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# W12a

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## STAFF REPORT: APPEAL – SUBSTANTIAL ISSUE

**Appeal Number:** A-5-DPT-22-0037

**Applicants:** Ladan and Babak Fallahzadeh

**Local Government:** City of Dana Point

**Local Decision:** Approval with Conditions

**Appellants:** Vice Chair Caryl Hart and Commissioner Linda Escalante

**Project Location:** 35525 Beach Road, City of Dana Point, Orange County (APN: 691-161-05)

**Project Description:** Appeal of City of Dana Point Local Coastal Development Permit No. 20-0007 for the construction of a new two-story, 28-ft. tall, 4,132 sq. ft. single-family residence and an attached 528 sq. ft. garage, both supported by caissons, on a 4,809 sq. ft. vacant beach-fronting lot.

**Staff Recommendation:** Find Substantial Issue

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**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. The Commission may ask questions of the applicants, appellants, any aggrieved person, the Attorney General, or the Executive Director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally, and at the discretion of the Chair, limited to three minutes total per side. Only the applicants, appellants, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which the Commission will take public testimony.

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## **SUMMARY OF STAFF RECOMMENDATION**

The City of Dana Point's action on Local Coastal Development Permit (CDP) No. 20-0007 approved the construction of a new, two-story, 28-ft. tall, 4,132 sq. ft. single-family residence and attached 528 sq. ft. garage on a 4,809 sq. ft. vacant beach-front lot. The City's action approved construction of a 28-caisson foundation to elevate the residence and garage above beach grade, as well as encroachments for an 18-ft.-wide, second-story balcony extending 8 ft. beyond the structure stringline over the lower deck and a 3.5-ft.-wide set of stairs extending 3 ft. beyond the patio stringline from the lower deck, and an administrative modification of standards to allow a 26 ft. wide section of stairs and landing to encroach 3 ft. seaward of the structure stringline over the lower deck. The project site is located between the first public road and the sea on Capistrano Beach, in the City of Dana Point's certified Coastal Overlay District and the Coastal Commission appeal jurisdiction. The standard of review for this appeal is the certified LCP and the Chapter 3 public access and recreation policies of the Coastal Act.

On July 22, 2022, Vice Chair Hart and Commissioner Escalante filed an appeal of Local CDP No. 20-0007. The appellants contend that the City's action does not adequately address whether the project has been designed for safety from shoreline hazards during the minimum 75-year development lifespan.

The City's findings indicate the new development will be safe from coastal hazards and references the applicants' submitted coastal hazards analysis. However, the applicants' submitted analysis does not acknowledge the full scope of flooding, erosion, and wave uprush possible with future sea level rise.

The applicants' submitted coastal hazards analysis does not meaningfully consider the potential for more extensive and rapid coastal erosion and the impacts of such shoreline retreat on hazards to the proposed development (e.g., wave forces on primary structure and threat of undermining Beach Road). The analysis also does not use the medium-high risk aversion scenario recommended by the Commission's 2018 Update to Sea Level Rise Guidance to establish the future design flood elevation required by the LCP. These issues raise a substantial issue as to whether the project is consistent with coastal hazards policies of the certified LCP.

Additionally, the appellants contend that the City's findings do not address the likelihood of public trust lands migrating under the proposed development foundation with predicted sea level rise.

The City deemed the project exempt from easement dedication requirements under IP Section 9.27.030(a)(5)(D), on the basis of sufficient existing access to the subject portion of Capistrano Beach from Poche Beach or Capistrano Beach County Park. These locations are each approximately ¾-mile from the project site, respectively, and may not constitute adequate vertical access to the site under current conditions. Furthermore, lateral public access to the project site may be increasingly difficult from these public beaches as sea level rise drives migration of the mean high tide line (MHTL) and public trust lands up to, and potentially below, the line of development. The local CDP did not

discuss this issue or specify whether development removal will be necessary. Therefore, this contention raises a substantial issue as to whether the local CDP is consistent with public access policies of the Coastal Act and the certified LCP.

The appellants also contend that Special Condition 12 of the local CDP, which requires removal of existing coastal armoring only if removal is possible without threatening neighboring properties, does not adequately resolve possible unpermitted development onsite. While City and Commission records do not show permitting history for shoreline protective devices onsite, and the proposal does not include any shoreline armoring, LUP (Conservation/Open Space Element, “COSE”) Policies 2.5 and 2.14 prohibit new development from relying on shoreline protection, and any existing shoreline protection onsite must be removed prior to construction of new development. Thus, it is not clear whether any coastal armoring exists at the subject site. This contention raises a substantial issue as to whether the project is consistent with coastal hazard policies of the certified LCP.

Finally, the appellants contend that the encroachments of the 2<sup>nd</sup>-floor balcony, landing and stairs above the lower deck, and the second set of stairs located seaward of the lower deck are inconsistent with the “appropriate boundary” for lateral access outlined in IP Section 9.27.030(a)(4)(G)(1). While the LCP allows for limited encroachments beyond the structure and patio stringline setback requirements for the Residential Beach Road Zoning District, the 3-ft. stairway encroachment beyond the patio stringline, in particular, impinges upon the existing public access easement recorded at the site. Given the nature of the recorded easement, which is located seaward of the proposed patio stringline (and includes a 10-ft.-wide privacy buffer), the seaward extent of the encroachments would potentially push the easement further seaward and would further exacerbate “coastal squeeze” of the public beach area. Therefore, this contention raises a substantial issue as to whether the local CDP is consistent with public access policies of the Coastal Act and the certified LCP.

Thus, Commission staff recommends the Commission find that there is a substantial issue with respect to the grounds on which the appeal was filed and that the project is not consistent with Chapter 3 of the Coastal Act and the certified LCP. The motion and resolution to carry out the staff recommendation is on Page 5 of this report.

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## EXHIBITS

- [Exhibit 1](#) – Project Location
- [Exhibit 2](#) – City Approved Plans
- [Exhibit 3](#) – Local CDP 20-0007
- [Exhibit 4](#) – Appeal
- [Exhibit 5](#) – Coastal Hazards Figures
- [Exhibit 6](#) – CDP 5-85-864
- [Exhibit 7](#) – Recorded Easement Documents
- [Exhibit 8](#) – Capistrano Beach Easements Map
- [Exhibit 9](#) – Beach Rd MHTL Survey (dated June 17, 2021)

## I. MOTION AND RESOLUTION – SUBSTANTIAL ISSUE

**Motion:** I move that the Commission determine that Appeal No. A-5-DPT-22-0037 raises **NO SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

Staff recommends a **NO** vote. Following the staff recommendation on this motion will result in a future 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-DPT-22-0037 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 Chapter 3 policies of the Coastal Act.

## II. APPELLANTS' CONTENTIONS

On July 22, 2022, an appeal was filed by Vice Chair Caryl Hart and Commissioner Linda Escalante (**Exhibit 4**). The appellants raise the following concerns with the City-approved development:

- 1) The City's findings do not adequately address preservation of lateral public access with migration of public trust lands below, or landward of, the development.
- 2) The City's findings do not adequately address whether the project has been designed for safety from shoreline hazards during the minimum 75-year development lifespan.
- 3) The local CDP condition requiring removal of existing coastal armoring only if removal is possible without threatening neighboring properties is insufficient in prohibiting reliance of the development on any existing shoreline protective devices.
- 4) The proposed encroachments, which are beyond the structure and patio stringline setback requirements, may further squeeze the lateral public access available along the beach near the site, may exacerbate beach erosion, and may subject portions of the development to increased flooding and wave scour.

## III. LOCAL GOVERNMENT ACTION

On June 27, 2022, a public hearing was held by the Dana Point Planning Commission for Local CDP No. 20-0007. The City record indicates that no members of the public spoke at the public hearing and no letters of opposition were received. On June 27, 2022, the Community Development Department Senior Planner issued a determination letter approving the local CDP for the proposed project (**Exhibit 3**). On July 22, 2022, the appellants filed a timely appeal of the City's local CDP approval (**Exhibit 4**). No other appeals were received prior to the end of the appeal period on July 27, 2022.

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

After certification of an LCP, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on CDPs. Development projects approved by cities or counties may be appealed if they are 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.

The project site is in an appealable area due to its location between the sea and the first public road paralleling the sea, and within 300 feet of the inland extent of any beach (Section 30603(a)(1)). The issues raised in the subject appeal apply to proposed development located in the appealable area.

##### **Grounds for Appeal**

The grounds for appeal of an approved local CDP in the appealable area are stated in Section 30603(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 the Commission to conduct 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 that a substantial issue does exist, 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 conduct the de novo portion of the public hearing on the merits of the project at a later time. A de novo review of the application on the merits 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 appellants, applicants, persons who opposed the application before the local government

(or their representatives), and the local government. Here, only the appellants, applicants, and local government would qualify. Testimony from other persons must be submitted in writing.

Upon the close of the public hearing, the Commission will vote on the substantial issue question. 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 follow at a later date during which the Commission will take public testimony.

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

### **A. PROJECT LOCATION AND DESCRIPTION**

The project site is a 4,809 sq. ft. vacant ocean-fronting lot located on sandy beach in Capistrano Beach, City of Dana Point ([Exhibit 1](#)). The property extends 156 ft. seaward from Beach Road. The property is located within the Capistrano Beach Community Association, an established row of residential development with access to homes obtained solely through the private Beach Road located landward of the subject site. Further landward of Beach Road are railroad tracks, Pacific Coast Highway, and a coastal bluff supporting additional development.

The subject site is designated as “Residential 0-3.5” in the City’s certified Land Use Element (LUE) of the LUP and “Residential Beach Road 12” in the certified IP, and “Floodplain Overlay District (FP-3)” in the certified LUP of the /LCP. The site is also located in the certified LCP “Coastal Overlay District” (California Coastal Zone) and the appeal jurisdiction of the Coastal Commission.

The site is currently vacant and consists of beach sand, minor vegetation, and a fence on the landward, street-facing side. Aerial photographic records show that over the past few decades, the site has been intermittently developed with temporary structures, likely serving a recreational purpose to neighbors and/or members of the Beach Road community. In 1986, coastal development permit CDP 5-85-864 was issued for this site ([Exhibit 6](#)), which allowed for the construction of a two-story, 3,203 sq. ft. single-family residence on the vacant lot. The home was never constructed. Nonetheless, as a condition of approval prior to issuance of the permit, Special Condition 1 required the property owner to irrevocably offer to dedicate a lateral public access and passive recreational easement along the shoreline seaward of the dripline of the approved deck for 21 years from the date of recordation. The offer-to-dedicate (OTD) was recorded on January 13, 1987, and on July 23, 2002, the Orange County Board of Supervisors accepted the OTD per Resolution No. 02-215 ([Exhibit 7](#)). The dripline of the ocean-fronting deck proposed under CDP 5-85-864 nearly exactly corresponds to the patio stringline outlined in IP Section 9.09.040(a)(1), which, for 35525 Beach Road, is 137 ft. seaward from the roadside property line along the west property line, and 139 ft. seaward from the roadside property line along the east property line. The recorded easement stipulates that the first 10 ft. immediately seaward of the deck dripline is a “privacy buffer” that is restricted to pass and repass only, and available only when no other dry beach areas are available for lateral public access. The

remaining areas seaward of the privacy buffer are available for passive recreation of various forms. The public enjoys approximately 90 ft. of beach under average contemporary conditions, but the beach is anticipated to become much narrower over time. The City did not require a new easement dedication with project approval. However, the former recorded easement onsite is still valid.

The proposed project includes the construction of a new, two-story, 28-ft. tall, 4,132 sq. ft. single-family residence with an attached 528 sq. ft., two-car garage. The City's action approved construction of a 28-caisson foundation to elevate the residence and garage above beach grade, as well as encroachments for an 18-ft.-wide, second-story balcony extending 8 ft. beyond the structure stringline over the lower deck and a 3.5-ft.-wide set of stairs extending 3 ft. beyond the patio stringline from the lower deck, and an administrative modification of standards to allow a 26 ft. wide section of stairs and landing to encroach 3 ft. seaward of the structure stringline over the lower deck ([Exhibit 2](#)). Encroachments beyond the structure and patio stringlines are allowed by the City's certified LCP. The attached garage will be constructed less than one foot above the Beach Road elevation, while the residence will be constructed approximately six feet above the Beach Road elevation ([Exhibit 2, Page 8](#)). The applicants and the City have not confirmed whether shoreline protective devices exist onsite, although there is no permit history for armoring at the site and aerial photographic records show that no shoreline armoring is found onsite. No new shoreline protection devices are proposed.

## **B. LOCAL COASTAL PROGRAM**

Dana Point is a shoreline community in southern Orange County that was incorporated as a city in 1989. The City of Dana Point presently has two groups of documents that serve as its certified Local Coastal Program (LCP). There is an older set of documents that were originally certified when Dana Point was unincorporated and which were adopted by the City when it incorporated, which still apply to the central geographic area of the City. These older documents have generally been referred to as the Dana Point Specific Plan Local Coastal Program or '1986' LCP, which the Commission certified on September 13, 1989. In addition, there is a more recent group of documents that includes three elements of the City's General Plan (the Land Use Element, Urban Design Element, and Conservation Open Space Element), the City's Zoning Code, the Monarch Beach Resort Specific Plan, the Headlands Development Conservation Plan, and the Dana Point Town Center Plan, which apply to those areas of the City that are not covered by the 1986 LCP. These more recent documents are referred to as the '1996 LCP.'<sup>1</sup> At the project site, the applicable documents are the City's certified 1996 /LCP, namely the relevant sections of the City's General Plan (referenced in this staff report as the Land Use Plan, or "LUP") and the certified portions of the City's Zoning Code (referenced in this staff report as the Implementation Plan, or "IP").

## **C. FACTORS TO BE CONSIDERED IN SUBSTANTIAL ISSUE ANALYSIS**

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<sup>1</sup> However, this is now a misnomer because the Headlands Development Conservation Plan and the Dana Point Town Center Plan were adopted after 1996.



When determining whether an appeal raises a “substantial issue,” Section 13115(b) of the Commission’s regulations provide that the Commission may consider factors, including but not limited to:

1. The degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the applicable standard of review;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government’s decision for future interpretations of its LCP; and
5. Whether the appeal raises local issues, or those of regional or statewide significance.

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

The Commission finds that **a substantial issue exists** with respect to whether the local government action conforms to the provisions of the City’s certified LCP and public access and recreation policies of the Coastal Act for the reasons set forth below.

#### **D. SUBSTANTIAL ISSUE ANALYSIS**

As stated in Section IV of this report, the local CDP may be appealed to the Commission on the grounds that the proposed development does not conform to the standards set forth in the City’s certified 1996 LCP or the public access and recreation policies of the Coastal Act. Pursuant to Section 30625(b) of the Coastal Act, the Commission must assess whether the appeal raises a substantial issue with respect to the grounds upon which the appeal was filed pursuant to Section 30603 of the Coastal Act. The primary issues raised by this appeal relate to coastal hazards and impacts to public access.

Section 30210 of the Coastal Act states, in relevant part:

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

Section 30211 of the Coastal Act states:

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

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

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby...

(b) For purposes of this section, "new development" does not include:...

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure....

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

Section 30214 of the Coastal Act states, in relevant part:

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

(1) Topographic and geologic site characteristics.

(2) The capacity of the site to sustain use and at what level of intensity.

(3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.

(4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

### **Relevant Certified LCP Policies**

All certified LCP policies below are included, in relevant part, in [Appendix B](#) due to length.

Certified IP Section 9.27.030, Development Standards.

Certified IP Section 9.69.070, Basis for Action on Coastal Development Permit Applications.

Certified LUP (COSE) Goal 2 Policies., Beach Conservation Policies.

Certified LUP (LUE) Goal 3 Policies., Community Growth Policies.

### **Public Access and Recreation**

Coastal Act sections 30210, 30211, and 30212 prioritize public access to the sea by prohibiting new development from interfering with any public access “acquired through use or legislative authorization.” Section 30214 additionally requires Chapter 3 public access policies of the Coastal Act be implemented in a manner that accounts for unique topographic site characteristics, the capacity of the site to sustain use, and the need for management of access areas to also protect property-owners’ privacy.

The certified LCP also includes policies which further specify the findings and easement dedications required for new development. IP Section 9.09.040(a)(4) requires offers to dedicate easements for public pedestrian access laterally along the beach at Capistrano Beach as a condition of any new development along Beach Road, consistent with the IP Section 9.27.030 requirements of public access. IP Section 9.27.030 defines lateral public access as passive or active recreational use of the shoreline (i.e. walking, swimming, fishing) and requires the dedication of a public easement as a condition of approval for new development located between the nearest public roadway and the sea. Section 9.27.030 requires analysis of the potential of providing vertical access at the site, which is defined as active recreational use of an accessway between the road and the shoreline and requires at least a 10-ft. buffer between the private structure and the accessway. IP Section 9.27.030(a)(3)(B) allows new development to forgo these easement requirements if: A) public access is inconsistent with public safety, military security, or vulnerable coastal resources, or B) adequate access methods exist nearby. Per IP Section 9.27.030(a)(3)(A), the City cannot impose any new easement requirements if the proposed development will not adversely affect (either individually or cumulatively) the ability of the public to reach and use the public tidelands, or that the access dedication would not alleviate the access burdens identified. .

The appellants contend that the project may result in future adverse impacts to public access as the MHTL migrates further landward with sea level rise. The appellants contend that, given the narrowness of the beach and already-occurring wave uprush along this row of development, the public trust lands (which extend seaward of the MHTL) could migrate under the City-approved caisson-foundation within the 75-year development lifespan. The appellants question whether this could necessitate partial removal of the structure in the future, and contend that the local CDP should have addressed this issue for consistency with the public access policies described above. Finally, the appellants are concerned that the City omitted any mention of the existing lateral public access easement at the site, which, as sea levels rise and the beach erodes over time, may be “squeezed,” leading to the gradual loss of the public’s ability to use and recreate on the beach.

The project area is located within a dense row of development with no vertical public access currently available, due to Beach Road being a private road and the fence located

on the landward, street-facing side of the lot. The closest vertical access points available are Capistrano Beach County Park and Poche Beach, each located about ¾-mile upcoast and downcoast of the project site, respectively. Lateral public access to the sandy beach in front of the project site is available by walking along the shoreline from either of these beach entry points. The city indicated in its local CDP findings that these two entryways provide adequate public access to the subject beach, and the city excepted the project from easement dedication requirements required by 9.27.030.

IP Section 9.27.030(a)(3)(B)(2) does not define “adequate access”—however, it is arguable whether entry points located more than three-quarters of a mile from the project site satisfy this requirement. These entry points may not be able to provide safe access to the beach onsite if the MHTL shifts landward; a MHTL survey of the area, performed by land surveyor Ralph W. Guida, IV and dated June 17, 2021, shows these entry points as already intermittently inundated under current conditions ([Exhibit 9](#)).

As discussed further in the following “Coastal Hazards” subsection, the project site may experience between 3.6 and 7.1 ft. of sea level rise by the year 2100 based on projections provided by the 2018 State Sea Level Rise Guidance (though there is a risk of greater sea level rise depending on various uncertainties, including the dynamics of ice sheet loss.) The U.S. Geologic Survey Coastal Storm Modeling System (CoSMoS), a regional sea level rise modeling tool, includes projected changes to the average mean high water (MHW) shoreline. It also provides predictions of wave runup and flooding that may be used to ascertain the potential effects from wave conditions.

With no sea level rise and no coastal storm event, CoSMoS shows a maximum wave runup and sandy beach width that appears generally consistent with onsite conditions that prevailed until recently ([Figure 1 of Exhibit 5](#)). In the past few years, however, chronic erosion in the larger stretch of beach from San Juan Creek through San Clemente has resulted in extremely narrow beach widths. Recent observations during high tides and south swells show little to no dry beach at the site, suggesting current conditions are further seaward than CoSMoS projections for shoreline retreat. Even under the lower sea level rise ranges available on CoSMoS (e.g., 0.8 - 2.5 ft), the model shows significant landward shifts in maximum wave runup, flooding, and MHW shoreline. Under the higher SLR ranges available on CoSMoS (e.g., 3.3 – 6.6 ft), especially in combination with storm events, the potential inundation, shoreline retreat and beach loss is extreme ([Figure 2 of Exhibit 5](#)). With 6.6 ft. of sea level rise (the closest available projection to 7.1 ft., which is the maximum projection under a medium-high risk aversion scenario) and an annual storm event, CoSMoS projects inundation up to the line of existing development with no sandy beach visible. The flooding shown in [Figure 2 of Exhibit 5](#) may be further exacerbated by beach erosion, as the applicants’ elevated pile foundation will allow erosion to continue below the home.

The City-approved project plans ([Exhibit 2](#)) do not show the existing lateral public access easement recorded per Instrument No. 87-020385 and accepted by the County per Instrument Resolution No. 02-215 ([Exhibit 7](#)). As previously described, the recorded easement is still valid, and stipulates that the first 10 ft. immediately seaward of the deck dripline is a “privacy buffer” that is restricted to pass and repass only, and available only

when no other dry beach areas are available for lateral public access. The remaining areas seaward of the privacy buffer are available for passive recreation of various forms. The LCP allows for walking, swimming, jogging, sunbathing, fishing, surfing, and picnicking within the established accessway. The impacts of sea level rise and coastal storm events on wave runup, flooding, and erosion are likely to result in at least partial inundation of the current lateral public easement onsite, and could result in near-complete inundation of the existing easement under higher sea level rise scenarios. This information suggests the appellants are correct in contending that public tidelands could push landward to, or under, the applicants' caisson foundation by the year 2100.

Section 30214 of the Coastal Act requires local governments to implement public access policies in a manner that considers the appropriateness of access limitations based on site-specific factors, such as “the proximity of the access area to adjacent residential uses.” IP Section 9.27.030(a)(5)(B) also requires project-specific analysis of the City's public access determinations, including identification of future beach profile changes unrelated to the proposed development. The City's public access findings do not discuss this possibility, nor do they consider methods for preserving future public access seaward of the project site. Furthermore, the City did not include any conditions that would require re-assessment of the project approval at such time that the development may encroach upon public tidelands.

LUP (LUE) Policy 3.12 requires public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, or where adequate access exists nearby. LUP (COSE) Policy 2.15 also requires that public safety is provided in all new seaward construction of beachfront single-family structures in a manner that “does not interfere, to the maximum extent feasible, with public access along the beach.” The City's findings did not include discussion of the existing lateral public access easement, nor the preservation of lateral public access along the beach more generally. The landward extent of the recorded lateral access easement is not ambulatory, but is fixed by the patio stringline as required by the LCP. As a result, the public enjoys approximately 90 ft. of beach under average contemporary conditions, but the easement is anticipated to become narrower over time.

In the City's approval of the project, there is no mention of the potential loss of public use and recreation on the beach over time. Specifically, in the Planning Commission Agenda Report dated July 27, 2022, there is very brief analysis of City Council Resolution 01-07-10-03, which states that no new dedication of public access along the beach may be required for new development between Capistrano Beach County Park and Poche Beach ([Exhibit 3](#)). In further discussions with City staff, the City pointed to additional language in a letter from attorney Sherman L. Stacey dated July 1, 2015, concerning public access easements along blufftop lots of Camino Capistrano. The City made findings that the proposed development will not adversely affect (either individually or cumulatively) the ability of the public to reach and use the public tidelands, and that any existing site-specific or regional access burdens will not be alleviated through the dedication of a new accessway at the site.

Nonetheless, the Public Trust Doctrine applies to a portion of the beach seaward of the subject site. Title to lands under tide waters may be vested in the people of California as a public trust, to subserve and protect the public right to use for swimming, fishing, bathing, access, and engagement in other forms of water recreation, such as boating, surfing, and anchoring. The State holds its Sovereign Lands in Public Trust for the benefit of the people, freed from the obstruction or interference of private parties. Furthermore, Section 30211 of the Coastal Act states that 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. As discussed above, there is concern that the proposed development may interfere with the public's rights under the Public Trust Doctrine as public tidelands encroach upon the house over time.

Finally, the appellants contend that the encroachments of the 2<sup>nd</sup>-floor balcony, landing and stairs above the lower deck, and the second set of stairs located seaward of the lower deck are inconsistent with the "appropriate boundary" for lateral access outlined in IP Section 9.27.030(a)(4)(G)(1). While the LCP allows for limited encroachments beyond the structure and patio stringline setback requirements for the Residential Beach Road Zoning District, the 3-ft. stairway encroachment beyond the patio stringline, in particular, encroaches into the existing public access easement recorded at the site.

Therefore, the appellants' contentions raise a substantial issue with regard to the project consistency with Coastal Act sections 30210-30212 and 30214, as well as IP Policies 9.27.030 and LUP Policies COSE 2.15 and LUE 3.12. of the certified LCP. The City's omission of the existing lateral public access easement at the site, the City's lack of findings regarding the effects of sea level rise and beach erosion on the easement, and the City's approval of encroachments seaward of the patio stringline, taken together, may lead to a gradual loss of the public's ability to use and recreate on the beach. The City-approved development may have an additional adverse impact on future interpretations of its LCP by following the same approach and disregarding the need to preserve public access along the beach in other developments on Beach Road, some of which may have different lateral public access easement stipulations or no recorded public access easements at all.

### **Coastal Hazards**

Certified LUP (COSE) Policies 2.1 and 2.9 adopt the requirements of Section 30253 of the Coastal Act, which requires new development be sited and designed to minimize risks in hazardous areas and avoid contributing to erosion or site instability. LUP (COSE) Policies 2.5 and 2.14 also prohibit reliance of new development on shoreline protective devices. Certified IP Section 9.69.070 bolsters this requirement by requiring that approval of CDPs be supported by findings analyzing the development for safety from undue risk.

The appellants contend that the City's action approved new development without adequate findings discussing the project's susceptibility to coastal hazards. While the local CDP findings acknowledge the project's location within a "coastal high-hazard area," the hazards findings are limited. The local CDP relies on the conclusion of the applicants'

site specific wave runup report that the future BFE (the elevation of water anticipated with a 100-year storm accounting for SLR) will be +21 ft. above the North American Vertical Datum of 1988 (NAVD88). The City’s findings indicate construction of the primary residence foundation above +21 ft. NAVD88 will allow water to flow under the residence without contributing to beach erosion. The local CDP does not specify the difference in elevations between the BFE and residence foundation, but the project plans show the residence finished floor elevation at +22.5 ft. NAVD88—approximately 1.5 ft. above the City’s referenced, future BFE. The findings also state that the five-foot lower garage will be constructed with breakaway panels to allow water to flow “through the garage to the street in the event of wave inundation.”

These hazard findings may underestimate the degree of risk posed by shoreline hazards resulting from sea level rise. The applicants’ submitted coastal hazards analysis published by Geosoils, Inc., dated February 28, 2020, assumes that the beach crest (i.e. the highest elevation of sand/cobble material deposited by wave action) will remain at an elevation below the residence foundation in the future. A beach crest elevation below the foundation would facilitate wave uprush surging through the breakaway panels and out onto Beach Road, avoiding impacts to the elevated residence. However, the possibility of the beach crest rising upward to the level of the foundation—and thus directing wave force upward against the foundation, rather than forward through the garage—may constitute an undue risk requiring additional analysis pursuant to IP Section 9.69.070. Prior to CDP approval, the City retained Moffat & Nichol as a third-party coastal hazards consultant to review the applicants’ submitted hazards report. In their formal response to the applicants’ report, dated June 24, 2020, Moffat & Nichol describe the possibility of beach crest remaining below the foundation or rising to meet the foundation as Case A and Case B, respectively. They requested additional analysis of Case B from the project coastal hazards analyst as follows:

“The GSI report focuses on Case A, in which coastal hazards from wave runup and overtopping occur beneath the foundation. However, the potential impacts on the proposed at-grade elements of the new residence (garage) from this overtopping bore are not discussed in the report. The analysis should account for the other possible condition that could result from significant beach profile changes that would be expected over the next 75-years in combination with sea level rise.”

The applicants’ consulting analyst, GeoSoils, Inc., published a response dated August 12, 2020. The response provided an estimate of the uplift forces (3,732 pounds per linear foot) and noted that, while seismic design loads normally exceed those required for wave uplift, the wave uplift force would be provided to the structural engineer for design purposes. In a follow-up letter dated December 30, 2022, GeoSoils, Inc.’s hazards analysis provides additional suggested adaptations, such as flood shields during the incidence of very high tides, high waves, and eroded beach conditions. In Case C, which is the worst case with 1% probability, additional adaptation measures may include removal of threatened portions of the development, shoreline protection (if allowed), and removal of the entire development if necessary. While it’s unclear whether any further planning action could be taken to protect against these scenarios without invoking a larger regional community resiliency plan for the Capistrano Beach community, the wave

runup analysis illustrates that the City's CDP conditions and findings are inadequate in ensuring that the development is sited and designed to avoid coastal hazards. Since the local CDP did not discuss or specify whether removal of the development will be necessary due to wave uprush, erosion, and flooding, the appellants' contentions raise a substantial issue with regard to the project's siting in a hazardous location and consistency with LUP (COSE) Policies 2.1 and 2.9 and IP Section 9.69.070 of the certified LCP.

The appellants contend that the City's analysis of flooding with sea level rise may also underestimate the degree of risk within the 75-year lifespan. The local CDP relies on the applicants' consulting analyst's future BFE estimation (+21 ft. NAVD88), which is a two-foot increase from the current +19 ft. NAVD88 Federal Emergency Management Agency (FEMA) BFE. The applicants' submitted, site-specific wave runup report considers this two-foot increase in BFE in conjunction with 5.6 feet of sea level rise and future 100-year storm conditions by 2095. The City's third-party consultant, Moffat & Nichol, published a memorandum on April 6, 2022 providing support for the +21 ft. NAVD88 BFE estimation. Nevertheless, in a memorandum dated November 17, 2021, Moffat & Nichol states that GeoSoils, Inc. had previously assumed that the beach would transition to a cobble beach over time, which would in turn substantially reduce the rate of erosion. This conclusion echoes the appellants' contentions. It is unlikely that cobble will be present across the entire beach profile, and therefore the original analysis overestimates the impeding effect of cobble on overall beach erosion, the assumptions of which have cascading effects on the ultimate conclusions about the combined effects of coastal hazards at the site. The sea level rise projection of 5.6 ft. was obtained by averaging the low and high greenhouse gas emissions scenarios provided by the Ocean Protection Council (OPC) for medium-high risk aversion. The Commission's 2018 Statewide Update to Sea Level Rise Guidance recommends using the high emissions scenario, as global greenhouse gas emissions have not departed significantly from the current high trajectory and a great degree of uncertainty remains regarding future greenhouse gas emission reductions. Additionally, the Commission's Guidance recommends using the medium-high risk aversion scenario for projects with greater consequences and/or a lower ability to adapt such as residential structures. In this case, the La Jolla Tidal Gauge (the closest tidal gauge to the project site) predicts 7.1 ft. of sea level rise by the year 2100 under the medium-high risk aversion scenario.

The certified LCP does not specify how future BFE estimates should be calculated, and estimating future BFEs includes a large degree of uncertainty. One approach, taken by the applicants in this case, and supported by the City, is to estimate the breaking wave elevation at the base of the structure in the next 75 years. IP Sections 9.27.030 and 9.31.060 of the certified LCP also requires an analysis of hazards at the site which include how access to the site might be affected by coastal hazards. Based on GeoSoils, Inc.'s assumptions about the effects of a transition to a cobble beach on erosion and wave conditions as well as assumptions about sea level rise scenarios, the approach still raises questions as to whether the full scope of sea level rise risk (including future shoreline change) was considered. Recent conditions in the area of the proposed development have shown even moderately high wave conditions and water levels result in hazardous conditions. LUP (COSE) Policies 2.1, 2.8, and 2.16 require that new



development be designed for safety from coastal hazards—it is unclear from the local CDP findings whether the project design accounted for the full range of flood hazards that could occur under the higher SLR scenarios within the development lifespan, even while Cases B & C were entertained in some of the wave runup analyses. Thus, this contention raises a substantial issue with regard to project consistency with LUP (COSE) Policies 2.1, 2.8, and 2.16 and IP Section 9.69.070 of the certified LCP.

Additionally, the appellants contend that the local CDP does not analyze the impacts of wave uprush flooding Beach Road via the garage breakaway panels. The City's findings suggest that inundation of the non-habitable garage may be an acceptable option to avoid impacts to the primary residence (which is elevated approximately five feet above the garage). In fact, IP Section 9.31.060(f)(3) requires that the garage be designed in this way, and IP Section 9.31.060(f)(8) requires ocean-facing decks to allow wave runup to go over and under without obstruction. However, Commission staff's analysis of such design parameters at this site yields potential outsized effects on scour and flooding of Beach Road further landward of the site. As stated, Beach Road is at approximately +15 ft. NAVD88 elevation, and the erosion of the beach beneath the residence may increasingly direct wave action towards the road and nearby residences while sparing the elevated portions of the home. Beach Road is the primary accessway for the Capistrano Beach Community Association—flooding of the road may result in impacts to public safety and infrastructure. The garage may also be used for storage of electrical/mechanical equipment, cleaning chemicals, or other hazardous pollutants; inundation of the garage could thus result in release of harmful toxins into the water, and/or impacts to water quality and surrounding coastal habitats. There is little discussion as to the frequency the breakaway panels may break away in the future and how often the impacts mentioned above may occur. The City's findings do not adequately address these concerns. Thus, this contention also raises a substantial issue with regard to consistency with LUP (COSE) Policy 2.16 and IP Section 9.69.070 the certified LCP.

Analyzing development for future shoreline hazards involves a large degree of uncertainty. In inherently hazardous areas, such as Capistrano Beach, it may not be feasible for development to be designed for safety from all risks. However, IP Section 9.69.070(d-e) and LUP (COSE) Policies 2.5, 2.9, and 2.14 require specific findings for new development which analyze the full scope of coastal hazards, as well as any future need for shoreline protection. The potential future risks described above could significantly impact both the subject residence and the surrounding community if left unaddressed. It is unclear from the local CDP findings whether the subject development has been adequately sited and designed for safety from beach erosion, flooding, and wave impact resulting from sea level rise. Capistrano Beach is a narrow, sandy beach highly susceptible to coastal hazards associated with sea level rise, including wave uprush, erosion, and flooding. Some existing residences located along Beach Road are already struggling with these hazards, exemplified by Emergency Permit Nos. G-5-20-0053 (35099 Beach Road) and G-5-21-0037 (35127 Beach Road) residences located approximately one mile upcoast of the project site. The emergency work in both cases included installation of sand cubes to protect an undermined patio attached to a single-family residence from wave action and illustrates the need for projects in this area to be designed for safety against shoreline hazards in the near future. In addition, the

Commission's Enforcement staff is tasked with identifying and correcting a huge scope of unpermitted development along the coast, including within vicinity of the subject site (e.g., 35527 Beach Road); many of the unpermitted shoreline protective devices have been installed in response to the beach's chronic erosion over the past few years resulting in extremely narrow beach widths. It is therefore crucial that new development withstand coastal hazards as unpermitted shoreline armoring nearby is investigated and is required to be removed.

Thus, the appeal contentions discussed above raise a substantial issue as to whether the project is consistent with coastal hazard policies of the certified LCP.

### **Shoreline Protection**

The appellants contend that Special Condition 12 of the local CDP, which requires removal of any existing coastal armoring onsite only if possible without threatening neighboring properties, does not adequately resolve possible unpermitted development onsite. The City has indicated that they are unaware of any possible protective devices. The Commission and City records do not show any CDP history for shoreline protective devices onsite. Thus, the appellants are correct in claiming that if there are any existing shoreline protective devices in the project area, they are unpermitted and constitute violations of the Coastal Act and the certified LCP. Special Condition 12 of the local CDP states, in relevant part [**emphasis** added]:

“b. The property owner(s) shall be responsible for the removal of any and all pre-existing ocean protective devices directly fronting the subject property **at the time they are determined to no longer be required to protect surrounding properties**. The property owner shall assume all costs and responsibilities associated with the removal.”

This condition does not specify which party is responsible for making the determination that the surrounding properties no longer require the unpermitted armoring. It also allows the property owner to retain any past unpermitted structures indefinitely if the neighboring properties are deemed at risk, which conflicts with Special Condition 12, subsection A prohibiting any shoreline protective devices that would substantially alter natural shoreline processes. Certified LUP (COSE) Policies 2.5 and 2.9 require protection of natural erosion processes, while LUP (COSE) Policies 2.5 and 2.14 prohibit new coastal development from relying on protective devices. For consistency with these policies, all unpermitted shoreline protective devices onsite should be removed prior to construction of any new development.

Therefore, this contention raises a substantial issue with regard to the City-approved project's consistency with LUP (COSE) Policies 2.5, 2.9, and 2.14 of the certified LCP.

### **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 with the relevant provisions of the certified LCP and Coastal Act.** The City’s analysis of site-specific coastal hazards failed to consider the full scope of risks facing the project, including increased erosion, sea level rise-related flooding, and undermining of Beach Road landward of the site. The City also did not consider that the approved encroachments seaward of the structure and patio stringline setback requirements would impinge upon the existing lateral public access easement. Additionally, the City’s findings to support a determination of project exception from easement requirements did not take into account the existing lateral access easement, the need to preserve lateral public access along the beach in the face of sea level rise and severe beach erosion, and the increasingly frequent inundation of the vertical public access entry points at Capistrano Beach County Park and Poche Beach. As described above, the local CDP included inadequate analysis of future coastal hazards and impacts to public access. The City’s findings could potentially allow for retention of shoreline protective devices at the site, given that the shoreline armoring removal requirement is contingent upon the protection of neighbors’ properties. Therefore, the Commission finds that the City provided an inadequate degree of factual and legal support for its decision to approve the new single-family residence and garage supported on caissons in a hazardous area.

**2. The extent and scope of the development as approved or denied by the local government.** The project may contribute to the future loss of lateral public access to Capistrano Beach, as well as public safety concerns associated with the flooding of Beach Road. These issues have far-reaching consequences and thus, the scope of the project raises a substantial issue.

**3. The significance of the coastal resources affected by the decision.** Public access to the coast is one of the most important policies embodied in the Coastal Act. Capistrano Beach is highly valued as a public resource for both tourists and community members—the fate of this beach within the next 75 years, as well as the safety of the community living on this beach, is a significant priority for the Commission. Given the area’s vulnerability to coastal hazards such as flooding, wave scour, and erosion, the City should carefully evaluate development project applications along Beach Road in order to adequately protect life and property from the imminent threat. This factor thus raises a substantial issue.

**4. The precedential value of the local government’s decision for future interpretations of its LCP.** The subject project raises a fundamental question regarding how local governments and the Commission should balance preservation of sandy beaches available to the public with the rights of property owners. Past locally approved CDPs in Dana Point have included similar project descriptions, with new residences approved for elevation on piles above +21 ft. NAVD88 and determined exempt from easement dedication requirements, even in cases where easements have already been present onsite.<sup>2</sup> Approval of this project would further strengthen this existing precedent without addressing significant questions of safety and loss of public lands, as detailed

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<sup>2</sup> [A-5-DPT-21-0056](#) (CDP 20-0024; 35275 Beach Road); 5-DPT-21-0424 (CDP 20-0028, 35537 Beach Road); 5-DPT-15-0795 (CDP 12-0006, 35537 Beach Road).

above. In addition, the Commission’s Enforcement staff is tasked with identifying and correcting a huge scope of unpermitted development along the coast—it is crucial that local governments support their efforts by researching underlying permit histories (including recorded public access easements) and investigating any unpermitted development and requiring removal prior to approving new development. In this case, removal of any unpermitted shoreline protection was required based solely on the safety of neighboring development, without findings discussing whether Coastal Act violations exist onsite. In addition, the City’s lack of findings concerning the need and preservation of a lateral public access easement onsite may result in future City decisions discounting the need for continued public use and recreation of the beach in the face of sea level rise and beach erosion. Thus, the project, as approved by the City, may contribute to multiple adverse precedents and raises a substantial issue.

**5. Whether the appeal raises local issues, or those of regional or statewide significance.** The State Legislature has acknowledged that sea level rise has already begun to impact public infrastructure. A U.S. Geologic Survey study from 2019 estimates that over \$150 billion of California property could be impacted by flooding associated with 6 feet of sea level rise and one extreme 100-year storm, with annual storms estimated to impact an additional \$119 billion in California property by 2100.<sup>3</sup> The California Legislative Analyst’s Office published a report in August 2020 also indicating that with three to six feet of sea level rise, “up to two-thirds of Southern California beaches may become completely eroded by 2100.”<sup>4</sup> The subject appeal raises issues of how to maintain public beaches and natural beach accretion while protecting existing communities and the safety public infrastructure. As described above, this appeal may set a new precedent for new development built in hazardous shoreline areas. In addition to statewide and regional concerns, the project raises issues for the local Capistrano Beach Community Association. The project may contribute to flooding of Beach Road, the primary accessway for the subject row of residential development. Therefore, the appeal raises issues of local, regional, and statewide significance. This factor supports a finding of substantial issue.

## **Conclusion**

Applying the five factors listed above clarifies that, on balance, the appeal raises a “substantial issue” with respect to the project’s consistency with Chapter 3 public access and recreation policies of the Coastal Act, as well as the certified LCP. There are significant questions of safety, public access, and unpermitted coastal armoring raised by the City’s findings. The City’s decision could contribute to an existing adverse precedent and influence future interpretations of the certified LCP. Therefore, staff recommends that the Commission find that the appeal raises a substantial issue as to the project’s conformity with Chapter 3 public access and recreation policies of the Coastal Act, as well as the certified LCP.

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<sup>3</sup> *Critical Infrastructure at Risk: Sea Level Rise Planning Guidance for California’s Coastal Zone*, adopted by the California Coastal Commission on November 17, 2021.

<[https://documents.coastal.ca.gov/assets/slr/SLR%20Guidance\\_Critical%20Infrastructure\\_12.6.2021.pdf](https://documents.coastal.ca.gov/assets/slr/SLR%20Guidance_Critical%20Infrastructure_12.6.2021.pdf)>

<sup>4</sup> Legislative Analyst’s Office, Gabriel Petek. “What Threat Does Sea-Level Rise Pose to California?” published on August 10, 2020. <https://lao.ca.gov/reports/2020/4261/sea-level-rise-081020.pdf>

## **Appendix A – Substantive File Documents**

- City of Dana Point certified Local Coastal Program (LCP)
- Wave Runup Analysis and Base Flood Elevation Determination, prepared by GeoSoils, Inc. dated February 28, 2020, and associated file documents
- City Council Resolution No. 01-07-10-03
- Letter to the City of Dana Point from Sherman L. Stacey dated July 1, 2015 regarding pending CDP for 24682 Camino Capistrano

## Appendix B – Relevant Certified LCP Policies

Certified IP Section 9.27.030 Development Standards states, in relevant part [emphasis added]:

(a) Coastal Access.

(1) The purpose of this section is to achieve the basic state goals of maximizing public access to the coast and public recreational opportunities, as set forth in the California Coastal Act; to implement the public access and recreation policies of Chapter 3 of the Coastal Act; and to implement the certified land use plan of the Local Coastal Program which is required by Section 30500(a) of the Coastal Act to include a specific public access component. In achieving these purposes, the provisions of this subsection shall be given the most liberal construction possible so that public access to the navigable waters shall always be provided and protected consistent with the goals, objectives and policies of the California Coastal Act and Article X, Section 4, of the California Constitution...

(C) Character of Accessway Use...

2. Passive recreational use. As used in this section, "passive recreational use" refers to the right of the public to conduct activities normally associated with beach use, such as walking, swimming, jogging, sunbathing, fishing, surfing, picnicking, but not including organized sports, campfires, or vehicular access other than for emergencies or maintenance.

3. Active recreational use. As used in this section, "active recreational use" refers to the right of the public to conduct the full range of beach-oriented activities, not including horseback riding and use of motorized vehicles unless specifically authorized...

(3) Applicability.

(A) Access Required. As a condition of approval and prior to issuance of a permit or other authorization for any class of new development as identified in Sections 9.27.030(a)(3)(A)1. through 9.27.030(a)(3)(A)4. below, except as provided in Section 9.27.030(a)(3)(B), an offer to dedicate an easement (or other legal mechanism pursuant to Section 9.27.030(a)(4)(J)2. for one or more of the types of access identified in Sections 9.27.030(a)(2)(D)1. through 9.27.030(a)(2)(D)5. shall be required and shall be supported by findings required by Sections 9.27.030 (a)(5)(A) through 9.27.030(a)(5)(C); provided that no such condition of approval for coastal access shall be imposed if the analysis required by Sections 9.27.030(a)(5)(A)1. through

9.27.030(a)(5)(A)4. establishes that the development will not adversely affect, either individually or cumulatively, the ability of the public to reach and use public tidelands and coastal resources or that the access dedication requirement will not alleviate the access burdens identified....

2. New development between the nearest public roadway and the sea.

3. New development on any site where there is substantial evidence of a public right of access to the sea acquired through use or a public right of access through legislative authorization...

(B) Exceptions. Section 9.27.030(a)(3)(A) above shall apply to all new development except in the following instances:

1. Projects excepted from the definition of "new development" in Section 9.27.020(a)(2).

2. Where findings required by Sections 9.27.030(a)(5)(A) and 9.27.030(a)(5)(B) establish any of the following:

a. Public access is inconsistent with the public safety, military security needs, or protection of fragile coastal resources; or

b. Adequate access exists nearby.

(4) Standards for Application of Access Conditions. The public access required pursuant to Section 9.27.030(a)(3)(A) shall conform to the standards and requirements set forth in Section 9.27.030(a)(4) herein.

(A) Lateral Public Access (Minimum Requirements).

1. A condition to require lateral access as a condition of approval of a coastal development permit (or other authorization to proceed with development) pursuant to Section 9.27.030(a)(3)(A) shall provide the public with the permanent right of lateral public access and passive recreational use along the shoreline (or public recreational area, bikeway, or blufftop area, as applicable); provided that in some cases controls on the time, place and manner of uses may be justified by site characteristics including sensitive habitat values or fragile topographic features, or by the need to protect the privacy of residential development located immediately adjacent to the accessway.

2. Active recreational use may be appropriate in many cases where the development is determined to be especially burdensome on public access. Examples include cases where the burdens of the proposed project would severely impact public recreational use of the shoreline, where the proposed development is not one of the priority uses specified in Public Resources Code Section 30222 and the policies of the certified land use plan, where active recreational uses reflect the historic public use of the site, where active recreational uses would be consistent with the use of the proposed project, and where such uses would not significantly interfere with the privacy of the landowner. In determining the appropriate character of public use, findings shall be made on the specific factors enumerated in Section 9.27.030(a)(5)(B). Lateral access shall be legally described as required in Section 9.27.030(a)(4)(G).

(B) Vertical Public Access (Minimum Requirements)...

3. Each vertical accessway shall extend from the road to the shoreline (or bluff edge) and shall be legally described as required in Section 9.27.030(a)(4)(G). The access easement shall be a minimum of 10 feet wide. If a residential structure is proposed, the accessway should not be sited closer than 10 feet (or another distance if specified in the certified land use plan) to the structure....

(F) Protection of Historic Public Use.

1. Substantial Evidence Determination. Substantial evidence that the area used by the public has been impliedly dedicated shall be determined based on evidence of all of the following:

- a. The public must have used the land for a period of five years or more as if it were public land,
- b. Without asking for or receiving permission from the owner,
- c. With the actual or presumed knowledge of the owner,
- d. Without significant objection or bona fide attempts by the owner to prevent or halt the use, and
- e. The use must be substantial, rather than minimal, and
- f. The applicant must not have demonstrated that the law has prevented the property from being impliedly dedicated.



2. Siting and Design Requirements. Development shall be sited and designed in a manner which does not interfere with or diminish any public right of access which may have been established based on historic public use. Only when site constraints are so severe that siting of the accessway or recreational use area in its historic location would significantly impair the proposed development and alternative development siting is not feasible, development may be sited in the area of public right of access based on historic use provided that the applicant provides an equivalent area of public access or recreation to and along the same destination and including the same type and intensity of public use as previously existed on the site. Mechanisms for guaranteeing the continued public use of the area or equivalent area shall be required in accordance with Sections 9.27.030(a)(4)(A) through 9.27.030(a)(4)(E) above.

3. Minimum Requirements. An access condition shall not serve to extinguish or waive public prescriptive rights. In permits where evidence shows the possibility of such prescriptive rights, the following language shall be added to the access condition:

"Nothing in this condition shall be construed to constitute a waiver of any prescriptive rights which may exist on the parcel itself or on the designated easement."

(G) Legal Description of an Accessway (Recordation).

1. An access dedication required pursuant to Section 9.27.030(a)(3)(A) shall be described in the condition of approval of the permit in a manner that provides the public, the property owner, and the accepting agency with the maximum amount of certainty as to the location of the accessway. As part of the condition of approval, easements shall be described as follows:

a. for lateral access: along the entire width of the property from the mean high tide line to (as applicable): the toe of the bluff, the toe of the seawall, or other appropriate boundary such as structural and patio stringlines as described in Section 9.09.040(a)(1) of this Zoning Code (the Residential Beach Road 12 (RBR 12) and Residential Beach Road Duplex 18 (RBRD) Zoning Districts)...

2. Prior to the issuance of the coastal development permit, the landowner shall execute and record a document in a form and

content acceptable to the Director of Community Development, consistent with provisions of Section 9.27.030(a)(6), irrevocably offering to dedicate to a public agency, non-profit organization, or private association approved by the Coastal Commission an easement for a specific type of access as described in Section 9.27.030(a)(2)(D) and a specific character of use as described in Section 9.27.030(a)(2)(E), as applicable to the particular condition.

3. The recorded document shall provide that the offer to dedicate shall not be used or construed to allow anyone, prior to acceptance of the dedication, to interfere with any rights of public access acquired through use which may exist on the property.

4. The recorded document shall include legal descriptions of both the applicants' entire parcel and the easement area and a map to scale. The offer shall be recorded free of prior liens and any other encumbrances which the Coastal Commission [or local agency authorized by the Commission] determines may affect the interest being conveyed. The offer to dedicate shall run with the land in favor of the People of the State of California, binding all successors and assignees, and shall be irrevocable for a period of 21 years, such period running from the date of recording.

(H) Management Plan (Minimum Requirements). A management plan may be required in conjunction with a dedication of public access in any case where there is substantial evidence of potential conflicts between public access use and other uses on or immediately adjacent to the site. Examples include access in areas of...significant hazards, or adjoining residential neighborhoods or military security areas. The plan shall be prepared by the accepting agency and approved by the City of Dana Point prior to the opening of the access to public use. Where applicable, the plan should specify management controls on time and intensity of use, standards for privacy buffers, and requirements for maintenance of aesthetic values through such measures as litter control.

(I) Privacy Buffers (Minimum Requirements). Separation between a public accessway and adjacent residential use may be provided when necessary to protect the landowner's privacy or security as well as the public's right to use of the accessway. Any such buffer shall be provided within the development area. Access should not be sited closer to any residential structure than the distance specified in the certified LUP amendment, or where there is no distance specified, no

closer than 10 feet. The buffer can be reduced where separation is achieved through landscaping, fences or grade separation...

(5) Required Findings And Supporting Analysis For Public Access Dedications.

(A) Required Overall Findings. Written findings of fact, analysis and conclusions addressing public access must be included in support of all approvals, denials or conditional approvals of projects between the first public road and the sea (whether development or new development) and of all approvals or conditional approvals of projects (whether development or new development) where an access dedication is included in the project proposal or required as a condition of approval. Such findings shall address the applicable factors identified by Section 9.27.030(a)(5)(B) and 9.27.030(a)(5)(C) and shall reflect the specific level of detail specified, as applicable. Findings supporting all such decisions shall include:

1. A statement of the individual and cumulative burdens imposed on public access and recreation opportunities based on applicable factors identified pursuant to Section 9.27.030(a)(5)(B). The type of affected public access and recreation opportunities shall be clearly described.

2. An analysis based on applicable factors identified in Section 9.27.030(a)(5)(B) and 9.27.030(a)(5)(C) of the necessity for requiring public access conditions to find the project consistent with the public access provisions of the Coastal Act.

3. A description of the legitimate governmental interest furthered by any access condition required.

4. An explanation of how imposition of a public access dedication requirement alleviates the access burdens identified and is reasonably related to those burdens in both nature and extent.

(B) Required Project-Specific Findings. In determining any requirement for public access, including the type of access and character of use, the City of Dana Point shall evaluate and document in written findings the factors identified in Sections 9.27.030(a)(5)(B)1. through 9.27.030(a)(5)(B)4. below, to the extent applicable. The findings shall explain the basis for the conclusions and decisions of the City of Dana Point and shall be supported by substantial evidence in the record. If an access dedication is required as a condition of approval, the findings shall explain how the dedication will alleviate or mitigate the adverse effects which have been identified and is reasonably related to those adverse effects in both nature and extent. As used in this section, "cumulative effect" means the effect of the individual project in combination with the effects of past projects, other current projects, and probable future projects, including development allowed under applicable planning and zoning. The following factors shall be analyzed:

1. Project Effects On Demand For Access And Recreation:

a. Identification of existing and open public access and coastal recreation areas and facilities in the regional and local vicinity of the development.

b. Analysis of the project's effects upon existing public access and recreation opportunities.

c. Analysis of the project's cumulative effects upon the use and capacity of the identified public access and recreation opportunities, including public tidelands and beach resources, and upon the capacity of major coastal roads from subdivision, intensification or cumulative buildout.

d. Projection of the anticipated demand and need for increased coastal access and recreation opportunities for the public.

e. Analysis of the contribution of the project's cumulative effects to any such projected increase.

f. Description of the physical characteristics of the site and its proximity to the sea, tideland viewing points, upland recreation areas, and trail linkages to tidelands or recreation areas.

g. Analysis of the importance and potential of the site, because of its location or other characteristics, for creating, preserving or enhancing public access to tidelands or public recreation opportunities.

2. Shoreline Processes (for accessways on sites subject to wave action, such as beachfront and coastal blufftop accessways):

a. Description of the existing shoreline conditions, including beach profile, accessibility and usability of the beach, history of erosion or accretion, character and sources of sand, wave and sand movement, presence of shoreline protective structures, location of the line of mean high tide during the season when the beach is at its narrowest (generally during the late winter) and the proximity of that line to existing structures, and any other factors which substantially characterize or affect the shoreline processes at the site.

b. Identification of anticipated changes to shoreline processes and beach profile unrelated to the proposed development.

c. Description and analysis of any reasonably likely changes, attributable to the primary and cumulative effects of the project,

to wave and sand movement affecting beaches in the vicinity of the project; the profile of the beach; the character, extent, accessibility and usability of the beach; and any other factors which characterize or affect beaches in the vicinity.

d. Analysis of the effect of any identified changes of the project- alone or in combination with other anticipated changes - will have upon the ability of the public to use public tidelands and shoreline recreation areas.

e. The rate of blufftop erosion due to wave action as the base of the bluff....

4. Physical Obstructions: Description of any physical aspects of the development which block or impede the ability of the public to get to or along the tidelands, public recreation areas, or other public coastal resources or to see the shoreline.

5. Other Adverse Impacts On Access And Recreation.

a. Description of the development's physical proximity and relationship to the shoreline and any public recreation area.

b. Analysis of the extent to which buildings, walls, signs, streets or other aspects of the development, individually or cumulatively, are likely to diminish the public's use of tidelands or lands committed to public recreation.

c. Description of any alteration of the aesthetic, visual or recreational value of public use areas, and of any diminution of the quality or amount of recreational use of public lands which may be attributable to the individual or cumulative effects of the development...

(D) Required Findings For Public Access Exceptions. Any determination that one of the exceptions of Section 9.27.030(a)(3)(B) applies to a development shall be supported by written findings of fact, analysis and conclusions which address all of the following:

1. The type of public access potentially applicable to the site involved (vertical, lateral, bluff top, etc.) and its location in relation to the fragile coastal resource to be protected or the public safety concern which is the basis for the exception, as applicable.

2. Unavailability of any mitigating measures to manage the type, character, intensity, hours, season or location of such use so that fragile coastal resources or public safety, as applicable, are protected.

3. Ability of the public, through another reasonable means, to reach the same area of public tidelands as would be made accessible by an accessway on the subject land.

(E) Findings For Management Plan Conditions. Written findings in support of a condition requiring a management plan for regulating the time and manner or character of public access use must address the following factors, as applicable.

1. Identification and protection of specific habitat values including the reasons supporting the conclusion that such values must be protected by limiting the hours, seasons, or character of public use.
2. Topographic constraints of the development site.
3. Recreational needs of the public.
4. Rights of privacy of the landowner which could not be mitigated by setting the project back from the accessway or otherwise conditioning the development.
5. The requirements of the possible accepting agency, if an offer of dedication is the mechanism for securing public access.
6. Feasibility of adequate setbacks, fencing, landscaping, and other methods as part of a management plan to regulate public use...

Certified IP Section 9.69.070 Basis for Action on Coastal Development Permit Applications states, in relevant part [emphasis added]:

(a) Approvals of Coastal Development Permits. In order for a Coastal Development Permit to be approved, all the following findings must be made, in writing, in addition to the findings required to approve other applications being considered concurrently:...

(2) That the proposed development, if located between the nearest public roadway and the sea or shoreline of any body of water, is in conformity with the public access and public recreation policies of Chapter Three of the Coastal Act. (Coastal Act/30333, 30604(c); 14 Cal. Code of Regulations/13096).

(3) That the proposed development conforms with Public Resources Code Section 21000 and following and that there are no feasible mitigation measures or feasible alternatives available which would substantially lessen any significant adverse impact that the activity may have on the environment. (Coastal Act/30333; 14 Cal. Code of Regulations/13096)...

(d) That the proposed development will be sited and designed to prevent adverse impacts to environmentally sensitive habitats and scenic resources located in adjacent parks and recreation areas, and will provide adequate buffer areas to protect such resources.

(e) That the proposed development will minimize the alterations of natural landforms and will not result in undue risks from geologic and erosional forces and/or flood and fire hazards...

Certified LUP (COSE) Goal 2 Policies, in relevant part:

Policy 2.1: Place restrictions on the development of floodplain areas, beaches, sea cliffs, ecologically sensitive areas and potentially hazardous areas. (Coastal Act/30235, 30236, 30240, 30253)

Policy 2.2: Site and architectural design shall respond to the natural landform whenever possible to minimize grading and visual impact. (Coastal Act/30250)

Policy 2.3: Control erosion during and following construction through proper grading techniques, vegetation replanting, and the installation of proper drainage, and erosion control improvements. (Coastal Act/30243)

Policy 2.4: Require the practice of proper soil management techniques to reduce erosion, sedimentation, and other soil-related problems. (Coastal Act/30243)

Policy 2.5: Lessen beach erosion by minimizing any natural changes or man-caused activities which would reduce the replenishment of sand to the beaches. (Coastal Act/30235)

Policy 2.6: Encourage public acquisition of significant land resources for open space when funds or opportunities are available. (Coastal Act/30240)

Policy 2.8: Minimize risks to life and property, and preserve the natural environment, by siting and clustering new development away from areas which have physical constraints associated with steep topography and unstable slopes; and where such areas are designated as Open space or include bluffs, beaches, or wetlands, exclude such areas from the calculation of net acreage available for determining development intensity or density potential. (Coastal Act/30233, 30253)

Policy 2.9: Preserve significant natural features as part of new development. Permitted development shall be sited and designed to minimize the alteration of natural landforms. Improvements adjacent to beaches shall protect existing natural features and be carefully integrated with landforms. (Coastal Act/30240, 30250, 30251, 30253)

Policy 2.14: Shoreline or ocean protective devices such as revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such

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construction that alters shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply and minimize adverse impacts on public use of sandy beach areas. (Coastal Act/30210-12, 30235)

Policy 2.15: Assure that public safety is provided for in all new seaward construction or seaward additions to existing beachfront single family structures in a manner that does not interfere, to the maximum extent feasible, with public access along the beach. (Coastal Act/30210-212, 30214, 30253)

Policy 2.16: Identify flood hazard areas and provide appropriate land use regulations, such as but not limited to the requirement that new development shall have the lowest floor, including basement, elevated to or above the base flood elevation, for areas subject to flooding in order to minimize risks to life and property. (Coastal Act/30235, 30253)

Certified LUP (LUE) Goal 3 Policies, in relevant part:

Policy 3.11: 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. (Coastal Act/30211)

Policy 3.12: Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, or where adequate access exists nearby, including access as identified on Figures UD-2 and COS-4. (Coastal Act/30212)