

CALIFORNIA COASTAL COMMISSION

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



Th11a

A-5-LGB-22-0060 (City of Laguna Beach)

March 9, 2023

Correspondence

Th11a & Th12a

March 3, 2023

Re: A-5-LGB-22-0060 and A-5-LGB-22-0025

From: Mark and Sharon Fudge, Laguna Beach

Dear Chair Brownsey, Coastal Commissioners and Staff,

We thank you for this opportunity to express our objections to the staff recommendations for two items we have involvement with on this month's agenda.

The projects at the Anita Street Stairway and 1007 Gaviota are directly adjacent to one another and inextricably linked. They involve a public project to improve a right of way and a private project that encroaches into that public right of way.

When looked at in the simplest terms, the staff recommendations for these two projects turns the mandate of 'providing maximum public access to all the people' on its head. **Instead of requiring the city to provide maximum access, staff is requiring the adjacent landowner (a private party) to encroach into a public right of way as a condition of receiving a permit.** By definition,¹ Revocable Encroachment Permits (REP) are issued to benefit the adjacent land owner (the holder) and they are considered to be an extension of the yard of the holder. The result of this scenario is that the city is absolved of responsibility for the provision of maximum access and we have no idea what the private party might ultimately propose for the space. The currently proposed improvements submitted by the private landowner are: 1) subject to change; 2) inadequate and don't provide anywhere near maximum public access; and 3) are not guaranteed to ever be carried out in the case the applicant sues, sells, or withdraws the project as he has previously done.

A little bit of history might be helpful here -

The items that are *italicized* relate to the 1007 Gaviota project:

2014 - Laguna Beach issues repair/maintenance permit for the structure at 1007 Gaviota. The scope of this permit is exceeded by Mr. Gray and the project was red-tagged and stopped. Work completed included the demolition of more than 50% of the existing structure.

March 2017 - The project to rehabilitate the beach access stairs at Anita Street was first considered by the City. A contract to a consulting group was approved.

October 2017 - The City's Design Review Board held a hearing to consider the new structure that was to be built at 1007 Gaviota.

¹ LBMC 11.50

April 2018 - The city's Planning Commission considered and rejected a proposal to abandon a portion of the public right-of-way and sell it to the adjacent landowner (Mr. Gray). This was scheduled to be done without a CDP which we objected to. Coastal Commission staff stepped in and informed the City that a CDP would be necessary.

May 2018 - The City Council's agenda included an item to approve the above mentioned abandonment and accept a \$540,000 contribution from the adjacent landowner (Mr. Gray). The item was continued to the June 2018 meeting where city staff requested more time to review the project. It never came back before the Council and was evidently dropped.

February 2019 - \$510,000 was transferred from the budget for the Anita Street stairs to the Pearl Street stairs project. (As you might remember, the Pearl Street stairs were built and just recently completed but have already been back to the Commission seeking emergency repair permits which were heard at last month's Coastal Commission hearing.)

March 2021 - DRB considered and approved the request to 'demolish an existing duplex and construct a new single-family dwelling'. This decision was locally appealed to the City Council which upheld the approval. This application included the use of the public right of way as a private driveway.

June 2021 - Appellants Mark and Sharon Fudge, and Councilman George Weiss appealed the city's approval of the new house to the CCC.

*August 2021 - The CCC was scheduled to hear the appeal, and had written a staff report recommending a finding of 'substantial issue.' The **applicant withdrew the application** prior to the hearing.*

April 2022 - The DRB considered and approved a new application for a newly designed home that eliminated the need for the use of the public right of way as a private driveway (the entrance to the garage was moved to allow access from the street). However, the applicant still desired to maintain an encroachment into the right of way and offered to place some minor public amenities there as well.

June 2022 - Mark and Sharon Fudge appealed the decision to approve the newly designed home to the Coastal Commission.

July 2022 - the appeal for the newly designed home was heard by the Commission and substantial issue was found. The de novo portion of that hearing is the subject of today's hearing (March 2023).

September 2022 - Planning Commission approved the public project to rehabilitate the Anita Street stairs that is the subject of the current appeal (substantial issue consideration March 2023).

The most important detail of the above timeline is that the scope and configuration of the house design changed in a significant way between the first proposal in March of 2021 and the second in April of 2022 in that the location of the garage moved from the northern elevation of the structure to the eastern elevation. This change of location meant that the driveway that previously encroached in the public right of way was no longer necessary, rendering the encroachment no longer necessary.

The second most important detail is that although the City had full knowledge that the adjacent homeowner no longer had an underlying need for an encroachment, and had this knowledge PRIOR to the presentation of the public works project to the Planning Commission, there was no consideration of revoking the previously approved revocable encroachment permit and making use of that extra 2000 sf (at a minimum) in the public works project to provide maximum access. Importantly, the staff report for the 1007 Gaviota project for your hearing on 3/9/23 states that the Revocable Encroachment Permit was never issued by the City to the applicant.

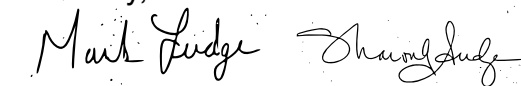
In this case the REP benefits the owners of 1007 Gaviota but has precluded the city from incorporating a superior set of amenities in coordination with the work currently being proposed at the public accessway adjacent. It only makes sense that the city incorporates a complete project NOW and that they will be responsible for it's timely completion and ultimate maintenance.

We are asking the Commissioners to **1) find substantial issue with our appeal A-5-LGB-22-0060; and 2) DENY permit A-5-LGB-22-0025.** If a denial is not possible, we ask that, at a minimum, the applicant be required to remove any obsolete or unpermitted seawalls immediately, and that the amended plans to be submitted be limited to the parcel owned by the applicant (i.e. do not require them to obtain a revocable encroachment permit).

Following this letter are explanations of our contentions in further detail, by project. Also included are some 'visuals' that may be helpful in understanding it all.

We appreciate your consideration of our requests and your tireless efforts to protect the coast and public access to the coast. If you have any questions, we are available to answer them at your convenience.

Sincerely,

Handwritten signatures of Mark and Sharon Fudge in black ink.

Mark and Sharon Fudge

P.O. Box 130

Laguna Beach CA 92652-0130

fudge1@cox.net

The Anita Street Stairway project A-5-LGB-22-0060

comments:

- Staff's recommendation of a 'no substantial issue' finding is inconsistent with previous actions taken by the Commission to ensure that not just public access, and not just 'better' amenities, but **maximum public access** is provided for all people in accordance with the California Constitution and the Coastal Act.

For instance, in "Harbor Center" the Commission objected to a proposed reduction in the width of a walkway (from 10' to 8') because it did not maximize public access as required by the Coastal Act. In the "Seaside Co Fence Extension" matter, the Commission equated maximum access to "unrestricted access" when considering the hours of availability of a walkway and required an expansion of those hours. Excerpts from those staff reports are included at the end of our comments.

- The Laguna Beach Planning Commission was not presented with a complete picture of the project's potential as the project application failed to address the existence of an encroachment into the public right of way. Instead, they were told that the encroachment area was unavailable to the project because the adjacent landowner had a permit.
- The provision of maximum access relies on a private land owner that isn't even a party to this permit. He is not compelled to EVER provide public access or amenities. He may reject the permit, or he may withdraw the project as he has done previously, or he may never act on the permit.
- Planning Commission's permit condition to recommend consideration of putting public amenities in the ROW to City Council for future work was meaningless. The moment is now, the opportunity is now. The decision makers were misinformed about the process. They were not told that the project next door had been redesigned² to eliminate the need for any encroachment into the ROW and were incorrectly told that the Coastal Commission has jurisdiction over revocable encroachment permits.
- Planning Commissioners were hopeful that a view bench or viewing area could be provided in the proposed design but were told it was not possible. In reality, it was only 'impossible' because the proposed design failed to incorporate the area most suited to those amenities into the project plan (the encroachment area). Due to the challenging topography of the site, the only place to provide amenities that can be used by people with disabilities is the area where the driveway of the adjacent property was located. This would be the perfect location for a handicapped parking space, picnic tables or a level viewing area on the site.

Our Request:

We ask that you make a finding that our appeal **presents a substantial issue** and review the project in its entirety in a de novo hearing to ensure that maximum access is provided by the City to all the people as required by the California Constitution and the Coastal Act.

²repositioning of garage allowing for access via Gaviota instead of Anita)

Th9a-5-2014.pdf 3-13-006 (Harbor Center)

However, the proposed reduction in width of the northern portion of the bayside walkway does not maximize public access as required by the Coastal Act. The proposed new retail unit will remove a significant portion of the currently 20+-foot-wide public walkway for use as a commercial retail establishment, resulting in a walkway that is only eight feet in width (Exhibit 2). Currently, this 20+-foot-wide area is especially important because it provides outdoor public tables and chairs and allows easy movement and congregation to observe the views of Morro Rock and the Bay. Although eight feet is the minimum width required by the LCP (which can be used as guidance), the Coastal Act provisions for development of this type require that maximum public recreational opportunities shall be provided. As stated above, the Commission has generally found ten feet to be the appropriate width for lateral public access in this important and well-used visitor serving area. Although the Commission has occasionally approved projects that have provided less than ten feet, these exceptions were for remodel projects that were constrained by existing development, did not include extension of the building footprint, and did not result in the loss of existing public access area. Therefore, especially given the project's impact on existing public access, it is appropriate to maintain the continuity of the 10-foot wide access along the Embarcadero and maintaining a ten foot lateral access width is necessary to meet the Coastal Act requirements regarding maximizing public access.

Therefore, to achieve Coastal Act consistency, Special Conditions 1(a) and 2(b) require that a minimum ten-foot-wide bayside lateral access be maintained. As conditioned, the project is consistent with the Coastal Act's public access and recreation policies.

F13a-10-2005.pdf 3-04-075 (Seaside Co Fence Extension)

Coastal Act Section 30210 states that maximum public access for all people shall be provided consistent with public safety needs. Rather than providing maximum (i.e., unrestricted) public access, the project proposes to limit public access through Walkway 6 to the hours when the Boardwalk is open for business at the east end of the park to preserve public safety and prevent tampering of existing rides, though it has not clearly established the specific times (i.e., days and times) when access would be available to the public. Accordingly, the proposal is not consistent with section 30210 of the Act. To bring the project into conformance with the Coastal Act, Special Condition 2 expands the required hours under which any gate at Walkway 6 must be open and available for general public use to include whenever the seasonal gate shown by Exhibit C is open, and as necessary to restore historic hours of availability. In addition, the permit has been conditioned to require the applicant to submit an access signing plan, providing for the installation of access signs at conspicuous locations within the Boardwalk parking lots, Boardwalk entry points, and along the San Lorenzo River levee trail. The Applicant is also required to update its Attraction Map to reflect the availability of public access at Walkway 6. These conditions are necessary to adequately inform the public of available access routes, particularly in light of the unpermitted restriction to public access promulgated by the Seaside Company in the recent past.

The 1007 Gaviota project comments:

1. The extent of work to redesign this house to comply with the certified LCP cannot be characterized as anything but significant, major, and substantial. It will require a complete overhaul (reducing the size by 25%) and is likely to be rejected by the applicant. This possibility would leave the property in it's degraded and dilapidated state for an even more extended period than it already has been for the last 10 years.

If redesigned, the review process will happen publicly at the local level where there is no opportunity for appeals or challenges to be made by any of the currently interested parties due to limitations for such at the city level. There will be no opportunity for the public to come back before the Coastal Commissioner either, as the plans will be approved by the ED, not in a public hearing.

2. The REP is unnecessary - the need was eliminated in the previous design revisions related to the original appeal we filed in 2021. The original project was withdrawn by the applicant when a finding of 'substantial issue' was recommended by staff. Specifically, the original design included a garage that took access from the Anita Street face of the structure and the new design allows for garage access directly from Gaviota Street so the driveway encroachment is no longer necessary.

By definition, REPs are issued to benefit the adjacent land owner (the holder). They are considered by the certified LCP (LBMC 11.50.040) to be an extension of the yard of the holder. They are also to be allowed only when it can be demonstrated that the uses will not interfere with the present and prospective public use of a right-of-way (LBMC 11.50.050). In this case the REP benefits the owners of 1007 Gaviota but has precluded the city from incorporating a superior set of amenities in coordination with the work currently being proposed at the public accessway adjacent.

3. The retaining walls are obsolete because the purpose of those walls was to stabilize the site due to the steep slope and the distance down the slope at 1007 Gaviota only. Because the walls were only meant to protect an 'existing house' and the project proposed is for 'new development', shoreline protective devices are prohibited by the LCP

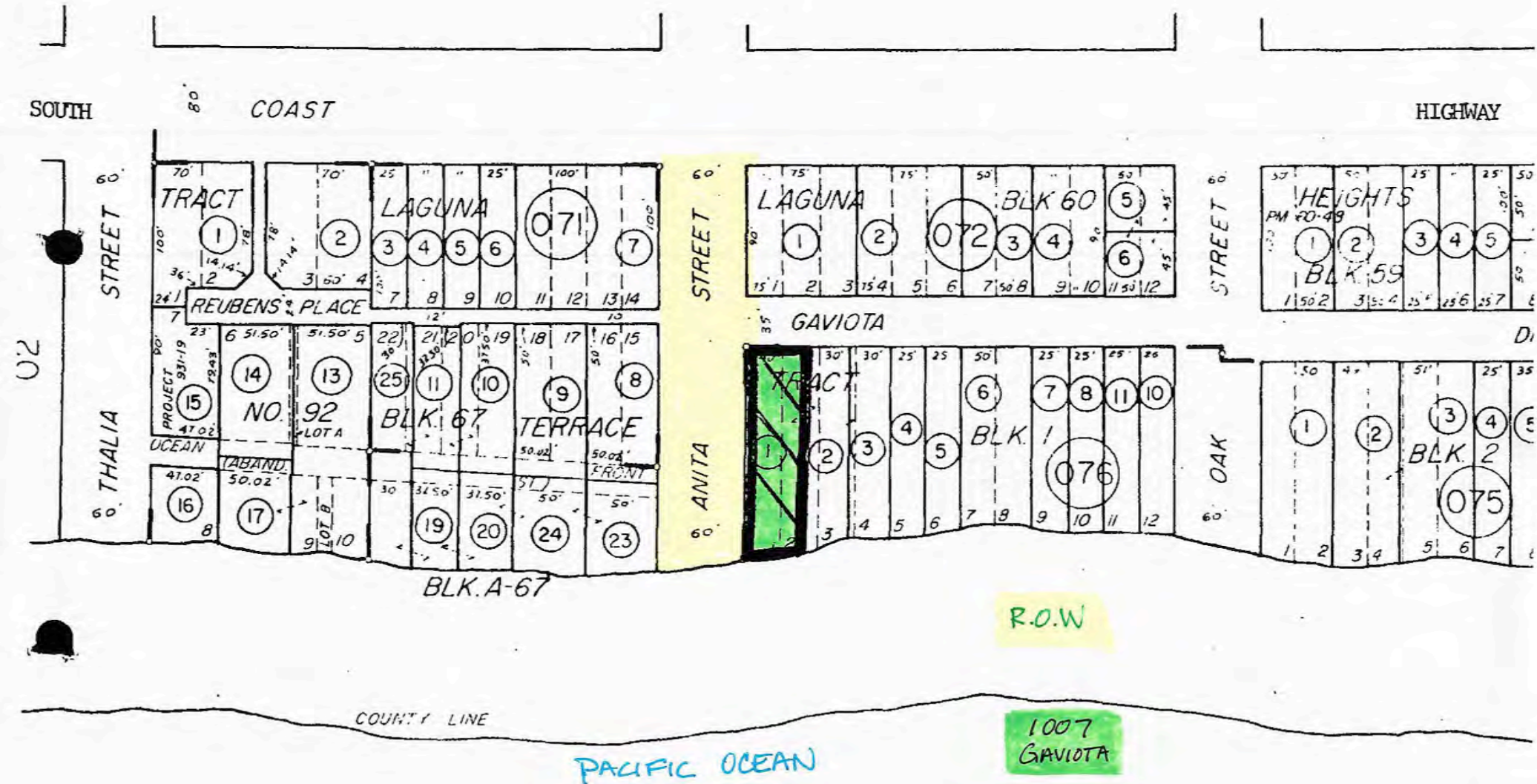
The house next door at 1021 Gaviota does not rely on the bluff protection devices at 1007 because it was issued it's own independent CDP (A-80-7288 approved on October 7, 1980). This CDP was granted **prior** to the one at 1007 (A-80-7442 approved on November 17, 1980 and corrected on December 5, 1980).

Requests -

Deny the permit - there are way too many conditions that will be unenforceable. There are way too many unknowns.

If the permit is approved:

1. limit the development to ONLY the underlying parcel (do not require them to obtain a revocable encroachment permit)
2. require the removal of any obsolete/unpermitted retaining walls immediately
3. include the mitigation measures required by the city's mitigated negative declaration on the first iteration of the project. These mitigation are related to protections of archeo/paleo and cultural resources.



MARCH 1974

LAGUNA TERRACE
LAGUNA HEIGHTS NO. 3
TRACT NO. 83
TRACT NO. 92

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M.M. 8-1
M.M. 10-32
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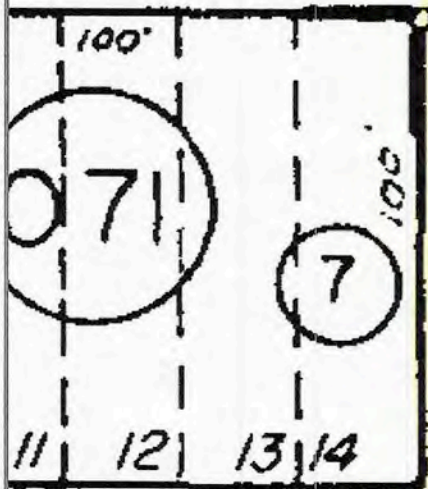
Anita St. Stairs, Laguna Beach

City development

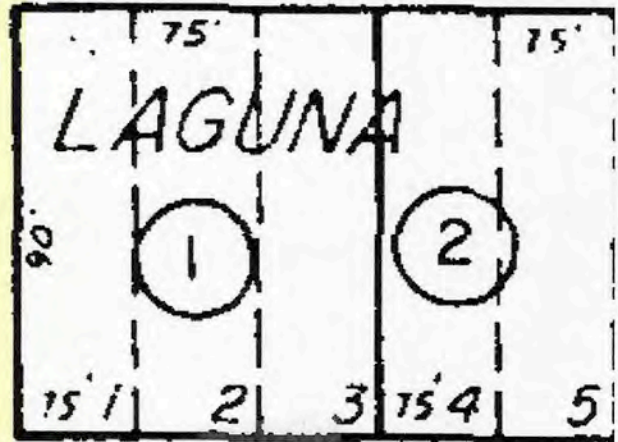
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Exhibit 2
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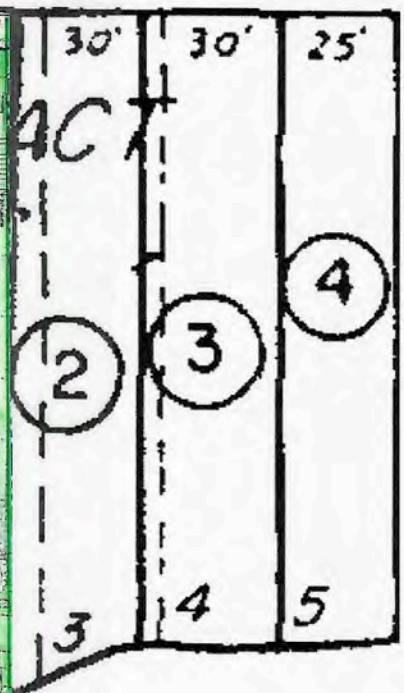
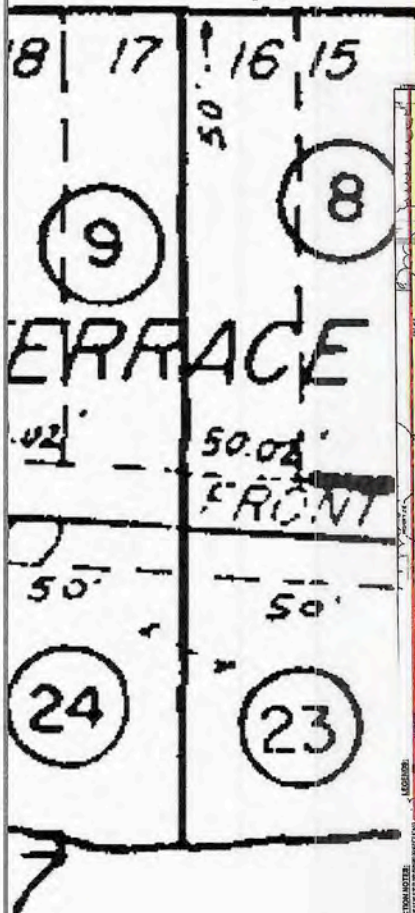
PACIFIC COAST HIGHWAY



ANITA STREET



GAVIOTA



R.O.W.


EXTENT OF 1007 DEVELOPMENT

PACIFIC OCEAN



Private Party
Project area

City Project area



Approximate location
of property line

Approximate area of
encroachment



March 3, 2023

California Coastal Commission
455 Market Street Suite 300
San Francisco, CA 94105

Re: Item Th11a (A-5-LGB-22-0060) City of Laguna Beach, Laguna Beach

Dear Chair Brownsey and Commissioners:

The Sierra Club Orange County Conservation Committee is concerned that this project not only will deny full public access, but may set a bad precedent for other stairways and paths to access the coast.

In this project, approved by the City of Laguna Beach, maximum access was not provided as required by the California Constitution and the Coastal Act.

City decision makers did not review the project 'as a whole' by including the entirety of the 60' wide Public Right Of Way (ROW) and the revocable encroachment permit (REP). The REP, issued to the adjacent landowner to use approximately one-third of the ROW, was not mentioned in the City staff report or in the Initial Study/Mitigated Negative Declaration.

Due to this oversight, decision makers were misinformed and failed to consider the revocation of said encroachment permit (REP) at the time of the project's review.

This unfortunate omission meant that only two-thirds of the available land was considered instead of the entire Public Right Of Way.

Providing maximum access is for all the people, by definition, including people with disabilities. Yet, there is nothing in the City decision that addresses the needs of the disabled community.

We look to the Coastal Commission (CCC) for their guidance in this area, and their insistence on compliance with the CCC's Environmental Justice Policy.

*The California Coastal Commission's commitment to diversity, equality and environmental justice recognizes that equity is at the heart of the Coastal Act, a law designed to empower the public's full participation in the land-use decision-making process that protects California's coast and ocean commons for the benefit of all the people. In keeping with that visionary mandate, but recognizing that the agency has not always achieved this mission with respect to many marginalized communities throughout California's history, the Commission as an agency is committed to protecting coastal natural resources and providing public access and lower-cost recreation opportunities for everyone. The agency is committed to ensuring that those opportunities not be denied on the basis of background, culture, race, color, religion, national origin, income, ethnic group, age, **disability status**, sexual orientation, or gender identity.*

At this location, the areas easily accessible to the disabled community, including a bench or viewing area, would only be available on the portion of the ROW that has been granted to the adjacent landowner.

These amenities cannot be provided on the portion of the ROW considered by the City Planning Commissioners because it is too narrow and too steep. This oversight must be corrected in a de novo review of the project, providing the Commissioners with an opportunity to apply appropriate Environmental Justice policies.

Concerns of the Sierra Club also include the precedent-setting possibilities of this decision on a statewide basis.

Based on our knowledge and experience, the provision of public access/amenities is primarily left in the hands of public agencies or commercial ventures. This is not a matter for private homeowners who stand to benefit disproportionately through the issuance of permits to sort out the access amongst themselves.

We believe the City's decision, and CCC staff's recommendation to not find a substantial issue with the appeal being heard, results in an inferior project with regards to Section 30210 of the Coastal Act.

Section 30210: 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.

The priorities of public access are superior to private needs when considering development on a public site - especially one related to coastal access. If this project is approved as presented, the opportunity to provide a better public experience will be lost - forever.

This 'giveaway' of public land use is egregious and should not be advanced. Providing public use of the FULL public right of way is the correct and lawful decision to make, and would uphold the policies of the Coastal Act.

We ask that the Commissioners make a finding of 'substantial issue' with the appeal and review the entire project in a future de novo hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Raymond T. Heimstra". The signature is fluid and cursive, with the first name "Raymond" and last name "Heimstra" clearly distinguishable.

Ray Heimstra, Chair
Sierra Club Orange County Conservation Committee



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Refer To File # 504223-0001

July 8, 2022

Th 12a

Donne Brownsey, Chair
Coastal Commissioners
California Coastal Commission
South Coast District Office
301 E. Ocean Boulevard, Suite 300
Long Beach, CA 90802

Re: Commission Appeal No. A-5-LGB-22-0025 (Mike & Lori Gray)
Hearing Date: March 9, 2023 Agenda Item: Th 12.a

Dear Chair Brownsey and Honorable Coastal Commissioners:

This firm represents Mike and Lori Gray, the owners of the oceanfront property at 1007 Gaviota Drive, Laguna Beach, who, after over 10 years of effort, seek Commission approval of their proposed residential remodel.

The last two years marked a commendable, cooperative effort between the Grays, the City, and Commission staff in which the Grays addressed all of the issues raised, leading to City approval of the proposed remodel, in conformity with the LCP and the public access and recreation policies of the Coastal Act. The bluff edge was determined and approved by the City, consistent with this Commission's 1980 CDP "top of the bluff" determination at the upper retaining wall and two expert reports by Geofirm (2021) and GeoSoils, Inc. (2022 "Final Coastal Bluff Edge Evaluation") and a third peer review by the City's third-party consultant confirming that location. The City approved the remodel with a 25-foot setback. That is the Project we ask the Commission to approve. (Please see Exh. 1 hereto.)

Unfortunately, the staff recommendation would nullify that past effort. While the Grays willingly agree to nearly all of the special conditions recommended, **they specifically object to Special Conditions 1 (the first paragraph), 1.a, 1.b, and 1.g**, insofar as they improperly redetermine the location of the bluff edge as being substantially landward and then add a 25-foot setback on top of that. As a result, the staff recommendation is not for approval; it is a de facto denial. It would destroy the proposed residence, making it unbuildable, and also makes it impossible for the Grays to provide the collaborative public access, native landscaping, and related public amenities in the Anita Street right-of-way that have been intended to complement

Donne Brownsey, Chair
Hon. Coastal Commissioners
March 3, 2023
Page 2

the City's own access and sewer lift project, agendized immediately before this item as Item Th11.a.

As discussed below, the staff recommendation would repudiate the 1980 Commission's CDP "top of the bluff" determination, which, as a matter of settled law, the Commission may not do. The recommendation proposes a redetermined and bizarrely configured bluff edge, which is fundamentally flawed for several reasons and not supported by the LCP or the facts, and then arbitrarily sets an irregular 25-foot setback line. The staff recommendation would result in an unconstitutional taking with respect to the 1980 CDP and the proposed development, a violation of substantive due process, and a denial of equal protection, as it demonstrably treats the Grays' proposed residence differently from all of the other residences, upcoast and downcoast, on Gaviota Drive, which are larger and situated far seaward, including to the beach below.

Accordingly, we respectfully request that the Commission and Staff revisit the staff recommendation. While our objections are detailed below, at the conclusion of this letter we ask the Commission to consider the many factors that enable it to either approve the proposed Project, consistent with the 1980 CDP and the City's approval, or to do so in the exercise of its discretion in order to achieve that result. (See pages 15-17.)

To that end, we ask simply that the reference in Special Conditions 1 (the first paragraph), 1.a, 1.b., and 1.g, to "from the bluff edge identified in Exhibit 4" be revised to read instead "from the bluff edge identified in the GeoSoils 'Final Coastal Bluff Edge Evaluation (October 20, 2021)'."

I. Procedural Background

The Grays have spent 10 years before the City of Laguna Beach in an effort to remodel their existing house. In May 2021, the City approved a prior iteration of this remodel, which was appealed to the Commission (A-5-LGB-21-0043). The Commission found substantial issue. Thereafter, the Grays determined that the best course was to withdraw their application and return to the City to work closely with both the Commission and City staffs to address each of the concerns noted in the Commission's substantial issue staff report. As a result, the Project was significantly revised, with the two staffs closely reviewing and dictating the changes at each step. Indeed, questions that Commission Staff asked were addressed and changes that Staff requested were, in turn, required by City staff and agreed to by the Grays. Still further, the Grays volunteered substantial public improvements in the Anita Street right-of-way, including an attractive vehicle drop off and pickup area for beachgoers (and especially children being dropped off at the beach by the parents), bikes racks, and a concrete bench. It was, as noted, a case of commendable collaboration between the two staffs and compliance by the Grays.

On April 28, 2022, the City's Design Review Board (DRB) unanimously voted to conditionally approve design review and a CDP for the major remodel of the existing residence. The resulting residence – although not disclosed by the Staff Report – is completely compatible with the surrounding neighborhood, except that it is smaller, lower in profile, and located further landward than any of the neighboring residences, upcoast or downcoast, on Gaviota Drive. (Exhs. 2 hereto; Staff Report, Exh. 1, pp. 1-2, and Exh. 2, pp. 19, 21.) As approved, it complies with the stringline and all required setbacks, including a 10-foot deck setback that Commission Staff itself dictated just prior to City approval, and with the guidance from Commission Staff and as required by the City, the Project is fully compliant with the LCP and public access and recreation policies of the Coastal Act.

The Project also has a unique history. It does not come before the Commission with an unprotected bluff. In 1980, the Commission approved a CDP for a separate project – the restoration and stabilization of a bluff that failed not only across this property but the adjacent downcoast property as well. That CDP permitted the retaining wall system that now protects both properties, as well the upcoast Anita Street public access stairs to the beach below. The Commission-issued CDP expressly marked the “top of the bluff” at the upper retaining wall. (Exh. 4 hereto.) The prior landowner vested that permit with the bluff repair. He also complied with the Commission's 1980 permit conditions, dedicating lateral public access over the sandy beach – a popular, wide beach enjoyed by the public (as evidenced by the City's concurrent application on your agenda as Item 11.a to implement additional public access and City sewer lift station improvements). (Exh. 5 hereto.) As discussed below, the current staff recommendation would unwittingly result in a taking or, alternatively, forfeiture of the dedicated beach access.

It also is worthy of note that the City of Laguna Beach weighed in previously to address the issues as well (*See* Substantial Issue Staff Report, Exh. 5), presumably because the City, too, felt that its positive interaction with Commission Staff during its review process compelled the conclusion that we now ask the Commission to make – an approval with the house in the location proposed and approved by the City.

II. The Grays Did Literally Everything Asked of Them by Both the Commission and the City, and Then Even More, as the Commission Recognizes in the Concurrently Issued Staff Report on the City's Anita Street Improvements

Before proceeding to the issues, we believe it is critical to emphasize just how commendably cooperative the Grays have been in pursuing their proposed residence. As noted, after the initial City approval was appealed to the Commission and a Substantial Issue Staff Report issued, the Grays elected to withdraw and work with the City and Commission staff to address and resolve all issues. This included:

- For nearly 100 years, the existing home has taken lawful driveway access to the garage from the Anita Street right-of-way. Staff questioned that driveway access, so the Grays redesigned the home to take direct driveway access off Gaviota Drive instead.

- Staff questioned whether the beach-level retaining wall should be removed as unpermitted or obsolete. The Grays produced the Commission permit for the wall (No. A-80-7442) and submitted reports from the consulting geologist demonstrating that the wall is not obsolete and continues to function and provide bluff stability on this property and the adjacent downcoast property, exactly as designed for over 40 years now.
- Staff indicated that an up-to-date wave run-up and sea level rise assessment must be prepared. The Grays had GeoSoils, Inc., prepare the required report.
- Staff stated the City should impose a condition requiring a waiver of the right to future shoreline protection. The Grays proactively proposed, and the City imposed, the condition.
- Staff stated the City should require a bluff edge determination. The City required a further bluff edge determination. In addition to producing the Commission's 1980 CDP which identified the "top of the bluff," the Grays had two additional bluff edge determinations prepared by both Geofirm and GeoSoils, both of which were peer-reviewed and approved by the City's geotechnical reviewer, Kling Consulting Group.
- Staff stated the City should determine the appropriate setback from the bluff edge, also noting that the LCP provides some discretion to determine whether the site should be subject to the 25-foot bluff edge setback. The Grays provided the 25-foot setback from the multiple consultants' identified bluff edge.
- Staff indicated the City should determine that the proposed remodel is consistent with the stringline. The City did so, and the Grays demonstrated, and the City concurred, that the proposed residence complies with the stringline.
- Staff stated that the adverse visual impacts of a substantial below-grade room proposed under the seaward deck and to daylight on the bluff be reconsidered and alternatives, if any, addressed to eliminate any such impacts. The Grays deleted the below-grade room from the Project.
- Staff stated that the City should consider whether approval of the proposed remodel would reduce density in the R-2 zone. The City did so, and the Grays produced evidence, and the City concurred, that the Project would not reduce density in the R-2 zone.

But that is not all.

First, Commission Staff advised the City, and the City in turn directed the Grays, to eliminate that portion of the deck proposed within 10 feet of the existing upper retaining wall. The Grays obliged and revised the plans to indicate native plants would be planted in the setback.

Second, the Grays' adjacent downcoast neighbor, whose house is significant larger and further seaward (Exh. 3 hereto; Staff Report, exh. 2, pp. 19, 21), insisted that the Grays move the downcoast portion of the house landward to avoid blocking their ocean view out of a side window. The Grays did so.

Third, because there are only a handful of parking spaces on Anita Street and Gaviota Drive, parents routinely must drop off and pick up children who go to the popular beach in the middle of the street. To eliminate the safety issue and working with the City, the Grays proactively proposed an attractive “cut-out” in the Anita Street right-of way for temporary drop-off and pick-up parking, a bench, a water fountain, and bike racks; agreed to protect and maintain a mature tree in the right-of-way and to landscape the area with native plants; and to further remove a very old fence along the upper portion of the slope along the right-of-way. (Staff Report, exh. 2, pp. 1, 28, 31.)

The Grays were not obligated to provide the off-site public access amenities in the right-of-way, but they did so and, as discussed below (see pages 13-14), that should be credited, among several other factors, in addressing the setback issue. As the “No Substantial Issue” staff recommendation for the City project (Item 11 on your Agenda, preceding this item) states:

“Through the City’s issuance of a Revocable Encroachment Permit, the applicant would construct public amenities in the encroachment area, including a public vehicle drop off area and public bike racks (Exhibit 2). The applicant would also be responsible for maintenance of an existing mature tree and native landscaping within the public right-of-way. Those elements are not part of the subject project, but should the Commission approve the adjacent project through a separate permit on appeal, they will improve public access adjacent to the public right of way.” (Staff Report, Item 11, p. 3.)

With the current Staff Recommendation, the Project would not proceed and it would be impossible for the Grays to provide these collaborative public benefits.

III. The Commission’s 1980 CDP Determined the “Top of the Bluff” and, As a Matter of Law, That Determination May Not Be Collaterally Attacked or Reexamined in this Appeal

The Staff Report first suggests that the location of the bluff edge, as approved by the City, is not accurate. The Staff’s analysis is wrong. In 1980, the Commission itself identified the location of bluff edge, and that bluff edge location was further confirmed by two expert geotechnical reports, which also were peer reviewed and approved by the City’s own geotechnical consultant. Commission staff knew exactly where the “top of the bluff” was located. In approving the restoration and stabilization of the bluff, the Commission noted the “top of the bluff” in the 1980 CDP at the upper retaining wall, which is essentially coincident with the natural location of the bluff subsequently delineated by GeoSoils, Inc., in its “Final Coastal Bluff Edge Evaluation” (2022).

Specifically, in 1980, the prior owner of this oceanfront property (1007 Gaviota Drive) and the owner of adjacent downcoast oceanfront property (1021 Gaviota Drive) concurrently applied to the Commission to restore and stabilize the bluff, which had just failed in a landslide that occurred across the two properties. The Commission approved two CDPs. As to this property, the Commission issued CDP No. A-80-7442 (Langman), which approved the

construction of the three retaining walls to restore and stabilize the failed bluff. (Exh. 4 hereto.) It concurrently issued a second CDP, A-80-7288 (Butts), to continue the bluff restoration/stabilization on the adjacent property. (Exh. 6 hereto.) Importantly, the description of the project which Staff wrote on the Commission permit approved for the subject property stated the following:

“Construction of 3 retaining walls on an improved, 4,880 +/- ocean bluff, R-2 lot. One retaining wall, at the top of the bluff, will be 32’ across the site and 4.5’ above grade, one wall will extend the width of the site, 40’ and 2’ above grade and the third wall, the most seaward, will extend the width of the site, 40’ above grade. Three walls are required to stabilize the site due to the steep slope and the distance down slope, 57 +/-’, to be stabilized.” (Exh. 4 hereto, p. 1; emphasis added.)

The Commission itself thus defined the “top of the bluff,” and it did so to restore the bluff to its natural location and based upon the definition of “coastal bluff” in the Commission’s regulations at the time. The validity of its decision is necessarily presumed. (Evid. Code, § 664; *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 976 [courts must presume that an agency carries out its official obligations].)

Under settled case law, the 1980 Commission decision was not challenged and became “administrative res judicata” and binding in effect. Today, as a matter of law, it may be collaterally challenged or repudiated by anyone, including appellants or the Commission. It is “absolutely immune from collateral attack.” (*Citizens for Responsible Development v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 505.) Indeed, the cases are legion in which this Commission has successfully barred attempts to collaterally attack its LUP and permit decisions. (*Beach and Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 263 [LUP decision]; *Sierra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 633, 669 [CCC permit decision]; *Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 524 [CCC permit decision]; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 572, 617 [CCC permit decision]; *Rossco Holdings, Inc. v. State of California* (1989) 212 Cal.App.3d 646, 656 [CCC permit decision]; *Leimert v. State of California* (1983) 149 Cal.App.3d 222, 233 [CCC permit decision].)

The Staff Report asserts that the Commission’s findings and exhibits did not identify the bluff edge and that bluffs are dynamic landforms which change over time. (Staff Report, p. 16.) To the contrary, the Coastal Development Administrative Permit approved the construction of 3 retaining walls (currently in place) and, as to the upper retaining wall, it specified “[o]ne retaining wall, at the top of the bluff, will be 32’ across at the site, and 4.5’ above grade,” and the “three walls are required to stabilize the site due to the steep slope and the distance down the slope (+/- 57’) to be stabilized.” (Exh. 4 hereto, p. 1; italics added.) Further, the foregoing cases demonstrate that the 1980 decision cannot now be reexamined to support a new and different “top of the bluff” determination. For purposes of administrative res judicata, even an erroneous decision, which is not the case here, would be as conclusive as a correct one. (*California Coastal*

Com. v. Superior Court (Ham) (1989) 210 Cal.App.3d 1488, 1493-1501 [barring a collateral challenge to a Commission decision imposing the same lateral access condition under the same circumstances as the access condition struck down as unconstitutional by the U.S. Supreme Court in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825]; *Weil v. Barthel* (1955) 45 Cal.2d 835, 839.)

The Staff Report also fails to apply the Commission regulation in effect at the time of the decision but rather purports to use the definition of “Oceanfront Bluff Edge or Coastal Bluff Edge” in the certified Land Use Element (“LUE”), which was added to the City’s LCP in 2011. However, the current definition is not the same as the coastal bluff edge definition in the Commission’s regulations in 1980. This is evident from the current definition, which is relied upon instead by Dr. Street.

In 1980, Section 13577 of the Commission’s regulations define the bluff edge as:

“Bluff line or edge shall be defined as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff, the bluff line or edge shall be defined as that point nearest the cliff beyond which the downward gradient of the land surface increases more or less continuously until it reaches the general gradient of the cliff. In a case where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge.”

The 2011 amendment of the City’s certified LUE added the definition of “Oceanfront Bluff Edge or Coastal Bluff Edge” as:

“The California Coastal Act and Regulations define the oceanfront bluff edge as the upper as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff face, the bluff line or edge shall be defined as that point nearest the bluff face beyond which a downward gradient is maintained continuously to the base of the bluff. In a case where there is a step like feature at the top of the bluff, the landward edge of the topmost riser shall be considered the bluff edge. **Bluff edges typically retreat over time because of erosional processes, landslides, development of gullies, or by grading (cut). In areas where fill has been placed near or over the bluff edge, the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.**” (Emphasized portion added by the 2011 LUE amendment.)

In 1980, the definition of bluff edge was simply different than that addressed by Staff. Indeed, that same definition was applied by the Commission right up to the 2011 LUE amendment. (5-11-064 (Yousefi), p. 11 [decided by the Commission in 2011, just prior to the final certification of the 2011 amendment to the LUE].)

In this case, the City carefully reviewed the issue, including with Commission Staff. In fact, the GeoSoils bluff edge delineation was requested by, and shared with, Staff. As the City concluded, the two recent expert reports addressed the bluff issue and confirmed that the top of the bluff is where the Commission itself determined it. The first report, prepared by Geofirm (10/22/21), explained the location of the top of bluff by reference to both the Commission's 1980 determination and its regulation defining "coastal bluff" in effect at that time. Geofirm determined that the bluff edge is located at the upper retaining wall, i.e., "at the top of the bluff," consistent with the 1980 CDP. That is the controlling location of the bluff edge on this property, and the Commission, adhering to settled precedent (nearly all of it established in cases involving the Commission), should so determine in approving this Project. Nothing has changed since 1980. As a matter of law, the 1980 CDP bluff edge determination cannot now be reconsidered. It is dispositive of the bluff edge and setback issues.

IV. Staff's Redetermination of the Bluff Edge and Setback is Fundamentally Flawed and Wrong

Dr. Street provided his own bluff edge determination, declining to address the 1980 CDP "top of the bluff" determination as involving a non-technical issue. (Staff Report, exh. 5, p. 4.) But even addressing his analysis, it is fundamentally flawed in several respects. This is separately addressed as well by Geofirm in its March 3, 2023 letter.

First, Dr. Street notes the second bluff edge determination prepared by GeoSoils, Inc., the "Final Coastal Bluff Edge Evaluation" (2/22/2022). (Exh. 6 hereto.) GeoSoils considered geologic maps and literature, historical aerial photographs, site reconnaissance, and engineering and geological analyses to determine the location of the natural bluff edge based on the City's LUE definition of oceanfront bluff/coastal bluff. Based on that information, GeoSoils concluded that the location of the coastal bluff edge at the subject site occurs at "the topographic inflection point between the mostly flat-lying to gently sloping coastal terrace and the more steeply sloping coastal bluff." (*Id.*, p. 7.) The approximate location of the natural bluff edge was plotted, roughly coterminous with upper retaining wall, which the 1980 CDP determined as "the top of the bluff." (*Id.*, Plate 1 and pp. 6-7.) And, the GeoSoils bluff edge determination was itself peer-reviewed and approved by the City's consulting geotechnical consultant. It demonstrated that the Commission knew exactly what it was doing in approving the 1980 CDP, in defining the "top of the bluff" as the location of the upper retaining wall and restoring the bluff to its natural location.

Second, Dr. Street agrees that the GeoSoils report "is a useful study, as it provides an estimate of the bluff edge position prior to both the landsliding discussed . . . and the emplacement of the bluff face fill and retaining walls." (Staff Report, Exh. 4, p. 4.) However, Dr. Street then postulates that the GeoSoils report, which utilized overhead aerials from 1947 and 1963, did not account for the "significant erosion and bluff edge retreat that appears to have occurred in the late 1960s – 1970s." (*Id.*) He further posits that the natural bluff edge in the GeoSoils Report "no longer existed (or had been substantially eroded) by the time the bluff slope was stabilized in 1980-1981." (*Id.*) Still further, he states that as a result, the LUE bluff edge

occurs approximately 10 feet landward of the top of the uppermost retaining wall, i.e., the seaward edge of the fill. (*Id.*, pp. 4-5.) The problem is that there outside of perhaps significant sloughing that occurred on the bluff face, there is scant evidence to support Dr. Street's comments, and in fact the evidence is to the contrary.

There is no evidence that natural bluff edge eroded or retreated by 10 feet, a couple of inches, or at all. There is no evidence that there was some blanket uniform, across the bluff, erosion of the natural bluff edge, as Dr. Street appears to assume. And there is no evidence where erosion or retreat occurred, and no evidence of how much erosion or retreat may have occurred. There is other helpful aerial photographic evidence. The California Records Project included oblique aeriels from 1972 and 1979, and they do show some evidence of erosion on the bluff face. (Exhs. 8 and 9 hereto.) It is localized erosion, primarily on the downcoast side of the bluff, but there is no evidence of an impact on the natural bluff edge during that period until the bluff failed in 1979-1980. Thus, the underpinning for the assumption that there was some significant bluff edge retreat, let alone 10 feet, is simply unsupported.

Third, Dr. Street notes that "tracing the bluff edge across the site in plan view is necessarily *inexact* due to the presence of the fill *obscuring* the topography of the natural bluff materials, and due to the *limited subsurface information available*." (Staff Report, Exh. 5, p. 5; italics added.) One would have to agree that an effort 43 years after the fact and actual Commission review is subject to inherent uncertainty. Dr. Street then resorts to use of the cut and fill line, the geologic contact between the fill ("Af") and the upper bluff marine ("Qtm") and non-marine ("Qtn") terrace deposits across the site. He states that this is the best evidence of the position of the LUE bluff edge on the subject lot. This wrong for two reasons.

The first reason is the LUE definition itself, which states, in the last sentence "[i]n areas where fill has been placed near or over the bluff edge, *the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge*." (Italics added.) The original bluff edge was established in the 1980 CDP and the 2022 GeoSoils report. The bluff edge is defined by where the natural bluff is located, not where the fill is. In this case, the whole goal of grading and filling was to restore the natural bluff, not to exceed it. The 1980 CDP accomplished that. The fill was placed near or over the bluff edge, and as the LUE expressly provides "the original bluff edge, even if buried beneath fill, shall be take to be the bluff edge."

The second reason is that the use of the cut and fill line was grossly improper. That line is shown on Staff Report Exhibit 5, page 9, as the "LUE Bluff Edge." It is completely irregular for a reason and that reason bears no relation to the natural bluff edge. This line is taken from the Geotechnical Plot Plan and Cross Sections A-A and B-B attached to the July 20, 2016 geotechnical report prepared by Geofirm. As explained in the separate letter from Geofirm, the line is an artifact created by the contractor to make the bluff repair efficient by creating access to facilitate the work and build the footings required to effect the repair. It could be further seaward or landward, whatever the contractor believes is necessary and in whatever configuration she/he/it believes is necessary to get the work done properly. It does not reflect any natural bluff edge, and

it should be noted that it includes three 90 degree angles, something that does occur in nature, much less in the configuration shown on the graphic.

Lastly, from Dr. Street's oddly configured LUE Bluff Edge," he creates a largely straightline on an angle, which does not match, to create a 25 foot bluff edge setback, but which effectively destroys the proposed residence. (Exhs. 10 and 11 hereto.)

In sum, while we have great respect for Dr. Street, in this case his suggested bluff edge determination and setback is fundamentally flawed and should not be applied in the case of this Project.

V. If the Commission Were to Repudiate its 1980 Permit Decision and Impose Special Conditions 1, 1a, and 1g, the Decision Would Constitute a "Taking" – Alternatively, it Would Require a Forfeiture of the Deed-Restricted Public Access Over the Sandy Beach

If, despite the foregoing, the Commission were to somehow repudiate the "top of the bluff" determination in its 1980 permit decision, then the decision would result in a "taking" or, alternatively, a forfeiture of the deed-restricted public access over the sandy beach which the then owner granted, as required by the Commission's conditions of approval.

Pursuant to the Commission's 1980 CDP, the bluff restoration project was implemented and thus vested. The permit also required the dedication of a lateral access easement over the sandy beach to the mean high line. Commission staff prepared and approved the easement document. It states:

"NOW, THEREFORE, in consideration of the granting of Permit No. A-80-1442 to the owners by the Commission, the Owners hereby irrevocably agree that there be, and hereby is, created the following restriction on the use and enjoyment of said property, to be attached to and become a part of the deed to the property: . . . An easement for public access and passive recreational use along the shoreline. The easement shall run parallel to the approved bulkhead and includes all area from the seaward edge of the most seaward bulkhead to the mean high tide lines." (Exh. 4, CCC Deed Restriction, pp. 2-3; emphasis added.

The applicant recorded the easement, and today the public enjoys a fairly wide and very popular sandy beach in front of this property. Yet, the staff recommendation that the Commission now can repudiate its 1980 decision, and specifically its "top of the bluff" determination, puts that public access and the Commission at risk in two ways. First, to exact the public access easement and then subsequently repudiate that decision and permit issued would surely constitute an unconstitutional taking, which the Fifth Amendment of the U.S. Constitution, and Article 1, section 19, forbid. Coastal Act section 30010 further prohibits the Commission from exercising its power "to grant or deny a permit in a manner that will take or damage private property for public use, without payment of just compensation therefor." The applicant gave away a valuable

property right, the sandy beach, in exchange for a permit that specified the retaining wall would be “at the top of the bluff.” That permit approval runs with the land, and subsequent owners, including the Grays, have the right to rely upon the Commission’s CDP. Second, the Commission cannot have it both ways. We would agree with the Commission that the deed restricted public beach access should remain; however, if the CDP which gave rise to it is impaired, then the access exacted should be forfeited, or just compensation paid for it.

VI. Imposition of the Bluff Edge and Setback Restrictions in Special Conditions 1, 1.a, and 1.b, and 1.g Would Violate the Equal Protection Clause

Special Conditions 1 (first paragraph) and 1.a requires that “the foundation of the proposed home shall be located at least 25 feet landward of the LCP-defined bluff edge” as Dr. Street suggests it should be located. Similarly, Special Condition 1.g. prohibits grading and excavation within 25 feet of that referenced bluff edge. This presents the unusual situation where such a contested restriction, if imposed by the Commission, would violate the Equal Protection Clause of the 14th Amendment of the U.S. Constitution and Article 1, Section 7 of the California Constitution. The rules are settled.

The Equal Protection Clause provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” (*City of Cleburne, Tex. V. Cleburne Living Center* (1985) 473 U.S. 432, 439.) The State Constitution similarly provides “[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection.”

Equal protection challenges usually come from claims that a state or local government has discriminated against an identifiable class or group of persons. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 857 (“*Las Lomas*”)) The U.S. Supreme Court, however, has provided that a claim may be made by “a ‘class of one.’ Where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 (“*Olech*”).) In *Olech*, the High Court found that the Village of Willowbrook irrationally and arbitrarily discriminated against a property owner by requiring a 33-foot easement as a condition of connecting her property to the municipal water supply when the Village only required 15-foot easements from similarly situated property owners. (*Id.* at p. 565.) In cases like *Olech* and here, where there is an equal protection claim from a “class of one,” a “claim is sufficient if the plaintiff alleges that (1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment.” (*Las Lomas, supra*, 177 Cal.App.4th at p. 858.) A claim fails if the claimant cannot meet any one of the three factors, above.

In this case, Condition 1 (first paragraph), 1.a, and 1.g would improperly move the bluff edge substantially landward and then apply a flat 25-foot setback, destroy the residence proposed, and treat the Grays in a manner dramatically different from all of the neighboring residences on Gaviota Drive, upcoast and downcoast. The Grays residence proposed to construct a home that

respects the Commission's 1980 bluff top determination, a 25' setback, and a further setback from downcoast adjacent neighbor's side window ocean view. By comparison to the other structures, upcoast and downcoast, is it smaller and lower in profile, as is evident from your Staff Report. (Staff Report, exh. 1, pp. 1-2, 19, 21.) However, Condition 1 (first paragraph) and 1A shove the structure so far landward of every other home on Gaviota Drive, all of which are substantially seaward and even extend all the way to the beach below, arbitrarily reducing its size, functionality, and viability. (Exh. 2 hereto; Staff Report, exh. 1, pp. 1-2.)

Further, Condition 1 would arbitrarily repudiate a decision that the Commission granted in 1980 and on which the then applicant and now the Grays have relied; would seek to retain the lateral beach access that the Commission extracted for granting that CDP but arbitrarily repudiate the bluff edge determination by reference to a standard that obviously was inapplicable in 1980; would radically alter that bluff edge, which in any event conforms to the current standard; improperly redetermines the bluff edge in a way that is fundamentally unsupported by the evidence; and would so radically reduce the size and configuration of the structure as to make the residence unbuildable. Staff may have cloaked its recommendation as an "approval with conditions," but, if adopted, it obviously would leave the Grays with an unbuildable project and necessarily the inability provide the public benefits they proposed. Simply put, it was an intentional "denial."

Finally, the Commission has no rational basis nor any coastal resource benefit for redefining the bluff edge, different from its 1980 permit decision, and then imposing a 25-foot setback. In a rational basis test, a claimant must show that the government's differing treatment was "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the actions were irrational." (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 471.) "The rational basis test is extremely deferential and does not allow inquiry into the wisdom of government action." (*Las Lomas, supra*, 177 Cal.App.4th at p. 858.)

The Staff Report asserts that the project site is highly visible from the public beach. The house, as proposed and approved with the setback approved the City, would not be highly visible, if it is visible at all. What is visible is the bluff face. But we agree with the Staff's observation that "the coastal bluff on which the subject home is built is marked with the development of multiple single-family and multi-family residences. The proposed new structure would not significantly or adversely affect the natural character of the bluff face and beach." This is not because of the staff recommendation. Rather, it is because it is transparently obvious that every other house, upcoast and downcoast, further seaward on the coastal bluff and larger create – as to this home – a non-Coastal view issue. (Exh. 11 hereto.) This house, as proposed and approved by the City, will not have any negative view impacts at all, either from the beach or the right-of-way. Any suggestion to the contrary would be devoid of any merit or evidentiary support.

By contrast, if the Project is approved in the location where the City approved, it will have beneficial view impacts by helping to clean up and beautify the Anita Street access to the beach. It will create the temporary drop-off/pick-up parking area and access support amenities (e.g., a

bench, bike racks), will maintain a mature tree and add native landscaping, greatly improving, along with the City project, the aesthetics at this entry point to the beach at Anita Street. Unlike the other property owners on Gaviota Drive, upcoast or downcoast, the Grays will contribute significant benefits to the residents and general public who use this popular beach.

Similarly, there is no bluff retreat issue at this site, with or without the retaining walls approved by the 1980 CDP. Geofirm has explained that “the bluff repair and stabilization systems that the Commission approved in 1980 has performed as intended. . . The results indicate a factor of safety greater than 1.5 for a static condition and 1.1 for a pseudo-static is located throughout the property and supporting the proposed residence.” (Geofirm (Oct. 3, 2022, pp. 2-3.) Similarly, “without the retaining walls supporting the backfill, a 1.5 factor of safety is achieved approximately 14 feet landward of the Commission bluff edge and seaward of the proposed building pad.” (*Id.*, p. 2.) Thus, the Grays proactively proposed the “no future shoreline protective device” and the City imposed it as a condition. Special Condition 8 repeats that condition and the Grays have no problem accepting it again.

In short, the differential treatment the current Staff Recommendation would impose on the Grays would deny them their constitutional rights under the U.S. and State Constitutions to equal protection of the law.

VII. Imposition of the Bluff Edge and Setback Restrictions in Special Conditions 1, 1.a, and 1.b, and 1.g Would Violate Substantive Due Process

The same same conditions, if imposed, would violate the Grays’ substantive due process rights. We acknowledge that the courts have held that “rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process.” (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 710.) Even where state officials have alleged violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation.” (*Id.*) Rather, substantive due process prevents “governmental power from being used for purposes of oppression,” or “abuse of government power that shocks the conscience,” or “action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.” (*Id.*) This is not the “ordinary” case, and substantive due process would be implicated here based on the facts.

In brief, this Commission approved two CDPs in 1980 for bluff repair and stabilization on the Gray’s property and the adjacent downcoast property at 1021 Gaviota Drive. Its decision set the “top of the bluff” at the upper retaining wall on the Gray’s property. Thus, two properties were protected, and today the house at 1021 Gaviota Drive is far larger, higher, and further seaward and will remain notwithstanding any decision the Commission makes on the Gray’s application. Yet, if the staff recommendation is adopted without change, the Grays, based upon repudiation of the 1980 CDP bluff edge determination and a fundamentally flawed attempt to redetermine the bluff edge, will be penalized and left with a largely unbuildable lot. One lot, the adjacent protected lot immediately downcoast, would retain its substantial structure, as with the

other lots, upcoast and downcoast, but the Grays will have no buildable house. That result would shock the conscience, and would be legally irrational because, as demonstrated in the preceding Section, it would not be keyed to legitimate state interests. The house proposed by the Grays is set well back, as approved by the City. The staff recommendation does not further any coastal resource protection issues. Those issues were addressed by the Grays and the City in the back-and-forth between the City and Commission staffs and the many project revisions that the Grays in earnest made in response.

VIII. Imposition of the Bluff Edge and Setback Restrictions in Special Conditions 1, 1.a, and 1.b, and 1.g Would Constitute a Regulatory Taking

A separate regulatory takings issue is additionally raised by the staff recommendation. Whether a CDP denial would constitute a taking is addressed under the *ad hoc* test identified in *Penn Central Transportation Co. v. New York* (1978) 438 US. 104, 124 (“*Penn Central*”). This test generally requires an examination of (1) the character of the government action, (2) the economic impact of the challenged regulation, and (3) the extent of the regulation’s interference with reasonable, investment-backed expectations.

To evaluate whether an applicant had a “reasonable and investment-backed expectation” that a residence could be developed on the property requires expectations objectively in terms of what a reasonable person might conclude about the developability of a site, and to what degree that expectation was backed by any actual investment. In order to analyze this question, one must assess from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed as proposed by the applicant, considering all the legal, regulatory, economic, physical, and other constraints that existed when the property was acquired.

When the Grays purchased this property in 2013 the Commission’s 1980 CDP for the bluff repair and stabilization defined the “top of the bluff” at the upper retaining wall. The City’s LCP required a 25-foot setback from the bluff edge. Accordingly, the Grays followed the Commission’s own decision and the City’s LCP and designed their house, which the City approved and is now before the Commission. All other houses, upcoast and downcoast, were larger, higher, and extended further seaward, but the Grays complied with the applicable requirements and had a reasonable, investment-backed expectation that their proposal met those requirements. In approving the Project, the City agreed.

As to the character of the government action, if the Commission were to adopt the staff recommendation and effectively “deny” the Grays’ application, that decision would not advance a legitimate public interest, as explained in the discussion above concerning the other two constitutional issues. There is no legitimate view or bluff retreat issue as to this unique property. Thus, the character of a Commission action in that regard would strongly argue for a taking.

Finally, *Penn Central* requires an analysis of the economic impact of the regulatory action on an applicant’s property. Although a landowner is not required to demonstrate that the

regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished. The Grays purchased the property for \$6 million, and the Orange County Assessor places the land value of the property at \$6.686 million. Based on the irregular setback line shown on Dr. Street's graphic, it is entirely unclear what could be built, if anything, and what habitable square footage would be left. For argument's sake, we assume approximately 2000 square feet would remain. The house at 1165 Gaviota Drive is currently listed for sale at \$16.9 million, with 4288 square feet, which yields a finished price per square foot of \$3941/square foot. The estimated cost per square foot to build a 2000 square foot house in this location in coastal Orange County and Laguna Beach would be approximately \$2000/square foot, and thus it would cost on the order of \$4 million to build a structure that would be comparable with the demand. The Grays' \$6 million purchase price plus \$4 million to construct the structure would therefore involve an investment of \$10 million. However, if the finished price per square foot is \$3941, that times 2000 square feet would yield a sales price, after construction, of \$7,882,000, a loss of approximately \$2 million, and thus would make no sense to pursue. Further, the Grays' realtor indicates there are no 2000 square foot structures in this area of Laguna Beach that have sold for as much as \$8 million, and that would especially be the case with a structure in this location, set so far back in the shadow of the adjacent downcoast house, which is far larger, far higher, and further seaward.

In sum, based on the difference in value between nearby developed properties, applicant's purchase price and the land value of this property, we believe that if the Commission were to adopt the staff recommendation, a court would conclude that effective denial of the application to construct the residence proposed results in a taking under *Penn Central*.

IX. Reasons For the Commission to Consider How to Approve the Project in a Manner That Permits a Viable Home Consistent With the City's Approval

While this letter states the Grays' objections to Special Condition 1, 1a, 1.b, and 1g of the Staff Recommendation, we respectfully submit that the proper course is to problem-solve. Therefore, we ask the Commission to consider a host of reasons how the proposed Project may be approved in a manner that results in a bluff edge and setback consistent with the City's certified LCP and that permits a home consistent with the Grays' current proposal.

This is not a residential project with an unprotected bluff, potentially subject to erosion through, for example, sea level rise or wave action. It is well protected by a Commission-approved retaining wall and bluff stabilization system that has worked perfectly as designed, as explained in reports prepared by Geofirm and GeoSoils. There is a 1980 Commission-issued permit with a "top of the bluff" determination at the upper retaining wall. There are two peer-reviewed expert reports which confirm that "top of bluff" determination, one based on the Commission regulation in effect at the time of the 1980 approval and one based on the more recent certified LUP. Dr. Street's bluff edge determination and setback are, unfortunately, inherently uncertain, based on assumptions that are unsupported, a redetermined bluff edge line that does not exist in nature or for the purpose of delineating a bluff edge, and a maximum

setback line that does not relate to the bluff edge line. And there are constitutional issues – the takings and equal protection issues – if the Staff’s redetermined bluff edge and 25’ setback are applied to this property as Staff has proposed in Special Condition 1, 1.a, 1.b, and 1g.

In these unique circumstances, the Commission enjoys the flexibility to approve the Project with the bluff edge line and setback approved by the City.

First, the Commission should recognize and apply the “top of the bluff determination” in its 1980 decision. The City properly applied a 25’ setback to that bluff edge in approving the home.

Second, where the federal and state constitutions have prohibited a taking or a denial of equal protection, the Commission has exercised the flexibility and discretion to avoid the constitutional violations. The Commission should do that here.

Third, Staff’s initial substantial issue staff recommendation explained that City Municipal Code section 25.50.004(B)(4) “provides the City’s Director of Community Development some discretion to determine whether the subject site [this site] should be subject to the 25-foot bluff edge setback requirement of Section 25.50.004(B)(4)(a)” The LCP implementation provision states: “In cases where the landform constitutes an oceanfront bluff whose slope is less than forty-five degrees, a determination as to whether or not the specific landform is subject to this provision shall be made by the director of community development.” Here, the slope is approximately 37 degrees and thus less than 45 degrees (SI Staff Report, 7/22/21, at page 9), and on appeal and in determining the Project’s conformity with the certified LCP, the Commission necessarily has the same authority to determine whether or how the subject site should be subject to the bluff edge setback. This may be accomplished in one of two ways: (1) The Commission can apply the bluff edge determination made in its 1980 CDP decision and additionally in the peer-reviewed expert reports prepared by Geofirm and GeoSoils and apply a 25 foot setback, or (2) utilize Dr. Street’s bluff edge determination, with which we vigorously disagree, and apply a lesser or no setback that reaches the same result and location. Either way, the Commission has the discretion to approve the residence in the location approved by the City.

The controlling factors for applying a lesser setback requirement are, in summary:

- (1) The “top of the bluff” determination the Commission made in 1980 CDP No. A-80-7422;
- (2) If the 1980 CDP is repudiated, the inability from Dr. Street’s analysis to properly determine the exact location of the bluff edge and associated setback;
- (3) The avoidance of a violation of the Gray’s federal and state constitutional rights;
- (4) The bluff seaward of the proposed residence is protected by the Commission-approved retaining wall and bluff stabilization system that has functioned perfectly and as designed for 43 years;

(5) The location of the proposed remodel, as approved by the City is set back significantly landward of every other house upcoast and downcoast on Gaviota Drive;

(5) The proposed home is lower in profile and smaller in size in contrast to all of the other homes, including the adjacent downcoast home, on Gaviota Drive;

(6) The proposed home will not create visual impacts from the beach below in contrast to every other house upcoast and downcoast on Gaviota Drive;

Finally, the proposed remodel is distinctly different from every other home on Gaviota Drive in voluntarily providing the recognized public access benefit to the Laguna Beach community and beach-going public generally by providing a safe drop-off/pick-up parking area for beachgoers (especially children) with associated access amenities (e.g., a concrete bench, bike racks), as well as landscaping improvements in the right-of-way (maintaining the mature tree, planting native landscaping) which will greatly improve and enhance the aesthetics of the approach to the beach at Anita Street, together with the access improvements proposed by the City.

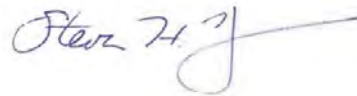
VIII. Conclusion

For all of the foregoing reasons, the Grays ask the Commission to approve their application consistent with the City's approval of the proposed remodel and with all of the special conditions recommended, except the following:

In each of Special Conditions 1 (the first paragraph), 1.a, 1.b., and 1.f, revise "from the bluff edge identified in Exhibit 4" to read "from the bluff edge identified in the GeoSoils 'Final Coastal Bluff Edge Evaluation (October 20, 2021)'"

We look forward to discussing the Project further with you at the upcoming hearing.

Very truly yours,



Steven H. Kaufmann
Nossaman LLP

SHK:jpr

ccs: Dr. Kate Huckelbridge, Executive Director
Karl Schwing, District Director, San Diego Coast/South Coast Offices
Zach Rehm, District Supervisor, South Coast District Office
Bailey Warren, Coastal Program Analyst, South Coast District Office
Marc Wiener, AICP, Community Development Director, City of Laguna Beach
Russell Bunim, AICP, Zoning Administrator, City of Laguna Beach
Christian Dominguez, Senior Planner, City of Laguna Beach
Mike and Lori Gray

4/26/2022

1

GRAY RESIDENCE

1007 Gaviota Drive

Laguna Beach, CA 92651



lohrbach **studio**

NEW DESIGN RENDERING

EXHIBIT "1"

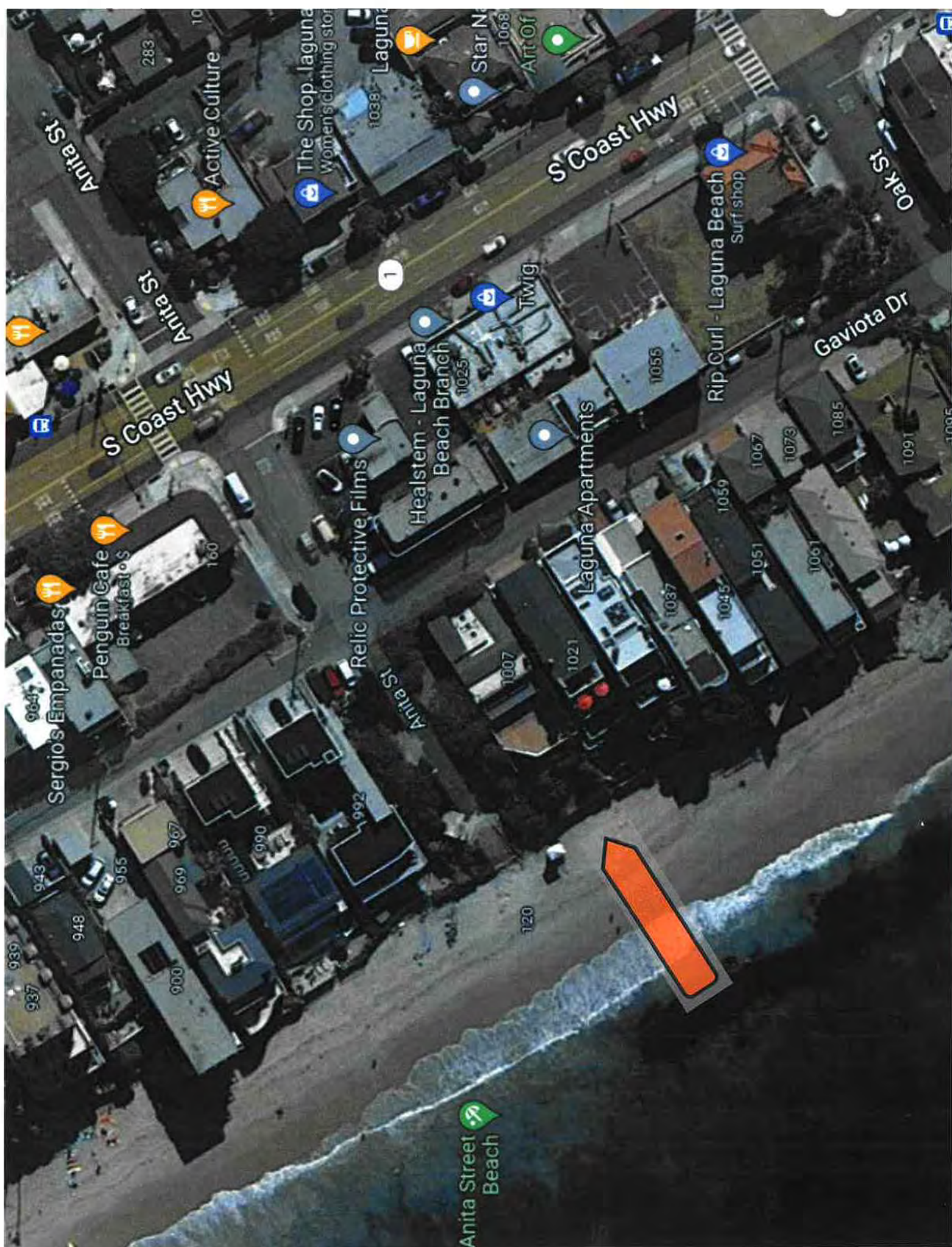
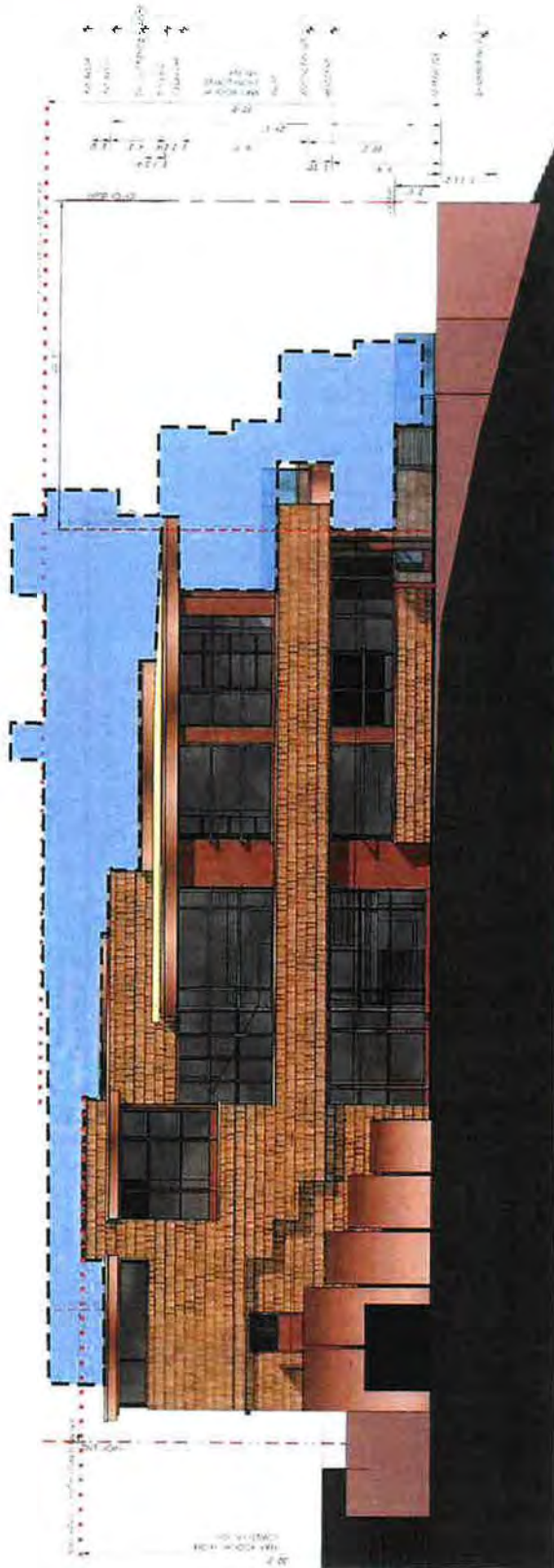
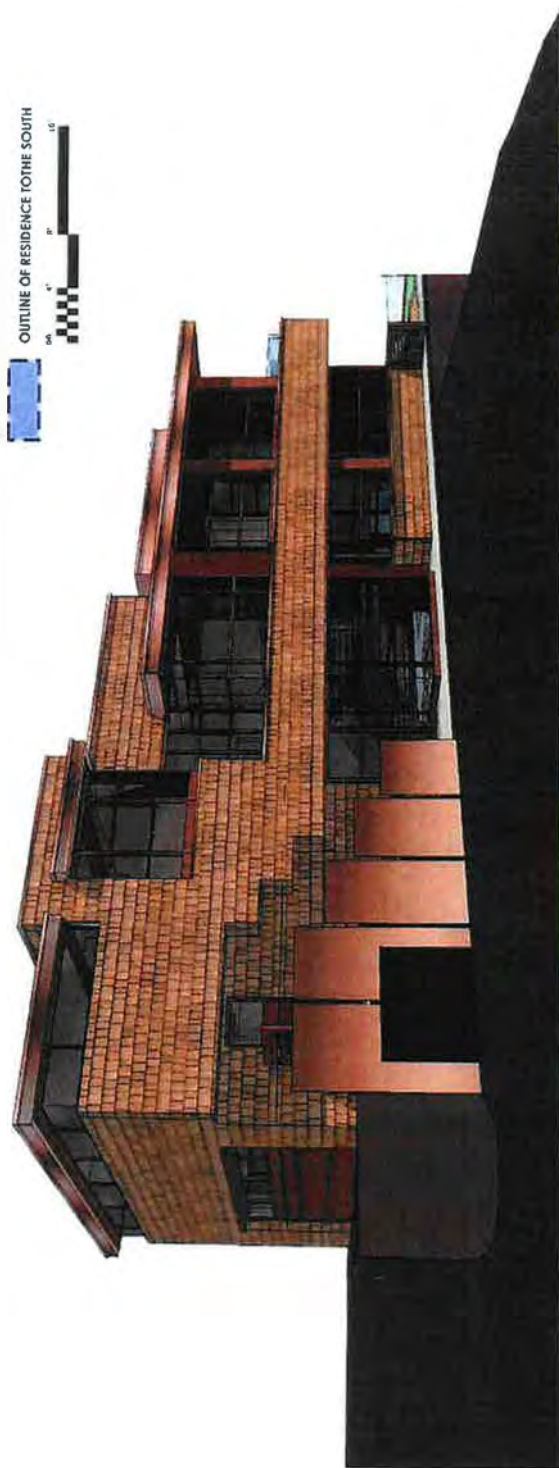
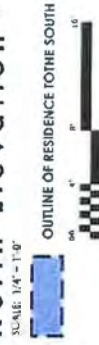


EXHIBIT "2"



North Elevation - Ex. 1



N - E Perspective - Ex. 2

CALIFORNIA COASTAL COMMISSION
SOUTH COAST REGIONAL COMMISSION
666 E. OCEAN BOULEVARD, SUITE 3107
P.O. BOX 1430
LONG BEACH, CALIFORNIA 90801
(213) 590-3071 (714) 846-0648

CORRECTED

COASTAL DEVELOPMENT ADMINISTRATIVE PERMIT



Application Number: A-80-7442
Name of Applicant: David Langman
1007 Gaviota Drive, Laguna Beach, CA 92651
Development Location: 1007 Gaviota Drive
Laguna Beach, CA

Development Description: Construction of 3 retaining walls on an improved, ±4800 sq. ft.,
ocean bluff, R-2 lot. One retaining wall, at the top of the bluff,
will be 32' across the site, and 4.5' above grade; one wall will extend the width of the site,
40', and 2' above grade; the third wall, the most seaward, will extend the width of the site,
40', and 7' above grade. Three walls are required to stabilize the site due to the steep
slope and the distance down the slope (±57') to be stabilized.

- I. The Executive Director of the South Coast Regional Commission hereby grants, subject to condition(s), a permit for the proposed development, on the grounds that the development as conditioned will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Plan conforming to the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.
- II. Conditions: 1. Prior to issuance of permit, the applicant shall submit to the executive
director a notarized letter agreeing to comply to the following lateral access condition.
2. Within 90 days from the date of Coastal Commission approval, the applicant shall execute
and record a document in a form and content approved in writing by the executive director
of the Commission irrevocably offering to dedicate to a public agency or a private association
approved by the executive director, an easement for public access and passive recreational
use along the shoreline. The easement shall run parallel to the approved bulkhead and in-
cludes all area from the seaward edge of the most seaward bulkhead to the mean high tide line.

California Coastal Commission

A-5-LGB-22-0025

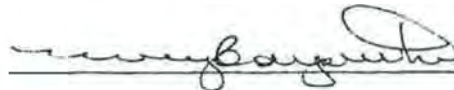
Exhibit 6

Page 26 of 43

Conditions met on November 17, 1980 By Gay J. Carpenter GP

- III. This permit may not be assigned to another person(s) except as provided in Section 13170 of the Coastal Commission Rules and Regulations.
- IV. This permit shall not become effective until:
- A. Completion of the Regional Commission review of the permit pursuant to the notice of public hearing.
- B. A copy of this permit has been returned to the Regional Commission, upon which copy all permittees or agent(s) authorized in the permit application have acknowledged that they have received a copy of the permit and have accepted its contents.
- V. Any development performed on this permit prior to the review by the Regional Commission is at the applicant's risk and is subject to stoppage upon completion of the review pending the Regional Commission's approval and/or completion of any appeal of the Regional Commission's decision.
- VI. Work authorized by this permit must commence within two years from the date of approval. Any extension of time of said commencement date must be applied for prior to expiration of the permit.

Approved on December 5, 1980.



M. J. Carpenter
Executive Director

I, DAVID LANGMAN, permittee/agent, hereby acknowledge receipt of Permit Number A-80-7442 and have accepted its contents.

DEC 11, 1980

(Date)



(Signature)

Scheduled Hearing Date December 8, 1980

California Coastal Commission
A-5-LGB-22-0025
Exhibit 6
Page 27 of 43

83-035333

1 RECORDING REQUESTED AND RETURN TO:
2 CALIFORNIA COASTAL COMMISSION
3 631 HOWARD STREET, FOURTH FLOOR
4 SAN FRANCISCO, CA 94105

\$11.00
C2

RECORDED IN OFFICIAL RECORDS
OF ORANGE COUNTY, CALIFORNIA

-1210 PM

JAN 24 1983

LEE A. BRANCH, County Recorder

DEED RESTRICTION

6 I. WHEREAS, (1) DAVID LANGMAN and ARLYNE LANGMAN, TRUSTEES
7 of the Langman Family Trust dated May 17, 1982.

8 record owners of the real property located at (2) 1007 GAVIOTA DRIVE
9 Laguna Beach, CA 92651.

10 and more specifically described in attached Exhibit A (3), which is attached
11 hereto and incorporated by reference; and

12 II. WHEREAS, the California Coastal Commission is acting on behalf of
13 of the People of the State of California; and

14 III. WHEREAS, the People of the State of California have a legal interest
15 in the lands seaward of the mean high tide line; and

16 IV. WHEREAS, pursuant to the California Coastal Act of 1976, the wharf
17 applied to the Commission for a coastal development permit for a development
18 on the real property described above; and

19 V. WHEREAS, a Coastal Development Permit No. (4) A-80-7442 was granted
20 on (5) November 17, 1980, by the Commission in accordance
21 with the Staff Recommendation on the permit application, which is attached
22 hereto as Exhibit B (6) and subject to the following condition.

23 (6) Verbatim condition for access:

24 An easement for public access and passive recreational use
25 along the shoreline. The easement shall run parallel to the
26 approved bulkhead and includes all area from the seaward edge
27 of the most seaward bulkhead to the mean high tide line.

(6) continued

VI. WHEREAS, the real property described above is located between the first public road and the shoreline; and

VII. WHEREAS, under the policies of Section 30210 through 30212 of the California Coastal Act of 1972, public access to the shoreline and along the coast is to be maximized and in all new development projects located between the first public road and the shoreline is added; and

VIII. WHEREAS, the Commission found that but for the imposition of the above condition the proposed development would not be found consistent with the public access provisions of Sections 30210 and 30211, and that a permit could not therefore have been granted.

NOW, THEREFORE in consideration of the granting of Permit # 83-00-7442 to the owners by the Commission, the owners hereby irrevocably agree that there be, and hereby they created the following restriction on the use and enjoyment of said property, as attached to and become a part of the deed

1 to the property:

2 (8) verbatim public access condition:

3 An easement for public access and passive recreational use
4 along the shoreline. The easement shall run parallel to the
5 approved bulkhead and includes all area from the seaward edge
6 of the most seaward bulkhead to the mean high tide line.

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16 Said deed restriction shall remain in full force and effect for the
17 period that said permit, or modification of said permit, is in
18 effect, and during the period that the development authorized by said
19 permit, or any modification of said development, remains in effect, and
20 upon any part of, and thereby confers benefit upon, the real property
21 described herein, and to that extent, said deed restriction is hereby
22 and agreed by Owners to be a covenant running with the land, and shall bind
23 Owners and all their assigns or successors in interest.

24 //

25 //

26 //

27 //

PAID
IN CALIFORNIA
JAN 10 1984

California Coastal Commission
A-5-LGB-22-0025
Exhibit 6
Page 35 of 43

owner hereby agrees to record this deed restriction in the recorder's
office for the County of(9) Orange

after the date of 1982

DATED: September 7, 1982

Dan Langan

TYPE OR PRINT NAME OF ABOVE

signed: Arline Langan

ARLINE LANGMAN

TYPE OR PRINT NAME OF ABOVE

STATE OF CALIFORNIA

COUNTY OF

On September 8, 1982, before the undersigned,

a Notary Public for the County and State mentioned above, personally

appeared Dan Langan and Arline Langan

on the basis of satisfactory evidence known to me to be the person(s) whose

name(s) is subscribed to the within instrument, and acknowledged that he/she

executed the same.

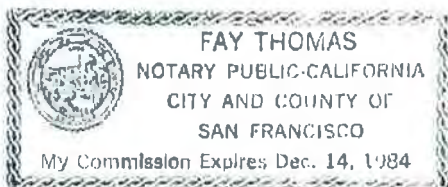


NOTARY PUBLIC IN AND FOR THE COUNTY AND
STATE OF

1 This is to certify that the land restriction set forth above, dated
 2 September 4, 1983, and executed by
 3 David Langman and A. L. Langman, Trustees of Family Trust
 4 owner(s), is hereby acknowledged by the undersigned officer on behalf of
 5 the California Coastal Commission pursuant to the authority conferred upon
 6 Commission when it was established by Public Law 93-637
 7 and that the Commission's consent to the execution
 8 thereof by its duly authorized officer.
 9 Steven D. Brown
 10 Legal Counsel
 11 CALIFORNIA COASTAL COMMISSION
 12

State of California)
) SS.
 County of San Francisco)

On this 19th day of January, in the year 1983,
 before me Fay Thomas, a Notary Public, personally
 appeared Steven D. Brown, personally known to me to
 be the person who executed this instrument as Legal Counsel
 TITLE
 of California Coastal Commission and acknowledged
 to me that the public agency executed it.



Fay Thomas
 NOTARY PUBLIC IN AND FOR SAID COUNTY AND
 STATE

RECORDING REQUESTED BY
 FREEMAN & SMITH
 Partnership of Law C. Corporation

RECORDED MAIL THIS DEED AND, IN LESS OTHER
 TOWN BELOW, MAIL TAX STATEMENTS TO

33-035333

RECORDED IN OFFICIAL RECORDS
 OF ORANGE COUNTY, CALIFORNIA

-1200 PM JUL 13 '82

LEE A. BRANCH, County Recorder

NAME
 ADDRESS
 CITY & STATE
 ZIP

Mr. & Mrs. David Langman
 518 North Foothill Road
 Beverly Hills, CA 90210

File Order No. _____ Estate No. _____

Laguna

SPACE ABOVE THIS LINE FOR RECORDERS USE

Quitclaim Deed

The undersigned declares that the documentary transfer tax is \$-0-0; consideration less than \$100* and is:

☐ computed on the full value of the interest or property conveyed; or

☐ computed on the full value less the value of liens or encumbrances existing thereon at the time of sale. The land, tenements or realty is located in:

☐ unincorporated area ☐ city of Laguna Beach and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged.

DAVID LANGMAN AND ARLINE LANGMAN

do hereby remise, release and forever quitclaim to

DAVID LANGMAN AND ARLINE LANGMAN, Trustees of the Langman Family Trust
 dated May 17, 1982

the following described real property in the city of Laguna Beach county of Orange
 state of California:

Lots 1 and 2 in Block 1 of Tract No. 83, in the City of Laguna Beach,
 County of Orange, as shown on a map thereof recorded in Book 10, Page 32
 Miscellaneous Maps, records of said Orange County.
 EXCEPTING THEREFROM the Southeasterly 10 feet of Lot 2.

* This transfer is a gift by spouses to a revocable family trust. The grantors
 are the present beneficiaries of the trust. The transfer is therefore exempt
 from change of ownership provisions under Proposition 13 and from the imposition
 of documentary transfer tax.

Dated 6/17/82

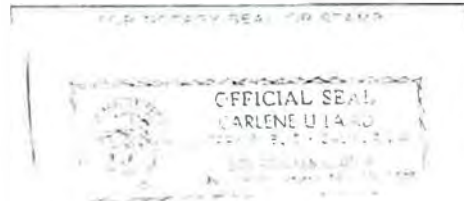
DAVID LANGMAN

ARLINE LANGMAN

STATE OF CALIFORNIA
 COUNTY OF Los Angeles

On 6/17/82 before me, the undersigned, a Notary Public in and for said County and State, personally
 appeared David Langman and Arline Langman

to be the person(s) whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.



California Coastal Commission
 A-5-LGB-22-0025
 Exhibit 6
 Page 38 of 43

CALIFORNIA

CALIFORNIA COASTAL COMMISSION
SOUTH COAST REGIONAL COMMISSION

1000 OCEAN BOULEVARD, SUITE 3107

P.O. BOX 1450

LAGUNA BEACH, CALIFORNIA 92651

(714) 590-3071 (714) 843-0648

COASTAL DEVELOPMENT ADMINISTRATIVE PERMIT

Application Number: A-80-7464Name of Applicant: David Landon1007 Gaviana Drive, Laguna Beach, CA 92651Development Location: 1007 Gaviana DriveLaguna Beach, CA

Development Description: Construction of 3 retaining walls on an improved, 4880 ± ocean bluff, R-2 lot. One retaining wall, at the top of the bluff, will be 32' across the site, and 4.5' above grade. One wall will extend the width of the site, 40' and 2' above grade and the third wall, the most seaward, will extend the width of the site, 40' above grade. Three walls are required to stabilize the site due to the steep slope and the distance down slope, 57 ±', to be stabilized.

I. The Executive Director of the South Coast Regional Commission hereby grants, subject to condition(s), a permit for the proposed development, on the grounds that the development as conditioned will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Plan conforming to the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. Conditions: (1) Prior to issuance of permit, the applicant shall submit to the Executive Director a notarized letter agreeing to comply to the following lateral access condition. (2) Within 90 days from the date of the Coastal Commission approval, the applicant shall execute and record a document in a form and content approved in writing by the Executive Director of the Commission irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline. The easement shall run parallel to the approved bulkhead and includes all area from the seaward edge of the most seaward bulkhead to the mean high tide line.

California Coastal Commission

A-5-LGB-22-0025

Exhibit 6

Page 39 of 43

EXHIBIT B page 1 of 2

Conditions met on

November 13, 1980

By

Gary R. [Signature]

- I. This permit may not be assigned to another person(s) except as provided in Section 1370 of the Coastal Commission Rules and Regulations.
- V. This permit shall not become effective until:
- Completion of the Regional Commission review of the permit pursuant to the notice of public hearing.
 - A copy of this permit has been returned to the Regional Commission, upon which copy all permittees or agent(s) authorized in the permit application have acknowledged that they have received a copy of the permit and have accepted its contents.
 - Any development performed on this permit prior to the review by the Regional Commission is at the applicant's risk and is subject to stoppage upon completion of the review pending the Regional Commission's approval and/or completion of any appeal of the Regional Commission's decision.

Work authorized by this permit must commence within two years from the date of approval. Any extension of time of performance beyond date must be applied for prior to expiration of the permit.

Approved on

November 13, 1980

File #

[Signature]
M. J. Carpenter
Executive Director

I, David D. [Signature], permittee/agent, hereby acknowledges receipt of

CALIFORNIA COASTAL COMMISSION
SOUTH COAST REGIONAL COMMISSION
666 E. OCEAN BOULEVARD, SUITE 3107
P.O. BOX 1450
LONG BEACH, CALIFORNIA 90801
(213) 590-5071 (714) 846-0648

COASTAL DEVELOPMENT ADMINISTRATIVE PERMIT

RECEIVED
OCT 07 1980

DEVELOPMENT SERVICES

Application Number: A-80-7288

Name of Applicant: Lee B. Butts

1021 Gaviota Drive, Laguna Beach, Ca. 92651

Development Location: 1021 Gaviota Drive

Laguna Beach, Ca. 92651

Development Description: Construction of 2 retaining walls on an improved, 4880⁺ ocean bluff R-2 lot. One retaining wall will be 30' long and 6' high and will be utilized at the toe of the bluff to stabilize slope failure. The second wall will be 30' long and 7' high and located on the bluff side of an existing duplex and will serve to prevent the undermining of the structure foundation.

- I. The Executive Director of the South Coast Regional Commission hereby grants, subject to condition(s), a permit for the proposed development, on the grounds that the development as conditioned will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Plan conforming to the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.
- II. Conditions: (1) Prior to issuance of permit, the applicant shall submit to the Executive Director a notarized letter agreeing to comply to the following lateral access condition. (2) Within 90 days from the date of Coastal Commission approval, the applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline. The easement shall run parallel to the approved bulkhead and includes all area from the seaward edge of that bulkhead to the mean high tide line.

California Coastal Commission

A-5-LGB-22-0025

Exhibit C

Page 30 of 43

Conditions met on 7 October 1980

By



III. This permit may not be assigned to another person(s) except as provided in Section 13170 of the Coastal Commission Rules and Regulations.

IV. This permit shall not become effective until:

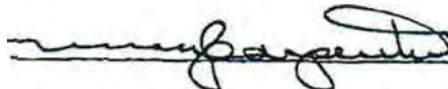
A. Completion of the Regional Commission review of the permit pursuant to the notice of public hearing.

B. A copy of this permit has been returned to the Regional Commission, upon which copy all permittees or agent(s) authorized in the permit application have acknowledged that they have received a copy of the permit and have accepted its contents.

V. Any development performed on this permit prior to the review by the Regional Commission is at the applicant's risk and is subject to stoppage upon completion of the review pending the Regional Commission's approval and/or completion of any appeal of the Regional Commission's decision.

VI. Work authorized by this permit must commence within two years from the date of approval. Any extension of time of said commencement date must be applied for prior to expiration of the permit.

Approved on October 7, 198 0.



M. J. Carpenter
Executive Director

I, _____, permittee/agent, hereby acknowledge receipt of Permit Number A-80-7288 and have accepted its contents.

(Date)

(Signature)

Scheduled Hearing Date October 20, 1980

California Coastal Commission
A-5-LGB-22-0025
Exhibit 6
Page 31 of 43



Geotechnical • Geologic • Coastal • Environmental

5741 Palmer Way • Carlsbad, California 92010 • (760) 438-3155 • FAX (760) 931-0915 • www.geosoilsinc.com

October 20, 2021

W.O. S8215-SC

Mr. Mike Gray
309 Via Lido Soud
Newport Beach, CA 92663

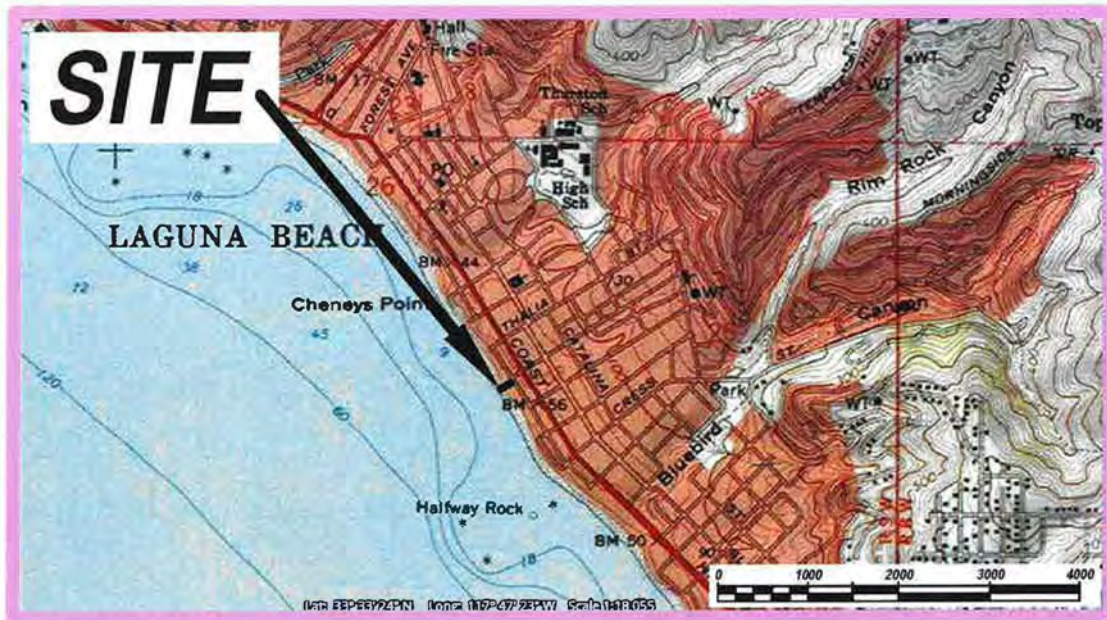
Subject: Coastal Bluff Edge Evaluation, 1007 Gaviota Drive, Laguna Beach,
Orange County, California 92651

Dear Mr. Gray:

In accordance with your request and authorization, GeoSoils, Inc. (GSI), is providing this summary of our coastal bluff edge evaluation as it pertains to proposed development at the subject site. The intent of this study was to delineate the coastal bluff edge location to fulfill the requirements of a coastal development permit (CDP) application. The explicit purpose of our evaluation was to locate the coastal bluff edge within the subject property. Therefore, this investigation does *not* constitute a preliminary geotechnical evaluation of the site relative to the proposed development. The scope of our services for this study included: 1) reviews of in-house regional geologic maps and literature; 2) stereoscopic and oblique aerial photograph analysis (see the Appendix); 3) site reconnaissance; 4) engineering and geological analyses; and 5) the preparation of this summary report.

EXISTING SITE CONDITIONS

The subject property consists of a rectangular-shaped parcel of land located at 1007 Gaviota Drive, in Laguna Beach, Orange County, California (see Figure 1, Site Location Map). The site is situated upon a coastal terrace atop a bluff that overlooks the Pacific Ocean. According to a topographic survey prepared by Toal Engineering, Inc. ([TEI], 2019), the site may be characterized as relatively flat-lying to steeply sloping terrain that descends in a southwesterly direction, toward the Pacific Ocean shoreline at gradients on the order of 1:1 (horizontal:vertical [h:v]), or flatter. TEI (2019) shows that site elevations vary between approximately 7 feet, on the beach, to about 60 feet (per North American Vertical Datum of 1988 [NAVD88]), for an overall relief of roughly 53 feet. The site is bounded by the beach on the Pacific Ocean, an adjacent property to the southeast, a public beach access (Anita Street) to the northwest, and by Gaviota Drive. The toe of the site bluff is comprised of erosion resistant cemented bedrock (Topanga Formation), at about elevation +11.5 feet NAVD88.




Base Map: TOPO!® ©2003 National Geographic, U.S.G.S. Laguna Beach Quadrangle, California
 – Orange Co., 7.5 Minute, dated 1996, current, 2000.



Base Map: Google Maps, Copyright 2021 Google, Map Data Copyright 2021 Google

This map is copyrighted by Google 2021. It is unlawful to copy or reproduce all or any part thereof, whether for personal use or resale, without permission. All rights reserved.



	W.O. S8215-SC
<p align="center">SITE LOCATION MAP</p> <p align="right"><i>Figure 1</i></p>	

Existing site improvements consist of a one- to two-story structure with concrete pavements, retaining walls, patio, and associated perimeter walls. Vegetation consists of typical residential shrubbery. The site and fronting shoreline were inspected on September 29, 2021 by GSI personnel. Figure 2 is a “Birds Eye” aerial photograph downloaded from the internet. The site visit/inspection focused on the back beach, the present shoreline conditions, the bluff slope and bluff top, and site geology. The top of the bluff on the site proper was obscured by a retaining wall, and the bluff face to the northwest was graded. The retaining wall and the graded slope were part of a permitted repair (CDP A-80-7442) from a previous bluff failure. The bluff failure was relatively shallow and is believed to be a result of heavy rainfall. The top of the bluff was identified to be at the top retaining wall in the permit.



Figure 2

SITE GEOLOGIC CONDITIONS

The subject site is contained within the southeast portion of the U.S.G.S. Laguna Beach 7½ minute quadrangle within the coastal plain region of the Peninsular Ranges geomorphic province. The beachfront property is located between Oak Street and Anita Street on the seaward side of Gaviota Drive. The property backs up to an approximately 34-foot high (from elevation +11 NAVD88 to about elevation +45 NAVD88), roughly 1:1 (horizontal to vertical) and locally steeper, seacliff associated with the western margin of the gently seaward-sloping terrace topography that extends from the base of the San Joaquin Hills approximately 2000 feet northeast of the site, and down to the coastline.

Active fault zones within the general site region include the Newport-Inglewood (offshore extension), Palos Verdes, and Elsinore, which are located approximately 2.1-miles southwest (offshore), 16.8-miles southwest (offshore), and 22.1-miles northeast of the site, respectively. The postulated San Joaquin Hills Blind thrust fault (model by Grant, et al, 1999), which has been classified as a Type B active fault by the California Geological Survey, reportedly extends from offshore to beneath the Laguna Beach area at a depth of approximately 3.7 miles. Review and interpretation of available aerial photographs and geologic maps/literature indicate no obvious deep-seated landsliding has been mapped and/or reported within the property. Review of the State of California Seismic Hazard Zones map for the Laguna Beach quadrangle indicates that the subject property does not lie within an area zoned as potentially susceptible to earthquake induced landsliding or liquefaction.

According to Morton (2004), the elevated terrace portion of the site is underlain by late to middle Pleistocene-age old paralic deposits comprised of poorly sorted, moderately permeable, reddish-brown, interfingered strandline, beach, estuarine, and colluvial deposits composed of silt, sand, and cobbles that are capped by extensive but thin, discontinuous, younger, locally derived, sandy alluvial fan deposits. These sediments were deposited during glacio-eustatic changes in sea level during the Pleistocene. The paralic deposits unconformably overlie older Tertiary-age (middle Miocene) marine sedimentary bedrock belonging to the Topanga Formation. The Topanga Formation is a very dense olive brown to olive grey brown, silty fine to medium sandstone, with occasional thin interbeds of stiff olive gray to green siltstone. The geologic contact between the two units lies at an elevation of approximately 33 feet (NAVD88) at the site. Structurally, the paralic deposits are considered essentially massive, and typically flat-lying, while bedding attitudes reported in the underlying Topanga Formation within the site vicinity indicate moderate inclinations ranging from approximately 22 to 44 degrees to the south/southwest. Morton (2004) also indicates that the shoreline is mantled by late Holocene-age marine deposits comprised of unconsolidated, active, or recently active sandy beach deposits.

COASTAL BLUFF & BLUFF EDGE

According to the "Laguna Beach General Plan, Land Use Element," (City of Laguna Beach, 2012), an oceanfront bluff/coastal bluff is defined as,

A bluff overlooking a beach or shoreline or that is subject to marine erosion. Many oceanfront bluffs consist of a gently sloping upper bluff and a steeper lower bluff or sea cliff. The term 'oceanfront bluff' or 'coastal bluff' refers to the entire slope between a marine terrace or upland area and the sea. The term 'sea cliff' refers to the lower, near-vertical portion of an oceanfront bluff.

According to the California Code of Regulations, Title 14, § 13577 (h) (2), the

Bluff line or edge shall be defined as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff face, the bluff line or edge shall be defined as that point nearest the cliff beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the cliff. In a case where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge.

This definition is recognized by the California Coastal Commission (CCC), and was in effect when the 1980 permit was issued. However, in a 2003 memorandum to the CCC, Dr. Mark Johnsson, former Staff Geologist for the CCC, indicated that the definition of the coastal bluff edge is largely qualitative and subject to various interpretations (CCC, 2003). This is particularly in the case when the natural bluff edge cannot be determined with precision.

RESEARCH

The University of Santa Barbara Library Aerial Photographs (UCSBLAP) contain several historical vertical images of the site. The oldest image available on the UCSBLAP website was taken in May 1931. However, the image is not of sufficient resolution to accurately determine the location of the natural bluff top. Figure 3 is a 1947 aerial photograph of the site which shows the estimated location of the bluff edge as determined using a stereoscope. The presence of vegetation obscures the exact location, so the bluff top on the site is approximated by connecting the adjacent bluff top locations. UCSBLAP also contains vertical aerial photographs that shows the site in February 1963. This image has the best resolution for determining the bluff top using a stereoscope, and also using the visible bluff top on properties to both the north and the south of the site. The bluff top shown on this image is Figure 4, and is in reasonable agreement with the location shown on Figure 3. It should be noted that the aircraft that were taking the photographs in 1947 and 1963 were flying over the ocean and not directly above the site. This is why the ocean facing side of the residence is seen in the images. If the aircraft was directly above the site,

the side of the residence would not be visible much like one sees in Google Earth images. The angle from the lense to the site results in some distortion of the features on the images.



Figure 3. Bluff top location from USCB Aerial Photograph Collection image C11730 4-75, taken on August 23, 1947.



Figure 4. Bluff top location from USCB Aerial Photograph Collection stereo pair images, taken on February 29, 1963.

CONCLUSIONS

Based on our site observations, review of vertical aerial photographs, and oblique aerial photographs prior to the construction of the upper retaining wall and grading of the slope, GSI concludes that the coastal bluff edge at the subject site occurs at approximate elevation 45 feet NAVD88. The location of the coastal bluff edge at the subject site is shown in plan view on Plate 1, adopted from TEI (2019). Figures 3 and 4 show the approximate location of the coastal bluff edge on two of the aerial photographs obtained for the investigation. It is our opinion that the location of the coastal bluff edge shown on Plate 1 represents the topographic inflection point between the mostly flat-lying to gently sloping coastal terrace and the more steeply sloping coastal bluff. In addition, per California Code of Regulations, Title 14, §13577(h)(2), the coastal bluff edge location shown on Plate 1 is considered the point nearest the cliff beyond which the downward

gradient of the surface increases more or less continuously until it reaches the general gradient of the cliff in effect when the 1980 permit was issued for bluff repair. It should be noted that the bluff top location shown on Plate 1 is essentially where the bluff top was denoted in CDP A-80-7442.

LIMITATIONS

Inasmuch as our study is based upon our review, engineering analyses, and laboratory data, the conclusions and recommendations presented herein are professional opinions. These opinions have been derived in accordance with current standards of practice, and no warranty is express or implied. Standards of practice are subject to change with time. GSI assumes no responsibility or liability for work or testing performed by others, or their inaction; or work performed when GSI is not requested to be onsite, to evaluate if our recommendations have been properly implemented. Use of this report constitutes an agreement and consent by the user to all the limitations outlined above, notwithstanding any other agreements that may be in place. In addition, this report may be subject to review by the controlling authorities. Thus, this report brings to completion our scope of services for this portion of the project.

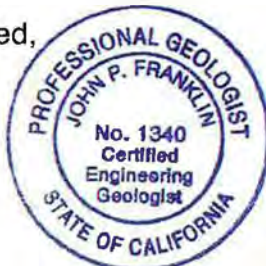
The opportunity to be of service is sincerely appreciated. If you should have any questions, please do not hesitate to contact our office.

Respectfully submitted,

GeoSoils, Inc.


John P. Franklin

Engineering Geologist, CEG 1340




David W. Skelly

Civil Engineer, RCE 47857



DWS/JPF/sh

Enclosure: Appendix - References
Plate 1 - Coastal Bluff Edge Location

Distribution: (2) Addressee (US Mail and email)

APPENDIX

REFERENCES

California Coastal Commission, 2003, Memorandum: Establishing development setbacks from coastal bluffs, W11.5, dated January 16.

California Department of Conservation, Division of Mines and Geology, 1997, Seismic hazard zone report for the Laguna Beach 7.5-minute quadrangle, Orange County, California, revision dated January 13, 2006.

City of Laguna Beach, 2020, Laguna Beach municipal code, dated January 1.

_____, 2012, Laguna Beach general plan, land use element, ordinance no.: 1559, dated February 7.

Morton, 2004, Preliminary geologic map of the Santa Ana 30' x 60' minute quadrangle, southern California, v. 2.0, 2 sheets, 1:100,000-scale, United States Geological Survey Open-File Report 99-172.

Toal Engineering, Inc., 2019, Topographic survey, 1007 Gaviot Drive, 1 sheet, scale: 1 inch = 8 feet, job no.: 16076, dated January 21,

State of California, California Code of Regulations, 2020, Title 14, § 13577 (h) (2).

United States Geological Survey, 1996, Topographic survey of the Laguna Beach 7.5-minute quadrangle, Orange County, California, 1 sheet, 1:24,000-scale.

PHOTOGRAPHS

University of Santa Barbara Library Aerial Photographs, C 1559 262 Photo taken on May 22, 1931, C-11730 4-75 Photo taken on 8-23-1947, Pai 199v -22 Photo taken on 2-2-1963, Pai 199v 1 39 Photo taken on 2-2-1963,

Coastal Records Website, 7238083 Photo taken in 1972, 201311206 Photo taken on 9-29-2013 (californiacoastline.org).

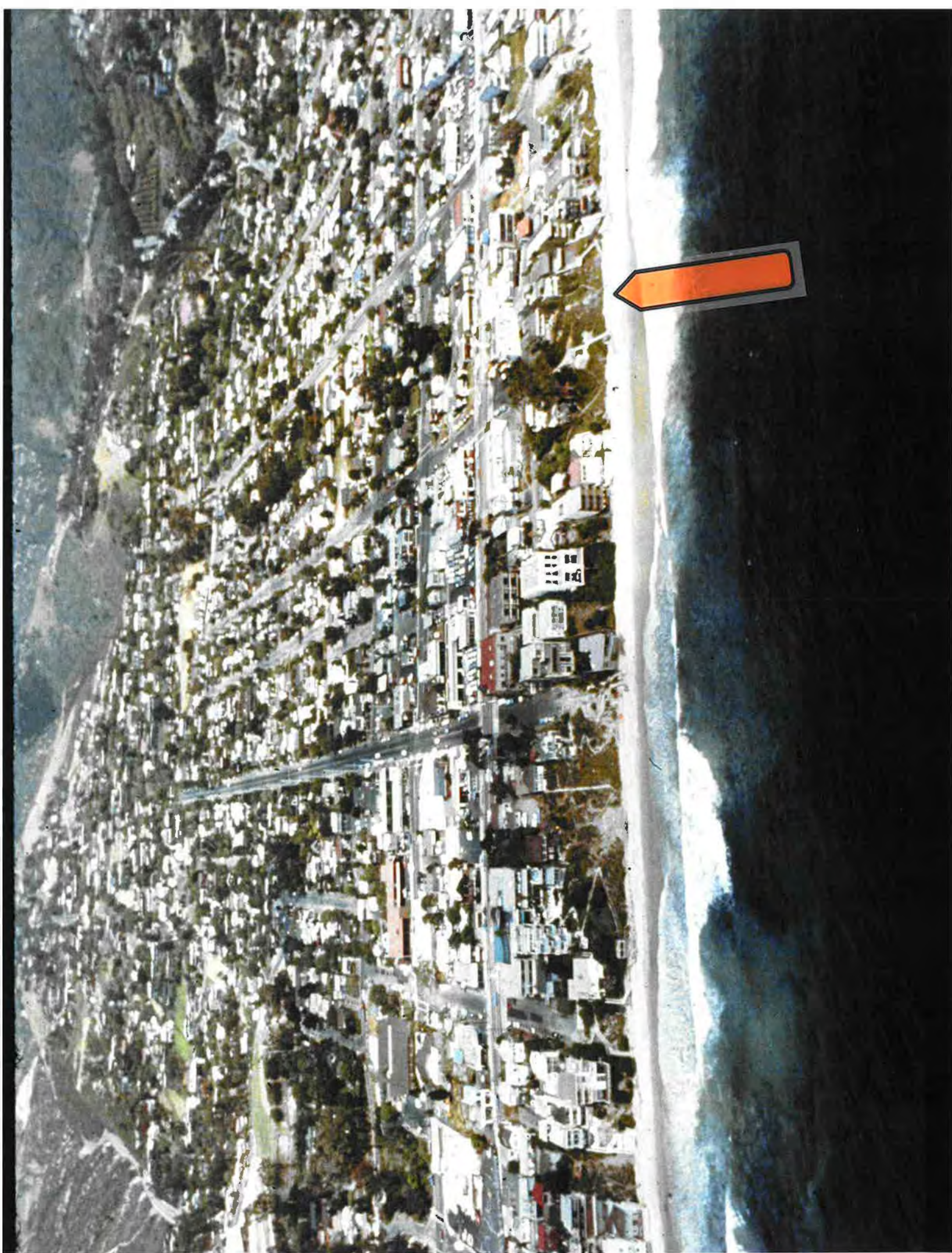


EXHIBIT "8"

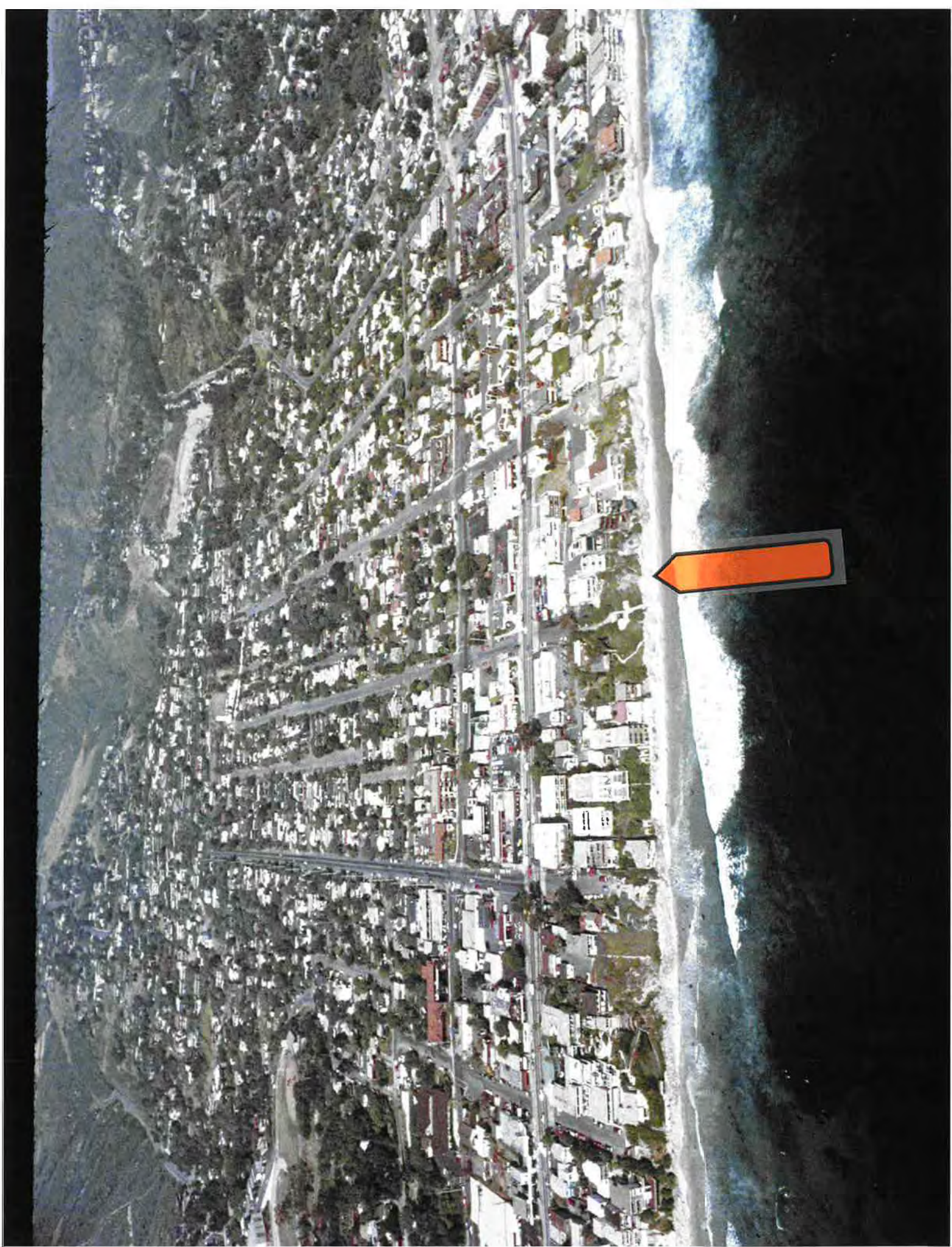


EXHIBIT "9"

Mike and Lori Gray Residence
1007 Gaviota Drive
Laguna Beach, California 92651

Revisions

No.	Date	Revision

Date	03.21.22
Job No.	
Planning	
Submitted	2022-03-21

Sheet Title
L.U.E. BLUFF EDGE
EXHIBIT

Sheet No.
Exhibit 7



First Floor & Basement Plan
L.U.E. Bluff Edge & Setback Exhibit
SCALE: 1/4" = 1'-0"

LEGEND

- L.U.E. BLUFF EDGE
- 25' SETBACK FROM BLUFF EDGE
- BLDG. AREA OUTSIDE OF SETBACK (APPROX. 638 SF)

**FIRST FLOOR HABITABLE AREA
DECREASED BY 47.3%.**





Second Floor & Mezzanine Plan
L.U.E. Bluff Edge & Setback Exhibit
SCALE: 1/4" = 1'-0"

LEGEND

- L.U.E. BLUFF EDGE
- 25' SETBACK FROM BLUFF EDGE
- BLDG. AREA OUTSIDE OF SETBACK (APPROX. 486 SF)

**SECOND FLOOR HABITABLE AREA
DECREASED BY 58.6%.**



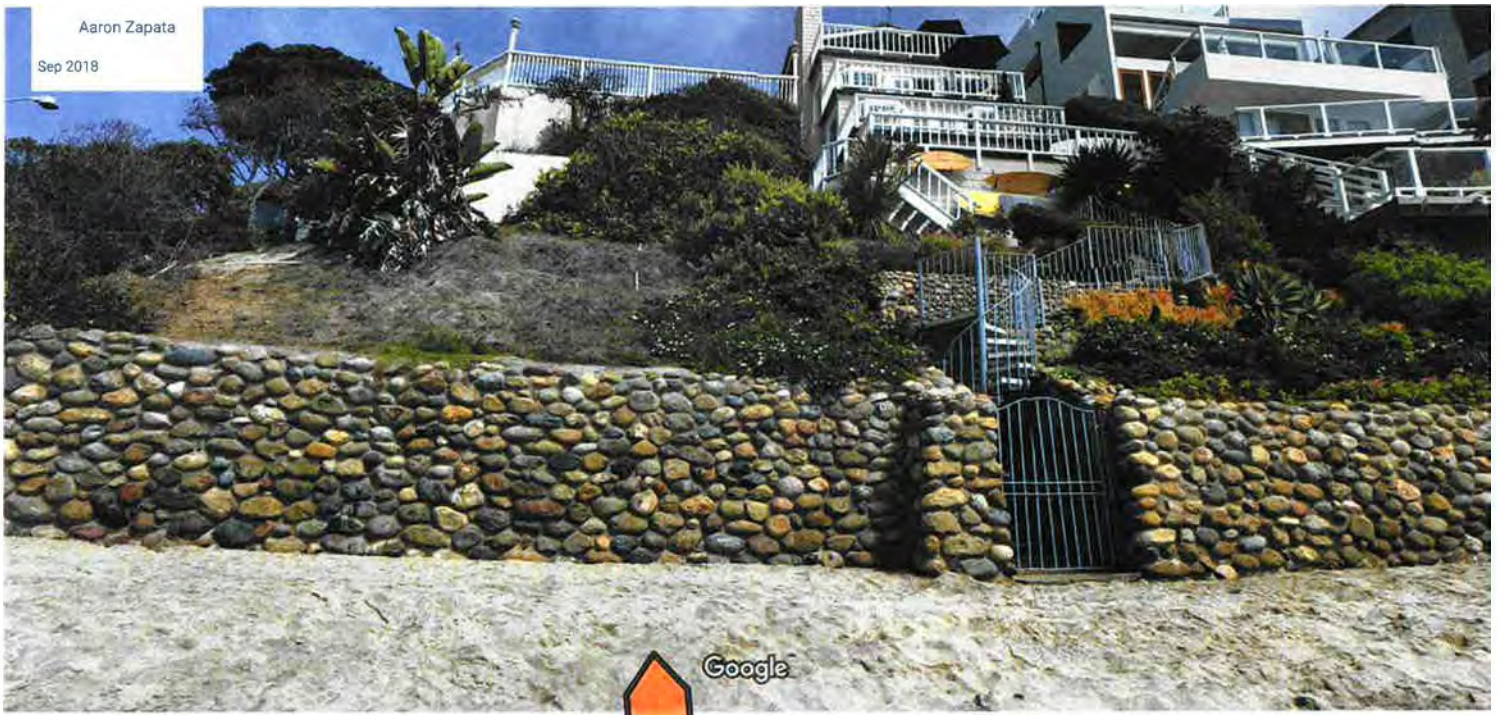


Image capture: Sep 2018 Images may be subject to copyright.



March 3, 2023

Mike and Lori Gray
c/o NOSSAMAN, LLP
777 South Figueroa Street, 34th Floor
Los Angeles, California 90017

Project No: 72175-01
Report No: 23-9332

Subject: **Response to Bluff Edge & Geologic Setback Review Memorandum dated February 24, 2023, Exhibit 5 to De Novo Appeal A-5-LGB-22-0025**
1007 Gaviota Drive
Laguna Beach, California

Dear Mr. and Ms. Gray,

In accordance with your request, this correspondence provides our response to a review of the California Coastal Commission Bluff Edge & Geologic Setback Review Memorandum dated February 24, 2023, attached as Exhibit 5 to the De Novo Appeal A-5-LGB-22-0025 regarding the proposed construction of a single-family home on the subject property.

CCC revised Bluff Edge Location and Setbacks

As background, this blufftop property was the site of a landslide failure in 1980 following 21-inches of rain from January through April. These storms were attributed to multiple bluff failures throughout the City in 1980. In this case, this failure was determined to threaten the residence, so a repair was devised for emergency permitting. Permit 80-491 indicated the scope of work to be completed as:

Emergency Slope Repair due to rain storms, Engineering advise that house probably suffer with additional storms if corrected work not done.

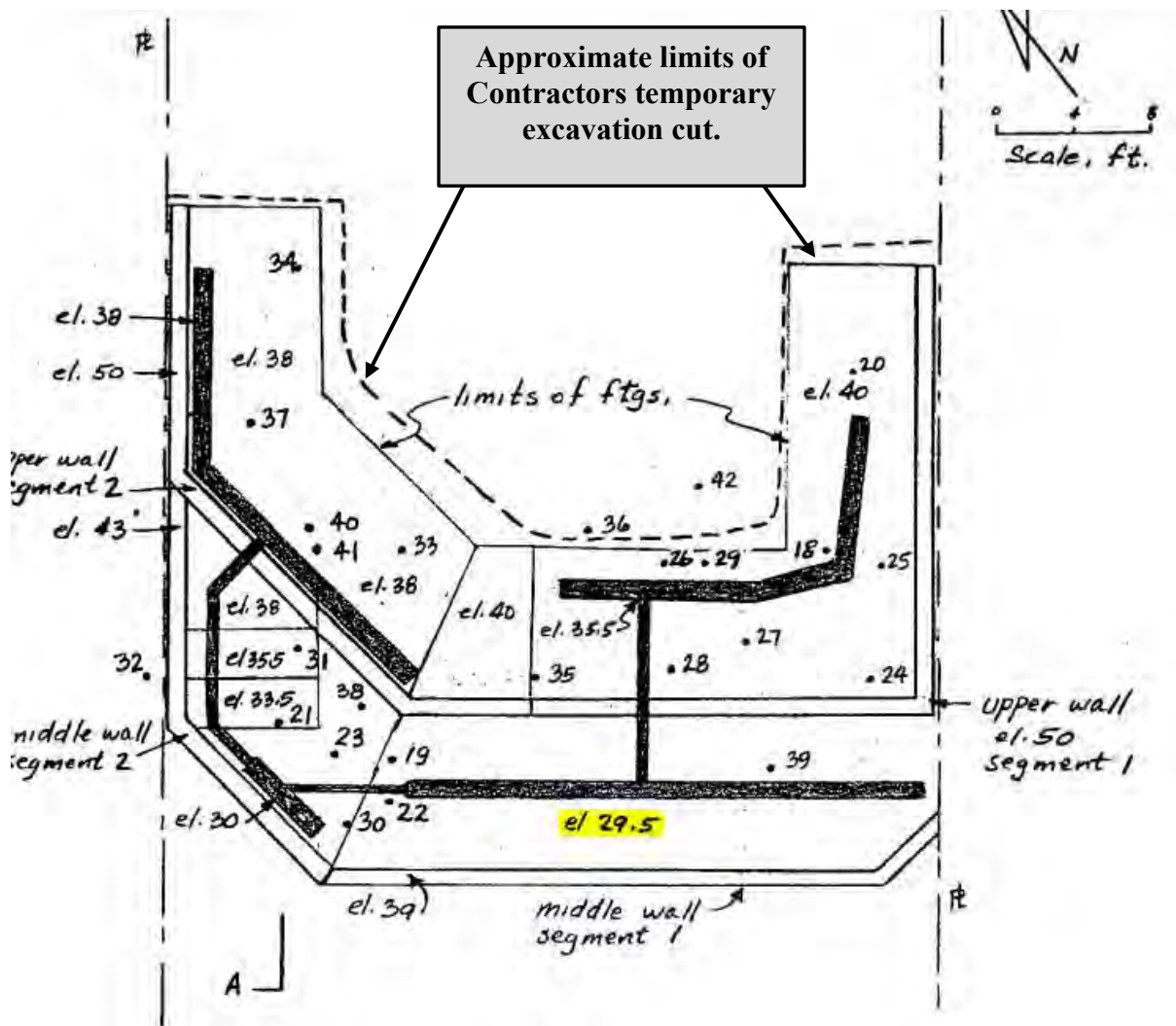
This City of Laguna Beach building permit was issued on November 11, 1980. The California Coastal Commission Coastal Development Administrative Permit A-80-7442 was approved on November 17, 1980. Based on the development description, the approved project consisted of:

*Construction of 3 retaining walls on an improved, 4880+_{ocean bluff} R-2 lot. One retaining wall, **at the top of bluff**, will be 32' across the site and 4.5' above grade, one wall will extend the width of the site, 40' and 2' above grade and a third wall, the most seaward, will extend the width of the site, 40' above grade. Three walls are required to stabilize the site due to the steep slope and the distance down slope, 57+', to be stabilized. (Emphasis added)*

Our office interprets the Commission limiting the location of the upper wall to the top of bluff in 1980 as a requirement that limits the project to a restoration of the level pad area of the property

to the natural and original configuration, not an opportunity for a seaward extension of the buildable lot. The project was completed and included additional conditions that were satisfied, including the final transfer of the beach in 1982. It is clear the project was considered satisfactory and in keeping with the intended and required objectives, and was accepted and approved by the City and the Coastal Commission.

To achieve the approved design, the stabilization of the site and installation of the permitted walls required earthwork, temporary cuts and engineered fill grading to provide adequate access to the contractor. The location and limits of these temporary cuts were established by the means and methods used by the repair contractor, and were recorded by the geotechnical engineer in the final report documenting the adequacy of the work. This is not a “pre-fill bluff edge”, it is a temporary artifact devised by the contractor to access the permitted work. Drawing 3 from the final report approximately depicts the limits of the temporary cuts used by the contractor.



Excerpt from Drawing No. 3, E.J. Miller, 1981, “Final Report of the Observations and Tests during Repair of the Slope on the Seaward Gaviota Drive, Laguna Beach, California” dated May 19, 1981

At significant issue in Exhibit 5 is the revised location of the bluff edge and the resulting setbacks to new construction. Based on comparison of the location with the temporary cut locations depicted by E.J. Miller, it appears the Commission Geologist is abandoning the permitted bluff edge and is reinterpreting the bluff edge to closely coincide with the temporary cut limit. Justification for the revision is presumed to be based on the 2011 amendment language to the definition of the “Oceanfront Bluff Edge”, which included

In areas where fill has been placed near or over the bluff edge, the original bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.”

The LUE bluff edge depicted in Exhibit 5, Figure 1, is clearly not the natural or *original bluff edge*. The natural and original bluff edge is presented in the GeoSoils report and is coincident with the top of the upper wall, as intended by the Commission in 1980. Additionally, it is within the LUE definition to have the bluff edge buried by fill, and be projected to the surface. Nowhere in the LUE definition is the bluff edge to be considered at a contractor manufactured excavation limit.

Surficial Erosion, Geofirm Reports

Exhibit 5 identifies reports by our office which interpret some surficial erosion at the subject property appeared to be present based on 1970 aerial photographs. Our 2019 report states:

In addition, the yard area backing the residence appears significantly reduced on the seaward edge in the images from 1970. It appears some material was lost at the top, possibly following the winter of 1969. The 1970 toe of the slope appears to be in the same location as 1931 and 1964, suggesting the material loss is not associated with a gross failure. It is our interpretation the upper portion of the slope, possibly within the terrace sand, failed after increased saturation and flowed along the terrace bedrock contact following the heavy rainfall season. It remains unknown to our office if the material lost from the slope between 1964 and 1970 was the impetus for the wall system construction in 1980.

It has come to our understanding the observation described above was not the reason for the 1980 repair. No quantitative measured or estimated breadth and width of the erosion interpreted on the yard seaward of the residence, which included the face of the slope beyond the bluff edge, as well as the pad, was provided by our office, given the apparent distances involved or interpreted did not possess the extent to allow reliable or practical measurements. The condition described and interpreted in the image reflected localized surficial soil sluffing, possibly into the terrace soils, as described. Subsequent oblique aerial photographs from 1972 and 1979 from the California Records Project website do show similar surficial sluffing on the slope face around that time period.

Unfortunately, the above statement provided the impetus for the Commission Geologist to apply an assumed retreat of the pad and 10 feet shift landward of the bluff edge in all areas. We find this assumption, as well as an assumed 10 feet of overall retreat throughout the pad, overstates our interpretation and observations. That assumed condition would be beyond dramatic, and a

March 3, 2023

Project No: 72175-01

Report No: 23-9332

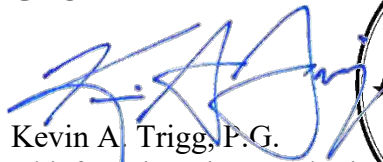
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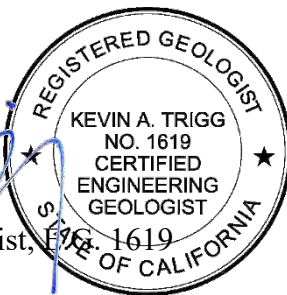
reliably measurable event and within our ability to provide an estimated distance or range of distances. Given the property owner's abilities and resources, such an event would have triggered an application for repair work at that time, similar to that conducted in 1981. Based on our findings, this was not the case.

Thank you for this opportunity to be of service. If you have any questions, please contact this office.

Respectfully submitted,

GEOFIRM


Kevin A. Trigg, P.G.
Chief Engineering Geologist, No. 1619



KAT: mr

Distribution: Addressee Via Email