

CALIFORNIA COASTAL COMMISSION

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W17a

A-6-DMR-22-0034 (Del Mar 107, LLC)

September 7, 2022

CORRESPONDENCE

Agenda item 17
Appeal no. A-6-DMR-22-0034
Name Greg Monahan
Position Opposition

Del Mar permit appeal memo dated 8/31/2022

Introduction

The ADU permit issued by the city of Del Mar on 6/21/2022 brings into sharp focus the interaction between the California Coastal Commission Act and the California housing laws relating to ADUs. The facts of this case are so unique they may very well set the precedent for future cases involving the protection of one of the most prized coastal resources (ocean front) vs the questionable need to quickly develop an ADU that will never be occupied by a homeless person. Make no mistake, the purpose of pursuing an ADU on an ocean front compound is not to help the homeless but to relieve the burden of strict coastal protections that, but for the ADU exemption, would be applied to these prime assets. If current subterfuge prevails anyone wanting to avoid appropriate Coastal Act protections can and will seek to use the ADU loophole to circumvent Coastal Act procedures. This precedent will not only apply to Del Mar but to the entire state. If ocean front property cannot be protected by the Coastal Act procedures, in a non-emergency situation, what can be protected?

In the past few years, the legal landscape has changed dramatically with the introduction of a series of new ADU Laws

Status of California Laws dealing with Coastal Protection laws and new housing Laws has become complex and confusing. On the coastal protection side, we have the Coastal Protection Act, the City of Del Mar LCP and the Coastal Commission's oversight role. On the new housing side, we have new laws relating to ADUs and the Department of housing Development and community development (HCD) in an oversight role. To provide added oversight the Office of Attorney General (AG) has been added to the oversight team. To keep up with the changing environment the Coastal Commission has to date issued 3 updated versions to its original guidance for implementation of new ADU laws.

In the latest version of the Coastal Commissions guidance, in reference to the changing laws states "Importantly, the changes did not modify existing provisions of state housing law that explicitly recognize that local governments must still abide by the requirements of the Coastal Act, and by extension, Local Coastal Programs (LCPs). Thus, provisions on coastal resource protection must be incorporated into the planning and development process, and **into** updated LCP J/ADU requirements when considering J/ADUs in the coastal zone." It is important that the LCP incorporate necessary changes in or to maintain its status as the stand alone "rule book" used to test the permit process compliance with the Coast Commission Act.

City of Del Mars Official Certified LCP does not support the accelerated process for ADU development.

After making 5 phone requests to 3 different Del Mar planning department staffers I was unable to get an official copy of the City of Del Mars Certified LCP. Knowing how important the

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LCP was to the process I wrote a detailed email to the Del Mar planning department, not individual planners but to the department, requesting the current Official Certified LCP. I specifically stated I needed the document for the purpose of determining if the proposed development was in conformity with the Certified LCP. I was demanding the “rule book”.

I was totally in my right to make such a demand. As the State of California constitution Article 1 sec 3(b)(1) I have the right of access to the writings of public officials and sec 3(b)(7) each agency is required to comply with the California Public Records act.

After a few days the city’s Planning Department provided me The Official certified LCP by email. I had finally achieved the goal of getting a copy of the current official Del Mar Certified LCP. It was a long (300 pages) well integrated plan consisting of both Implementing Ordinances and Land Use Plan. The Implementing Ordinances labeled on the cover page as Certified by the California Coastal commission on September 11, 2001

The officially provided Certified Del Mar LCP has NO mention of ADUs whatsoever. There is NO chapter 30.19 or chapter 30.21 or chapter 30.91 in the Official Certified LCP. These chapters are the key chapters the City relied upon to issue the permit in question and therefore the process used to issue the permit cannot possibly be consistent with the current Certified LCP.

The permit should be rejected based on the failure of Del Mar Ordinance 966 to qualify for inclusion into the Del Mar certified LCP.

Ordinance 966, which added chapters 30.19, 30.21 and 30.91 to Del Mar Municipal code (DMCC) was the basis for issuing the permit. The City of Del Mar submitted a LCP implementation Plan, incorporating Ordinance 966 changes on August 24, 2020. The Amendment was never approved or certified and in fact was withdrawn. The Del Mar website lists the status of 966 as NOT IN EFFECT. The status of 966 at the time of the permit findings and permit issuance in June of 2022 had not changed but 966 was included as the basis for justifying the permit. How is it possible to find the request is consistent with the requirements of the Certified Local Coastal Program when the founding principle (966) was rejected and in a “not in effect” status?

A historically bad proposed precedent

The Commission’s staff report does not dispute that the 966 Amendment was never approved and Certified. The staff justifies the use of the 966 provisions based on the statement that the city is working on submitting a new amendment. Given that the City has been working on the amendment for over 2 years with little progress the city should be required to complete the amendment negotiation process, incorporate the changes to the LCP, get the commissions review, approval, and certification of the complete LCP prior to being able to issue permits.

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Can you imagine the precedent that would be set by allowing cities to issue permits based on a statement that they will be going thru the amendment process sometime in the future? You would lose complete control for implementing the Coastal Commission Act.

The ADU proposed is larger and blocks more public view and enjoyment than the staffs report reflects.

At the bottom of Page 2 of the staff W17a report it states “The proposed ADU will be located on the southern edge of the subject lot and will extend the existing building further **south** into the rear yard...” If the ADU is at the southern edge it cannot extend further south. According to the drawings the 16’-18’ high resulting structure will run along the eastern most side of the lot (4 ft setback) and end approximately 67’ north from the southern property line. This structure will block out all the water view between the existing buildings as one walks west down Penny Lane to the bench on the bluff. Walkers frequently walk down to the bench at the end of Penny Lane and enjoy a glass of refreshment while looking at the view.

The Del Mar Certified Land Use Plan, chapter IV(A)p73 provides “In addition to the policies of this Land Use Plan which serves to protect the most significant public views, Del Mar’s Design Review Ordinance provides for the protection of additional views from public and private residences and business “. The city also finds that “the protection and provision of visual access to the coastline...is paramount to the overall goal of protecting the scenic and natural resources which characterize the City”.

When walking west on Penny Lane, to the bench at the end, and looking at the water view between the houses it is not uncommon to see motorized hang gliders in the sky and dolphin in the water. The public should not have to give up the pleasure of seeing such beauty while walking down Penny Lane.

The Notice of Coastal Development Permit Approval is fatally flawed because it does not specify a date certain for the forfeiture of right to appeal.

The Notice specifies the appeal period runs 10 (ten) calendar days, commencing from the date upon which the Coastal Commission **receives** notice of the City’s final action on the application. Nowhere does the notice specify the start date of the ten-day period. Given (1) the magnitude of the issue –forfeiting the right to insist on the present setting protection of the most valuable portion of the coast- and (2) the complexity of the overlapping laws and regulations and extraordinarily short notice period it is totally unreasonable to not have a date certain. Without this information it is not possible for someone in opposition to the permit to logically plan the resources and timing of a response.

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Conclusions

1. The Ocean front property deserves the highest level of public protection
2. LCP Amendment process must keep up with the pace of legislative change
3. The Official Del Mar Certified LCP does not permit an accelerated ADU permit process
4. Permit was based on an Ordinance that was never approved or certified
5. Proposed structure would eliminate the ocean view while walking to the bluff
6. City's Notice of permit award fails to identify forfeiture date – the purpose of the notice



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Coastal Property Rights, Land Use & Litigation

September 2, 2022

VIA EMAIL

California Coastal Commission
7575 Metropolitan Drive, Suite 103
San Diego, California 92108
SanDiegoCoast@coastal.ca.gov

Re: Appeal No. A-6-DMR-22-0034 (Del Mar 107, LLC), Agenda Item W17a

Dear Chair Brownsey, Vice Chair Hart, and Honorable Commissioners:

I am the attorney for the applicant, Del Mar 107, LLC, c/o Thomas Harrington. We agree with staff's conclusion that the appeal does not present a substantial issue and fully support staff's recommendation that the Coastal Commission find *no* substantial issue. I write to point out certain errors in the staff report that make the question appear closer than it should be.

In the staff report dated August 23, 2022, staff states that "the proposed ADU does not adhere to the setback or height requirements of the current certified LCP" but recommends a finding of no substantial issue because "the ADU will not result in a significant adverse impact to public views and does not raise a substantial issue with regard to conformity with the City's visual resource protection policies in the LCP." (Staff Report at 3.) It is undoubtedly true that there is no significant impact on public views. But the staff report errs in its preliminary conclusion that the proposed ADU violates setback and height requirements. Contrary to the staff report, the City of Del Mar correctly found this project to be "consistent with the requirements of the certified Local Coastal Program." (Exhibit 5.)

The issue of the rear yard setback is not properly before the Coastal Commission because the appellants do not allege a violation of any rear yard setback requirement

The scope of a substantial issue hearing is limited. The sole issue for consideration is whether a "substantial issue exists *with respect to the grounds on which an appeal has been filed* pursuant to Section 30603." (Pub. Res. Code, § 30625(b), emphasis added.) "The grounds for an appeal [are] 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 [the Coastal Act]." (Pub. Res. Code, § 30603(b)(1).) Neither of the appellants alleges that the proposed ADU does

not conform to any rear yard setback requirement.¹

Mr. Monahan’s notice of appeal alleges that the “Proposed building is 16 feet high and Maximum permissible is 14 feet.” (Exhibit 4.) That is the only statement in his notice of appeal that might reasonably be construed as “an allegation that the development does not conform to the standards set forth in the certified local coastal program.” (Pub. Res. Code, § 30603(b)(1).) There is no mention of public access policies. Mr. Monahan discusses extraneous issues including the alleged circumvention of Del Mar’s design review process,² impact on the homeless population, potential blockage of his private view,³ and denial of his due process rights,⁴ but none of these issues is relevant to Del Mar’s certified LCP or the public access policies of the Coastal Act. In any event, Mr. Monahan makes no allegation concerning any rear yard setback requirement.

Mr. Monroe does not address the LCP or public access policies at all; he only complains that the applicant did not go through Del Mar’s design review process and that the proposed ADU “impairs” his and his neighbors’ private views. (Exhibit 4.) Mr. Monroe, like Mr. Monahan, does not allege a violation of any rear yard setback requirement. Therefore, the issue of conformity with the rear yard setback requirement is not properly before the Coastal Commission in this appeal, and the staff report should not have even addressed it.

The proposed ADU does not violate any setback requirement

Though the staff report should not have even addressed the issue, for the reasons outlined below, the report errs in concluding that the proposed ADU is not in conformance with the rear yard setback requirement.

Del Mar’s currently certified—but obsolete—ADU ordinance (hereinafter the “2017 ADU ordinance”) requires that an “ADU shall comply with the required setbacks of the applicable zone.” (Del Mar Mun. Code, § 30.91.040(N).) Here, the proposed ADU, and the single-family dwelling to which it is attached, are located at the rear of the lot. (See Exhibit 3.) As noted in the

¹ The city’s approval of the project was not appealed by any commissioner.

² An ADU is “considered and approved ministerially without discretionary review or a hearing.” (Gov. Code, § 65852.2.(a)(3).) Therefore, it is not subject to design review. Mr. Monahan’s protest is specious.

³ Private views are not governed by the Coastal Act or Del Mar’s LCP. (*Schneider v. California Coastal Com.* (2006) 140 Cal.App.4th 1339, 1346–1347 [“The California Coastal Commission has adopted the following statement regarding Section 30251: [¶] ‘The primary concern under this section of the Act is the protection of ocean and coastal views from public areas such as highways, roads, beaches, parks, coastal trails and accessways, vista points, coastal streams and waters used for recreational purposes, and other public preserves rather than coastal views from private residences where no public vistas are involved.’” [italics removed]].)

⁴ Mr. Monahan does not identify any property that has been taken from him without due process. Assuming he is referring to a potential impairment of his private view, California law does not recognize private views as a property right in the absence of a view easement. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 494 [noting that “neither state nor local law protects private views from private lands”].)

staff report, the minimum rear yard setback for this R2-zoned lot is 10 feet.⁵

After Del Mar enacted its 2017 ADU ordinance, however, the California Legislature amended the state ADU law. The new law became effective January 1, 2022, and requires local governments to approve ADUs with at least a 4-foot rear yard setback. (Gov. Code, §§ 65852.2(a)(1)(D)(vii); 65852.2(c)(2)(C).) Importantly for the present discussion, “[i]f a local agency has an existing accessory dwelling unit ordinance that fails to meet the requirements of this subdivision, *that ordinance shall be null and void and that agency shall thereafter apply the standards established in this subdivision for the approval of accessory dwelling units, unless and until the agency adopts an ordinance that complies with this section.*” (*Id.*, § 65852.2(a)(4).) Del Mar’s 2017 ADU ordinance fails to meet the statute’s requirements because, among other reasons, it requires an ADU to comply with all setback requirements of the applicable zone. The 2017 ADU ordinance is therefore null and void.

The City of Del Mar has since adopted a new ADU ordinance that requires only a 4-foot rear yard setback for ADUs, consistent with state law. (See Del Mar Ordinance No. 944, § 30.91.040(N).) Assuming that the new ADU ordinance is not effective until certified by the Coastal Commission, however, the city is required to apply the statewide standard, which is also 4 feet, as set forth above. Either way, the proposed ADU’s rear yard setback of over 7 feet exceeds this minimum.

The proposed ADU does not violate any height restriction

Del Mar’s 2017 ADU ordinance contains a height restriction of 14 feet, but as explained, that ordinance is now null and void. Assuming the new ADU ordinance is not yet effective, the city must “apply the standards established in this subdivision,” meaning subdivision (a). (Gov. Code, § 65852.2(a)(4).) Subdivision (a) of section 65852.2 contains *no height restriction* for ADUs. Therefore, the proposed ADU cannot violate any height restriction.

Alternatively, the 16-foot peak height of the proposed ADU is compatible with the 16-foot height restriction of the city’s new ADU ordinance. (See Del Mar Ordinance No. 944, § 30.91.040(L).) The 16-foot peak height is also under the 26-foot height limit of the underlying zoning. (See Del Mar. Mun. Code, § 30.20.070(C)(2).) The height of the building thus does not violate any applicable standard.

The appeal raises no substantial issue

Regardless of whether there is a technical violation of height and rear yard setback requirements

⁵ Normally, the rear yard setback for this R2-zoned lot would be 20 feet. (Del Mar Mun. Code, § 30.20.070(C)(1)(b).) But under Del Mar’s certified LCP, “[w]here an alley ten feet or greater in width abuts a ... rear yard, one-half the width of such alley, up to a maximum of ten feet, may be applied to the required amount of ... rear yard.” (Del Mar. Mun. Code, § 30.86.200(D).) Here, the rear of the applicant’s lot abuts an alley, Penny Lane, which is more than 20 feet wide at this location. (See Exhibit 3.) Thus, a 10-foot strip of the alley is applied to the rear yard setback, making the effective rear yard setback 10 feet.

(we contend there is not, for all the reasons set forth above), we fully support the staff report's conclusion that the appeal raises no substantial issue because there is no impact on public ocean views or access.

Conclusion

To summarize, the notices of appeal do not allege a violation of any rear yard setback requirement. Therefore, this issue should not even be considered. If the Coastal Commission does consider the issue, the rear yard setback of approximately 7.1 feet exceeds the minimum of 4 feet under either Government Code section 65852.2 or the city's new ADU ordinance. Per section 65852.2, there is no height limit applicable to this project. Alternatively, the project is within the 16-foot height limit of the city's new ADU ordinance and the 26-foot height limit of the underlying zoning. Finally, even if there is a technical violation of the rear yard setback requirement or height restriction, the project has no impact on public views or access; therefore, the appeal raises no substantial issue.

Very truly yours,

AANNESTAD ANDELIN & CORN LLP



Lee M. Andelin

cc: Jim Sneed
Thomas Harrington

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Appeal no. A-6-DMR-22-0034
Name Greg Monahan
Position Opposition

September 4, 2022

To: Commissioners and Interested Persons

From: Greg Monahan

Subject: Response to the Coastal Commissions September 1, 2022, Addendum to item **W17a, A-6-DMR-22-0034 (Del Mar 107, LLC)**, for the Commission Meeting of September 7, 2022

The purpose of this correspondence is to respond to the Staffs Addendum dated September 1, 2022 to the Staff report item W17a, A-6-DMR-22-0034 (Del Mar 107, LLC), dated 8/23/22 for the Commission Meeting of September 7, 2022.

1. Identification of the official Certified Del Mar LCP. As I have stated numerous times in prior submittals, I was focused from day 1 on getting a copy of the Certified LCP, the "Rule Book," because it was made clear that lack of consistency with the Certified LCP was the only grounds for appeal. The only way to determine the consistency is to compare the actual language of the entire Certified LCP with the process used to issue the permit. After 5 phone calls, leaving urgent messages requesting copy of the LCP, to 3 staffers in the Del Mar planning department I had not even received a return phone call. Desperate to get a copy of the rule book I sent an email to the City of Del Mar who owns and controls the language in the LCP and is responsible for keeping it up to date. My written request was pursuant to provision 6253(b) of the California Government code (Public records Act (PRA)). My request described in detail (a) what I wanted and (b) why I needed it. I specifically stated "send me a copy of the city's official certified LCP that should be used to evaluate the conformity of the project to the requirements of the LCP"

The PRA law requires the city to make records available promptly and they were. In response the city of Del Mar sent a long (300 pages) well integrated Document consisting of both Implementing Ordinances (IP) and Land Use Plan (LUP). The cover page of the (IP) included the city's official logo on the top followed by the label in bold print "Local Coastal Program Implementing Ordinance" Near the bottom of the page was a box containing the words "Certified by the California Commission on September 11, 2001" This document was clearly an official Del Mar document. It was the "Rule Book" I had been desperately seeking that could be used to evaluate the projects consistency with the Del Mar official Certified LCP.

The officially provided Certified Del Mar LCP has NO mention of ADUs whatsoever.

There is NO chapter 30.19 or chapter 30.21 or chapter 30.91 in the Official Certified LCP. These chapters are the key chapters the City relied upon to issue the permit in

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question and therefore the process used to issue the permit cannot possibly be consistent with the current Certified LCP.

The Commission staff desires to add language to their 8/23/22 report by means of their 9/1/22 addendum. The staff basically add language from a document referred to as LCP-6-DMR-17-0062-2 to describe coverage of ADU units that was not covered by the City of Del Mar's provided version of the Official Certified LCP. Unfortunately, the LCP-6-DMR-17-0062-2 document **does not raise to the dignity of an Official Certified LCP amendment.**

In my all-out effort to find the "Rule Book", as a backup to my request to the city, I made a similar written request to the Commission. In response I was provided the LUP and IP for the city of Del Mar with the caveat that neither document was up to date. I was also provided 2 Coastal Commission staff generated reports, as opposed to Del Mar generated documents, entitled LCP-6-DMR-20-0044-2 and LCP-6-DMR-20-0044-2.

The LUP and IP provided were identical to the ones that the City of Del Mar provided and again were complete well integrated documents. And, as with the Del Mar provide documents, they had no mention of ADUs.

The staff reports are just that –staff reports- not Official Del Mar City Certified LCPs for the following reasons:

- a. They are not labeled as "Local Coastal Program" with a certification date
- b. They are not a complete LCP i.e., the 2001 IP has about 160 pages and the underline and cross out exhibit has only 46
- c. The summarized report language is not integrated into the total document. There are sections that refer to other sections that are not included. How do you determine what that missing section provides? The missing section number does not have a revision date on the reference
- d. MOST IMPORTANTLY the underline and cross out exhibit (closest thing to an actual document) has stamped in large letters on every page DRAFT How can the Coastal Commission possibly Certify a DRAFT DOCUMENT.
- e. The staff report describes a process and does NOT PROVIDE AN INTEGRATED LCP DOCUMENT WITH THE DETAILED WORDS THAT DETERMINE THE RIGHTS AND LIABILITIES OF THE PARTIES
- f. The city of Del Mar when required by law to produce "the cities official certified LCP that should be used to evaluate the conformity of the project to the requirements of the LCP" did not produce LCP-6-DMR-20-0044-2
- g. In the WHEREAS section of the original findings to justify the permit approval the city never mentioned LCP-6-DMR-20-0044-2
- h. Finally the staff has already admitted that LCP-6-DMR-20-0044-2 has not been approved or certified.

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2. The reference to 16'-18' pertains to the total structure running along the eastern side of the lot. The total structure consists of the combination of the old structure, 18', and the new ADU structure 16'.
3. Penny lane is traveled by walkers enjoying the very nice ocean views with the goal of taking advantage of the bench at the west end of the street. As one walks to the bench there is a pretty ocean view to the northwest between the existing structure on lot 107 and the house on the northwest corner of lot 101. If the proposed 16' high ADU is built as planned the new extended structure will totally obliterate this view. A picture of the view was submitted with the prior submittal.

In addition, the Del Mar undisputed (LUP) pages 73-79 states there is a recognition that protection of numerous view corridors to the ocean is of paramount to the overall goal of protecting the scenic and natural resources which characterize the city. Also, Policy IV-27 states "Continue to implement the process of design review for new construction projects in order to preserve views of community-wide importance and enhance the small-town village atmosphere of Del Mar." Skipping the design review process as is part of the ADU process would be in direct conflict with the provisions of the LUP.

4. The staff raises the issue of "new" assertions being raised but fails to list and or describe any. I cannot respond to the phantom assertions. The last issue raised by the staff appears to relate to a complaint about a timely submittal of City's Notice of Final Action. My statements related to the fact that the end of the 10-day appeal period was not defined because it was to start upon **Commissions receipt** of the City's notice and the **date of Commissions receipt was never provided in the notice papers, prepared by the City, that I received.** The dates of the preparation or mailing of the papers by the city are irrelevant and only adds to the confusion and stress associated with responding to such an important and complex set of issue within a few days just prior to a major 4th of July holiday weekend. Not surprising it was virtually impossible to get any help from the city as most of the staff were not in the office during this response period.

FW: pictures for response to Addendum for item W17a, A-6-DMR-22-0034

SanDiegoCoast@Coastal <SanDiegoCoast@coastal.ca.gov>

Tue 9/6/2022 8:37 AM

To: Leach, Stephanie@Coastal <stephanie.leach@coastal.ca.gov>

Hi Steph,

Here is one more public comment for A-6-DMR-22-0034.

Thank you,

Adriana Palato

Management Services Technician

California Coastal Commission

7575 Metropolitan Drive #103

San Diego, CA 92108

From: Greg Monahan <gregmonahan8@gmail.com>

Sent: Monday, September 5, 2022 5:58 PM

To: SanDiegoCoast@Coastal <SanDiegoCoast@coastal.ca.gov>

Subject: Fwd: pictures for response to Addendum for item W17a, A-6-DMR-22-0034









~~J. Dwelling. A building or portion thereof used exclusively for residential purposes, including one family, two family, and multiple dwellings, but not including hotels, boarding houses, lodging houses, and all forms of vehicles including immobilized vehicles.~~

~~K. Dwelling, Multiple Family. A building, portion thereof or buildings used for occupancy by three or more families (including their guests, servants and employees of each such family) living independently of each other, and containing three or more dwelling units. "Multiple Dwelling" shall include apartment houses, bungalow courts and group houses.~~

~~L. Dwelling, One Family. A detached building used exclusively for occupancy by one family (including their guests, servants, and employees) and containing one dwelling unit.~~

~~M. Dwelling, Two Family. Two dwelling units on one lot, each used exclusively for occupancy by one family (including their guests, servants, and employees) living independently of each other. The two units may be attached or separate.~~

~~N. Dwelling Unit. One or more rooms in a building or portion thereof used, intended, or designed with a kitchen and living, sleeping, and eating areas that are used by or intended to be used for occupancy and occupied by one family or more persons living together with common access to and common use of all areas within the unit (including their guests, servants and employees) for living or sleeping purposes, and having only one kitchen.~~

~~O. Dwelling Unit, Attached. A dwelling unit not attached to another dwelling unit by use of a common wall.~~

~~P. Dwelling Unit, Clustered. In the R-1 Zones, shall mean the siting of dwelling units in close proximity to one another, but not attached. A dwelling unit that is sited in close proximity to another dwelling unit or dwelling units. In the RM and R-2 Zones, shall mean the site of dwelling units may be attached, in close proximity to one another, including attachment.~~

~~Q. Dwelling Unit, Efficient. A dwelling that combines kitchen, living, and sleeping rooms into one room, such as a bachelor or efficiency unit.~~

30.04.070 "G" Words and Phrases Defined.

A. through P. [No change]

G. Guest House. See "Accessory Living Quarters."

H- G. Guest Room. [No change in text]

