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# W12a

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**STAFF REPORT: APPEAL – SUBSTANTIAL ISSUE & DE NOVO**

**Appeal No.:** A-5-LGB-22-0061

**Applicant:** Jack Corwin

**Agents:** Todd Skenderian and Larry Nokes

**Local Government:** City of Laguna Beach

**Local Decision:** Approval with Conditions

**Appellant:** Mark Fudge

**Project Location:** 31351-31355 Coast Highway, Laguna Beach, Orange County  
APNs: 056-032-04 at 31351 Coast Hwy  
056-032-07 at 31355 Coast Hwy

**Project Description:** Appeal of City of Laguna Beach Local Coastal Development Permit No. 19-4321 for construction of new perimeter fencing on a residential coastal bluff lot.

**Staff Recommendation:** Determine that a substantial issue exists and deny a Coastal Development Permit.

**IMPORTANT HEARING PROCEDURE NOTE:** The Commission will not take public testimony during the “substantial issue” phase of the appeal hearing unless at least three Commissioners request it. If the Commission finds that the appeal raises a substantial issue, the “de novo” phase of the hearing will follow, during which the Commission will take public testimony.

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## **SUMMARY OF STAFF RECOMMENDATION**

The subject site is an oceanfront, bluff lot located between the sea (West Street Beach) and the first public road (Coast Highway) in Laguna Beach. The subject site is currently developed with a 4,092 square-foot single-family dwelling and attached two-car garage and historic gazebo. The subject site is comprised of two lots, the larger is an irregularly shaped area (31351 Coast Highway), with the smaller a long, narrow rectangle (31355 Coast Highway). The residence is located on the larger lot. The two lots combined total approximately 27,706 square feet ([Exhibit 1](#)).

The City's action on local CDP No. 19-4321 authorized perimeter fencing around the two lots, including two pedestrian gates and one driveway gate. No development other than the fencing and gates is proposed. In support of the proposed fence project, the applicant's consultant prepared an Updated Discussion of Geomorphology and Bluff Edge Determination (GeoSoils, 6/2/2022). Based on the applicant's bluff edge determination, accepted by the City, the proposed seaward most portion of the proposed fencing and gate would be setback 10 feet from the bluff edge. The appeal contends that the project is not consistent with the bluff edge definition and is not consistent with the LCP policy that prohibits development on a bluff face.

The applicant's determination of bluff edge location does not correctly apply the certified LUE definition of oceanfront bluff edge.

The Commission's staff geologist has evaluated the site to determine the correct bluff edge location based on correct application of the certified LCP definition of oceanfront bluff edge, contained in the Land Use Element (LUE) of the LCP. When determined in a manner consistent with the certified LUE definition, the bluff edge location is properly placed near the level of Coast Highway, significantly landward of the bluff edge location identified by the applicant and accepted by the City. Based on the correct bluff edge location, the proposed fence would actually be located on the bluff face.

LUE Policy Action 7.3.5 prohibits development on a bluff face, with only limited exceptions for public improvements that provide public access, protect coastal resources, or provide for public safety, and then only when no feasible alternative exists and coastal resource impacts are minimized. The appellant contends the project approved by the City is inconsistent with the LCP requirements regarding bluff development, specifically with the LUE definition for oceanfront bluff edge and with the Policy Action 7.3.5. The proposed fencing is inconsistent with these sections of the certified LCP. Therefore, the project approved by the City raises a substantial issue on the grounds upon which the appeal was filed.

Because the applicant's bluff edge determination was incorrectly prepared, and the true bluff edge, consistent with the LCP, is landward of the proposed development, the

proposed development will be located on the bluff face. Such development on the bluff face is inconsistent with the LCP.

In addition, public comments at the local level assert that at least a portion of the subject site was formerly public land, purchased by a private entity from the State ([Exhibit 6](#), page 1). Such a purchase, on land located between the sea and the first public road, would have required approval of a coastal development permit. It is not clear whether the allegation is accurate; in any case there is no evidence that a CDP was approved for such a purchase if it did occur. The same public comment also alleges that there may be prescriptive public rights related to the subject property. There is not enough information in the file to determine the viability of either of these allegations. Nothing in the City record indicates that these public access questions were addressed. More information regarding acquisition and possible historic public of use of the property is needed. Without this information, it is not possible to find that the project will not have adverse impacts on public access. Thus, staff is recommending that the project cannot be found to be consistent with the public access policies of the Coastal Act or the City's certified LCP and should be denied on de novo review of the project.

The applicant asserts the fence is necessary to address trespass, vandalism and burglary on the property. However, no supporting documentation is included in the project file, such as records or reports from the Laguna Beach Police Department. Moreover, if it were demonstrated that a verified safety risk is present, no consideration of alternatives to development on a bluff face were evaluated. Potential, non-development alternatives might include installation of an electronic home security system. Another possible option might be planting appropriate native vegetation to serve as a barrier. No information on the habitat types that may exist on the bluff has been provided, but native plants such as prickly pear (*Opuntia basilaris*) or similar, if compatible with the bluff habitat, might effectively deter unsafe behavior if such behavior is demonstrated to be a problem. If deemed appropriate for the location, prickly pear has a fast growth rate and most pear cacti respond well to transplantation and will establish a new root system swiftly.

Staff recommends that the Commission determine that a **substantial issue exists** with respect to the grounds on which appeal number A-5-LGB-22-0061 was filed.

For the reasons stated above, Commission staff also recommends that, after a public hearing, the Commission **deny a Coastal Development Permit** for the proposed fencing and gates on the bluff face. The motion and resolution can be found on Page [12](#) of the staff report.

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### **EXHIBITS**

**Exhibit 1 – Vicinity Map**

**Exhibit 2 – Project Plans**

**Exhibit 3 – Design Review Board Resolution No. 19-4320 Approving Project with  
Conditions**

**Exhibit 4 – Appeal of CDP 19-4321 by Mark Fudge**

**Exhibit 5 – Coastal Commission Staff Geologist Memo**

**Exhibit 6 – Local Hearing Public Comments**

## I. MOTION AND RESOLUTION – SUBSTANTIAL ISSUE

**Motion:** I move that the Commission determine that Appeal No. A-5-LGB-22-0061 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

Staff recommends a **NO** vote. Following the staff recommendation on this motion will result in the Commission proceeding to conduct a de novo review of the application, and adoption of the following resolution and findings. Conversely, passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

**Resolution:** The Commission hereby finds that Appeal No. **A-5-LGB-22-0061** presents a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access policies of the Coastal Act.

## II. APPELLANT'S CONTENTIONS

The Commission received a Notice of Final Action for City of Laguna Beach Coastal Development Permit No. 19-4321 on October 10, 2022. On October 24, 2022, Mark Fudge filed an appeal of the City's approval of CDP 19-4321 ([Exhibit 4](#)). The appellant contends:

1. The location of the bluff edge was incorrectly determined, based on the definition of Oceanfront Bluff Edge included in the certified LCP Land Use Element. As a result of the City's acceptance of the incorrect bluff edge location, the development (fencing and gates) will be located seaward of the bluff edge, on the bluff face.
2. LUE Policy 7.3.5 expressly prohibits development on a bluff face unless it is a public improvement or for public safety.
3. Approval of this CDP and its bluff edge location will set a negative precedent for future bluff development.

## III. LOCAL GOVERNMENT ACTION

On September 22, 2022, the City of Laguna Beach Design Review Board conditionally approved Coastal Development Permit No. 19-4321 ([Exhibit 3](#)). On October 10, 2022, the Coastal Commission received the City's Notice of Final Action and the Commission's 10 working day appeal period was established, extending to October 24, 2022. On October 24, 2022, the Commission received Mark Fudge's appeal ([Exhibit 4](#)). No other appeals were received. On October 24, 2022, a Notification of Appeal was sent to the Laguna Beach Community Development Department and the applicant, notifying each party of the appeal of the City's coastal development permit. The City's decision was automatically stayed, pursuant to Public Resources Code Section 30623, pending Commission action on

the appeal.

#### **IV. APPEAL PROCEDURES**

After certification of LCPs, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on CDPs. Development approved by cities or counties may be appealed if it is located within certain geographic appealable areas, such as those located between the sea and the first public road paralleling the sea or within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of a coastal bluff.

Section 30603 of the Coastal Act states in relevant part:

- (a) After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:
  - (1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.
  - (2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

The project site is in an appealable area because it is located between the sea and the first public road paralleling the sea, and within 300 feet of the inland extent of any beach. The project site also qualifies as an appealable area based on Section 30603(a)(2) because of its location on the bluff. The issues raised in the subject appeal, on which the Commission finds there is a substantial issue as described further below, apply to proposed development located in the appeals area.

#### **Grounds for Appeal**

The grounds for appeal of an approved local CDP in the appealable area are stated in Section 30603(b)(1):

- (b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in this division.

Section 30625(b)(2) of the Coastal Act requires a de novo review of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603(a). If Commission

staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered presumed, and the Commission will proceed to the de novo portion of the public hearing on the merits of the project. A de novo review of the merits of the project uses the certified LCP as the standard of review. (Section 30604(b).) In addition, for projects located between the first public road and the sea, a specific finding must be made at the de novo stage of the appeal that any approved project is consistent with the public access and recreation policies of the Coastal Act. (Section 30604(c).) Sections 13110-13120 of Title 14 of the California Code of Regulations further explain the appeal hearing process.

### **Qualifications to Testify before the Commission**

If the Commission, by a vote of three or more Commissioners, decides to hear arguments and vote on the substantial issue question, proponents and opponents will have an opportunity to address whether the appeal raises a substantial issue. The time limit for public testimony will be set by the chair at the time of the hearing. As noted in Section 13117 of Title 14 of the California Code of Regulations, the only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. In this case, the record reflects that Mark Fudge spoke in opposition to the project at the local hearing, and qualifies as an aggrieved party pursuant to Section 30625 of the Coastal Act. In addition to Mr. Fudge, persons qualified to testify at the hearing include Ron and Deborah Marshall, Algis Ratkelis, and Mr. Muche.

Upon the close of the public hearing, the Commission will vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will immediately follow, during which the Commission will take public testimony.

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

### **A. Project Description and Location**

The applicant is proposing to install perimeter fencing around a residential coastal bluff lot developed with a single-family residence. The lot is located between the sea (the north end of West Street Beach) and the first public road (Coast Highway) ([Exhibit 1](#)). The perimeter fencing approved by the City includes three gates: one vehicular gate across the driveway near the existing residence; one pedestrian gate to be located on the eastern side of the property, near the rear of the existing garage; and, the third pedestrian gate to be located on the western/seaward side of the property. The project includes approximately 460 linear feet of 6-foot-high steel fencing along the side and rear property lines, and approximately 110 linear feet of 4-foot-high steel fencing within the front seaward area ([Exhibit 2](#)). No other development, including changes to existing site lighting or landscaping, is proposed. The project originally included two additional pedestrian gates and 4-foot-high fencing within the triangular (landward) portion of parcel APN 056-032-07 (31355 Coast Highway), but a condition of the City's approval required removal of those features from the project.

These features are depicted on the project plans, but are no longer proposed by the applicant.

The subject site is currently developed with a 4,092 square-foot single-family residence and an attached two-car garage and courtyard driveway, decks, historic gazebo and potting shed. The existing residence was originally constructed in 1930. The subject site is comprised of two lots, the larger is an irregularly shaped area (31351 Coast Highway), and the smaller lot is a long, narrow rectangle (31355 Coast Highway). The existing residence and majority of site development are located on the irregularly shaped lot at 31351 Coast Highway. The gazebo is located near the seaward end of the narrow rectangular lot at 31355 Coast Highway. The two lots combined total approximately 27,706 square feet. The project is located seaward of Coast Highway within the South Laguna area of the City of Laguna Beach, in Orange County.

### **B. Local Coastal Program Certification**

The City of Laguna Beach Local Coastal Program (LCP) was certified on January 13, 1993. The City's LCP is comprised of a Land Use Plan (LUP) and an Implementation Plan (IP). The City's Land Use Plan is comprised of a variety of planning documents including the Land Use Element (LUE), Open Space/Conservation Element, Technical Appendix, and Fuel Modification Guidelines (of the Safety General Element of the City's General Plan as adopted by Resolution 89.104). The Implementation Plan (IP) of the City of Laguna Beach certified Local Coastal Program (LCP) is comprised of over 10 documents, including Title 25, the City's Zoning Code. The Coastal Land Use Element of the LCP was updated and replaced in its entirety via LCPA 1-10 in 2012. The Open Space/Conservation Element and Title 25 have been amended a number of times since original certification. Laguna Beach has a certified Local Coastal Program (LCP), but there are four areas of deferred certification in the City: Irvine Cove, Blue Lagoon, Hobo Canyon, and Three Arch Bay. The project site is located within the City of Laguna Beach's certified jurisdiction and is subject to the policies of the certified LCP.

### **C. Substantial Issue Analysis**

As stated in Section IV of this report, the grounds for an appeal of a CDP issued by the local government are the project's conformity with the policies of the LCP and the project's conformity with the public access policies of the Coastal Act. The Commission shall hear an appeal unless it determines that no substantial issue exists as to conformity with the policies of the LCP and the project's conformity with the public access policies of the Coastal Act.

Section II of this staff report outlined the appellants' contention regarding the project – namely that the project does not conform to the bluff edge setback requirements because the determination of the bluff edge location, applied in conjunction with approval of the project, was incorrectly done. Based on the correct bluff edge location, the fencing project is located on the bluff face. Further, the appellant alleges, acceptance of this incorrectly determined bluff edge location would set a negative precedent for future bluff development.

City of Laguna Beach certified Local Coastal Program (LCP) Land Use Plan (LUP) Land



Use Element (LUE) includes the following definition and policy:

**Oceanfront Bluff Edge or Coastal Bluff Edge** - The California Coastal Act and Regulations define the oceanfront bluff edge as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the bluff is rounded away from the face of the bluff, the bluff edge shall be defined as that point nearest the bluff face beyond which a downward gradient is maintained continuously to the base of the bluff. In a case where there is a step like feature at the top of the bluff, the landward edge of the topmost riser shall be considered the bluff edge. Bluff edges typically retreat over time as a result of erosional processes, landslides, development of gullies, or by grading (cut). In areas where fill has been placed near or over the bluff edge, the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.

**Action 7.3.5** Prohibit development on oceanfront bluff faces, except public improvements providing public access, protecting coastal resources, or providing for public safety. Permit such improvements only when no feasible alternative exists and when designed and constructed to minimize landform alteration of the oceanfront bluff face, to not contribute to further erosion of the oceanfront bluff face, and to be visually compatible with the surrounding area to the maximum extent feasible. (*Ongoing implementation.*)

In support of the proposed fence project, the applicant's consultant prepared an Updated Discussion of Geomorphology and Bluff Edge Determination (GeoSoils, 6/2/2022). Based on the applicant's bluff edge determination, accepted by the City, the proposed seaward most portion of the proposed fence and gate would be setback 10 feet from the bluff edge. However, the applicant's determination of the bluff edge location does not correctly apply the certified LUE definition of oceanfront bluff edge (cited above).

The Commission's staff geologist has evaluated the site to determine the correct bluff edge location based on correct application of the certified LUE definition of oceanfront bluff edge ([Exhibit 5](#)). The Staff Geologist's memo states:

"The bluff slope extends from the back beach at approximately +20 ft elevation<sup>1</sup> to approximately +88 ft at the inland property line, and to approximately +100 – 110 ft at Coast Hwy (depending on location)."

The bluff edge determined by the applicant's consultant does not represent the bluff edge, but rather the landward edge of a steeply eroded bank and of the seacliff. However, the Staff Geologist's memo states:

"Across much of the site the seaward toe of the colluvium has been eroded by wave action into a steeper bank, the top of which is at elevations of approximately 22 - 23 feet. The bluff edge determination submitted by the applicant (Ref. 1) identifies the top of this lower bank as the bluff edge, except in the southernmost part of the site, where the bluff edge is identified as the top of the San Onofre breccia sea cliff

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<sup>1</sup> No vertical datum was indicated in Ref. 1; elevations are assumed to be relative to mean sea level.

(Figs. 1, 2). However, as noted above, the LUE definition of “Oceanfront/Coastal Bluff” expressly includes the entire slope between the upland area and the sea, not just the lower sea cliff. The applicant’s analysis does not account for the considerable elevation change that occurs between the identified bluff edge (at ~22 – 23 ft elevation), the inland edge of the subject lot (at ~88 ft) and Coast Highway (at ~100 – 110 ft), nor the significant slope of the upper bluff, which based on the applicant’s topographic survey averages about 25° on the northern part of the lot and 30° on southern part of the lot, with portions of the bluff approaching 40°.² The upper bluff slope at the site significantly exceeds the general slope of the upland/terrace area (~10°, 6:1 h:v) immediately inland, as estimated from the OCPW topographic data.”

Correct application the LUE bluff edge definition considers the entire slope between the upland area and the sea, not just the sea cliff. When determined in a manner consistent with the LUE definition, the bluff edge location is properly placed near the level of Coast Highway, significantly landward of the bluff edge location identified by the applicant and accepted by the City. Based on the correct bluff edge location, the approved fence would actually be located on the bluff face ([Exhibit 5](#)).

LUE Policy Action 7.3.5 (cited above) prohibits development on a bluff face with only limited exceptions for public improvements that provide public access, protect coastal resources, or provide for public safety. And even for the listed public development that may be allowed on a bluff face, it is only allowed when no feasible alternative exists and coastal resource impacts are minimized. The proposed project is the installation of private fencing on a coastal bluff face. The proposed private fencing is not a public development serving any of the specified allowable uses. Thus, the proposed fencing is not consistent with the certified LUE policy that prohibits development on the bluff face. Moreover, the applicant’s determination of bluff edge location is inconsistent with the LUE definition of oceanfront bluff edge. Therefore, the project approved by the City does raise a substantial issue on the grounds upon which the appeal was filed.

#### **SUBSTANTIAL ISSUE FACTORS:**

The Commission typically applies five factors in making a determination whether an appeal raises a substantial issue pursuant to Section 30625(b)(2).

#### **1. The degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the certified LCP.**

The City’s approval of the fence project relies on an incorrect determination of the bluff edge location. The bluff edge location is incorrect because it was not determined in accordance with the certified LUE definition of oceanfront bluff edge. Therefore, there is inadequate factual and legal support for the local government’s decision, and this factor supports a substantial issue finding.

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² These slope values are roughly consistent with an upper bluff slope of approximately 33 degrees (1.5:1 h:v) between elevations 20 – 120 ft indicated in the 1885 U.S. Coast and Geodetic Survey T-Sheet map cited by Ref. (1).

**2. The extent and scope of the development as approved or denied by the local government.** The fence project approved by the local government may appear to be minor in scope, but the location of the approved development on the bluff face would set an adverse precedent for future development on an oceanfront bluff face. The LCP limits development on a bluff face due to issues potentially raised by such development, including adverse hazard impacts, adverse impacts to habitat, visual resources, and public access. Therefore, this factor supports a finding of substantial issue.

**3. The significance of the coastal resources affected by the decision.** The subject site is an oceanfront bluff lot, which may raise specific concerns that are not routinely raised on interior, in-fill lots. California's coastal bluffs are a significant resource, and represent a rare and visually pleasing landform which California citizens and governments have historically sought to preserve. Coastal bluffs are dynamic geologic formations, and development on them increases the potential for geologic hazards. Development on coastal bluffs and adjacent to public beaches also can have significant impacts on scenic resources and public access opportunities. The LCP and the Coastal Act provide coastal bluffs with special protections. This factor supports a finding of substantial issue.

**4. The precedential value of the local government's decision for future interpretations of its LCP.** The majority of ocean-fronting development in Laguna Beach is located on bluff top properties, and approval of this project may influence the City's decisions on future CDP applications – specifically regarding the correct location of the bluff edge. Allowing the local government's decision to authorize development on the bluff face would set a negative precedent for future LCP interpretations. If the subject fence project is found to be consistent with the LCP, there is a possibility that future project applicants will reference this action if they wish to determine the bluff edge location in a manner that is inconsistent with the LCP bluff edge definition. There are hundreds of these potential project locations in Laguna Beach. This factor supports a finding of substantial issue.

**5. Whether the appeal raises local issues, or those of regional or statewide significance.** Bluff developments, and correct application of permit requirements pursuant to a certified LCP, are an issue of statewide significance, given that bluff top and bluff face structures are present and desired throughout the state. Requiring local governments to make decisions consistent with their certified LCP is a matter of statewide importance. Incorrect application of these LCP policies could have regional or statewide ramifications regarding similar LCPs and their policies regarding bluffs (e.g. limitations on bluff face development). This factor supports a finding of substantial issue.

## **Conclusion**

Staff is recommending that the Commission find that a substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603(a) of the Coastal Act.

## VI. MOTION AND RESOLUTION – DE NOVO

**MOTION:** I move that the Commission approve Coastal Development Permit No. A-5-LGB-22-0061 for the development proposed by the applicant.

### **STAFF RECOMMENDATION OF DENIAL:**

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

## VII. FINDINGS AND DECLARATIONS – DE NOVO

Note: The Findings and Declarations in the Substantial Issue section of this staff report are hereby adopted by reference into the Findings and Declarations for the De Novo review.

### **A. Project Description**

The applicant is proposing to install perimeter fencing around a coastal bluff lot (two parcels) developed with a single-family residence. The lot is located between the sea (the north end of West Street Beach) and the first public road (Coast Highway). The perimeter fencing approved by the City includes three gates: one vehicular gate across the driveway near the existing residence; one pedestrian gate is to be located on the eastern side of the property, near the rear of the existing garage; and the second pedestrian gate is to be located on the western/seaward side of the property. The project includes approximately 460 linear feet of 6-foot-high steel fencing along the side and rear property lines, and approximately 110 linear feet of 4-foot-high steel fencing within the front seaward area. No other development is proposed, including no changes to existing site lighting or landscaping. The project originally included two additional pedestrian gates and 4-foot-high fencing within the triangular (landward) portion of parcel APN 056-032-07 (31355 Coast Highway), but a condition of the City's approval required removal of those features from the project. These features are depicted on the project plans, but are not longer proposed by the applicant. This also means that the linear feet of 4-foot high fencing is less than 110 feet.

The subject site is currently developed with a 4,092 square-foot single-family residence and an attached two-car garage and courtyard driveway, decks, historic gazebo and potting shed. The existing residence was originally constructed in 1930. The subject site is comprised of two lots, the larger is an irregularly shaped area (31351 Coast Highway, APN 056-032-07), and the smaller lot is a long, narrow rectangle (31355 Coast Highway, APN 056-032-04). The existing residence and majority of site development are located on the irregularly shaped lot at 31351 Coast Highway. The gazebo is located near the seaward end of the narrow rectangular lot at 31355 Coast Highway. The two lots

combined total approximately 27,706 square feet ([Exhibit 1](#)). The project is located seaward of Coast Highway in the South Laguna area of the City of Laguna Beach, Orange County.

## **B. Standard of Review**

Section 30604(b) of the Coastal Act states:

*(b) After certification of the local coastal program, a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.*

In addition, Section 30604(c) of the Coastal Act states:

*(c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that the development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).*

Therefore, the standard of review for projects heard on appeal by the Coastal Commission that are located between the first public road and the sea, like this one, are the City's certified Local Coastal Program and the public access and public recreation policies of the Coastal Act. The City of Laguna Beach Local Coastal Program was certified by the Commission on January 13, 1993 (except for the areas of deferred certification: Three Arch Bay, Blue Lagoon, Hobo Canyon, and Irvine Cove). The subject site falls within the City's certified LCP jurisdiction. The City's LCP Land Use Plan portion is comprised of a variety of planning documents including the Land Use Element (LUE), Open Space/Conservation Element (OSC), and the Coastal Technical Appendix. The Implementation Plan portion of the LCP is comprised of a number of documents including Title 25 Zoning.

## **C. Bluff Edge Location and Setback**

The City of Laguna Beach certified Local Coastal Program (LCP) Land Use Plan (LUP) Land Use Element (LUE) includes the following definition and policy:

**Oceanfront Bluff Edge or Coastal Bluff Edge** - The California Coastal Act and Regulations define the oceanfront bluff edge as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the bluff is rounded away from the face of the bluff, the bluff edge shall be defined as that point nearest the bluff face beyond which a downward gradient is maintained continuously to the base of the bluff. In a case where there is a step like feature at the top of the bluff, the landward edge of the topmost riser shall be considered the bluff edge. Bluff edges typically retreat over time as a result of erosional processes, landslides, development of gullies, or by grading (cut). In areas where fill has been placed near or over the bluff edge, the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.

**Action 7.3.5** Prohibit development on oceanfront bluff faces, except public improvements providing public access, protecting coastal resources, or providing for

public safety. Permit such improvements only when no feasible alternative exists and when designed and constructed to minimize landform alteration of the oceanfront bluff face, to not contribute to further erosion of the oceanfront bluff face, and to be visually compatible with the surrounding area to the maximum extent feasible. (Ongoing implementation.)

In support of the proposed fence project, the applicant's consultant prepared an Updated Discussion of Geomorphology and Bluff Edge Determination (GeoSoils, 6/2/2022). Based on the applicant's bluff edge determination, the proposed seaward-most portion of the proposed fence and gate would be setback 10 feet from the bluff edge. However, this bluff edge determination does not correctly apply the certified LUE definition of Oceanfront Bluff (cited above).

The Commission's staff geologist has evaluated the site to determine the correct bluff edge location based on correct application of the certified LUE definition of oceanfront bluff edge ([Exhibit 5](#)). As outlined in the findings for Substantial Issue, including the entire slope between the upland area and the sea, not just the sea cliff, as required by the LUE bluff edge definition, puts the bluff edge location at the subject site near the level of Coast Highway, significantly landward of the bluff edge location identified by the applicant. Based on the correct bluff edge location, the proposed fencing and gates would be located on the bluff face.

LUE Policy Action 7.3.5 (cited above) prohibits development on a bluff face with only limited exceptions for public improvements that provide public access, protect coastal resources, or provide for public safety. Even for the listed public development that may be allowed on a bluff face, it is only allowed when no feasible alternative exists and coastal resource impacts are minimized. The proposed project involves private fencing on a bluff face. Thus, because it is not public development, the proposed fencing is not consistent with the certified LCP. Specifically, the proposed development is inconsistent with certified LCP Policy Action 7.3.5 which prohibits development on the bluff face.

The applicant has indicated that the proposed fencing is necessary for security purposes due to incidents of trespass, vandalism and burglary. The City's record for the project includes, in the public commentary file, a list labeled "30 Reports Issued by Laguna Beach PD of Trespassing, Vandalism and Burglary at 31351 Coast Highway." ([Exhibit 6, page 4](#)) It is not clear how this list was compiled or who submitted it; it is not obviously related to any of the three public comment emails received by the City about the project. It is also not substantiated by any formal reports or records from the Laguna Beach Police Department.

In any case, even if there have been up to thirty cases of illicit activity on the site, possible alternatives to installation of bluff face fencing to address the issue should be considered. One non-development option that might be considered might be use of one of the various electronic home security systems available, which may employ use of lights and sound or other means to deter unwanted activity. Another example, planting a

vegetative barrier rather than installation of metal fencing could be considered. This may include planting something like prickly pear cactus (*Opuntia basilaris*), which could be effective in deterring trespass. Whatever type of vegetative barrier may be considered must be native and compatible with any native plants present on site. However, no sensitive vegetation survey was prepared for the project, even though it would be constructed on a bluff face. A vegetative barrier alternative would need to include a vegetation survey of the area in order to best understand what type of plant(s) might be appropriate. Native landscaping that enhances the habitat value of the bluff may be allowable on the bluff face. But more information is needed to make such a determination. If deemed appropriate for the location, prickly pear has a fast growth rate and most pear cacti respond well to transplantation and will establish a new root system swiftly.<sup>3</sup> Or other vegetative deterrent plants may be appropriate. These options could be considered, if some type of security barrier is demonstrated to be necessary. There may be other alternatives, in addition to electronic devices or a vegetative barriers, but no evidence that any alternatives were considered has been provided. It has also not been definitively demonstrated that any barrier is necessary.

The proposed fencing would be located on the bluff face, inconsistent with the certified LCP. Possible alternatives to traditional fencing have not been evaluated. A definitive need for fencing has not been demonstrated. For these reasons, the proposed project is inconsistent with the LCP and must be denied.

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

Coastal Act Section 30210 states:

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

Coastal Act Section 30211 states:

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

The certified LUP Open Space Conservation Element includes the following policies:

- 3-A Retain and improve existing public beach accessways in the City, and protect and enhance the public rights to use the dry sand beaches of the City.

Coastal Act Section 30210 requires that public access be maximized and that new development maintain and enhance public access to the coast. This Coastal Act requirement is re-stated in the LCP's Coastal Technical Appendix. LCP OSC Policy 3-A

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<sup>3</sup> <https://homeguides.sfgate.com/transplant-pear-cactus-36761.html>

also requires that public use of the City's beaches be protected and enhanced.

The subject site is located between the first public road and the sea, fronting on West Street Beach. A public comment email included in the City's record ([Exhibit 6, page 1](#)) forwarded once the appeal was received, includes the following statement:

“For the past 22 years I have used the parkway adjacent to my property [31365 Coast Highway, see [Exhibit 1c](#)] that gives me beach access to West Street beach. When I first moved into my house that Parkway was owned by the state. A few years ago they try [sic] to give it to Laguna Beach but Laguna was not interested and so they offered it to my two neighbors Mr. Schiffmann and Mr. Corwin. Mr. Schiffmann made the highest offer and it was excepted [sic] by the city.

We soon found out that Mr. Corwin had a small pie shaped piece of property that crossed that parkway.”

The same correspondence continues:

“I have had a prescriptive easement to this Parkway for over 22 years and the people who owned this property previously had that same prescriptive easement. I dare say that everyone who has lived in this house since it was built in 1948 has used this parkway with no obstructions.”

#### Sale of Public Land

It is not entirely clear what or where the referenced parkway is. But, at least a “small pie shaped” portion of the subject property, if not the entire parcel at 31355 (APN 056-032-07) may have been property owned by the State and sold to a private entity. Moreover, it appears that there may be a basis for prescriptive rights across the parkway property. The Coastal Act states that any activity defined as “development” within the Coastal Zone requires a coastal development permit. Under the Coastal Act, the vacation or transfer to a private entity of any public land or interest in public land (including a road easement or right-of-way) that provides public access to the beach/ocean (including pedestrian or vehicular access) is an action that results in a “change in the intensity of use of water, or access thereto” and constitutes “development” as defined by Section 30106 of the Coastal Act and, therefore, requires a coastal development permit.

In addition to the requirement that public agencies obtain a coastal development permit prior to the vacation or transfer of such lands, the Coastal Act also has specific restrictions that apply to state land adjacent to the ocean. Public Resources Code Section 30609.5 states: “no state land that is located between the first public road and the sea, with an existing or potential public accessway to or from the sea, or that the Commission has formally designated part of the California Coastal Trail, shall be transferred or sold by the state to a private entity unless the state retains a permanent property interest in the land adequate to provide public access to or along the sea.” This expressly applies to any interest in land, including easements. This section became effective January 1, 2000. In addition, there are other state laws that apply to such transfers or vacations of public land.



Section 53036 states that a local agency may not "sell, lease or otherwise transfer real property owned by it and lying between the high water line of the Pacific Ocean and the public street or highway nearest the Pacific Ocean without reserving a public right of access over such real property, unless such local agency or its grantee shall make available to the public an alternate route which, in the judgment of the local agency, gives equal or greater public access to the Pacific Ocean in the same immediate vicinity."

In addition, the California Constitution protects access to navigable waters. Finally, the Streets and Highways Code Section 8324 applies to local agencies. It requires that prior to vacating a street, highway or public service easement, a local agency must hold a hearing and determine that the street "is unnecessary for present or prospective public use . . ." Further, in *Heist v. County of Colusa* (1984) 163 Cal.App.3d 841, 849, the court also imposed a second requirement: that abandonment must be in the public interest.

It appears that there may be public access issues associated with the subject site, based on the allegation of the sale of State land to a private entity. Such a sale, if it has occurred, would have required approval of a coastal development permit. There is no evidence that such a permit was ever obtained. In addition, the question of prescriptive rights that may affect the property has been raised. Nothing in the City record indicates that these potentially significant public access issues were addressed. More information regarding acquisition of the subject property is needed to ascertain whether both parcels of the property were legally obtained, including approval of a Coastal Development Permit if purchased from the State. This necessary additional information may include, but is not limited to, evidence of the history of property's ownership, including possibly a chain of title. In addition, information regarding historic use of the site for access to West Street Beach is needed. Without this information, it is not possible to find that the project will not have adverse impacts on public access. Thus, the project cannot be found to be consistent with the public access policies of the Coastal Act or with the City's certified LCP, and therefore, must be denied.

#### Conclusion

Because, the project is not consistent with the LCP policies regarding development on a bluff face, and because the evidence in the record does not demonstrate that the project is consistent with the public access policies of the Coastal Act and LCP, Coastal Development Permit No. A-5-LGB-22-0061 is denied.

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

1. Appeal No. A-5-LGB-22-0061 and associated file documents
2. Geotechnical Review Memorandum, Joseph Street, Ph.D., P.G., Staff Geologist,  
12/1/2022
3. Updated Discussion of Geomorphology and Bluff Edge Determination, GeoSoils,  
6/2/2022