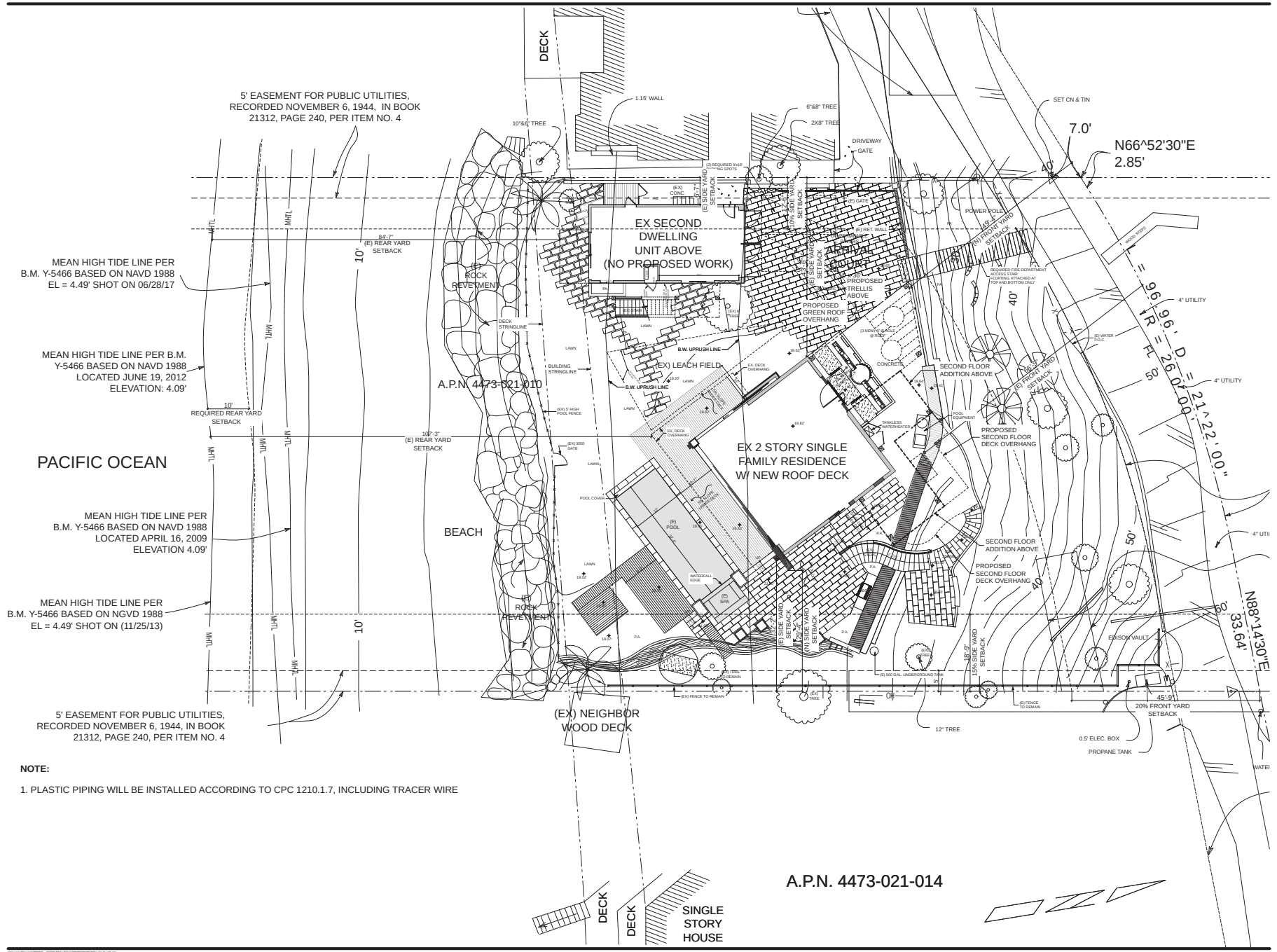


Exhibit 2
Parcel Map
Appeal No. A-4-MAL-20-0046


Pacific Coast Highway
Nicholas Canyon Beach
Project Location
Exhibit 3
Aerial Photo
Appeal No. A-4-MAL-20-0046



NOTE:

1. PLASTIC PIPING WILL BE INSTALLED ACCORDING TO CPC 1210.1.7, INCLUDING TRACER WIRE

Exhibit 4.
Site Plan, Floor Plan, and Elevation Plans
Appeal No. A-4-MAL-20-0046

33608 PCH RESIDENCE

PACIFIC COAST HWY.
MALIBU, CA 90265

LICENSED ARCHITECT
DOUGLAS W. BURDGE
C-18888
RENEWAL 11/30/2019
STATE OF CALIFORNIA

NO	DATE	ISSUE
	2017/06/15	CDP SUBMITTAL
	2017/09/11	CDP RE-SUBMITTAL
	2018/10/05	CDP RE-SUBMITTAL
	2018/12/20	CDP RE-SUBMITTAL
	2019/01/30	CDP RE-SUBMITTAL
	2019/04/19	CDP RE-SUBMITTAL

BURDGE & Associates
ARCHITECTS
MALIBU
SUN VALLEY
WWW.
BUAIA.COM
24911 PACIFIC COAST HWY.
MALIBU, CA 90265
TEL. 310-456-5905

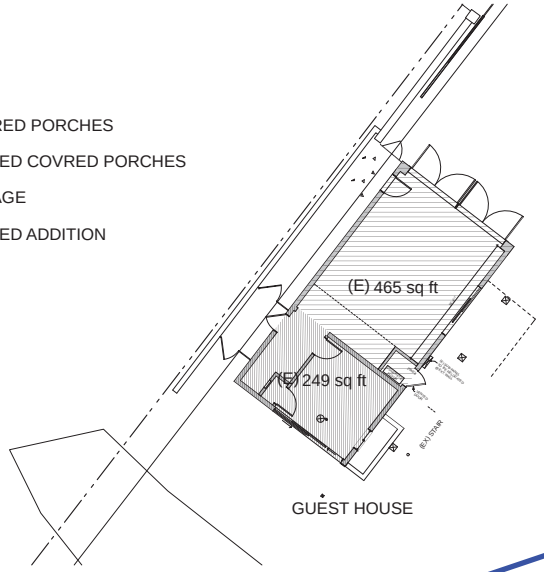
DESCRIPTION:

PROPOSED SITE PLAN

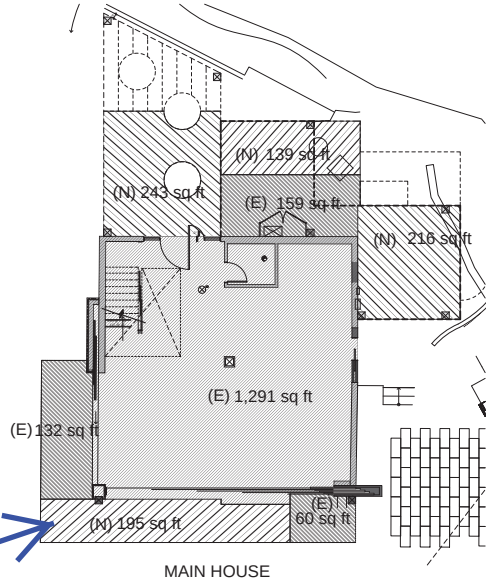
DRAWING NO.
T-1.3

PROJECT	33608 PCH RESIDENCE
DATE	Plot Date: 4/18/19
SCALE	1" = 10'
DRAWN BY	DWB, CZ, JT

LIVABLE
EX COVRED PORCHES
PROPOSED COVRED PORCHES
EX GARAGE
PROPOSED ADDITION



GUEST HOUSE



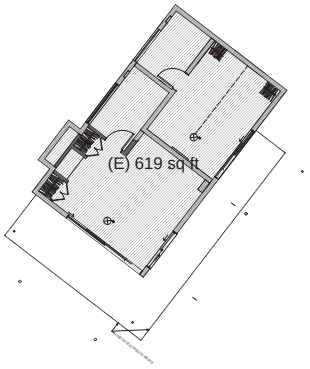
MAIN HOUSE

FIRST FLOOR 1

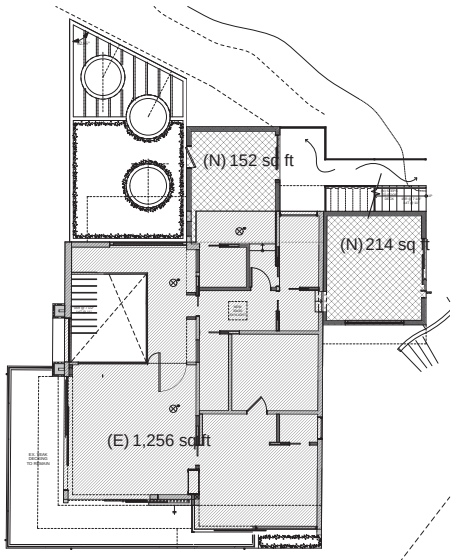
Existing covered porch that will be newly calculated in TDSF

PROPOSED SQUARE FOOTAGE TABULATION:

	EXISTING	ADDITION	PROPOSED
Main House			
First Floor	1,291 Sq.Ft.	0 Sq.Ft.	1,291 Sq.Ft.
Second Floor	1,256 Sq.Ft.	366 Sq.Ft.	1,622 Sq.Ft.
Main House Livable	2,547 Sq.Ft.	366 Sq.Ft.	2,913 Sq.Ft.
Detached Garage with Guest Unit (NO Work)			
First Floor	249 Sq.Ft.	0 Sq.Ft.	249 Sq.Ft.
Second Floor	619 Sq.Ft.	0 Sq.Ft.	619 Sq.Ft.
Guest House Livable	868 Sq.Ft.	0 Sq.Ft.	868 Sq.Ft.
Garage	465 Sq.Ft.	0 Sq.Ft.	465 Sq.Ft.
Total Guest House	1,333 Sq.Ft.	0 Sq.Ft.	1,333 Sq.Ft
Total TDSF	**3,880 Sq.Ft.**	**366 Sq.Ft.**	**4,246 Sq.Ft.**
Main House Covered Porches (>6')	351 Sq.Ft.	793 Sq.Ft.	1,144 Sq.Ft.
GRAND TOTAL	**4,231 Sq.Ft.**	**1,159 Sq.Ft.**	**5,390 Sq.Ft.**



GUEST HOUSE



MAIN HOUSE

SECOND FLOOR 2

33608 PCH RESIDENCE

PACIFIC COAST HWY.
MALIBU, CA 90265

LICENSED ARCHITECT
DOUGLAS W. BURDGE
C-18888
RENEWAL
11/30/20xx
STATE OF CALIFORNIA

NO	DATE	ISSUE
	2017/06/19	CDP SUBMITTAL
	2017/09/11	CDP RE-SUBMITTAL
	2018/10/05	CDP RE-SUBMITTAL
	2018/12/20	CDP RE-SUBMITTAL
	2019/01/30	CDP RE-SUBMITTAL
	2019/04/19	CDP RE-SUBMITTAL

BURDGE & Associates ARCHITECTS
MALIBU SUN VALLEY
WWW. BUAIA.COM
24911 PACIFIC COAST HWY.
MALIBU, CA 90265
TEL. 310-456-5905

DESCRIPTION:

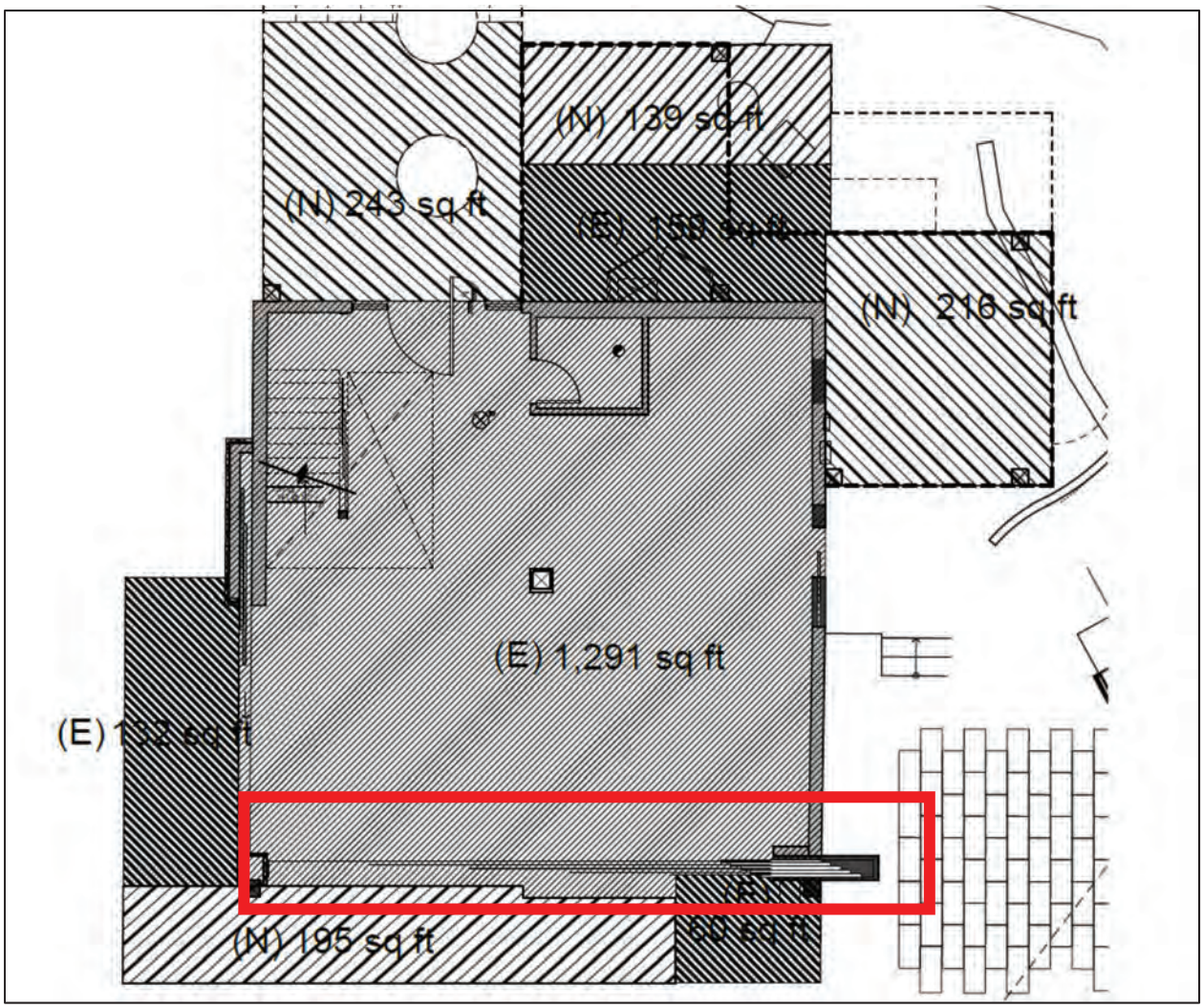
AREA TABULATIONS

DRAWING NO.
T-1.5

PROJECT	33608 PCH RESIDENCE
DATE	Plot Date: 6/19/19
SCALE	1/8" = 1'-0"
DRAWN BY	DWB, CZ, JT

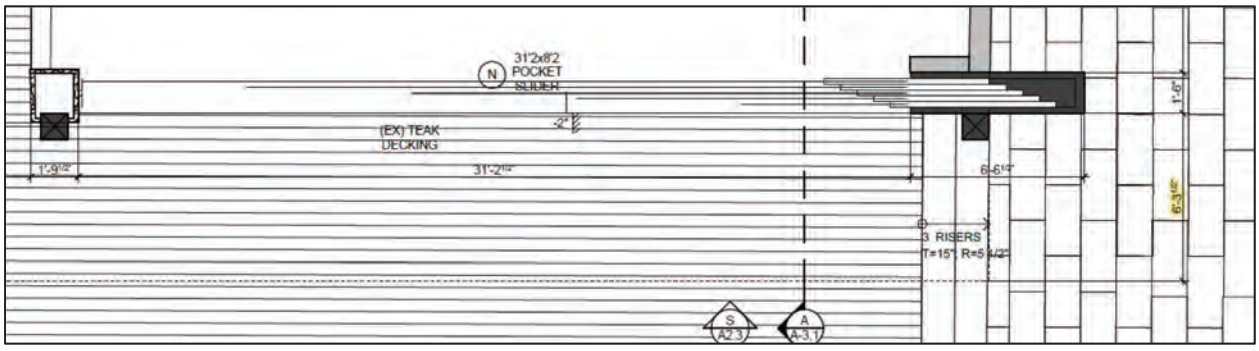
Project Plans - Sheet T-1.5 (Excerpt)

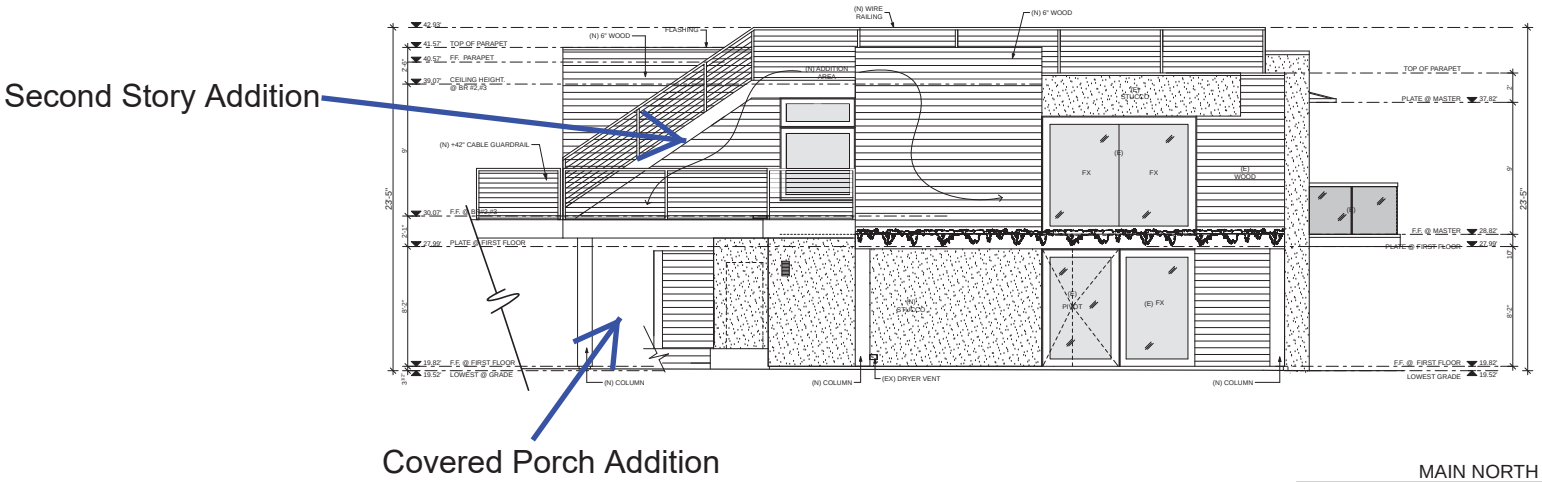
Spaces labeled (N) are covered porches that are being newly calculated as TDSF. The 195 square feet of seaward covered porch labeled as (N) is a currently existing porch that will be newly calculated in TDSF due to a replacing the fireplace located at the area boxed in red with a sliding pocket door.



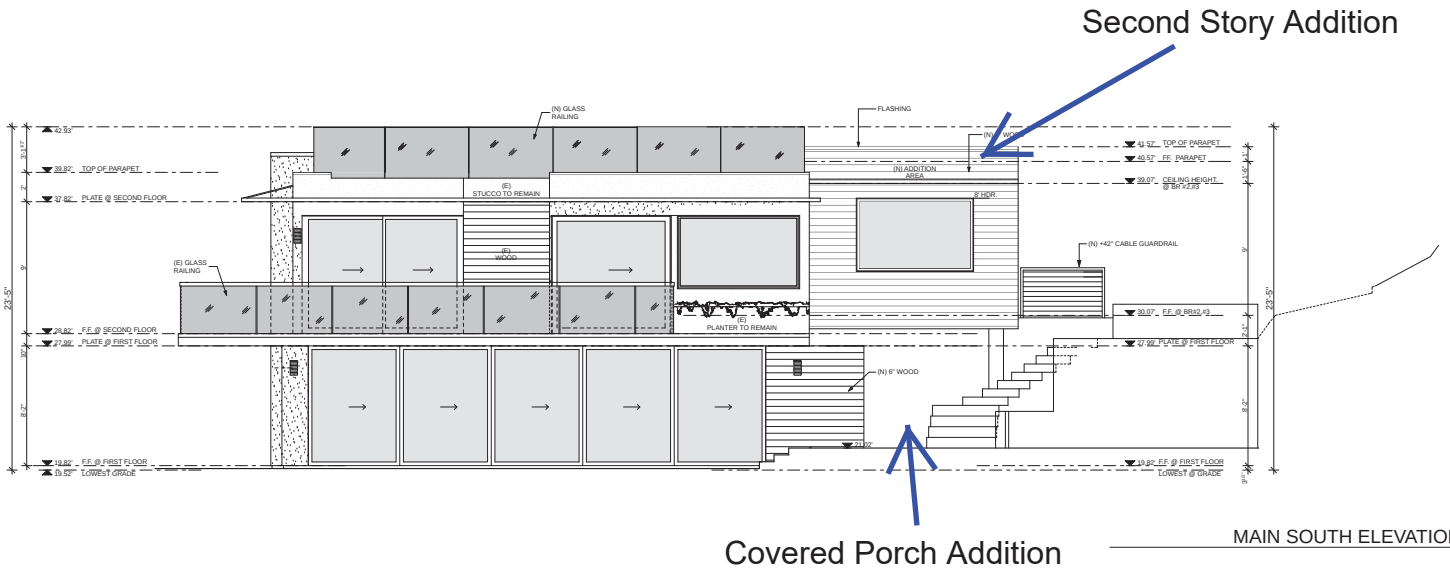
Project Plans – Sheet A-1.1 (Excerpt)

The below shows is a closer look at the red boxed area above. The depth is shown at the right (highlighted) as 6’3.5”. This is increased from previous depth of 5’11”.





MAIN NORTH ELEVATION 1



MAIN SOUTH ELEVATION 2

33608 PCH RESIDENCE

PACIFIC COAST HWY.
MALIBU, CA 90265

LICENSED ARCHITECT
DOUGLAS W. BURDGE
C-18888
RENEWAL
11/30/20xx
STATE OF CALIFORNIA

NO	DATE	ISSUE
	2017/06/15	CDP SUBMITTAL
	2017/09/11	CDP RE-SUBMITTAL
	2018/10/05	CDP RE-SUBMITTAL
	2018/12/20	CDP RE-SUBMITTAL
	2019/01/30	CDP RE-SUBMITTAL
	2019/04/19	CDP RE-SUBMITTAL

BURDGE & Associates ARCHITECTS
MALIBU SUN VALLEY
WWW. BUAIA.COM
24911 PACIFIC COAST HWY.
MALIBU, CA 90265
TEL. 310-456-5905

DESCRIPTION:

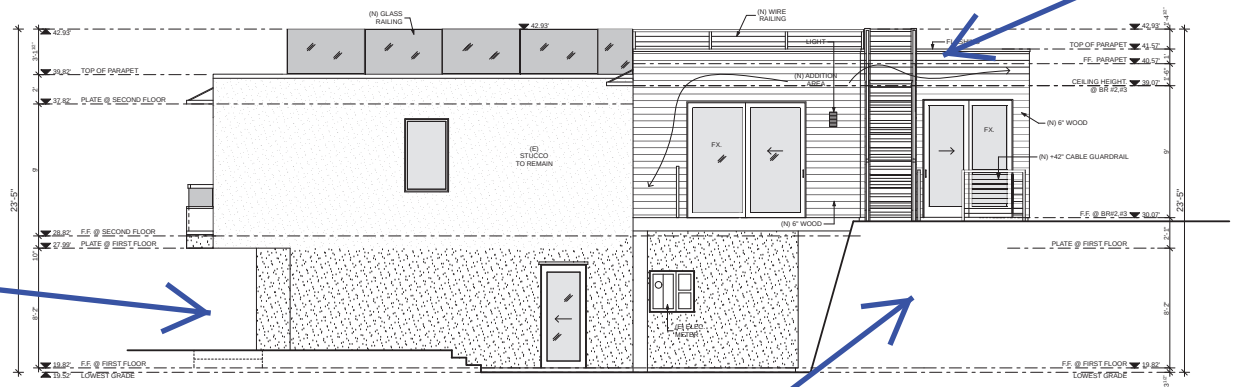
PROPOSED ELEVATIONS

DRAWING NO.
A-2.1

PROJECT	33608 PCH RESIDENCE
DATE	Plot Date: 4/18/19
SCALE	1/4" = 1'-0"
DRAWN BY	DWB, CZ, JT

Second Story Addition

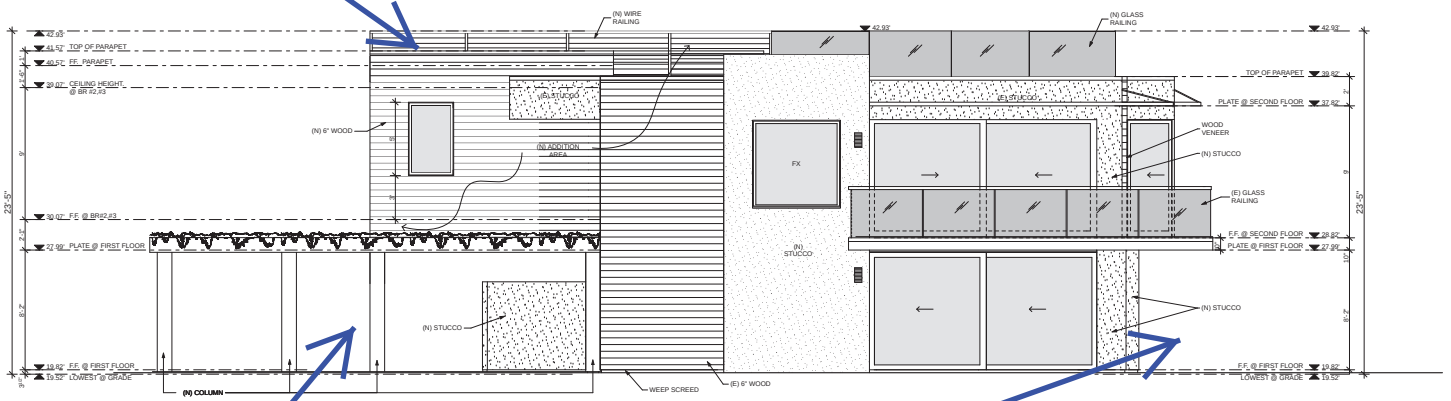
Existing covered porch that will be newly calculated in TDSF



Covered Porch Addition

MAIN EAST ELEVATION 2

Second Story Addition



Covered Porch Addition

Existing covered porch that will be newly calculated in

MAIN WEST ELEVATION 1

33608 PCH RESIDENCE

PACIFIC COAST HWY.
MALIBU, CA 90265

LICENSED ARCHITECT
DOUGLAS W. BURDGE
C-18888
RENEWAL 11/30/2019
STATE OF CALIFORNIA

NO	DATE	ISSUE
	2017/08/15	CDP SUBMITTAL
	2017/09/11	CDP RE-SUBMITTAL
	2018/10/05	CDP RE-SUBMITTAL
	2018/12/20	CDP RE-SUBMITTAL
	2019/01/30	CDP RE-SUBMITTAL
	2019/04/19	CDP RE-SUBMITTAL

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24911 PACIFIC COAST HWY.
MALIBU, CA 90265
TEL. 310-456-5905

DESCRIPTION:

PROPOSED ELEVATIONS

DRAWING NO.
A-2.2

PROJECT	33608 PCH RESIDENCE
DATE	Plot Date: 4/18/19
SCALE	1/4" = 1'-0"
DRAWN BY	DWB, CZ, JT

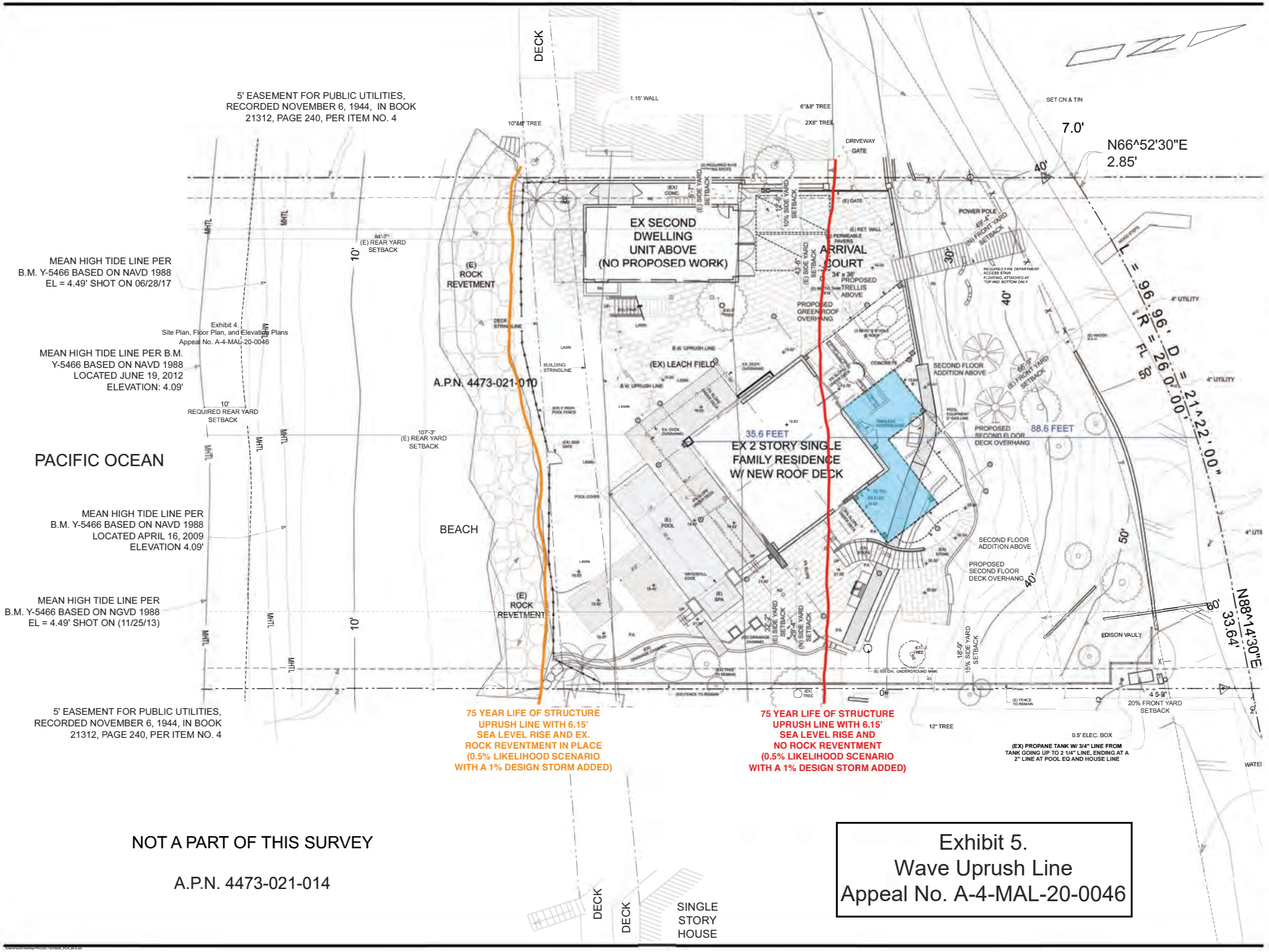

Exhibit 5.
Wave Uprush Line
Appeal No. A-4-MAL-20-0046

33608 PCH RESIDENCE

33608 PACIFIC COAST HWY.
MALIBU, CA 90265

LICENSED ARCHITECT
DOUGLAS W. BURDGE
C-16899
RENEWAL 11/30/2021
STATE OF CALIFORNIA

NO	DATE	ISSUE
	2017/09/15	CDP SUBMITTAL
	2017/09/11	CDP RE-SUBMITTAL
	2018/10/05	CDP RE-SUBMITTAL
	2018/12/20	CDP CLARIFICATIONS
	2019/02/20	CDP RE-SUBMITTAL
	2019/04/19	CDP RE-SUBMITTAL
	2019/06/20	CDP CLARIFICATIONS
	2020/04/29	B&S SUBMITTAL
	2020/10/09	B&S RE-SUBMITTAL

BURDGE ARCHITECTS
24911 PACIFIC COAST HWY
MALIBU, CA 90265
TEL 310-456-5905

DESCRIPTION:

COASTAL WAVE UPRUSH LINE EXHIBIT

DRAWING NO.
T-1.15

PROJECT	33608 PCH RESIDENCE
DATE	Plot Date: 5/17/2021
SCALE	1" = 10'
DRAWN BY	DWB, CZ, JT

NOTICE OF FINAL LOCAL ACTION ON COASTAL PERMIT

Date of Notice: July 16, 2020

Notice Sent to (US. Certified Priority Mail):
California Coastal Commission
South Central Coast District Office
89 South California Street, Suite 200
Ventura, CA 93001

Contact:
Lilly Rudolph, Contract Planner
City of Malibu
23825 Stuart Ranch Road
Malibu, CA 90265
(310) 456-2489

Please note the following **Final City of Malibu Action** on a coastal development permit application (all local appeals have been expired for this matter):

Project Information

COASTAL DEVELOPMENT PERMIT NO. 17-071, APPEAL NO. 20-003, AND SITE PLAN REVIEW NO. 17-036– An application for an interior and exterior remodel of, and 1,159 square feet of additions to, an existing 2,547 square foot, two-story, single-family residence, involving 15 percent demolition of exterior walls; including a site plan review for construction up to 24 feet in height with flat roofs for the residence

Application Date:	June 21, 2017
Issue Date:	July 13, 2020
Applicant:	Joseph Lezama, Burdge and Associates Architects, Inc., 24911 Pacific Coast Highway, Malibu, CA 90265
Owner:	Michael Price
Location:	33608 Pacific Coast Highway
APN:	4473-021-010

Final Action Information

Final Local Action: □ Approved ☑ Approved with Conditions □ Denied
Final Action Body: Approved by the City Council on July 13, 2020

Required Materials Supporting the Final Action	Enclosed	Previously Sent (date)
Adopted Staff Report: July 13, 2020 City Council Meeting		7/2/2020
Adopted Findings and Conditions: City Council Resolution No. 20-39	X	
Site Plans and Elevations		7/2/2020

California Coastal Commission Appeal Information
This Final Action is:

☐ **NOT appealable** to the California Coastal Commission (CCC). The Final City of Malibu Action is now effective.

☒ **Appealable** to the California Coastal Commission. The Coastal Commission's 10-working day appeal period begins the first working day after the Coastal Commission receives adequate notice of this final action. The final action is not effective until after the Coastal Commission's appeal period has expired and no appeal has been filed. Any such appeal must be made directly to the California Coastal Commission South Central Coast District Office in Ventura, California; there is no fee for such an appeal. Should you have any questions regarding the California Coastal Commission appeal period or process, please contact the CCC South Central Coast District Office at 89 South California Street, Suite 200, Ventura, California, 93001 or by calling (805) 585-1800.

Copies of this notice have also been sent to:
- Property Owner/Applicant

Exhibit 6
Final Local Action Notice and City Resolution
Appeal No. A-4-MAL-20-0046

RESOLUTION NO. 20-39

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MALIBU, DETERMINING THE PROJECT IS CATEGORICALLY EXEMPT FROM THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, GRANTING APPEAL NO. 20-003 AND APPROVING COASTAL DEVELOPMENT PERMIT NO. 17-071 TO ALLOW AN INTERIOR AND EXTERIOR REMODEL OF AND 1,159 SQUARE FEET OF ADDITIONS TO AN EXISTING 2,547-SQUARE-FOOT, TWO-STORY, SINGLE-FAMILY RESIDENCE; INCLUDING SITE PLAN REVIEW NO. 17-036 FOR CONSTRUCTION UP TO 24 FEET IN HEIGHT WITH FLAT ROOFS FOR THE RESIDENCE LOCATED IN THE RURAL RESIDENTIAL-TWO ACRE ZONING DISTRICT AT 33608 PACIFIC COAST HIGHWAY (PRICE)

The City Council of the City of Malibu does hereby find, order and resolve as follows:

SECTION 1. Recitals.

A. On June 21, 2017, an application for Coastal Development Permit (CDP) No. 17-071 and Site Plan Review (SPR) No. 17-036 was submitted to the Planning Department by the applicant, Burdge and Associates Architects, Inc., on behalf of the property owner, Michael Price. The application was routed to the City Biologist, City Coastal Engineer, City Environmental Health Administrator, City geotechnical staff, City Public Works Department, and Los Angeles County Fire Department (LACFD) for review.

B. On October 22, 2019, Planning Department staff conducted a site visit to document the story poles.

C. On January 9, 2020, a Notice of Coastal Development Permit (CDP) Application was posted on the subject property.

D. On January 9, 2020, the CDP application was deemed complete for processing.

E. On January 9, 2020, a Notice of Planning Commission Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500-foot radius of the subject property.

F. On February 3, 2020, the Planning Commission continued the item to the February 18, 2020 regular Planning Commission meeting.

G. On February 18, 2020, the Planning Commission held a duly noticed public hearing on the subject application, reviewed and considered the staff report, reviewed and considered written reports, public testimony, and other information in the record. At the conclusion of the hearing, the Commission directed staff to return with an updated resolution denying the project and reflecting its findings that, as designed, the proposed project does not comply with the 2/3rds rule and will adversely affect neighborhood character.

H. On March 2, 2020, the Planning Commission adopted Planning Commission Resolution No. 20-11, denying the project.

I. On March 11, 2020, an appeal of the project was timely filed by the property owner, Michael Price.

J. On June 25, 2020, a Notice of City Council Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a radius of 500 feet from the subject property and all interested parties.

K. On July 13, 2020, the City Council held a duly noticed public hearing on the subject appeal, reviewed and considered the agenda report, reviewed and considered written reports, public testimony, and other information in the record.

SECTION 2. Appeal of Action.

The appeal filed by the Appellant contends that the findings were not supported by the evidence, and the decision was contrary to law. Specifically, the Appellant contends that: a) The Planning Commission incorrectly applied the two-thirds rule in violation of the LIP, MMC, and longstanding Planning Department policy; and b) The Planning Commission incorrectly found that the project will adversely affect neighborhood character.

In the associated Council agenda report, Planning Department staff responded to each of the Appellant's contentions.

SECTION 3. Findings for Granting the Appeal.

Based on evidence in the record and in the Council agenda report for the subject project, the City Council hereby makes the following findings of fact granting the appeal and finds that substantial evidence in the record supports the required findings for approval of the project. In addition, the analysis, findings of fact, and conclusions set forth by staff in the agenda report and Planning Commission staff report are incorporated herein as though fully set forth.

A. The proposed project complies with the two-thirds rule. The methodology used to calculate conformance with the two-thirds rule, by including outdoor covered areas with a depth greater than six feet, is consistent with direction provided by ZORACES in 2008 and has been the accepted methodology since.

B. The project will not adversely affect neighborhood character. The square footage information provided by the Los Angeles County Tax Assessor's records is not the equivalent of the City's total development square footage (TDSF) metric since it is based on the Assessor's rules for property valuation, and as such, should not be used as a primary means of evaluating neighborhood character. Because the project is proportional to its lot size and has a similar two-story design to other properties in the area, no adverse impacts to neighborhood character are expected.

C. As demonstrated in the previous Commission agenda report, the accompanying Council agenda report and the findings below, the evidence in the record supports the required findings to grant the appeal and approve the application.

SECTION 4. Environmental Review.

Pursuant to the authority and criteria contained in the California Environmental Quality Act (CEQA), the Planning Commission has analyzed the proposed project. The Planning Commission

has found that this project is listed among the classes of projects that have been determined not to have a significant adverse effect on the environment. Therefore, the project is categorically exempt from the provisions of CEQA according to CEQA Guidelines Sections 15301(a) and (e) – Existing Facilities. The Planning Commission has further determined that none of the six exceptions to the use of a categorical exemption applies to this project (CEQA Guidelines Section 15300.2).

SECTION 5. Coastal Development Permit Findings.

Based on substantial evidence contained within the record and pursuant to Local Coastal Program (LCP) Local Implementation Plan (LIP) Sections 13.7(B) and 13.9 and Malibu Municipal Code (MMC) Section 17.62.070, the Planning Commission adopts and approves the analysis in the agenda report, incorporated herein, the findings of fact below, and approves CDP No. 17-071 to allow an interior and exterior remodel of and 1,159 square feet of additions to an existing 2,547 square foot, two-story, single-family residence; including SPR No. 17-036 for construction up to 24 feet with flat roofs for the residence located in the Rural Residential-Two Acre (RR-2) zoning district at 33608 Pacific Coast Highway.

The project is consistent with the LCP's zoning, grading, cultural resources, water quality, and wastewater treatment requirements. With the inclusion of the proposed site plan review, the project, as conditioned, has been determined to be consistent with all applicable LCP codes, standards, goals, and policies. The required findings are made herein.

A. General Coastal Development Permit (LIP Chapter 13)

1. The project is located in the RR-2 zoning district, an area designated for residential uses. The project has been reviewed for conformance with the LCP by the Planning Department, the City Biologist, City Coastal Engineer, City Environmental Health Administrator, City geotechnical staff, City Public Works Department, and LACFD. The proposed project, with the inclusion of the site plan review, as conditioned, conforms to the LCP and MMC in that it meets all applicable residential development standards.

2. Evidence in the record demonstrates that the proposed project conforms to the public access and recreational policies in Chapter 3 of the Coastal Act as the subject parcel contains an existing lateral access easement and vertical beach access exists nearby.

3. The proposed project meets the development policies of the LCP and MMC, with the inclusion of the site plan review and has been determined to be the least environmentally damaging feasible alternative. The proposed development has been sited on an existing, approved development pad, limiting environmental impacts such as grading and landform alteration. Additionally, there are no significant adverse impacts anticipated as a result of the proposed development. Therefore, the proposed project has been determined to be the least environmentally damaging feasible alternative.

B. Site Plan Review for Construction in Excess of 18 Feet in Height (LIP Section 13.27.5)

SPR No. 17-036 from the development standards contained in LIP Section 13.27 will allow construction over 18 feet in height for flat roofs up to 24 feet for the proposed additions to the existing single-family residence.

1. The project has been reviewed for conformance with all relevant policies and provisions of the LCP. Based on submitted reports, visual impact analysis, and a detailed site investigation, the project is consistent with all policies and provisions of the LCP and MMC.

2. Story poles were installed in October 2019 and demonstrate that the project is compatible with the surrounding development. Surrounding properties are developed with one- and two-story residential structures. As demonstrated by the story poles, the proposed development will not be visible from a public viewing area and will not block bluewater views from neighboring properties. Therefore, the project will not be more impactful than the surrounding development with regards to neighborhood character and is not anticipated to adversely affect neighborhood character.

3. As designed, the proposed development will be lower in elevation than the adjacent property to the north, thereby providing views over the residence toward the Pacific Ocean. Due to the steep topography on the lot and existing mature vegetation, the proposed development will not block views from Pacific Coast Highway. Therefore, the proposed development is designed to not block views from a scenic area or scenic road.

4. The proposed project will comply with all applicable requirements of State and local law and is conditioned to comply with any relevant approvals, permits and licenses from the City of Malibu and other related agencies.

5. The proposed project is consistent with the LCP in that the property is located in an area that has been identified and zoned for residential use. The proposed project is consistent with the LCP in that it conforms to the residential land use designation and all applicable development standards.

6. The proposed development is not expected to obstruct visually impressive scenes from private property as all nearby residences have views oriented away from, or over, the subject property.

C. Scenic, Visual and Hillside Resource Protection (LIP Chapter 6)

1. Based on an analysis of the project's visual impacts, it was determined that the proposed development is not expected to have significant adverse scenic or visual impacts. The proposed development will be visible from the beach, however, with the inclusion of the conditions set forth in this resolution, pertaining to permissible exterior colors, materials and lighting restrictions, the project will blend in with the surrounding developed environment. As demonstrated by the story poles, the proposed development will not have significant adverse scenic or visual impacts as the proposed development is located landward of the mean high tide line and on an existing, approved development pad. Standard conditions of approval have been included for colors, materials, and lighting.

2. The project has been designed and conditioned to not have significant adverse scenic or visual impacts. The project has been conditioned to include limitations on lighting and colors of the materials used to prevent any visual impacts to scenic areas and primary views.

3. As previously discussed in Section A, the project is the least environmentally damaging alternative. The proposed development is sited on an existing, approved development

pad and does not propose any grading or landform alteration. Therefore, the project, as proposed and conditioned, is the least environmentally damaging alternative.

4. The project, as designed and conditioned, is not expected to adversely affect scenic and visual resources and no feasible alternatives would avoid or substantially lessen any significant adverse impacts on scenic and visual resources.

5. The proposed project will not result significant visual impacts to public views from Pacific Coast Highway and will not impact sensitive resources. The proposed development is sited to minimize or otherwise contribute to conformance to sensitive resource protection policies.

D. Hazards (LIP Chapter 9)

1. Evidence in the record demonstrates that the project will neither be subject to nor increase the instability of the site from geologic, flood, or fire hazards. The proposed development is suitable for the intended use provided that the certified engineering geologist and/or geotechnical engineer's recommendations and governing agency's building codes are followed.

2. The project, as designed, conditioned, and approved by the City geotechnical staff and the City Public Works Department, does not have any significant adverse impacts on the site stability or structural integrity from geologic or fire hazards due to the project design.

3. The project, as conditioned, is the least environmentally damaging alternative.

4. The proposed development has been analyzed for the hazards listed in LIP Chapter 9 by the City Biologist, City Coastal Engineer, City Environmental Health Administrator, City geotechnical staff, City Public Works Department, and LACFD. These specialists and agency determined that the proposed project does not impact site stability or structural integrity. There are no feasible alternatives to the proposed development that would result in less site disturbance.

5. The proposed project, as designed and conditioned, will not have adverse impacts on sensitive resources.

E. Shoreline and Bluff Development (LIP Chapter 10)

1. The subject property is located in a developed neighborhood and neighboring properties contain similarly sized residential development. The proposed development complies with the development standards of LIP Chapter 10 as all proposed development is sited landward of the mean high tide line and no work is proposed on the sand. Additionally, no new encroachments are proposed on the bluff. The project as designed and conditioned, is not expected to have significant adverse impacts on public access, shoreline sand supply or other resources.

2. The project, as designed and conditioned, is not expected to have any significant adverse impacts on public access or shoreline sand supply or other resources as the proposed development is sited landward of the mean high tide line and on the existing, approved development pad.

3. The project, as designed and conditioned, is the least environmentally damaging alternative as the proposed additions are sited on the existing graded pad and no additional grading or landform alterations are proposed.

4. The project, as designed and conditioned, is not expected to have any significant adverse impacts on public access or shoreline sand supply or other resources.

SECTION 6. City Council Action.

Based on the foregoing findings and evidence contained within the record, the City Council hereby approves CDP No. 17-071 and SPR No. 17-036 subject to the following conditions.

SECTION 7. Conditions of Approval.

1. The property owners, and their successors in interest, shall indemnify and defend the City of Malibu and its officers, employees and agents from and against all liability and costs relating to the City's actions concerning this project, including (without limitation) any award of litigation expenses in favor of any person or entity who seeks to challenge the validity of any of the City's actions or decisions in connection with this project. The City shall have the sole right to choose its counsel and property owners shall reimburse the City's expenses incurred in its defense of any lawsuit challenging the City's actions concerning this project.

2. Approval of this application is to allow for the following:

Demolition

a. 15 percent demolition of exterior walls (cumulative total of 30 percent including Over-the-Counter Permit No. 13-097 and CDP No. 13-050).

Construction

b. An interior and exterior remodel of an existing two-story, single-family residence including:
   i. 366 square feet of additions to the second story; and
   ii. 793 square feet of covered decks.
   Total: 1,159 square feet

Additional Discretionary Request

c. SPR No. 17-036 for construction up to 24 feet in height for a flat roof.

3. Except as specifically changed by conditions of approval, the proposed development shall be constructed in substantial conformance with the approved scope of work, as described in Condition No. 2 and depicted on plans on file with the Planning Department date stamped **June 20, 2019**. The proposed development shall further comply with all conditions of approval stipulated in this resolution and Department Review Sheets attached hereto. In the event project plans conflict with any condition of approval, the condition shall take precedence.

4. Pursuant to LIP Section 13.18.2, this permit and rights conferred in this approval shall not be effective until the property owner signs, notarizes and returns the Acceptance of

Conditions Affidavit accepting the conditions of approval set forth herein. The applicant shall file this form with the Planning Department prior to the issuance of any development permits.

5. The applicant shall submit three (3) complete sets of plans, including the items required in Condition No. 6 to the Planning Department for consistency review and approval prior to plan check and again prior to the issuance of any building or development permits.

6. This resolution, signed and notarized Acceptance of Conditions Affidavit and all Department Review Sheets attached to the agenda report for this project shall be copied in their entirety and placed directly onto a separate plan sheet behind the cover sheet of the development plans submitted to the City of Malibu Environmental Sustainability Department for plan check, and the City of Malibu Public Works Department for an encroachment permit (as applicable).

7. The CDP shall expire if the project has not commenced within three (3) years after issuance of the permit, unless a time extension has been granted. Extension of the permit may be granted by the approving authority for due cause. Extensions shall be requested in writing by the applicant or authorized agent prior to expiration of the three-year period and shall set forth the reasons for the request. In the event of an appeal, the CDP shall expire if the project has not commenced within three years from the date the appeal is decided by the decision-making body or withdrawn by the appellant.

8. Any questions of intent or interpretation of any condition of approval will be resolved by the Planning Director upon written request of such interpretation.

9. All development shall conform to requirements of the City of Malibu Environmental Sustainability Department, City Biologist, City Coastal Engineer, City Environmental Health Administrator, City geotechnical staff, City Public Works Department, Los Angeles County Waterworks District No. 29 and LACFD, as applicable. Notwithstanding this review, all required permits shall be secured.

10. Minor changes to the approved plans or the conditions of approval may be approved by the Planning Director, provided such changes achieve substantially the same results and the project is still in compliance with the Malibu Municipal Code and the Local Coastal Program. Revised plans reflecting the minor changes and additional fees shall be required.

11. Pursuant to LIP Section 13.20, development pursuant to an approved CDP shall not commence until the CDP is effective. The CDP is not effective until all appeals, including those to the California Coastal Commission (CCC), have been exhausted. In the event that the CCC denies the permit or issues the permit on appeal, the coastal development permit approved by the City is void.

12. The property owner must submit payment for all outstanding fees payable to the City prior to issuance of any building permit, including grading or demolition.

Cultural Resources

13. In the event that potentially important cultural resources are found in the course of geologic testing or during construction, work shall immediately cease until a qualified archaeologist can provide an evaluation of the nature and significance of the resources and until the Planning Director can review this information. Thereafter, the procedures contained in LIP Chapter 11 and those in MMC Section 17.54.040(D)(4)(b) shall be followed.

14. If human bone is discovered during geologic testing or during construction, work shall immediately cease, and the procedures described in Section 7050.5 of the California Health and Safety Code shall be followed. Section 7050.5 requires notification of the coroner. If the coroner determines that the remains are those of a Native American, the applicant shall notify the Native American Heritage Commission by phone within 24 hours. Following notification of the Native American Heritage Commission, the procedures described in Section 5097.94 and Section 5097.98 of the California Public Resources Code shall be followed.

Colors and Materials

15. The project is visible from scenic roads or public viewing areas, therefore, shall incorporate colors and exterior materials that are compatible with the surrounding landscape.
    a. Acceptable colors shall be limited to colors compatible with the surrounding environment (earth tones) including shades of green, brown and gray, with no white or light shades and no bright tones. Colors shall be reviewed and approved by the Planning Director and clearly indicated on the building plans.
    b. The use of highly reflective materials shall be prohibited except for solar energy panels or cells, which shall be placed to minimize significant adverse impacts to public views to the maximum extent feasible.
    c. All windows shall be comprised of non-glare glass.

16. All driveways shall be a neutral color that blends with the surrounding landforms and vegetation. Retaining walls shall incorporate veneers, texturing and/or colors that blend with the surrounding earth materials or landscape. The color of driveways and retaining walls shall be reviewed and approved by the Planning Director and clearly indicated on all grading, improvement and/or building plans.

Lighting

17. Exterior lighting must comply with the Dark Sky Ordinance and shall be minimized, shielded, or concealed and restricted to low intensity features, so that no light source is directly visible from public view. Permitted lighting shall conform to the following standards:
    a. Lighting for walkways shall be limited to fixtures that do not exceed two feet in height and are directed downward, and limited to 850 lumens (equivalent to a 60 watt incandescent bulb);
    b. Security lighting controlled by motion detectors may be attached to the residence provided it is directed downward and is limited to 850 lumens;
    c. Driveway lighting shall be limited to the minimum lighting necessary for safe vehicular use. The lighting shall be limited to 850 lumens;

31. Grading, excavation and vegetation removal scheduled between February 1 and September 15 will require nesting bird surveys by a qualified biologist prior to initiation of grading activities. Surveys shall be completed no more than five days from proposed initiation of site preparation activities. Should active nests be identified, a buffer area no less than 150 feet (300 feet for raptors) shall be fenced off until it is determined by a qualified biologist that the nest is no longer active. A report discussing the results of the surveys shall be turned in to the City within two business days of completion of surveys.

32. Construction fencing shall be placed at the top of the rock revetment. Construction fencing shall be installed prior to the beginning of any construction and shall be maintained throughout the construction period to protect the beach.

33. Night lighting from exterior and interior sources shall be minimized. All exterior lighting shall be low intensity and shielded so it is directed downward and inward so that there is no offsite glare or lighting of natural habitat areas.

34. The use of pesticides, including insecticides, herbicides, rodenticides or any toxic chemical substance which has the potential to significantly degrade biological resources shall be prohibited throughout the City of Malibu. The eradication of invasive plant species or habitat restoration shall consider first the use of non-chemical methods for prevention and management such as physical, mechanical, cultural, and biological controls. Herbicides may be selected only after all other non-chemical methods have been exhausted. Herbicides shall be restricted to the least toxic product and method, and to the maximum extent feasible, shall be biodegradable, derived from natural sources, and use for a limited time.

Coastal Engineering

35. The property owner shall comply with the requirements for recorded documents and deed restrictions outlined in LIP Sections 10.6(A) and 10.6(B)(1).

36. The Project Coastal Engineer shall submit a Shore Protection Device (SPD) Monitoring Program for the existing rock revetment that is consistent with the City's requirements. The property owner is required to record a "Covenant and Agreement regarding Maintenance of the Shoreline Projection Device and the Use and Transfer of Ownership of Property," informing any successors-in-interest to the property of these SPD monitoring requirements for the onsite rock revetment.

Geology

37. All recommendations of the consulting certified engineering geologist or geotechnical engineer and/or the City geotechnical staff shall be incorporated into all final design and construction including foundations, grading, sewage disposal, and drainage. Final plans shall be reviewed and approved by the City geotechnical staff prior to the issuance of permits.

38. Final plans approved by the City geotechnical staff shall be in substantial conformance with the approved CDP relative to construction, grading, sewage disposal and drainage. Any substantial changes may require a CDP amendment or a new CDP.

Public Works

39. The consulting engineer shall sign the final plans prior to the issuance of permits.

Grading/Drainage/Hydrology

40. Exported soil from a site shall be taken to the Los Angeles County Landfill or to a site with an active grading permit and the ability to accept the material in compliance with LIP Section 8.3.

Stormwater

41. A Local Storm Water Pollution Prevention Plan (LSWPPP) shall be provided prior to issuance of grading/building permits. This plan shall include an Erosion and Sediment Control Plan (ESCP) that includes, but not limited to:

Erosion Controls Scheduling	Erosion Controls Scheduling
	Preservation of Existing Vegetation
Sediment Controls Silt Fence	Sediment Controls Silt Fence
	Sand Bag Barrier
	Stabilized Construction Entrance
Non-Storm Water Management	Water Conservation Practices
	Dewatering Operations
Waste Management	Material Delivery and Storage
	Stockpile Management
	Spill Prevention and Control
	Solid Waste Management
	Concrete Waste Management
	Sanitary/Septic Waste Management

All Best Management Practices (BMP) shall be in accordance to the latest version of the California Stormwater Quality Association (CASQA) BMP Handbook. Designated areas for the storage of construction materials, solid waste management, and portable toilets must not disrupt drainage patterns or subject the material to erosion by site runoff.

Demolition/Solid Waste

42. Prior to demolition activities, the applicant shall receive Planning Department approval for compliance with conditions of approval.

43. The applicant/property owner shall contract with a City approved hauler to facilitate the recycling of all recoverable/recyclable material. Recoverable material shall include but shall not be limited to asphalt, dirt and earthen material, lumber, concrete, glass, metals, and drywall.

44. Prior to the issuance of a building/demolition permit, an Affidavit and Certification to implement waste reduction and recycling shall be signed by the Owner or Contractor and submitted to the Environmental Sustainability Department. The Affidavit shall indicate the

agreement of the applicant to divert at least 65 percent (in accordance with CalGreen) of all construction waste from the landfill.

45. Upon plan check approval of demolition plans, the applicant shall secure a demolition permit from the City. The applicant shall comply with all conditions related to demolition imposed by the Building Official.

46. No demolition permit shall be issued until building permits are approved for issuance. Demolition of the existing structure and initiation of reconstruction must take place within a six-month period. Dust control measures must be in place if construction does not commence within 30 days.

47. The project developer shall utilize licensed subcontractors and ensure that all asbestos-containing materials and lead-based paints encountered during demolition activities are removed, transported, and disposed of in full compliance with all applicable federal, state and local regulations.

48. Any building or demolition permits issued for work commenced or completed without the benefit of required permits are subject to appropriate "Investigation Fees" as required in the Building Code.

49. Upon completion of demolition activities, the applicant shall request a final inspection by the Building Safety Division.

50. Fifty percent or more of exterior walls must remain in place during construction. Pursuant to LCP LIP Section 13.4.2, the replacement of 50 percent or more of a single-family residence is not repair and maintenance, but instead constitutes a replacement structure requiring a coastal development permit. A major remodel agreement acknowledging this shall be required prior to issuance of building permits for the project. Contact Planning Department staff to discuss options PRIOR TO DEMOLITION of more than 50 percent of the existing exterior walls, should any questions or issues concerning exterior wall demolition come up during construction. Demolition of exterior walls will be determined based on LCP Policy 3 (Remodels and Additions).

Construction / Framing

51. Prior to the commencement of work, the applicant shall submit a copy of their Construction Management Plan. The Construction Management Plan shall include a dedicated parking location for construction workers, not within the public right of way.

52. Construction hours shall be limited to Monday through Friday from 7:00 a.m. to 7:00 p.m. and Saturdays from 8:00 a.m. to 5:00 p.m. No construction activities shall be permitted on Sundays or City-designated holidays.

53. Construction management techniques, including minimizing the amount of equipment used simultaneously and increasing the distance between emission sources, shall be employed as feasible and appropriate. All trucks leaving the construction site shall adhere to the California Vehicle Code. In addition, construction vehicles shall be covered when necessary; and their tires rinsed prior to leaving the property.

54. When framing is complete, a site survey shall be prepared by a licensed civil engineer or architect that states the finished ground level elevation and the highest roof member elevation. Prior to the commencement of further construction activities, said document shall be submitted to the assigned Building Inspector and Planning Department for review and sign off on framing.

55. Construction debris and sediment shall be properly contained and secured on site with BMPs to prevent the unintended transport of sediment and other debris into coastal waters by wind, rain or tracking.

56. All new development, including construction, grading, and landscaping shall be designed to incorporate drainage and erosion control measures prepared by a licensed engineer that incorporate structural and non-structural Best Management Practices (BMPs) to control the volume, velocity and pollutant load of storm water runoff in compliance with all requirements contained in LIP Chapter 17, including:
    a. Construction shall be phased to the extent feasible and practical to limit the amount of disturbed areas present at a given time;
    b. Grading activities shall be planned during the Southern California dry season (April through October);
    c. During construction, contractors shall be required to utilize sandbags and berms to control runoff during on-site watering and periods of rain in order to minimize surface water contamination; and
    d. Filter fences designed to intercept and detain sediment while decreasing the velocity of runoff shall be employed within the project site.

Deed Restrictions

57. The property owner is required to execute and record a deed restriction which shall indemnify and hold harmless the City, its officers, agents, and employees against any and all claims, demands, damages, costs and expenses of liability arising out of the acquisition, design, construction, operation, maintenance, existence or failure of the permitted project in an area where an extraordinary potential for damage or destruction from wildfire exists as an inherent risk to life and property. The property owner shall provide a copy of the recorded document to Planning Department staff prior to final Planning Department approval.

58. Prior to final Planning Department approval, the applicant shall be required to execute and record a deed restriction reflecting lighting requirements set forth in Condition Nos. 17 a-f - 22. The property owner shall provide a copy of the recorded document to the Planning Department prior to final Planning Department approval.

59. The garage and storage area shall be limited to accessory use as defined by the City of Malibu Local Coastal Plan (LCP). The garage and storage area cannot be converted into habitable space at any time in the future. Prior to issuance of building permits, the application is required to execute and record a deed restriction to this effect.

Prior to Final Sign-Off

60. Prior to, or at the time of final inspection, the City Biologist shall inspect the project site and determine that all Planning Department conditions to protect natural resources are in compliance with the approved plans.

61. The applicant shall request a final Planning Department inspection prior to final inspection by the City of Malibu Environmental and Sustainability Department. A final approval shall not be issued until the Planning Department has determined that the project complies with this CDP.

62. Any construction trailer, storage equipment or similar temporary equipment not permitted as part of the approved scope of work shall be removed prior to final inspection and approval, and if applicable, the issuance of the certificate of occupancy.

Fixed Conditions

63. This coastal development permit shall run with the land and bind all future owners of the property.

64. Violation of any of the conditions of this approval may be cause for revocation of this permit and termination of all rights granted there under.

SECTION 8. The City Clerk shall certify to the passage and adoption of this resolution and enter it into the book of original resolutions.

PASSED, APPROVED AND ADOPTED this 13th day of July 2020.

MIKKE PIERSON, Mayor

ATTEST:

HEATHER GLASER, City Clerk
(seal)

APPROVED AS TO FORM:

CHRISTI HOGIN, City Attorney

COASTAL COMMISSION APPEAL – An aggrieved person may appeal the City Council's approval to the Coastal Commission within 10 working days of the issuance of the City's Notice of Final Action. Appeal forms may be found online at www.coastal.ca.gov or by calling (805) 585-1800. Such an appeal must be filed with the Coastal Commission, not the City.

Any action challenging the final decision of the City made as a result of the public hearing on this application must be filed within the time limits set forth in Section 1.12.010 of the MMC and Code of Civil Procedure. Any person wishing to challenge the above action in Superior Court may be limited to raising only those issues they or someone else raised at the public hearing, or in written correspondence delivered to the City of Malibu at or prior to the public hearing.

I CERTIFY THAT THE FOREGOING RESOLUTION NO. 20-39 was passed and adopted by the City Council of the City of Malibu at the regular meeting thereof held on the 13th day of July 2020 by the following vote:

AYES:	4	Councilmembers:	Farrer, Mullen, Peak, Pierson
NOES:	1	Councilmember:	Wagner
ABSTAIN:	0		
ABSENT:	0		

HEATHER GLASER, City Clerk
(seal)

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT OFFICE
89 S. CALIFORNIA ST., SUITE 200
VENTURA, CA 93001-4508
(805) 585-1800
SOUTHCENTRALCOAST@COASTAL.CA.GOV

APPEAL FORM

Appeal of Local Government Coastal Development Permit

Filing Information (STAFF ONLY)

District Office: South Central Coast

Appeal Number: _____

Date Filed: _____

Appellant Name(s): _____

APPELLANTS

IMPORTANT. Before you complete and submit this appeal form to appeal a coastal development permit (CDP) decision of a local government with a certified local coastal program (LCP) to the California Coastal Commission, please review the appeal information sheet. The appeal information sheet describes who is eligible to appeal what types of local government CDP decisions, the proper grounds for appeal, and the procedures for submitting such appeals to the Commission. Appellants are responsible for submitting appeals that conform to the Commission law, including regulations. Appeals that do not conform may not be accepted. If you have any questions about any aspect of the appeal process, please contact staff in the Commission district office with jurisdiction over the area in question (see the Commission's contact page at https://coastal.ca.gov/contact/#/).

Note regarding emailed appeals. Please note that emailed appeals are accepted ONLY at the general email address for the Coastal Commission district office with jurisdiction over the local government in question. For the South Central Coast district office, the email address is SouthCentralCoast@coastal.ca.gov. An appeal emailed to some other email address, including a different district's general email address or a staff email address, will be rejected. It is the appellant's responsibility to use the correct email address, and appellants are encouraged to contact Commission staff with any questions. For more information, see the Commission's contact page at https://coastal.ca.gov/contact/#/).

Exhibit 7
Appeal by Kraig Hill
Appeal No. A-4-MAL-20-0046

1. Appellant information[1]

Name: Kraig Hill

Mailing address: 20544 Seaboard Rd. Malibu CA 90265

Phone number: 310-456-8229

Email address: kraig.malibu@gmail.com

How did you participate in the local CDP application and decision-making process?

☐ Did not participate ☑ Submitted comment ☑ Testified at hearing ☑ Other

Describe: I submitted comment and testified in the 7/13/20 Council Zoom meeting, as a citizen unaffiliated with the City of Malibu. Previously, I was a member of the Planning Commission that denied the original application.

If you did *not* participate in the local CDP application and decision-making process, please identify why you should be allowed to appeal anyway (e.g., if you did not participate because you were not properly noticed).

Describe: NA

Please identify how you exhausted all LCP CDP appeal processes or otherwise identify why you should be allowed to appeal (e.g., if the local government did not follow proper CDP notice and hearing procedures, or it charges a fee for local appellate CDP processes).

Describe: City Council decided appeal, 7/13/20; Final Local Action Notice sent 7/31/20. First listing in "Currently Appealable Local Permits" was 8/11/20, only three days before nominal deadline of 8/14/20 (due to Coastal's server fault).

[1] If there are multiple appellants, each appellant must provide their own contact and participation information. Please attach additional sheets as necessary.

2. Local CDP decision being appealed[2]

Local government name: City of Malibu

Local government approval body: City Council

Local government CDP application number: CDP No. 17-071

Local government CDP decision: ☑ CDP approval ☐ CDP denial[3]

Date of local government CDP decision: July 13, 2020

Please identify the location and description of the development that was approved or denied by the local government.

Describe: 33608 PCH; Applicant: Burdge and Assocs.; Owner: Michael Price.
Project approved as submitted, overturning denial by Planning Comm'n.
Interior and exterior remodel of, and 1,159 sq.ft. of additions to
single-family residence, to maximize total TDSF at 5,390 sq.ft.
including Site Plan Review (SPR) No. 17-036 for construction up to 24 feet
in RR-2 zoning district.
All additions to be made to 2nd story, such that 1st story = 1,291 sq.ft., while
2nd story = 1,622 sq.ft – a violation of "2/3 Rule," LIP 3.6(K)(2).
Rationale to allow violation is that house is at elev ~10 ft. above MHTL,
and subject to flooding and sea-level rise, such that first-floor additions
cannot be permitted. Yet no exemption to LIP 3.6(K)(2) exists in code.
Wave Uprush Study is deficient.

Please see attached "Grounds for Appeal" for full, relevant description
of the Malibu City Council's decision.

[2] Attach additional sheets as necessary to fully describe the local government CDP decision, including a description of the development that was the subject of the CDP application and decision.

[3] Very few local CDP denials are appealable, and those that are also require submittal of an appeal fee. Please see the appeal information sheet for more information.

3. Identification of interested persons

On a separate page, please provide the names and contact information (i.e., mailing and email addresses) of all persons whom you know to be interested in the local CDP decision and/or the approved or denied development (e.g., the applicant, other persons who participated in the local CDP application and decision making process, etc.), and check this box to acknowledge that you have done so.

☐ Interested persons identified and provided on a separate attached sheet

4. Grounds for this appeal[4]

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP or to Coastal Act public access provisions. For appeals of a CDP denial, grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions. Please clearly identify the ways in which the development meets or doesn't meet, as applicable, the LCP and Coastal Act provisions, with citations to specific provisions as much as possible. Appellants are encouraged to be concise, and to arrange their appeals by topic area and by individual policies.

Describe: Please see attached letter, "Grounds for Appeal."

[4] Attach additional sheets as necessary to fully describe the grounds for appeal.

5. Appellant certification[5]

I attest that to the best of my knowledge, all information and facts in this appeal are correct and complete.

Print name Kraig Hill

Signature

Date of Signature 8-13-20

5. Representative authorization[6]

While not required, you may identify others to represent you in the appeal process. If you do, they must have the power to bind you in all matters concerning the appeal. To do so, please complete the representative authorization form below and check this box to acknowledge that you have done so.

☐ I have authorized a representative, and I have provided authorization for them on the representative authorization form attached.

[5] If there are multiple appellants, each appellant must provide their own certification. Please attach additional sheets as necessary.

[6] If there are multiple appellants, each appellant must provide their own representative authorization form to identify others who represent them. Please attach additional sheets as necessary.

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400

DISCLOSURE OF REPRESENTATIVES

If you intend to have anyone communicate on your behalf to the California Coastal Commission, individual Commissioners, and/or Commission staff regarding your coastal development permit (CDP) application (including if your project has been appealed to the Commission from a local government decision) or your appeal, then you are required to identify the name and contact information for all such persons prior to any such communication occurring (see Public Resources Code, Section 30319). The law provides that failure to comply with this disclosure requirement prior to the time that a communication occurs is a misdemeanor that is punishable by a fine or imprisonment and may lead to denial of an application or rejection of an appeal.

To meet this important disclosure requirement, please list below all representatives who will communicate on your behalf or on the behalf of your business and submit the list to the appropriate Commission office. This list could include a wide variety of people such as attorneys, architects, biologists, engineers, etc. If you identify more than one such representative, please identify a lead representative for ease of coordination and communication. You must submit an updated list anytime your list of representatives changes. You must submit the disclosure list before any communication by your representative to the Commission or staff occurs.

Your Name NA

CDP Application or Appeal Number CDP No. 17-071

Lead Representative

Name NONE
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Your Signature _____

Date of Signature _____

Additional Representatives (as necessary)

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Your Signature_____

Date of Signature _____

Kraig Hill
Seaboard Road, Malibu 90265
(310)456-8229 kraig.malibu@gmail.com

August 14, 2020

BY EMAIL ONLY

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT OFFICE
89 S. CALIFORNIA STREET SUITE 200
VENTURA, CA 93001-4508

GROUNDS FOR APPEAL
of CDP No. 17-071
City of Malibu
re
33608 Pacific Coast Highway
Applicant: Burdge and Associates Architects, Inc.;
Property Owner: Michael Price

Dear Members of the California Coastal Commission,

The Malibu City Council fundamentally misunderstood what they were looking at when they voted to approve the present application, overturning a denial by the Planning Commission. This appeal focuses on only two defects pertaining to interpretation of the LCP that should be of substantial interest to the Commission. (It also presents one other issue pertaining to Municipal Code to be addressed, should this project be reviewed *de novo*.)

Note that, due to a computer server malfunction at the Coastal Commission lasting roughly a week,[1] the application appeared for the first time on the list of "Currently Appealable Local Projects" as late as only three days before the appeal deadline. Thus, while this memo states the Grounds for Appeal, it may need to be amended in a timely manner. In particular, representations of statements made by Council members, staff and/or applicants may not yet be quoted exactly until I have sufficient time to review the video record of the Council hearing.

To be clear and candid, I was a Planning Commissioner when the initial denial was rendered; I was no longer on the Commission when acting as an interested party in the Council hearing. I have no animus for the owner or applicant, and regret that they have been subjected to what must feel like a tug of war. Rather, this appeal is animated (in part) by the observation that sometimes the Malibu City Planning Staff cuts corners in interpreting the LCP, in a manner that consistently favors applicant/developers over safety, neighbors and/or the environment; they sometimes allow unwarranted variances and too-liberal interpretations of code. That observation prompted a close examination of the present application in relation to the LCP. It contains several examples.

1 As reported to me by Program Analyst Denise Venegas in phone conversation, 8/13/20.

OVERVIEW

The existing house is sited at elevation ~10 feet above MHTL, above a rip-rap revetment. Curiously, although a layperson would certainly call it a "beach house," the parcel is zoned RR-2, so subject to the 2/3 Rule [LIP 3.6(K)(2)]. The second story is currently almost the same size as the first story (1,256 sq.ft. over 1,291 sq.ft.). Due to "potential flooding issues" – as conceded by both staff and the applicant – the 1st floor cannot accommodate further additions, so the proposal is to instead add square footage to the 2nd floor. To avoid exacerbating the existing violation of the 2/3 Rule, they propose adding substantial (793 sq.ft.) decking around the perimeter of the 2nd story, and counting the covered area underneath the decking as part of the area of the first floor, even though it's open patio. Staff does this by using TDSF as the standard for measuring the relative areas of the two floors (as TDSF includes covered areas), yet the 2/3 Rule expressly states the appropriate measure as being "floor area", to wit: "Any portion of the structure above 18 feet in height shall not exceed 2/3rds the first floor area."[2] Not TDSF. Staff's interpretation would yield an absurd result: any house could have an infinitely large second story (subject to other constraints such as lot setbacks), as long as enough decking were extended around its perimeter.

This memo presents the following three grounds for appeal. The issues are first briefly summarized, then each is discussed more fully in its own section.

The first two issues are interrelated: The facts underlying Issue No. 1 gave rise to the facts of No. 2, as conceded by both staff and the applicant.

(1) The Wave Uprush Study is significantly flawed in being based on a maximum wave height of four feet, plus only two feet of sea level rise; whereas wave heights of ten feet or more are reasonably foreseeable, and the Coastal Commission's standard for sea level rise is *at least* 40"-80" (more recent Commission thinking on sea level is noted herein). Evidently, the Uprush study was given short shrift because the initial determination was that no additions could be added to the first floor, due to the possibility of flooding and sea level rise, as conceded by staff and applicant. That possibility drove the decision to allow additions to the second story only – thus making considerations of uprush and sea level rise *seem to be* irrelevant; though raised in hearing, they were fairly ignored by Council.

Note that the wave uprush and sea level rise issues here are comparable in material respects to those of the residential application at 30708 Pacific Coast Highway (adjacent to Trancas Creek), which the Coastal Commission itself appealed, and on February 13, 2020 found to present a Substantial Issue, so continued it for *de novo* hearing (pending).[3] In that application, the problematical Finished Floor Elevation (FFE) is 19.5 ft. (NAVD88);[4] the FFE of this application is 19.27 ft. (NAVD88)[5] – evidently even more vulnerable to uprush and sea level issues.

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2 LIP 3.6(K)(2).

3 Appeal Th10c of A-4-MAL-19-0218 (Klein Family Partnership), February 13, 2020, brought by Commissioners Padilla and Uranga. Finding of Substantial Issue, continued for *de novo* hearing, pending.

4 Staff report at 21, CDP No. 17-119, Variance No. 19-038, Demolition Permit No. 18-010, and Code Violation No. 19-055, Planning Commission meeting 12/2/19. https://www.malibucity.org/AgendaCenter/ViewFile/Item/4031?fileID=9986

5 Coastal Engineering Review Sheet, in Commission Staff Report, CDP No.17-07, SPR No.17-036, meeting date 2/18/20, at PDF 59 of 76.

(2) Staff, and subsequently Council, incorrectly applied the 2/3 Rule [LIP 3.6(K)(2)], to yield an absurd result. The second floor area is already virtually the same as the first floor (as noted above). The Planning Commission read the 2/3 Rule as plain English: where the code specifies "floor area," and where the clear intent is to make 2nd stories somewhat smaller than 1st stories, the Commission found that one must simply measure the *area* of the *floor* of each *story*. To reach for a definition involving TDSF – a measure used to calculate total structure area relative to parcel size – would be less relevant, unnecessarily complicated, and would potentially lead to absurd results – as it has done here.

At times, Staff has maintained that its interpretation using TDSF as the measure of area was implemented in 2008. And, in the hearing, Staff allowed Council to take away the distinct and clearly incorrect impression that the policy was formalized then. Yet at other times, staff has conceded that the TDSF interpretation policy was never formalized, so has been used in an *ad hoc* way ever since. (In most cases it hasn't mattered because virtually all applicants have used common sense in understanding that the volume of the second floor can't be more than 2/3 that of the first – the intent of the Rule is pretty simple.) Documentation is provided in the full section below.

Staff's ad hoc interpretation of the 2/3 Rule is ongoing, compounding the significance of the issue, as Council is set to hear another appeal of a Planning Commission denial, on August 24.

(3) The proposed TDSF is greater than allowed on the parcel because staff erred in not applying the slope factor to the approximately 5% of lot area that's comprised of slope 1:1 or steeper – resulting in that area not having been subtracted from the gross lot area, thereby causing the proposed TDSF of the structures to be greater than the actual amount allowable on the net lot area.[6] (This issue pertains to Malibu Municipal Code, so would be addressable in a *de novo* hearing.)

The applicant suggests that the 10-ft-high revetment can simply be ignored, yet in plan view it clearly comprises at least 5% of the lot. The applicant suggests that it's not as steep as 1:1, yet sometimes refers to it as a "wall," and relies on its inherent verticality functioning as a sea wall.

This discrepancy is critical, insofar as the proposed TDSF only 5 sq.ft. lower than that that which would be allowable on the *gross* lot area. It's too big for the *net* lot area by hundreds of square feet.

Each of the three issues are independently fatal to the project as designed. They are each addressed in more detail, following.

6 Per MMC 17.40.040(6)(d).

1. The Wave Uprush Study is deficient

This issue speaks to the underlying reason why additions could not be made to the first floor. The applicant and staff did not offer evidence of the admitted "flooding issue," saying it was irrelevant to building on the second story. Yet the integrity of the Wave Uprush Study and assumptions about anticipated sea level rise are critical to the question of whether *any* additional square footage can be added to the main house (or the separate guest house and garage, for that matter).

As noted above (at 2), the wave uprush and sea level rise issues here are comparable to those of the residential application at 30708 Pacific Coast Highway, for which the Coastal Commission ordered a *de novo* hearing (pending).[7] There, the problematical Finished Floor Elevation (FFE) is 19.5 ft. (NAVD88);[8] here, it's 19.27 ft (NAVD88)[9] – evidently even more vulnerable.

The Wave Uprush Study is based on two unworkable assumptions: it uses a nominal wave height of only 4 ft., and a projected sea level rise of only 2 ft. Here's the relevant excerpt of the Coastal Engineering Review Sheet:

> City of Malibu — Coastal Engineering Review Sheet
> MALC5267.527
>
> The proposed project will consist of the addition and remodel to an existing SFR and any required changes to the existing OWTS. The property includes a detached garage and guest house. An existing rock revetment has been constructed for the protection of the existing OWTS. The main house finished floor is at +19.27 ft NAVD88. The garage and guest house finished floor is at +19.46 ft NAVD88. The Coastal Engineering Consultant has determined, for a 4-ft, 18-second period wave on an unprotected beach without a seawall and sea level rise of 2 feet, a breaking wave crest at Elevation +16.23 ft NAVD88 and a wave uprush limit at Elevation +12.00 ft NAVD88 at approximately 137.7 ft seaward from the service road right-of-way line. Based on recent flood hazard mapping, the site is within the Preliminary FEMA Zone A (FEMA, 2016).

Using a 4-ft wave, the study finds a wave crest elevation of 16.23 (NAVD88), while the finished floor elevation is 19.27 ft. That's only 3.04 feet higher. So a wave of only 7 ft. (4 +3 ft.) would reach the finished floor elevation. Whereas Malibu gets 10-foot waves every few years, and 15-foot waves once a decade or so (this is swell amplitude, not wave faces, which are taller). On top of that, add factors for high tide and storm surge, and the likelihood of damage approaches 100%.

Then on top of all that is sea level rise. The applicant used a projection of 2 ft. But at the time the project was completed, the Coastal Commission's recommended standard was to allow 40" height if you're moderately risk averse, or 80 inches if you're more prudently risk averse (or 12 ft. if you're extremely risk averse).[10]

In that context, recall the similarly conservative considerations about sea level rise in the appeal document of Commissioners Padilla and Uranga filed in re 30708 PCH (Trancas Creek):[11]

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7 *Supra*, note 3.
8 *Supra*, note 4.
9 *Supra*, note 5.
10 https://documents.coastal.ca.gov/assets/slr/guidance/2018/6_Ch6_2018AdoptedSLRGuidanceUpdate.pdf, at 103.
11 https://documents.coastal.ca.gov/reports/2020/2/th10c/th10c-2-2020-exhibits.pdf, at PDF 68 of 71.

Additionally, the City's findings relied on a Wave Uprush Study and Coastal Engineering Report, dated December 17, 2017, which looked at the proposed development in relation to coastal hazards under a range of sea level rise projections and provided a recommended finish floor elevation. However, it's important to note that in August 2018, the Commission's Sea Level Rise Guidance was updated to reflect new best available science with new sea level rise projections stemming from two reports from the California Ocean Protection Council (OPC), the State Sea Level Rise Guidance (OPC 2018), and Rising Seas in California (Griggs et al. 2017). The new best available science on sea level rise indicates that in this area, sea levels may rise between 3.3 and 10 feet by the year 2100, which is significantly higher than the level analyzed in the City's findings. Using the appropriate medium-high risk aversion and high emissions scenario, sea level rise is projected to be 5.5 feet by 2090 and 6.8 by 2100 in the Santa Monica area (OPC 2018). For the 75-year project life of the approved residence, sea level rise is projected to be roughly 6.15 feet by year 2095 (the mid-way point between the 2090 and 2100 projections). The difference in sea level rise projection between the projection used in the Wave Uprush Study and Coastal Engineering Report for the approved project, dated December 17, 2017 (1.5 feet) and the updated and best available sea level rise science (6.15 feet) is more than 4.65 feet, which is significant and would change the conclusions of the analysis about the required finished floor elevation and the safety of the proposed structure from extreme events and sea level rise.

For the current project we can apply the same conclusion: that "for the 75-year project life...sea level rise is predicted to be roughly 6.15 feet by year 2095" (the two sites being only 1.5 miles apart, the assumptions about sea rise height should be practically identical.) That's 74 inches. Which is more than double the 3.04' margin the applicants have allowed themselves in their Coastal Engineering Review Sheet (above).

All told, the allowance for wave uprush itself should be on the order of 5-10 feet higher... plus another few feet allowance for tide and storm surge... plus Coastal's required 74 inches for sea level rise… So the finished floor elevation should actually be something on the order of 12-15 ft. higher than specified. It would appear that this house being built to last only a few years before it becomes flotsam and jetsam. Even if these numbers were off by several feet, it would still be a matter of grave concern.

Even beyond all that, the Wave Uprush study states that there's an extremely low probability of tsunami generated waves occurring in the vicinity of the subject property; yet the City's own policy, according to the City of Malibu Emergency Services Director, Susan Dueñas, is to be prepared for a tsunami of 8 feet.[12] If the City is required to be prepared for that additional uprush height, should not a resident too?

2. Staff applies the 2/3 Rule incorrectly

In terms of bulk, the existing house is already essentially a cube (First floor = 1,291 sq.ft, second floor = 1,256 sq.ft.; an imperceptible difference). The purpose of the 2/3 Rule is to reduce the bulk of a building, and the second floor in particular. Nonetheless, starting with a "cube," the applicant wants to add an additional 366 sq.ft. to the 2nd floor, plus another 793 sq.ft of 2nd-floor decking out beyond that, extending the second floor by a total of 1,159 sq.ft.. Even if the 366 sq.ft. were added

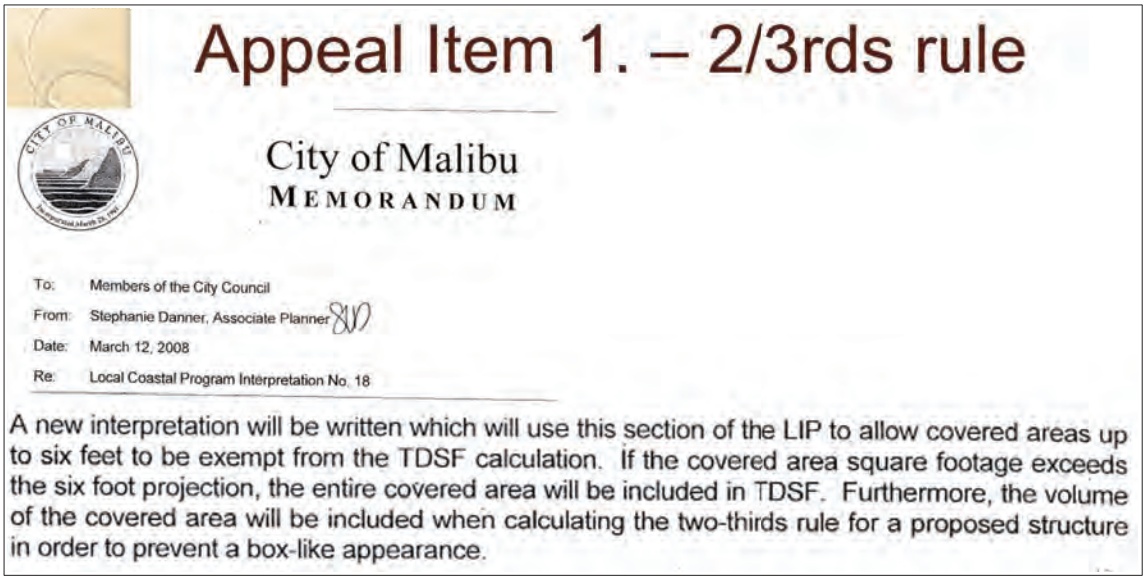
12 As presented live to the CERT Training Course I attended in February, 2020.

instead to the *ground floor*, it still wouldn't produce a structure of proportions that would be compliant with the 2/3 Rule. To be adding that much more to the second story of a cube, you'd better have an incredible argument to overcome the clear intent of the 2/3 Rule.

Neither the staff nor the appellant can make that argument. Staff does not read the black-letter code for the obvious meaning on its face. Instead, they conjure up an unnecessary need for further interpretation beyond what the code actually says. Their convoluted "interpretation" makes a mockery of the 2/3 Rule. By their logic, you could have one room on the first floor, with hundreds of rooms on the second floor, as long as you kept adding deck to the second story to capture TDSF covered-area underneath to count towards the first floor. **Carried to its logical conclusion, staff's interpretation would permit a house with a second story of infinite size, with an infinitely great ratio in comparison to the first floor** (subject only to other constraints such as lot setbacks and the TDSF limitation).

And yet, the 2/3 Rule doesn't mention TDSF. It refers to "floor area," as I'll show in a moment.

But first, **Council made a critical error in misreading the import of a 2008 memo written by an associate planner to the then City Council.** Planning Director Bonnie Blue flashed the following image of the memo on the screen of Council's Zoom meeting of this past July 13th for a tantalizingly brief period; I managed to capture it in a screenshot. Director Blue asserted – I'll have to review the video to recall her precise words, but in any case the Council understood her as having asserted – that the memo represented the official memorialization of a policy change to use TDSF instead of "floor area" when calculating the 2/3 Rule.



But that policy has never formally been in effect. The memo states, "A new interpretation will be written…," in the future tense. As Director Blue conceded in the Staff Report (which Council evidently missed), "a formal interpretation policy was never prepared due to staffing shortages and shifting priorities."[13] **That's a direct admission that there is no binding precedent to use TDSF as a substitute for "floor area" in the code.**

13 Staff Report at 4.

Instead, it seems that staff has been "winging it" for years – which has usually worked out okay, because applicants generally tend to correctly calculate floor area in good faith, by the plain meaning of the words in the statute, "floor area" and "of the structure." **Not incidentally, the 2008 memo also notes that the intent of the 2/3 Rule is "to prevent a box-like appearance."** The interpretation that Council accepted in the present application does the opposite of that.

Bizarrely, Council assumed that the memo that was briefly shown on their screens was a formalized policy, and chastised the Planning Commission for "making up" a new interpretation of the 2/3 Rule. But they had it backwards: The Commission had applied the code as it reads, whereas Staff's "interpretation" goes beyond the plain meaning of the words, and has never been been vetted by any Council.

So let's examine the language in the relevant section of the LIP.[14] The Staff Report relies on the portion of the code shown here in red (which they underlined in their report). In contrast, the portion in blue is what the Planning Commission found to be the actual expression of the 2/3 Rule.

> **LIP 3.6(K)(2): Multi-Story or Single Floor Area, Structures Greater Than 18 Feet In Height.**
> Notwithstanding any other provision of this Chapter, the total development square footage for a structure greater than 18 feet in height shall not be greater than permitted for single-story construction.
> Any portion of the structure above 18 feet in height shall not exceed 2/3rds the first floor area, and shall be oriented so as to minimize view blockage from adjacent properties.

There are two separate concepts in that section. The concept of TDSF is invoked only in the first clause. It's used solely in service of the point that, whatever amount you'd be allowed to build as one story, you can't build more than that by adding a second story. That's not the 2/3 Rule.

Whereas, the clause beginning in blue goes on to a new and different concept: **the 2/3 Rule. It makes no reference back to the prior mention of TDSF. Its only metric is "first floor area," by which it clearly means the area of the first floor of the structure.** There's no need for some legalistic interpretation there, that's just plain English.

Note also that the blue clause references "the structure," so by a plain reading it would include only "floor area" *of the structure*, not the ground somewhere outside or beyond the structure – such as on an outdoor terrace – as the appellant persuaded the Council to believe. Surely, by no reasonable definition can an outdoor terrace (a patio) be considered a "structure."

Moreover, a fundamental distinction between TDSF and "floor area" is that the former is concerned with measuring the totality of built structures on a property, as it expressly includes *accessory* structures. Just so, the LIP definition of TDSF begins with the purpose of the metric: it's for "the calculation of the interior space of the *primary and accessory structures*." So why in the world would one use a metric concerned with accessory structures when considering the 2/3 Rule, which pertains solely to the single, primary structure? Using TDSF for the 2/3 Rule is nonsensical.

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14 The MMC is substantially similar for purposes of the 2/3 Rule.

In effect, staff's position boils down to: *We have interpreted the code incorrectly, against logic and common English usage, but because we have done this before, we have the right keep doing it.* **But if two wrongs don't make a right, neither do 2,000. The concept of *common practice* is not an availing excuse when it contradicts a black-letter statute.**

Meanwhile, if there were still any doubt, the **LIP's General Development Standards** require that:

> A balcony or deck projecting from a higher story may extend over a lower balcony or deck but shall not in such case be deemed a roof for the lower balcony or deck.[15]

Strictly speaking, that applies to one balcony or deck above another. But logically, **if a balcony or deck can't be considered "a roof" for the area below, then how could the area below be considered enclosed for purposes of counting it towards the 2/3 Rule?** Of course one wouldn't count it. This clause harmonizes back to the original one: the area below can't be counted as part of the ground floor, because it's not floor area *of the structure* itself.

Moreover, if any of the 2nd-story decking had to be removed due to the effects of damage by wave action or flooding, then even the Staff's perverse 2/3 Rule interpretation would be prove to have been violated. This is because Staff concedes that flooding or wave uprush is a threat – that's the whole impetus for building additions to the second floor, not the first. But then LIP §10.4(L) states:

> **[A]ccessory structures**, **including but not limited to patios**, stairs, recreational facilities, landscaping features, **and similar design elements shall be constructed and designed to be removed or relocated in the event of threat from erosion, bluff failure or wave hazards.**"

That means that the decking is required to be designed to be transient, ephemeral. That being so, it can't possibly qualify to have the area underneath it counted as structural square footage, even under the TDSF interpretation of the 2/3 Rule. The applicant can't have their cake and eat it too.

Evidently, staff's incorrect interpretation hasn't previously mattered because applicants have simply and faithfully counted the "floor area" of the first and second floors, computed the 2/3 ratio – and by having done just that much, they've satisfied the 2/3 Rule. There's been no need to go through further contortions involving TDSF or other irrelevant measures.

Yet the staff's ad hoc interpretation of the 2/3 Rule is ongoing, compounding the significance of this issue. On the very next City Council agenda (Aug. 24, 2020) is another appeal of a Planning Commission decision on the 2/3 Rule. The staff report for it states,[16]

> The Planning Commission, following a new interpretation of the two-thirds rule it had adopted in denying a CDP application for a new residence at 33608 Pacific Coast Highway, based the denial on finding that the covered patio areas of the main residence should not be included in the two-thirds calculation of the main residence and that instead only the interior floor area should have been utilized in the calculation.

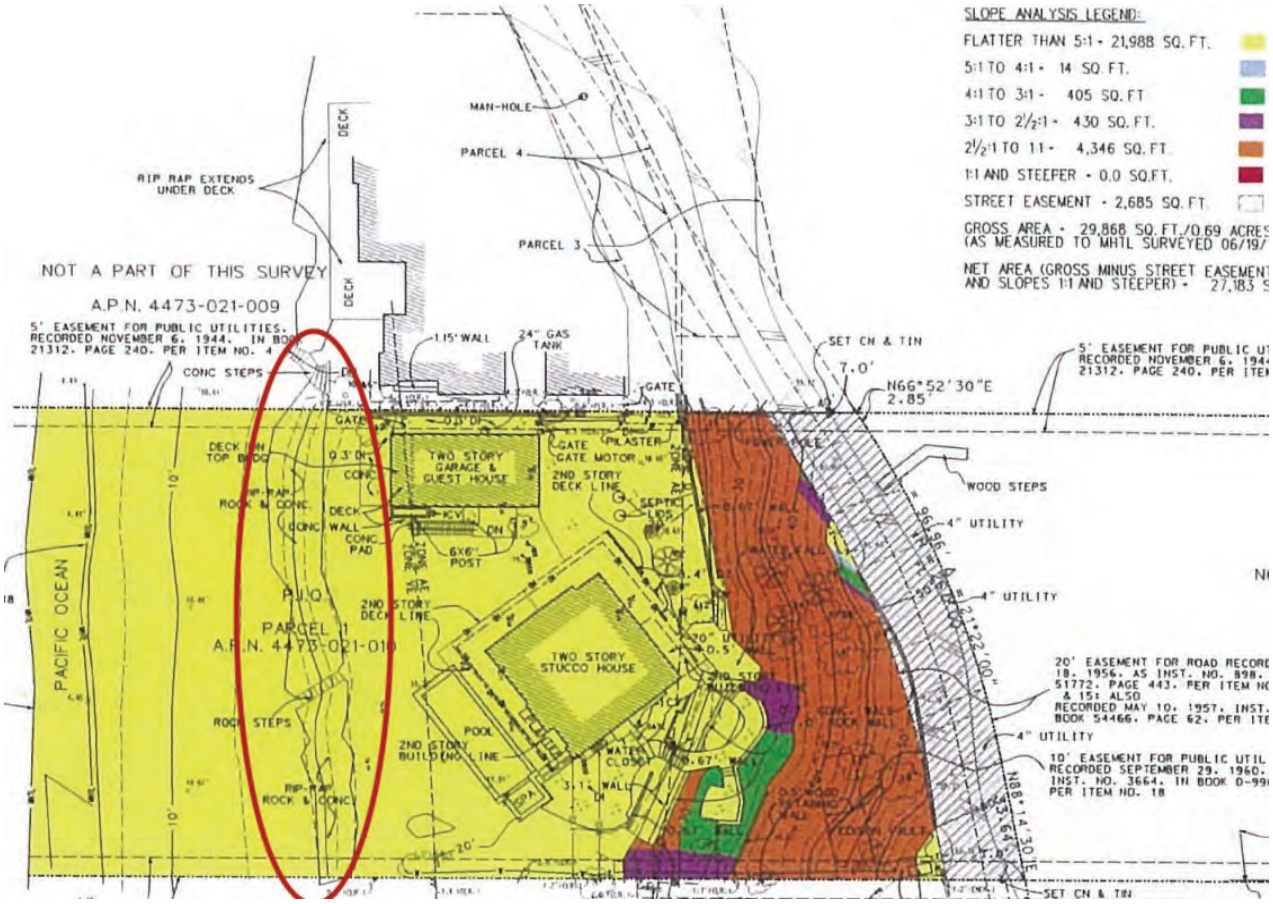
15 LIP 3.5.3(B)(4), at 101.

16 https://www.malibucity.org/AgendaCenter/ViewFile/Item/4456?fileID=16079, at 6.

Of course, that Commission's interpretation cannot be characterized as "new," insofar as it simply implements the plain English of the section that has existed almost since the first draft of the LCP, several decades ago.

3. The proposed TDSF is greater than allowed on the net parcel.

A rip-rap rock wall covers an area comprising at least 5% of the parcel (indicated by a red oval on the Slope Analysis map). That wall, practically by definition, is sloped 1:1 or steeper. Yet the project's Slope Analysis ignores its slope, instead including it in the zone of "flatter than 5:1," as indicated in yellow on the map – as though the ocean washes up around the house.



The MMC requires that "slopes equal to or greater than 1:1 shall not be included in the lot dimensions."[17] (That's noted on the map, at the bottom of the Legend.) This is of critical significance because the proposed TDSF (5,390) is only 5 sq.ft. below the putative allowable TDSF limit (5,395). **When the area of the rip-rap wall is subtracted to find the true net area of the parcel, the allowable TDSF will be significantly lower than stated. The result is that the current project is hundreds of square feet larger than allowable under the TDSF formula.**

17 MMC 17.40.040(6)(d).

The applicant downplays the significance of the wall, suggesting that it's "just sort of part of the beach."[18] But that wall, and the ~10 ft. of elevation that separates the ocean from the rest of the parcel, is what keeps this from being zoned as a beach, and it's what the applicant hopes will keep the house in place. So the wall is inherent to the site. Its area certainly cannot be ignored.

4. Conclusion

The Wave Uprush Study, and its underestimation of wave heights, sea level rise, et al, would likely leave anyone living on the first floor cold and wet, several decades from now. The project grossly violates the 2/3 Rule in multiple ways. The net size of the parcel has been misrepresented; and because the project was so close to the assumed limit of TDSF, it actually overshoots the true allowable TDSF by hundreds of square feet.

The Coastal Commission should please send the applicant back to the drawing board, with an order that they respect the true 2/3 Rule; that they get the *net* lot size sorted out, discounting the 5+% area of the rip-rap wall (for purposes of determining TDSF); and that they re-do the Wave Uprush Study using values currently approved by the Commission. You might also dare to suggest that, having remodeled 3 or 4 times in the past decade, they might best focus on qualitative improvements and accept that the current size of the house is nearly all that the lot size will bear.

Finally, please keep an ongoing eye out for developer-biased interpretations made by Planning Staff. This concern is particularly timely insofar as Planning Director Bonnie Blue will be leaving in a few months; without knowing who her replacement may be, this is an important opportunity to ensure that the new regime gets off on the right foot.

Respectfully,
Kraig Hill

18 Stated by the applicant's agent to me during a visit to the site.

Kraig Hill
Seaboard Road, Malibu 90265
(310)456-8229 kraig.malibu@gmail.com

August 21, 2020

BY EMAIL ONLY

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT OFFICE
89 S. CALIFORNIA STREET SUITE 200
VENTURA, CA 93001-4508

SUPPLEMENTAL MEMO
in support of APPEAL (filed 8-14-20)
of CDP No. 17-071
City of Malibu
re
33608 Pacific Coast Highway
Applicant: Burdge and Associates Architects, Inc.;
Property Owner: Michael Price

Dear Members of the California Coastal Commission,

As noted in the Grounds for Appeal that I filed on August 14, the present application appeared on the list of "Currently Appealable Local Projects" only three days before the appeal deadline;[1] as a result, I needed additional time to review the video of the Malibu City Council hearing to obtain more specific evidence in support of the grounds stated in my initial appeal. I have now done so.

This memo presents that additional evidence in the same order as the grounds in the appeal document, such that the two documents track generally side-by-side:

(1) The Wave Uprush Study is significantly flawed;
(2) Staff, and subsequently Council, incorrectly applied the 2/3 Rule [LIP 3.6(K)(2)], to yield an absurd result; and
(3) The proposed TDSF is greater than allowed on the parcel because staff erred in not applying the slope factor to the approximately 5% of lot area that's comprised of slope 1:1 or steeper (this is an MMC issue, relevant only in a *de novo* hearing).

1 Due to a server malfunction at the Coastal Commission, according to Program Analyst Denise Venegas in phone conversation, 8/13/20.

OVERVIEW

Grounds for appeal No. 1 (Wave Uprush) and No. 2 (2/3 Rule) are interrelated. The following brief narrative provides the general framework into which the specific grounds and evidence (discussed in more detail below) fit in relation to each other.

The applicant is unable to make further additions to the ground floor of his house due to issues of "flooding" and/or "wave uprush," as is conceded by both staff and the applicant. This assumption was scarcely examined by the Council.[2] The applicant and staff *assume* that, because his combined structures (house, guest house and garage) do not comprise quite the maximum allowable TDSF, he must therefore be allowed to make further additions to the second floor. (No distinction has been recognized between "maximum allowable" and how much one might be allowed "by right.") Whether he can build any additions under current sea level rise guidelines is an open question; but note that the Finished Floor Elevation is actually lower than that of the house at 30708 Pacific Coast Highway (adjacent to Trancas Creek) which the Coastal Commission itself recently appealed.

Turning to the 2nd Ground for appeal, although a layperson would call it a "beach house," the zoning is RR-2, so the house is subject to the 2/3 Rule [LIP 3.6(K)(2)]. The second story is currently almost the same size as the first story (1,256 sq.ft. over 1,291 sq.ft.). The applicant proposes to add 366 sq.ft. to the second floor, resulting in 1,622 sq.ft of 2nd floor area over 1,291 sq.ft of 1st floor area – a ratio not of 2/3 but of 5/4. Because no more habitable space can be added to the ground floor, the applicant was told by staff that, for purposes of satisfying the 2/3 Rule, he could add 793 sq.ft. of 2nd-story decking to create covered areas on the ground floor that could be counted as 1st floor area.

That might work if the 2/3 Rule were measured as TDSF, however the Rule specifies "floor area," as was recognized by a majority of the Planning Commission. The Council did not attempt to pin down, parse, or otherwise clarify the language of LIP 3.6(K)(2)[3]; instead they defaulted to a narrative that "the code has a lot of gray area in it."[4] As discussed below, that code section is only "gray" if you try to read more into it than what it is printed on the page – which is what the Council was asked to do by Planning Director Bonnie Blue, who showed them a 2008 memo mentioning the idea of using TDSF for measuring the 2/3 Rule. The Council, despite momentarily recognizing that the memo merely signaled the *possibility* of formalizing the use of TDSF in place of "floor area," nonetheless leapt at the notion that the memo, formalized or not, offered an interpretation to relieve the 2/3 Rule of its "gray area." Staff, for their part, rested on the claim that the interpretation using TDSF has been in use for years. Yet neither staff nor Council seem to understand that, where there is black-letter law, no amount of misinterpretation can give rise to a new "common law" standard. If two wrongs don't make a right, neither do 200, where statutory authority speaks otherwise.

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2 Except for some brief questioning by Council member Mullen, discussed *infra*.

3 Perhaps because none of them are attorneys, so don't know any principles of statutory construction to draw upon.

4 In just the 4 pages-worth of quotes that I transcribed out of the ~90 minute hearing, the phrase "gray area" appears 7 times, used by 3 different Council members.

The third Ground for Appeal, that >5% of the parcel should have been subtracted for purposes of TDSF calculation because it is sloped 1:1,[5] is simple enough that discussion is left to its own section below – except to note that, despite it's having been publicly raised at both the Planning Commission and Council levels, the Council did not address it at all.

1. The Wave Uprush Study is deficient

The Wave Uprush Study is significantly flawed in being based on a maximum wave height of only four feet, plus only two feet of sea level rise; whereas wave heights of ten feet or more are reasonably foreseeable, and the Coastal Commission's standard for sea level rise is *at least* 40"-80" (more recent Commission thinking on sea level is noted herein).

The existing house appears to be sited at elevation ~15 feet above MHTL[6], above a rock wall that's 10-15 ft high (depending on variable sand level) and 10-15 feet wide. The wave uprush and sea level rise issues here are comparable in material respects to those of the residential application at 30708 Pacific Coast Highway (adjacent to Trancas Creek), which the Coastal Commission itself appealed, and on February 13, 2020 found to present a Substantial Issue, so continued it for *de novo* hearing (pending).[7] In that problematical application, the Finished Floor Elevation (FFE) is 19.5 ft.;[8] the FFE of this application is 19.27 ft.[9] – evidently even more vulnerable to uprush issues.

Evidently, the Uprush study was given short shrift by planning staff and the Council because the initial determination was that no additions could be built on the first floor, due to the possibility of ocean flooding, as conceded by staff and applicant. In turn, that possibility drove the decision to allow additions to the second story only – thus making further consideration of uprush and sea level rise *seem to be* irrelevant (i.e., why worry about flooding on the ground floor when you have a second story). So, although raised in hearing, the uprush issues were fairly ignored by Council.

The rock wall/revetment is visible in this photo from the applicant's PowerPoint presentation, (which shows the guest house at left and the main house at right, circled by the applicant):

5 MMC 17.40.040(6)(d) – relevant in a *de novo* hearing only.

6 Exact elevation is difficult to estimate due to sand variability, but the Uprush Study specs the finished floor elevation at 19.27 ft.

7 Appeal Th10c of A-4-MAL-19-0218 (Klein Family Partnership), February 13, 2020, brought by Commissioners Padilla and Uranga. Finding of Substantial Issue, continued for *de novo* hearing, pending.

8 (NAVD88). Staff report at 21, CDP No. 17-119, Variance No. 19-038, Demolition Permit No. 18-010, and Code Violation No. 19-055, Planning Commission meeting 12/2/19. https://www.malibucity.org/AgendaCenter/ViewFile/Item/4031?fileID=9986

9 (NAVD88). Coastal Engineering Review Sheet, in Commission Staff Report, CDP No.17-07, SPR No.17-036, meeting date 2/18/20, at PDF 59 of 76.

Indeed, it seemed everyone was avoiding the uprush issue, except for Councilmember Mullen, in the following exchanges:

> Mullen:[10] "This is something for the applicant-appellant to think about, because I would like you to answer it….is there something impeding your ability to make that whole first floor enclosed, and if so, what?
> [He continues speaking on other aspects, then asks the same question of Ms. Blue a few minutes later; she replies.]
> Blue[11]: "Yes, ordinarily [the first floor] could be enclosed. I think the applicant should address their design choices about that particular issue, because I think there are some reasons why they elected not to do that."
> Mullen[12]: "Is it anything having to do with proximity to the ocean or the beach, or something like that, that is inhibiting their ability to enclose that whole bottom floor? I'm not saying they should do that, I just wanted to point out that apparently if it was enclosed it would comply with the 2/3 Rule."
> Blue[13]: "Right, right. But again, I would defer to the applicant, but I believe it did have to do with the setting there, with the flood elevation and things like that."

10 Malibu City Council meeting, July 13, 2020, video: https://www.youtube.com/watch?v=sJJg9O4DlKI&feature=youtu.be, at 3:56:24.
11 Video, at 3:59:55.
12 Video, at 4:00:19.
13 Video, at 4:00:37.

So, twice Ms. Blue deflected questions about the uprush issues (whereas typically she would be eager to provide as much detail on a topic as a Council person might request).

Six minutes later, Councilmember Mullen queried the applicant's attorney, Jim Arnone, and yielded an admission:

> Mullen: "The main question is, is there something impeding you from enclosing that whole bottom floor."
> Arnone: "Yes, there is actually, Councilman. There's a flood plain issue, that in an extreme storm event...there could be an excess of flooding down in the flatter area. It doesn't necessarily mean it's impossible ever to find a way to do it, but the hoops we'd have to go through, and the challenges of being able to determine that that would be safe, to add more to the first floor, made it to be just not feasible to proceed that way. So that's why the additional enclosed area is on the second floor."[14]

So, the applicant concedes that nothing can be built on the ground floor due to the possibility of "an excess of flooding." (Unless a new structure had a higher Finished Floor Elevation.) What does that mean exactly? The Council didn't know, because the staff didn't say, despite having been asked about it twice.

To briefly summarize the uprush issues detailed in my original Grounds for Appeal letter, the Wave Uprush Study is based on unrealistic assumptions: it uses a nominal wave height of only 4 ft., and a projected sea level rise of only 2 ft.[15] My letter shows that, after considering wave height, sea level rise, high tide and storm surge, and when taking into account the Coastal Commission Guidelines on Sea Level Rise,[16] the finished floor elevation should be something like 10-12 feet higher than it is. It also discusses how the proposed Finished Floor Elevation (FFE) of this application is lower than that of the project at 30708 PCH (Trancas Creek) that the Coastal Commission itself appealed.[17] And that an observation made in that case also applies here: that "for the 75-year project life...sea level rise is predicted to be roughly 6.15 feet by year 2095" (the two sites being only 1.5 miles apart, the assumptions about sea rise height should be practically identical.) That's 74 inches. Which is more than double the 3.04' margin the applicants have allowed themselves here.

The deficiencies of the Wave Uprush Study have several implications. First, if the FFE of the existing ground floor is already too low, as it is when compared to that of the project at 30708 PCH, can it even be permissible to add any new square footage, regardless of which floor its on? **That is, if the building is situated in an unsafe place, is not the whole building unsafe?** If the ground floor is unsafe, then surely so is the story above it. Otherwise, it's as though the applicant is arguing, by analogy, that it's not the fall from the top of the Empire State Building that's deadly, it's just the part where you hit the ground.

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14 Video, at 4:06:30.

15 Coastal Engineering Review Sheet, in Commission Staff Report, CDP No.17-07, SPR No.17-036, meeting date 2/18/20, at PDF 59 of 76.

16 https://documents.coastal.ca.gov/assets/slr/guidance/2018/6_Ch6_2018AdoptedSLRGuidanceUpdate.pdf, at 103.

17 https://documents.coastal.ca.gov/reports/2020/2/th10c/th10c-2-2020-exhibits.pdf, at PDF 68 of 71.

Second, the applicant and the staff argue, and Council endorsed, that unenclosed patios on the ground floor could be counted for purposes of the 2/3 Rule as "mass" (they mean volume) on the 1st story because they would have covered decks above. In effect, they're saying that the existence of decking above produces a virtual addition to the 1st Floor. **Yet it's a perverse result to suggest that you're allowed to count area as an "addition" to satisfy the 2/3 Rule, when you wouldn't be allowed to build an actual addition in that same area.** Stated another way, an area shouldn't be counted as Total Development Square Footage (TDSF) if it's not legally permissible for it to be developed, due to the uprush circumstances.

On a related note, if any of the 2nd-story decking had to be removed due to the effects of damage by wave action or flooding, then even the Staff's perverse 2/3 Rule interpretation would prove to have been violated. Staff does concede that flooding or wave uprush is a threat – that's the impetus for building additions to the second floor. And LIP §10.4(L) states:

> **[A]ccessory structures**, **including but not limited to patios**, stairs, recreational facilities, landscaping features, **and similar design elements shall be constructed and designed to be removed or relocated in the event of threat from erosion, bluff failure or wave hazards.**"

The 2nd story decking, with its supports attached at ground level, is by that definition an "accessory structure," so must be designed to be removable. That being so, it can't possibly qualify to have the area underneath it counted as *permanent* structural square footage, even under the putative TDSF interpretation of the 2/3 Rule. The applicant can't have their cake and eat it too.

In short, the Council was evidently not concerned that a building that is admittedly unsafe on the ground floor might therefore be unsafe throughout its height. And, except for Mullen, none even acknowledged that clear deficiencies in the Uprush Study had been identified. It seemed as though one or a few Council members had not even read the staff report. (That's not a charitable observation, yet a more logical explanation for their apparent disregard of the uprush numbers remains elusive.) And if you can't build on the ground floor, you shouldn't be able to call that same area virtual development square footage – even assuming that TDSF were the proper measure to use in the 2/3 Rule, which it's not, as we'll see.

2. Staff, and subsequently Council, incorrectly applied the 2/3 Rule [LIP 3.6(K)(2)], to yield an absurd result

Staff's muddled treatment of the Wave Uprush study, disallowing additions to the first floor while allowing them on the second floor, placed an unusual conceptual pressure on the 2/3 Rule. Under typical circumstances, an applicant will read the 2/3 Rule for the clear meaning on its face and simply design a building such that the second story has no more than 2/3 the floor area of the first story. In this case, by contrast, the applicant and the staff were compelled to reach for a tortured "interpretation" of the Rule where none was needed or allowed. Their reliance on the argument, "we've done it this way for a long time" – the truth of which is debatable at best – is in any case unavailing when the black-letter law speaks otherwise.

As demonstrated by the quotations below from the City Council hearing, the majority of the Council were under the misapprehension that the Planning Commission had "made up" an interpretation of the 2/3 Rule "on the fly," when in fact the Commission was simply reading the plain language of the code, and it was staff's and the applicant's interpretation that wasn't supportable. The Council went through an elaborate series of steps (unremarked as such) to ignore the obvious and get to the outcome they wanted from the outset.

First, let's review the language in the relevant section of the LIP.[18] The Staff Report relies on the portion of the code shown here in red (which they underlined in their report). In contrast, the portion in blue is what the Planning Commission found to be the actual expression of the 2/3 Rule.

> **LIP 3.6(K)(2): Multi-Story or Single Floor Area, Structures Greater Than 18 Feet In Height.**
> Notwithstanding any other provision of this Chapter, the total development square footage for a structure greater than 18 feet in height shall not be greater than permitted for single-story construction.
> Any portion of the structure above 18 feet in height shall not exceed 2/3rds the first floor area, and shall be oriented so as to minimize view blockage from adjacent properties.

Those are two separate concepts in LIP 3.6(K)(2), presented in two separate sentences. The concept of TDSF is invoked only in the first sentence. It's used solely in service of the point that, whatever amount you'd be allowed to build as one story, you can't build more than that by adding a second story. That's not the 2/3 Rule.

Whereas, the sentence beginning in blue goes on to a new and different concept: **the 2/3 Rule. It makes no reference back to the earlier mention of TDSF. Its only metric is "first floor area," by which it clearly means the area of the first floor of the structure.** There's no need for some legalistic interpretation there, it's just plain English.

18 The MMC is substantially similar for purposes of the 2/3 Rule.

Note also that the blue sentence references "the structure," so by a plain reading it would include only "floor area" *of the structure*, not the ground somewhere outside or beyond the structure – such as on an outdoor terrace – as the appellant persuaded the Council to believe. Surely, by no reasonable definition can an outdoor terrace (a patio) be considered a "structure."

Moreover, a fundamental distinction between TDSF and "floor area" is that the former is concerned with measuring the totality of built structures on a property, as it expressly includes *accessory* structures. Just so, the LIP definition of TDSF begins with the purpose of the metric: it's for "the calculation of the interior space of the *primary and accessory structures*." So why would one use a metric concerned with accessory structures in applying the 2/3 Rule, which pertains solely to the single, primary structure? Using TDSF for the 2/3 Rule is nonsensical.

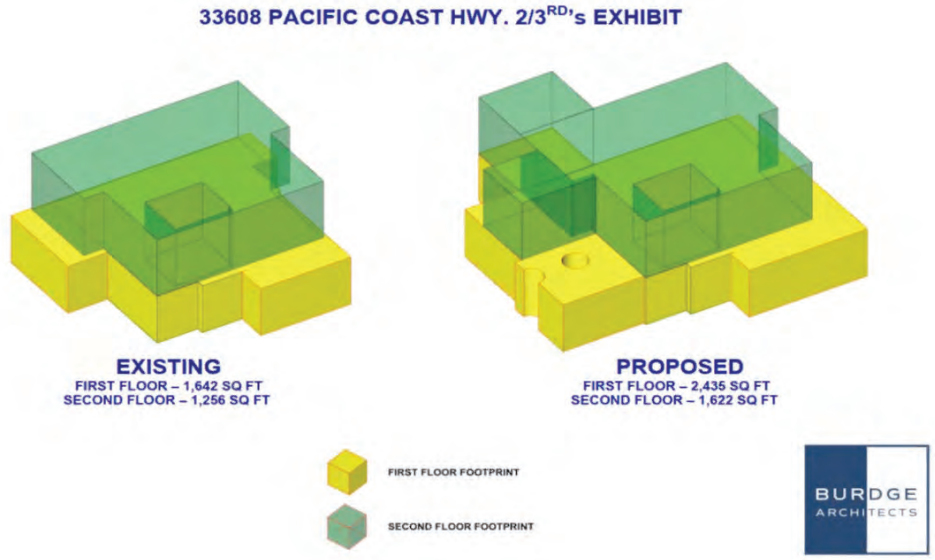
Indeed, the application of the 2/3 Rule here was nonsensical on its face. The existing house is already essentially a cube (First floor = 1,291 sq.ft, second floor = 1,256 sq.ft.; an imperceptible difference). Starting with that "cube," the applicant wants to add an additional 366 sq.ft. to the 2nd floor, plus another 793 sq.ft of 2nd-floor decking out beyond that, extending the second floor by a total of 1,159 sq.ft.. Even if the 366 sq.ft. were added instead to the *ground floor*, it still wouldn't produce a structure of proportions that would be compliant with the 2/3 Rule. To be adding that much more to the second story of a cube, you'd better have an incredible argument to overcome the clear intent of the 2/3 Rule. Neither the staff nor the appellant can make that argument.

Here's the existing house (center) and guest house (at left).[19] Note that the second story is already the same size as the first. (The green pin shows ground level, with the covered pool set into the ground-level patio.)

19 Screen shot from the Applicant's Powerpoint Presentation. Blue lines are property boundaries.

Staff's convoluted "interpretation" using TDSF makes a mockery of the 2/3 Rule. By their logic, you could have one room on the first floor, with hundreds of rooms on the second floor, as long as you kept adding deck to the second story to capture TDSF covered-area underneath to count towards the first floor. **Carried to its logical conclusion, staff's interpretation would permit a house with a second story of infinite size, with an infinitely great ratio in comparison to the first floor** (subject only to other constraints such as lot setbacks and the TDSF limitation).

The Council were bamboozled by the following deceptive graphic proffered by the applicant. Where the yellow areas added in the "Proposed" version appear to be adding more "mass" to the ground floor, in actuality those volumes wouldn't exist at all. The applicant has just artificially blocked in the areas that would be covered by second-story decks. The decks will stick out, making the second story look even larger, with no mass where the yellow is. The first story would now be substantially smaller than the second story – the true ratio is not 2/3, but 5/4. Also, they have positioned the *existing* and *proposed* volumes at a perspective that minimizes the effect of the additional 2nd-story room, at the rear-left side in this view.



Council was led to believe – by staff, by the applicant, and by their own self-reinforcing comments – that the 2/3 Rule somehow has a lot of "gray area," despite its clear, simple language: "Any portion of the structure above 18 feet in height shall not exceed 2/3rds the first floor area." Councilmembers referenced the notion of "gray area" or synonymous language at least dozen different times in the hearing, for example:

> Mullen: "It's a dilemma. I mean, what is considered the first floor? Is it 'floor area'? Is it TDSF? That's a gray area.[20]
>
> Wagner: "The interpretations are very fluid, and they change as we change the colors of

20 Video, at 4:07:40.

our shirts every day."[21]

Pierson: "The rules are vague. If you're on the Planning Commission, you experience it long and often. Looking at the code, there's three things about it: there's the words of the code itself; there's the interpretation of the code, which is past, present and future; and then there's the intent of the code – which sometimes can get lost as the decades go by…."[22]

Pierson: "Going over the language of the LIP, there is an area where it talks about TDSF, and then it goes to 'floor area.' That is confusing. That's totally confusing!"[23]

How did the Council so readily accept the "gray area" narrative proffered by staff? First, none have legal training, so none have been taught basic principles of statutory construction. None have the conceptual tools by which to read the code and figure out whether or not it even needs further interpretation beyond the language on its face. Second, Mayor Pierson had been on the Planning Commission for seven years, so when he promoted the "gray area" narrative, the others deferred to his expertise. After all, the notion sounds reasonable; and certainly there are some code sections that do require interpretation. The 2/3 Rule just isn't one of them. Mayor Pierson dominated the discussion, doing roughly half the talking of the whole Council, perhaps due in similar parts to their deference to his experience and to his current roll as Mayor. Finally, the staff's retrenchment was doubtless also a factor: by promoting the "gray area" narrative and not accepting that the meaning of the code could be plain on its face, the staff keeps itself situated as the gatekeeper of knowledge and expertise – it's Organizational Behavior 101.[24]

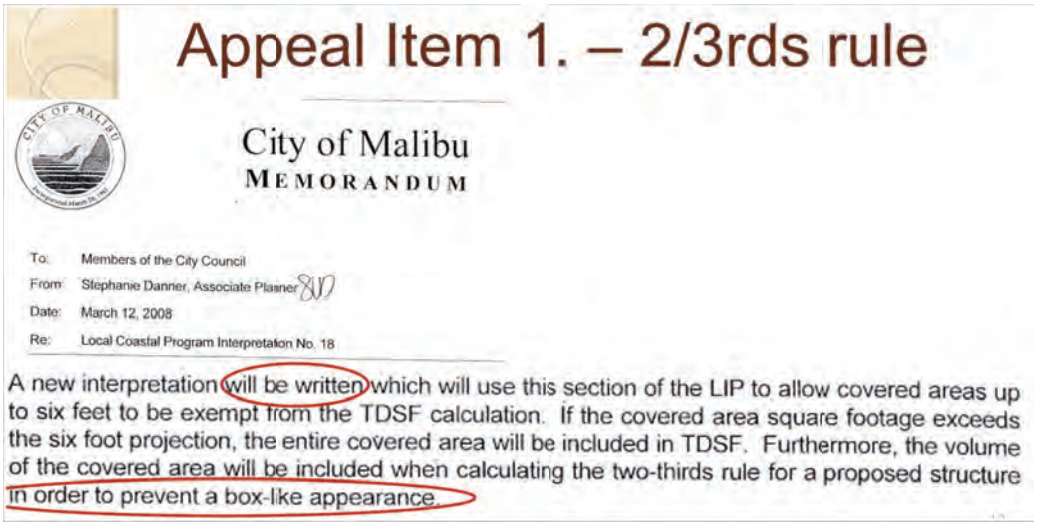
The Council was led to believe, largely by staff and the applicant, that despite that putative "gray area" in the 2/3 Rule, a speculative 2008 staff memo had somehow addressed it and become settled law. The memo was purported to represent the official memorialization of a policy change to use TDSF instead of "floor area" when calculating the 2/3 Rule. Ms. Blue flashed an image of it on the Zoom screen for a tantalizingly brief minute during her presentation;[25] the Council never saw it again, for the full remainder of the hour and a half until the vote was finally called. During that whole period of deliberation, Councilmembers believed they had been looking at a settled, formalized interpretation – or at least one that could resolve the "gray." (The memo image is reproduced on the next page.)

But that policy has never formally been in effect. The memo states, "A new interpretation will be written…," in the future tense. As Ms. Blue conceded in the written Staff Report (which Council

21 Video, at 3:53:00.
22 Video, at 4:12:40.
23 Video, at 4:13:35.
24 See, for instance the work of Herbert Simon. (While classical economic theories assume that people are rational decision-makers, Simon argued a contrary point. He argued that cognition is limited because of *bounded rationality* For example, decision-makers often employ *satisficing*, the process of utilizing the first marginally acceptable solution rather than the most optimal or correct solution.) Simon, Herbert A. (1997) Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations, 4th ed., The Free Press.
25 Video, beginning at 3:04:51, for a minute or two; a full 1.5 hours before the vote was called at 4:34:52.

evidently missed), "a formal interpretation policy was never prepared due to staffing shortages and shifting priorities."[26] **That's a direct admission that there is no binding precedent to use TDSF as a substitute for "floor area" in the code.**

Here is the excerpt of the memo shown by Ms. Blue (I added the red ovals):



Instead, it seems that staff has been "winging it" for years – which has usually worked out okay, because applicants tend to correctly calculate floor area in good faith, by the plain meaning of the words in the statute, "floor area" and "of the structure." **Not incidentally, the 2008 memo also notes that the intent of the 2/3 Rule is "to prevent a box-like appearance."** The interpretation that Council accepted in the present application does the opposite of that.

Ms. Blue also took pains to point out that staff had been using the memo's interpretation since 2008. Yet the memo addresses two different rules: (1) to "Allow covered areas up to six feet to be exempt from the TDSF calculation"; and (2) the 2/3 Rule. In purporting to explain that the 2/3 Rule has been long interpreted as using TDSF, **she confirmed only that the first part of the memo had arguably been in use since 2008**; her one mention of the 2/3 Rule in a rambling discourse was a vague, hand-wavy non-sequitur. Referring to the on-screen memo she stated:

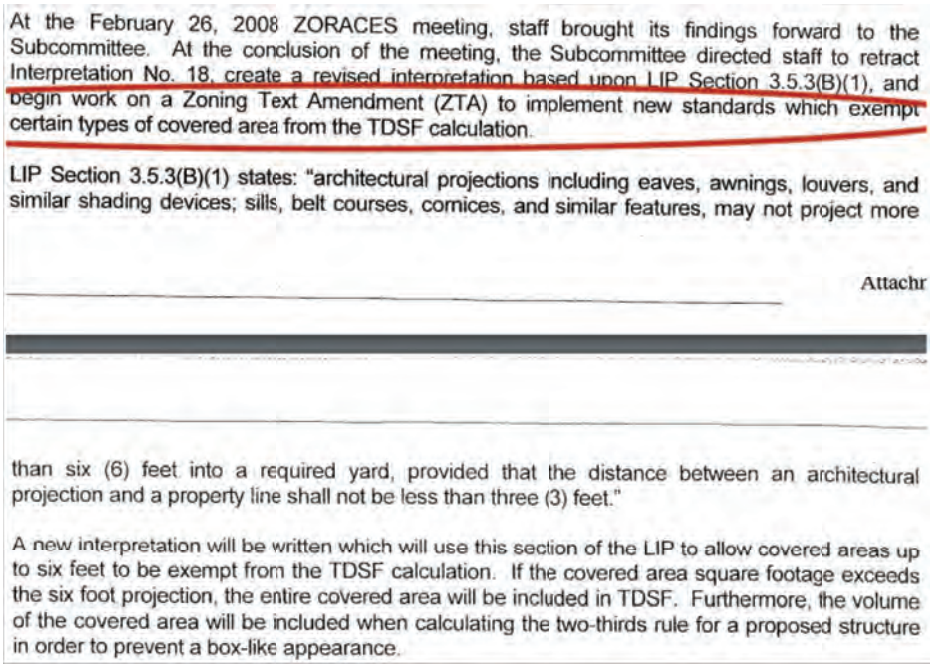
> "This application of the code [in the present application] is based on long-standing policy going back in writing as long as 2008… I mention 'in writing' because there is a Zoning Interpretations Manual that is available on the City's website and at City Hall, and is referred to by staff and applicants for purposes of understanding how to apply the code when the code isn't crystal clear – which is unfortunately pretty often – on a number of issues. So, [this memo] explains City practice and intention going forward to include specifically square footage of covered areas in TDSF when the covered areas extend more than six feet from a structure. And here in this project, the addition of covered patios to the first floor as TDSF is used as a strategy to balance out – not balance out, but to make the massing of the structure work for purposes of the 2/3 Rule. This

26 Staff Report at 4.

practice was vetted through ZORACES back at this time, and the memo was presented to City Council. So it was vetted. So this just goes to show that this is not a secret practice, it's not a new practice, it's not one that staff made up and just put into place without vetting."[27]

But it was not the 2/3 Rule that was vetted, it was the inclusion of covered areas as TDSF – a distinguishable application of the code, as evidenced by the fact that LIP 3.6(K)(2) consists of two separate provisions.

Underscoring that the 2/3 Rule was never formally subject to a new "interpretation" in 2008, the memo excerpt presented by Ms. Blue (above), when read in context, is more clearly just about TDSF calculations, not the 2/3 Rule. Following is a more extensive excerpt of the same memo, as it appears in the City's Planning-Interpretations-and-Policies-Manual,[28] from which Ms. Blue copied selectively. The phrasing she began her excerpt with, "A new interpretation will be written…" is preceded by other material. Notice that in the first paragraph, staff has been directed to "begin work on" a ZTA – work which was never actually done, and which in any case is stated as being almost entirely about "new standards which exempt certain types of covered areas from the TDSF calculation." The brief mention of the 2/3 Rule at the end appears almost as an afterthought, without any stated purpose other than "to prevent a box-like appearance" – which in itself doesn't speak to how the "floor area" specified in the code should be measured. This expanded excerpt further confirms that the supposed "policy" cited by Council as being "in writing" was never actually written. Yet Council referred to a piece of wishful thinking as though it were already codified into law.



At the February 26, 2008 ZORACES meeting, staff brought its findings forward to the Subcommittee. At the conclusion of the meeting, the Subcommittee directed staff to retract Interpretation No. 18, create a revised interpretation based upon LIP Section 3.5.3(B)(1), and begin work on a Zoning Text Amendment (ZTA) to implement new standards which exempt certain types of covered area from the TDSF calculation.

LIP Section 3.5.3(B)(1) states: "architectural projections including eaves, awnings, louvers, and similar shading devices; sills, belt courses, cornices, and similar features, may not project more

Attachr

than six (6) feet into a required yard, provided that the distance between an architectural projection and a property line shall not be less than three (3) feet."

A new interpretation will be written which will use this section of the LIP to allow covered areas up to six feet to be exempt from the TDSF calculation. If the covered area square footage exceeds the six foot projection, the entire covered area will be included in TDSF. Furthermore, the volume of the covered area will be included when calculating the two-thirds rule for a proposed structure in order to prevent a box-like appearance.

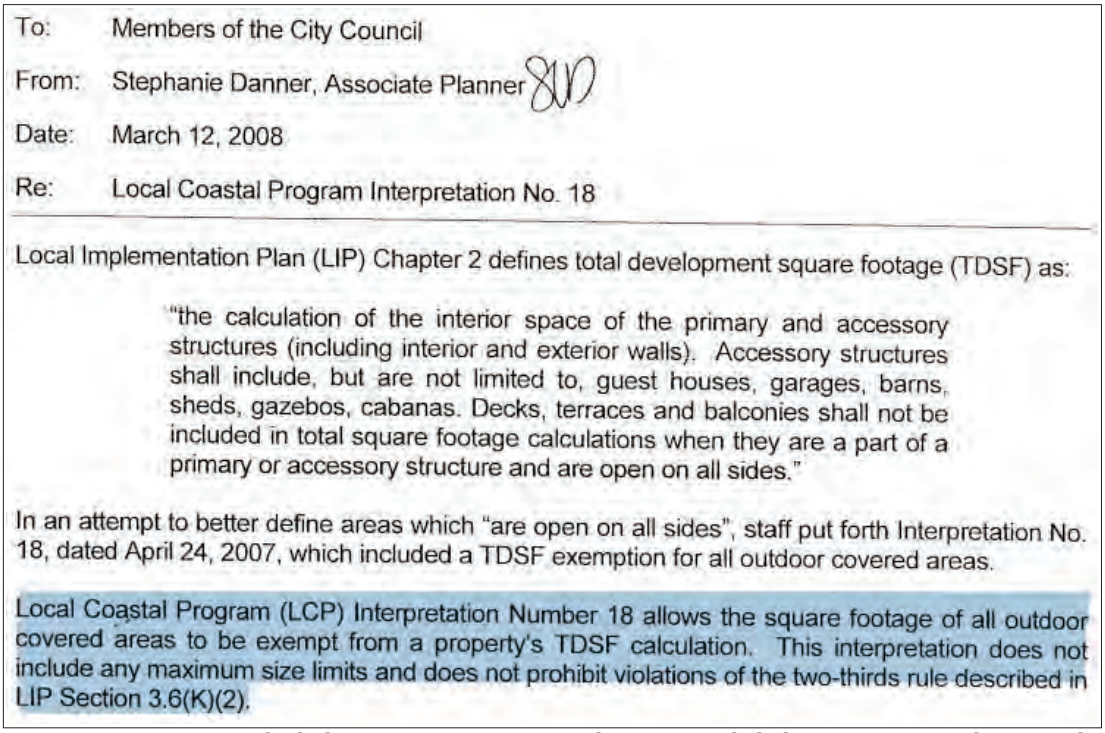
(The dark horizontal bar is a page break; the memo runs between two pages of a PDF.)

27 Video, at 3:05:00.

28 https://www.malibucity.org/DocumentCenter/View/6500/Planning-Interpretations-and-Policies-Manual_September-2019?bidId= At PDF 74 of 76.

The 2008 memo's focus on TDSF, and not any new interpretation of the 2/3 Rule, is further underscored by the fact that its purpose was to have replaced LCP Interpretation No. 18, which is solely about TDSF calculation and expressly does not deal with the 2/3 Rule.

Shown below is the very beginning of that same memo, describing what the ZTA "to be written" should replace, namely LCP Interpretation No. 18, which "allows the square footage of all outdoor covered areas to be exempt from a property's TDSF calculation." Interpretation No. 18 says nothing about the 2/3 Rule (the entirety of it is appended here as Attachment 1, as confirmation). So, **nowhere is there any reference to "interpretation" of the 2/3 Rule prior to its mention in the 2008 memo suggesting that a future interpretation "will be written."** It was never implemented. **So the black letter language of LIP 3.6(K)(2) still stands, subject to the plain English meaning on its face:** "Any portion of the structure above 18 feet in height shall not exceed 2/3rds the first floor area." Period.



To: Members of the City Council

From: Stephanie Danner, Associate Planner SD

Date: March 12, 2008

Re: Local Coastal Program Interpretation No. 18

Local Implementation Plan (LIP) Chapter 2 defines total development square footage (TDSF) as:

> "the calculation of the interior space of the primary and accessory structures (including interior and exterior walls). Accessory structures shall include, but are not limited to, guest houses, garages, barns, sheds, gazebos, cabanas. Decks, terraces and balconies shall not be included in total square footage calculations when they are a part of a primary or accessory structure and are open on all sides."

In an attempt to better define areas which "are open on all sides", staff put forth Interpretation No. 18, dated April 24, 2007, which included a TDSF exemption for all outdoor covered areas.

Local Coastal Program (LCP) Interpretation Number 18 allows the square footage of all outdoor covered areas to be exempt from a property's TDSF calculation. This interpretation does not include any maximum size limits and does not prohibit violations of the two-thirds rule described in LIP Section 3.6(K)(2).

Interpretation No. 18, which the unwritten ZTA was to have succeeded, does not mention the 2/3 Rule anywhere. (The complete text of Interpretation No. 18 is attached hereto).

Notably, the never-superseded Interpretation No. 18, while discussing TDSF, also validates "floor area" as a separate measure. For example, it states:

> Further support for this interpretation is provided through the LCP definition of "floor area ratio (FAR)," where it states that FAR is "the sum of the gross horizontal areas of the several floors of a building (and shall be) measured from the interior face of exterior walls.[29]

29 Planning-Interpretations-and-Policies-Manual, *supra*, at 71 of 76 PDF. Also presented as Attachment 1.

So, in discussing TDSF and floor area as separate concepts, LCP Interpretation No. 18 tends to confirm the Planning Commission's observation that where the 2/3 Rule refers to "floor area," it is referring to a real measurement, not just a different way of saying "TDSF."

In any case, even if the memo had been "presented to Council" in 2008, it was never acted upon and formalized. So the "old" interpretation of the Rule is still in place – meaning no formalized interpretation, just a simple, literal reading of the code's language, "floor area." One could even argue that the 2008 Council's inaction signaled an intent not to adopt the memo's "new interpretation," on TDSF, "floor area," or anything else.

As Planning Commissioner John Mazza noted in his brief testimony:

> "I've been on the Planning Commission a long time. Never, ever, ever have we considered a project where the architect added a covered deck so he could put more space on the first floor, and create a cube. It's not a standard practice. It's never been done before."[30]

The Council, having accepted both the notion that there was "gray area" requiring some interpretation, and that the 2008 memo on TDSF somehow provided that clarity, then leaned on the notion that the interpretation had been formalized and was now settled law.

Mayor Pierson opined:

> "On the 2/3 Rule, John, and Jo, and Kraig – they may be right on the words [of the 2/3 Rule]. The problem here though, on this determination, is that it has been established what the policy is, and it's in print, from 2008."[31]

Well, yes, we have been "right on the words." But no, as noted above, that which is in print was not formally established, nor does it speak to the 2/3 Rule (it's about TDSF).

A few seconds later, Pierson then retreated back from "it's in print," to an argument of customary practice:

> "In this case, I think it really comes down to the fact that this has been the practice, whether we like it or not, for 12 years at this point."[32]

Yet, as already noted, where the black-letter law speaks (i.e., "floor area") there is no room for administrative interpretation. And, as long-time Commissioner Mazza stated (above), using the 2/3 Rule to create a "cube" is "not a standard practice. It's never been done before."

Sixteen minutes later, when the motion was nearing its roll-call, Pierson returned to that which

30 Video, at 3:43:45.
31 Video at 4:13:35.
32 Video at 4:13:50.

was never demonstrated: that a written interpretation exists, whether formalized or not (and it appears that the Council didn't even recognize that distinction):

> "For me, the dividing line is that there has been an interpretation of what it means. It's not a hidden thing. It's actually in print [referring to the 2008 Memo]. The words of the code are gray, but there is actually a written interpretation."[33]

Again, no, that's incorrect. Yet the Council was now well into the solipsistic realm of, "If you say something often enough, it must be true."

Finally, Councilmember Peak, who had been uncharacteristically quiet throughout the hearing, signaled that he was buying Pierson's argument:

> "Our job right now – it's been on the books – and now it applies to this project."

But it hasn't been on the books. Ad infinitum….

Further, the Council, as though to validate their own *ad hoc* decision, evidently felt it necessary to characterize the Planning Commission's reading of the 2/3 Rule as having been made "on the fly." Here the irony thickens. Ms. Blue led off by suggesting that the Commission's interpretation was arbitrary, stating in her staff report[34] that the Commission had used "gross floor area" to calculate the 2/3 Rule, but that "Gross floor area is a commercial development standard, and total development square footage is the standard that is used for residential structure size." That's incorrect: the Commission referenced "floor area" (not "gross floor area"), because that's the exact wording used in the 2/3 Rule. Several times, staff seemed to take pains to conflate "floor area" and "gross floor area" from two different parts of the code, to suggest that the Planning Commission had been reading the wrong section. (In practice, there may be no real difference between the two terms, but the point is that staff seemed to think the Commission couldn't rely on the phrase "floor area" in the 2/3 Rule as being sufficiently defined in and of itself.)

From there, Council members cemented their misconception, piling on the irony more thickly.

> Farrer: "I don't think we can change the rules in the middle of the game…we need to look at the current standards, and consider this project in that context, and if we need to do more work in the future then let's agendize that. But I don't see us somehow trying to cobble together a new code on our own over this project."[35]

Of course, *they* were the ones changing the 2/3 Rule "in the middle of the game," cobbling together a new, unsupported and unnecessary interpretation.

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33 Video, at 4:30:00.
34 Video, at 3:02:12.
35 Video, at 4:11:20.

> Pierson: If we don't like the code, let's change it. But, on the fly, it's not the Planning Commission's job to change the code….[36] We can't change midstream. It's just not going to work. There's no basis for it."[37]

So it went. If the staff had wanted to change the 2/3 Rule from "floor area" to TDSF, they should have followed through on the proposal that was made in 2008, yet which was never heard by Council and never implemented.

Even as the Council members' individual votes were coalescing in their respective minds – in favor of allowing the application *somehow* – they were simultaneously recognizing that their interpretation of the 2/3 was not supported in law. They launched into a digression about how the 2/3 Rule needed to be "cleaned up" in order to support their current interpretation of it. They were too invested in the notion that the code is "gray" to rethink their impending vote, yet were realizing that if they wanted the code to say what they wanted it to mean, it would have to be changed. (And now, after 11PM, the thought of reconsidering their arguments must have seemed too daunting.)

So, Mayor Pierson asked of Ms. Blue:

> "There is definitely some gray language in here that is not helping [to get the application passed].[38] Is this anywhere in our pipeline of being cleaned up, or is it something that we can figure out a way to bring forward towards cleaning up...I understand the frustration on the words and all of that, but?"[39]

> Blue: "In the short term, or the fastest term, my suggestion would be that we update the interpretation." [Bringing the code in line with how it's now being misinterpreted.] "We can bring that to ZORACES and publish it in the [Planning] Interpretation Manual, so that it would be available to everybody. In the longer term, we can look at code amendments, including the LCP if necessary, to tighten everything up related to that."[40]

To clarify just what it is that they wanted to "clean up," Assistant City Attorney Rusin pointed out that,

> "[C]hanging 'floor area' to 'TDSF' in that section…is any easy change. The issue about covered areas counting as TDSF, I think is more complicated. So that's what I was hoping to get direction on."[41]

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36 Video, at 4:13:55.

37 Video, at 4:16:35.

38 Elsewhere in the hearing, Mayor Pierson had already made several remarks making it clear that he wanted to see the application passed. For instance, at 4:15:00: "This appeal is gumming up the works. It's slowing everything down. It's not helping anybody." And at 4:16:35: "I urge you to really work at helping residents build houses and not delay it… If we're going to look at every word [in the code]...we're never going to get a project through here."

39 Video, at 4:28:45.

40 Video, at 4:29:18.

41 Video, at 4:31:52.

In other words, the written code ("floor area") doesn't allow for their desired interpretation (TDSF), so they would need to revise it, going forward – an effective admission that they were already going against the existing code.

From there, they spent the last five minutes before their vote discussing whether and when they could schedule a ZORACES hearing on the 2/3 Rule to consider formalizing a new version of it, a version that would match the *ad hoc* interpretation they were about to make (they didn't say that last part out loud).

Then at 4:32:40, a telling exchange between Attorney Rusin and Mayor Pierson:

> Rusin: "I was just curious if it was more an issue of how the 2/3 Rule measurement is done, or what's counting as what the first floor is."
> Pierson: "They're kind of intertwined, aren't they? Until we know what the first floor is, how do we know if we're violating the 2/3 Rule? Maybe now is not the time to get too deep into that."

So, 90 minutes into the discussion, they still weren't sure what they were talking about. In the end, they punted on whether the 2/3 Rule is based on TDSF or "floor area." They simply voted to approve the application, without even resolving the central issue on appeal.

Meanwhile, as pointed out in my initial Grounds for Appeal, if there were still any doubt, the **LIP's General Development Standards** require that:

> A balcony or deck projecting from a higher story may extend over a lower balcony or deck but shall not in such case be deemed a roof for the lower balcony or deck.[42]

Strictly speaking, that applies to one balcony or deck above another. But logically, **if a balcony or deck can't be considered "a roof" for the area below, then how could the area below be considered enclosed for purposes of counting it towards the 2/3 Rule?** Of course one wouldn't count it. This code section harmonizes with the clear intent of the 2/3 Rule: the area below can't be counted as part of the ground floor, because it's not floor area *of the structure* itself.

In the end, the stakes are high, because the staff's *ad hoc* interpretation of the 2/3 Rule is ongoing. On the very next City Council agenda (Aug. 24, 2020) is another appeal of a Planning Commission decision on the 2/3 Rule. The staff report for it states,[43]

> The Planning Commission, following a *new interpretation* of the two-thirds rule it had adopted in denying a CDP application for a new residence at 33608 Pacific Coast Highway, based the denial on finding that the covered patio areas of the main

42 LIP 3.5.3(B)(4), at 101.
43 https://www.malibucity.org/AgendaCenter/ViewFile/Item/4456?fileID=16079, at 6.

> residence should not be included in the two-thirds calculation of the main residence and that instead only the interior floor area should have been utilized in the calculation. [Italics added.]

Of course, the Commission's interpretation cannot be characterized as "new," insofar as it simply implements the plain English of the section that has existed almost since the first draft of the LCP, several decades ago.

3. The proposed TDSF is greater than allowed on the net parcel

This ground for appeal is relevant only in a *de novo* hearing, as it concerns the MMC.

(3) The proposed TDSF is greater than allowed on the parcel because staff erred in not applying the slope factor to the approximately 5% of lot area that's comprised of slope 1:1 or steeper. That area was not subtracted from the gross lot area, thereby causing the proposed TDSF of the structures to be greater than the actual amount allowable on the net lot area.[44] (Compare the photograph on page 4, *supra*, and the Slope Analysis map, next page.)

The MMC requires that "slopes equal to or greater than 1:1 shall not be included in the lot dimensions."[45] This is of critical significance because the proposed TDSF (5,390) is only 5 sq.ft. below the putative allowable TDSF limit (5,395). **When the area of the rip-rap wall is subtracted to find the true net area of the parcel, the allowable TDSF will be significantly lower than stated. The result is that the current project is several hundred square feet larger than allowable under the TDSF formula.**

The applicant suggests that the 10-15 foot high rock wall (its height varies with the level of the sand, according to the applicant) can simply be ignored. But that wall separates the ocean from the rest of the parcel, and it's what kept this lot from being zoned as a beach lot. It's what the applicant hopes will keep the house in place. The applicant sometimes even refers to it as a "wall," and relies on its inherent verticality to function as a sea wall. It's inherent to the lot, so its area can't be ignored.

In the Council hearing, Ms. Blue argued that the rock wall could be ignored, as being a mere feature *upon* the land:

> "A revetment is a shoreline protective device and, like a sea wall, we wouldn't exclude a structure that sits on the lot from the lot area. So that's why that was not counted."[46] (Sic)

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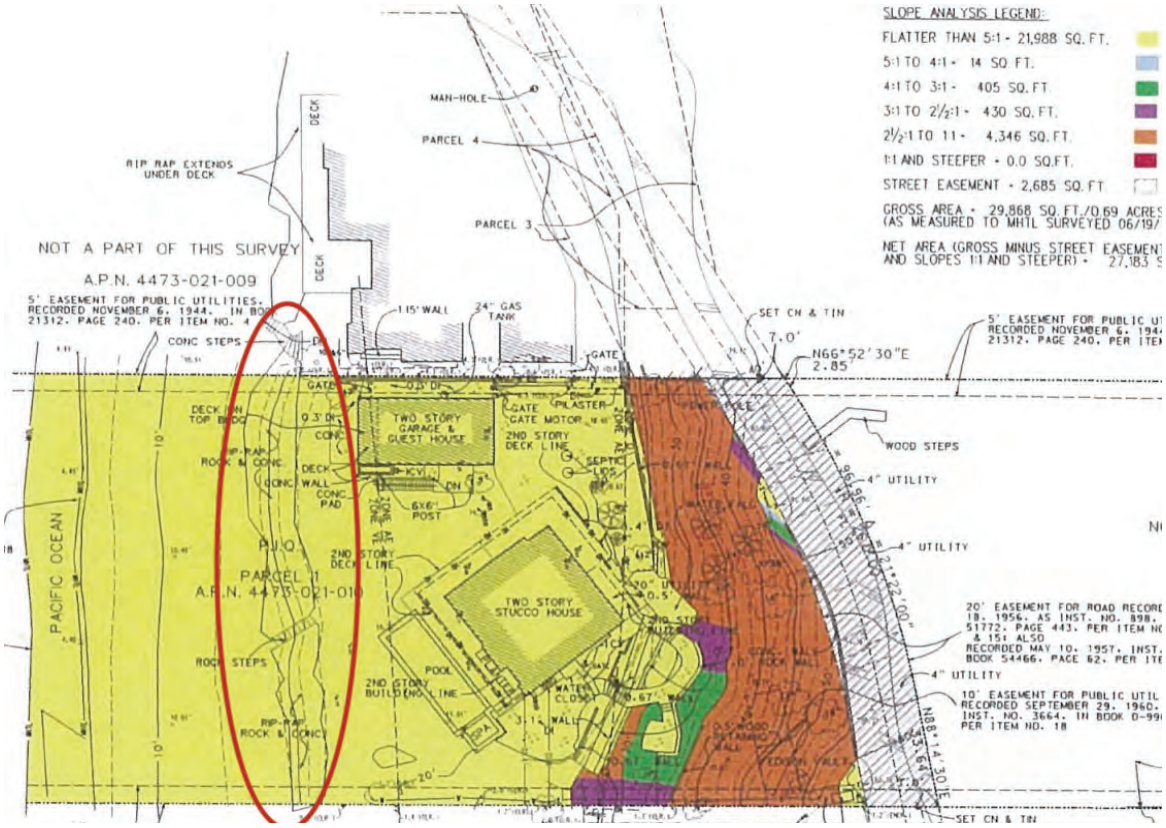
44 Per MMC 17.40.040(6)(d).
45 MMC 17.40.040(6)(d).
46 Video, at 3:15:55.

But that's semantic hand-waving, because one would still have to account for the area of the lot *underneath* the revetment. That underlying land covers the same area, over the same 1:1 slope in the lot itself, so must still be subtracted from the gross lot area to derive the net area for purposes of determining TDSF.

The Slope Analysis map (following) shows that the rock wall – within my added red oval – covers an area comprising at least 5% of the parcel. Note that the colored analysis ignores the wall, merely including it in the zone of "flatter than 5:1," as indicated in yellow on the map – as though the ocean washes up around the house.[47]



47 The 1:1 Rock wall is >5% of the gross lot area. (Slope Anal. fm Staff Report; photo fm Applicant's Powerpoint.)

4. Conclusion

The Wave Uprush Study, with its underestimated wave heights, sea level rise, et al, obscures the fact that no further additions can be made to the existing house – if not on the 1st floor, then certainly not on the 2nd floor, not least because the decking would have to be removable, per LIP §10.4(L).

The project grossly violates the 2/3 Rule; whereas the Council was led to believe the Planning Commission made up an *ad hoc* interpretation of the Rule, the opposite was true: the Commission read the black-letter code ("floor area"), while the Council tried to justify a project approval using an "interpretation" that was never formalized nor implemented with respect to the 2/3 Rule [leaving aside whether it's been implemented for the "TDSF" portion of LIP 3.6(K)(2)].

The net size of the parcel has been misrepresented by the Slope Analysis, in not subtracting the 1:1 rock wall from the gross lot area [per MMC 17.40.040(6)(d)]; and because the project is so close to the assumed limit of TDSF, it overshoots the actual allowable TDSF by several hundred square feet.

The Coastal Commission should send the applicant back to the drawing board, with an order that they respect the true 2/3 Rule; that they get the *net* lot size sorted out, discounting the 5+% area of the rip-rap wall (for purposes of determining TDSF); and that they re-do the Wave Uprush Study using values currently approved by the Commission. A proper Uprush Study, in particular, might show that the existing house cannot be further modified without substantially raising the Finished Floor Elevation.

Respectfully,
Kraig Hill

Attachment 1: Malibu LCP Interpretation No. 18

Number: 18

Dated: April 24, 2007

Amended: _____

Planning Manager: CJ Amstrup, AICP

Interpreting Body: ZORACES

LCP Section: Section 3.6 (K)

Title: Covered Porches to be Excluded from Calculations of Total Development Square Footage (TDSF)

Issue: The Local Coastal Program (LCP) does not specifically state that covered porches, balconies, terraces or similar should be excluded from calculations of total development square footage (TDSF). However, in defining TDSF, the LCP (on page 25) stipulates that "decks, terraces and balconies shall not be included in total square footage calculations when they are a part of a primary or accessory structure and are open on all sides." Section 3.6 (K) (page 64) further stipulates that when calculating TDSF, "arbors or trellis open to the sky" shall be excluded. A covered porch cannot (by design) be "open on all sides" and attached to a primary or accessory structure. Logically, the structure would have to share at least one wall with the primary residence/accessory structure in order to be considered "a part" of the building as stated in the LCP. The language is vague at best; consequently Planning staff has previously interpreted the standard as intending to exclude only roofed structures "open to the sky" (trellises, etc.). Conversely, staff practice has previously been to include all patios, porches, etc. covered by solid, non-permeable rooftops in calculations of TDSF. Going forward however, it is the contention of Planning staff that the intent of the LCP is in fact to exclude covered porches, trellis, patios, decks and the like ("outdoor living spaces") - whether covered by an open, permeable rooftop such as the lattice-work of a trellis or by a solid, impermeable rooftop - from calculations of total development square footage.

Interpretation:

Where a project includes a covered "outdoor living space," (porch, trellis, patio, deck or balcony) and whether that space is covered by an open, permeable rooftop or solid impermeable rooftop; the square footage of that covered space shall be excluded from all calculations of total development square footage (TDSF).

Justification:

While the LCP does not specifically exempt covered porches from calculations of TDSF, it does exempt arbors and trellis open to the sky, and any deck, terrace or balcony that is a part of a primary or accessory structure and open on all sides. That latter requirement amounts to a paradox, and so staff must interpret the intent of the ordinance. In references to terraces, balconies, etc., the LCP is broadly describing "outdoor living spaces," and exempts such from TDSF calculations by references to roof type ("open to the sky") as well as construction ("open on all sides"). Further support for this interpretation is provided through the LCP definition of "floor area ratio (FAR)," where it states that FAR is "the sum of the gross horizontal areas of the several floors of a building (and shall be) measured from the interior face of exterior walls." Balconies, terraces, etc. cannot (by definition) have solid exterior walls, and so must be considered exempt from any calculations of development area. The intent of the LCP is to include only those areas of a structure enclosed by solid walls and rooftops in calculations of TDSF.

The 2008 memo was never implemented, and the policy it sought to change, LCP Interpretation No. 18, doesn't mention the 2/3 Rule. So there is no formal interpretation of the 2/3 Rule beyond the plain English on its face: "Any portion of the structure above 18 feet in height shall not exceed 2/3rds the first floor area."