

CALIFORNIA COASTAL COMMISSION

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W8a

Filed:	12/23/22
180th Day:	6/21/23
Staff:	F. Sy-LB
Staff Report:	4/20/23
Hearing Date:	5/10/23

STAFF REPORT: CONSENT CALENDAR

Application No.:	5-23-0019
Applicant:	CR Family Trust
Agent:	Eric Trabert & Associates
Location:	5007 Seashore Drive, Newport Beach, (Orange County) (APN: 424-451-03)
Project Description:	Construct an approximately 9-ft. deep by 30-ft. wide wooden deck patio and 3-ft. high perimeter wall associated with a single-family residence within the City of Newport Beach allowable beach encroachment area.
Staff Recommendation:	Approval with conditions

SUMMARY OF STAFF RECOMMENDATION

The applicant proposes construction of an approximate 9-ft. deep by 30-ft. wide wooden deck patio and 3-ft. high patio perimeter wall, creating an approximately 270 sq. ft. area for a private patio for a single family residence on a beach fronting lot within the City of Newport Beach allowable beach encroachment area. The proposed development is located on sandy beach area within the Commission's original permit jurisdiction. The standard of review for development within the Commission's original permit jurisdiction is Chapter 3 of the Coastal Act, and the City's certified Local Coastal Program (LCP) may provide guidance. The City's LCP allows private patio encroachments up to 10 ft. onto the Oceanfront Walk right-of-way in the area of the subject site only if the development does not interfere with access to the beach or ocean, when a building permit is not required, and subject to payment of a mitigation fee.

Issues raised by the proposed project and addressed by the staff recommendation are mitigation for public access impacts and agreement by the applicant that the development is temporary subject to removal in the future if determined by an appropriate agency to be permanently unsafe for use due to coastal hazards or if the area is needed for public access or recreation. Commission staff recommends that the Commission find construction of the encroachment at the subject site, as conditioned, is consistent with the Coastal Act and the certified LCP.

Staff is recommending approval of the proposed project with seven (7) special conditions regarding: 1) no future shoreline protective device; 2) assumption of risk; 3) construction best management practices; 4) landscaping; 5) no deviation from approved encroachments and mitigation compliance; 6) City's right to revoke encroachment permit; and 7) deed restriction.

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APPENDICES

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EXHIBITS

[Exhibit No. 1 – Location Map](#)

[Exhibit No. 2 – Project Site Plan](#)

[Exhibit No. 2 – Project Elevations Plan](#)

I. MOTION AND RESOLUTION

Motion:

I move that the Commission approve the Coastal Development Permit applications included on the consent calendar in accordance with the staff recommendations.

Staff recommends a **YES** vote. Passage of this motion will result in approval of all the permits included on the consent calendar. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution:

The Commission hereby approves Coastal Development Permit Application No. 5-23-0019 for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act . Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittees to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **No Future Shoreline Protective Device.**
 - A. By acceptance of the permit, the permittee agrees, on behalf of themselves and all successors and assigns, that no new shoreline protective device(s) shall be constructed to protect the development approved pursuant to Coastal Development Permit No. 5-23-0019 including, but not limited to, the patio, perimeter wall, footings and any other future improvements in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, liquefaction, sea level rise, or any other coastal hazards in the future. By acceptance of this permit, the permittee hereby waives, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under applicable law.
 - B. By acceptance of this permit, the applicant/landowner further agree, on behalf of themselves and all successors and assigns, that the landowner shall remove the development authorized by this permit including, but not limited to, the patio, perimeter wall, or footings, if the City or any government agency with legal jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that the structures are currently and permanently unsafe for occupancy or use due to coastal hazards and that there are no measures that could make the structures suitable for habitation or use without the use of a shoreline protective device. Any future encroachment must be removed unless the Coastal Commission determines that the encroachment is legally permissible pursuant to the Coastal Act and authorizes it to remain, and any future encroachment would also be subject to the State Lands Commission's (or other trustee agency's) leasing approval. The permittees shall obtain a coastal development permit for removal of approved development unless the Executive Director determines that no coastal development permit is legally required.
2. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the permittee acknowledges and agrees (i) that the site may be subject to hazards from waves, erosion, storm conditions, liquefaction, flooding, and sea level rise; (ii) to assume the risks to the permittee and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's

approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

3. Storage of Construction Materials, Mechanized Equipment and Removal of Construction Debris. The permittee shall comply with the following construction-related requirements:

- A. No demolition or construction materials, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion;
- B. No demolition or construction equipment, materials, or activity shall be placed in or occur in any location that would result in impacts to environmentally sensitive habitat areas, streams, wetlands or their buffers;
- C. Any and all debris resulting from demolition or construction activities shall be removed from the project site within 24 hours of completion of the project;
- D. Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters;
- E. All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day;
- F. The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction;
- G. Debris shall be disposed of at a legal disposal site or recycled at a recycling facility. If the disposal site is located in the Coastal Zone, a coastal development permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required;
- H. All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil;
- I. Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems;
- J. The discharge of hazardous materials into any receiving waters shall be prohibited;
- K. Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible;
- L. Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or

construction-related materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity; and

- M. All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

4. Landscaping-Drought Tolerant, Non-Invasive Plants. Vegetated landscaped areas shall only consist of native plants or non-native drought tolerant plants, which are non-invasive. No plant species listed as problematic and/or invasive by the California Native Plant Society (<http://www.CNPS.org/>), the California Invasive Plant Council (formerly the California Exotic Pest Plant Council) (<http://www.cal-ipc.org/>), or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a “noxious weed” by the State of California or the U.S. Federal Government shall be utilized within the property. All plants shall be low water use plants as identified by California Department of Water Resources (See: <https://ucanr.edu/sites/WUCOLS/files/183488.pdf>). If potable water is used for irrigation only drip or micro spray irrigation systems may be used. Other water conservation measures shall also be considered, such as use of weather based irrigation controllers.

5. No Deviation from Approved Encroachments. The only encroachment into the 10-ft. deep encroachment area within the City of Newport Beach Oceanfront public right-of-way allowed by this coastal development permit is a perimeter patio wall (no more than 3-ft. high) around the perimeter of an at-grade approximate 9-ft. deep by 30-ft. wide wooden deck patio. Any development in the public right of way, including improvements, repairs, and maintenance, cannot occur without an amendment to this coastal development permit or a new coastal development permit from the Coastal Commission, unless the Executive Director determines through written confirmation that no amendment or new permit is legally required.

PRIOR TO ISSUANCE OF THE PERMIT, the permittee shall submit evidence, for the review and approval of the Executive Director, that the permittee has obtained an encroachment permit from the City of Newport Beach, as well as the permittee’s enrollment in the City’s public access impact mitigation program, including proof of the permittee’s most recent annual payment into the City’s mitigation program. The permittee and all successors and assigns must remain enrolled in the City’s public access impact mitigation payment program and make the recurring annual payment so long as the encroachments approved by this permit remains in place. If the City’s encroachment permit modifies the requirements of this permit, the permittee must obtain an amendment to the permit.

6. City’s Right to Revoke Encroachment Permit. Approval of this coastal development permit shall not restrict the City’s right and ability to revoke, without cause, the approved City encroachment permit in order to construct public access and recreation improvements within the public right of way or to provide additional sandy beach area.

7. Deed Restriction. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the landowner has executed and recorded against the parcel(s) located at 5007 Seashore Drive, Newport Beach (the "Applicant's Property"), a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the City of Newport Beach and the California Coastal Commission has authorized development on City-owned property adjacent to the Applicant's Property associated with and benefiting the Applicant's Property subject to terms and conditions that restrict the use and enjoyment of the adjacent property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Applicant's Property. The deed restriction shall include a legal description of the entire parcel or parcels of the Applicant's Property and description of the beach encroachment area governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on, adjacent to, or with respect to the property.

IV. FINDINGS AND DECLARATIONS

A. PROJECT LOCATION, DESCRIPTION, AND STANDARD OF REVIEW

The project site is a portion of public sandy beach adjacent to a privately owned beach fronting parcel located at 5007 Seashore Drive within an existing developed residential area on the Balboa Peninsula in the City of Newport Beach Orange County ([Exhibit No. 1](#)). A single-family residence is located on the privately owned beach fronting parcel adjacent to the project site within the City of Newport Beach's LCP permitting jurisdiction.

The proposed project includes the construction of an approximately 9-ft. deep by 30-ft. wide, 270 sq. ft. wooden deck patio and a 3-ft. high perimeter wall 9-ft. from the south (ocean-facing) property line for private patio use associated with the single-family residence along a portion of public beach where encroachments are allowed by the City of Newport Beach ([Exhibits No. 2-3](#)). The public beaches of Balboa Peninsula are within the Commission's permit jurisdiction. The pattern of development in the vicinity is similar to that proposed by the project – primarily low patio/garden wall, patios, landscaping extending ten feet onto the sandy beach in public right-of-way designated on assessor's parcel maps as Oceanfront Street or Oceanfront Walk. The portion of public right-of-way along the central part of the Balboa Peninsula (downcoast of the subject site, between 36th Street and E Street) is developed with a paved public walkway/bikeway. However, there is no paved beachfront public lateral accessway in front of the subject site, only sandy beach. The proposed encroachment would contribute to the cumulative adverse impacts on recreational beach use resulting from the various existing encroachments on the public right-of-way in the area. In addition, if not constructed in a manner which minimizes impacts to the natural environment and if not designed to be easily removable, the proposed encroachments could make it difficult for the City to extend the boardwalk upcoast for expanded paved lateral access.

The City of Newport Beach LCP was effectively certified on January 13, 2017. The standard of review for development within the Commission's original permit jurisdiction is Chapter 3 of the Coastal Act, although the City's certified LCP is advisory in nature and may provide guidance. In 1991, the Commission certified an amendment to the City of Newport Beach LUP. The LUP allowed for the approval of encroachments in the City-owned public right-of-way, while also acknowledging the adverse public access impacts that would result from encroachments on the sandy beach area in this area. This cumulative impact is addressed in the certified Land Use Plan by imposition of a mitigation plan. The mitigation plan requires an annual payment to be made to the City by encroaching homeowners which is applied to improving public access in Newport Beach. The City has constructed a number of public access improvements (including street end improvements which provide additional public parking spaces) using the encroachment funds. When it certified the LUP amendment allowing these encroachments, the Commission found that, if developed consistent with the mitigation plan, encroachments onto the City's Oceanfront public right-of-way would be consistent with the public access and recreation policies of Chapter 3 of the Coastal Act. The Commission certified the City of Newport Beach Implementation Plan (IP) in January

2017 which included the Oceanfront Encroachment Policy Guidelines as Appendix C of the certified LCP.

As conditioned, the proposed encroachment at the subject site is consistent with the certified LCP oceanfront encroachment policies and with previous Commission-approved encroachments adjacent to other properties in the Zone A (52nd Street to 36th Street) in the vicinity of the project site. The Commission's findings supporting certification of LUP Amendment 90-1 address the encroachment policy's consistency with Chapter 3 of the Coastal Act and are incorporated herein by reference. Specifically, the Commission found encroachments could be permitted in this area because of the presence of the wide sandy beach, lack of beach habitat (e.g., dunes), and the public amenities the City pledged to invest in and improve with encroachment permit fees and other City funds. The City is continuing to carry out the public access improvements required by the LCP mitigation plan to offset any adverse impacts of the encroachments. The mitigation payment made to the City is an annual recurring payment. The applicant and any successors in interest must remain enrolled in the annual fee system and pay the recurring fee so long as the encroachment remains in place. The applicant did not provide proof of current encroachment permit from the City or proof of payment of the annual mitigation fee. Therefore, **Special Condition No. 5** requires the applicant submit evidence, for the review and approval of the Executive Director, of an encroachment permit from the City of Newport Beach, as well as enrollment in the City's public access impact mitigation program, including proof of the most recent annual payment into the City's mitigation program. The applicant and all successors and assigns must remain enrolled in the City's public access impact mitigation payment program and make the recurring annual payment so long as the encroachments approved by this permit remain in place.

Section 13250(b)(1) of the California Code of Regulations provides that development such as the proposed encroachment is not exempt from the requirement of obtaining a coastal development permit pursuant to Coastal Act Section 30610(a), because such development would be located on the beach. To ensure that no further beach encroachments occur, **Special Condition No. 5** also requires that an amendment to this permit or a new coastal development permit be obtained for any deviations to the encroachments described in this permit. This would allow the Commission to evaluate future encroachment deviations for adverse public access and recreation impacts. Additionally, the permittees must enter into an encroachment agreement with the City in which they waive their right to contest the ability of the City to remove the encroachments in order to build public access improvements within the public right-of-way. Thus, **Special Condition No. 6** ensures that issuance of this coastal development permit neither restricts, nor interferes with, the City's right to revoke its encroachment permit. This would ensure future opportunities for public access and recreation because the City would retain the ability to construct public access and recreation improvements in the public right of way.

Furthermore, the proposed project is located in an oceanfront area where coastal hazards exist and can adversely impact the proposed development. No shoreline

protective device is proposed to protect the development pursuant to this permit. As conditioned, the approximate 3-ft. high perimeter wall proposed in the encroachment area may prevent the site from flooding in instances of extreme rain events or a 100-year storm that causes low lying areas of the beach to flood, but the wall is not designed to act as a shoreline protective device and can be easily removed in case it is damaged or the City revokes the encroachment permit. **Special Condition No. 1** requires the applicant to acknowledge that the development approved by this permit is not entitled to shoreline protection, to waive any rights to shoreline protection that may exist under applicable law, and bears physical and financial responsibility to remove the accessory development if it is determined to be permanently unsafe for occupancy or use due to coastal hazards. **Special Condition No. 2** would require the applicant to assume the potential risk of injury and damage arising from coastal hazards that may threaten the development.

B. HAZARDS

Development adjacent to the ocean or bay is inherently hazardous. Development which may require a protective device in the future cannot be allowed due to the adverse impacts such devices have upon, among other things, public access, visual resources and shoreline processes. To minimize the project's impact on shoreline processes, and to minimize risks to life and property, the development has been conditioned to: require an appropriate set-back from the water; require a drainage and runoff control plan to direct, treat, and minimize the flow of water offsite; prohibit construction of protective devices (such as a seawall) in the future; and to require that the landowner and any successor-in-interest assume the risk of undertaking the development. As conditioned, the Commission finds that the development conforms to the requirements of the City of Newport Beach LCP regarding the siting of development in hazardous locations.

C. Development

The development is located within an existing developed area and is compatible with the current character and scale of the surrounding area (small beach encroachments subject to the City's encroachment program). However, the proposed project raises concerns that future development of the project site potentially may result in a development which is not consistent with the Chapter 3 policies of the Coastal Act. To assure that future development within the encroachment area is consistent with the Chapter 3 policies of the Coastal Act, the Commission imposes **Special Condition No. 5** requiring a permit for any new development in the encroachment area. As conditioned, the development conforms with the Chapter 3 policies of the Coastal Act.

D. Public Access

The proposed development will not affect the public's ability to gain access to, and/or to use the coast and nearby recreational facilities. Therefore, the proposed development, as conditioned, conforms to the City of Newport Beach certified LCP policies and requirements regarding public access and the public access and recreation policies of the Coastal Act.

E. WATER QUALITY

The proposed development has a potential for a discharge of polluted runoff from the project site into coastal waters. Thus, the Commission imposes **Special Condition No. 3**, which requires the project incorporate design features to minimize the effect of construction and post-construction activities on the marine environment. These design features include, but are not limited to, the appropriate management of equipment and construction materials, reducing runoff through the use of permeable surfaces, and for the use of post-construction best management practices to minimize the project's adverse impact on coastal waters. As conditioned, the Commission finds that the development conforms to the water quality control policies and requirements of the City of Newport Beach certified LCP regarding the protection of water quality to promote the biological productivity of coastal waters and to protect human health.

F. DEED RESTRICTION

To ensure that any prospective future owners of the property are made aware of the applicability of the conditions of this permit, the Commission imposes **Special Condition No. 7** requiring that the property owner record a deed restriction against the property, referencing all of the above Special Conditions of this permit and imposing them as covenants, conditions and restrictions on the use and enjoyment of the property. Thus, as conditioned, this permit ensures that any prospective future owner will receive actual notice of the restrictions and/or obligations imposed on the land use and enjoyment of the land in connection with the authorized development, including the risks of the development and/or hazards to which the site is subject, and the Commission's immunity from liability.

G. LOCAL COASTAL PROGRAM (LCP)

On January 13, 2017, the City of Newport Beach Local Coastal Program (LCP) was effectively certified. The subject CDP application is for development proposed seaward of the property line, an area within the Commission's jurisdiction and consequently, the standard of review is Chapter 3 of the Coastal Act and the certified LCP serves as guidance. As conditioned, the proposed development within the Commission's original jurisdiction is consistent with Chapter 3 of the Coastal Act.

H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The City of Newport Beach is the lead agency responsible for certifying that the proposed project is in conformance with the California Environmentally Quality Act (CEQA). The City determined that in accordance with CEQA, the project is categorically exempt (CEQA Guidelines Sections 15268), identifying a Class 3 CEQA Exemption on December 2, 2022. Section 13096(a) of the Commission's administrative regulations requires Commission approval of coastal development permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of CEQA.

Although the proposed development is categorically exempt from CEQA, the Commission has imposed conditions to ensure conformity with Coastal Act requirements. As conditioned, there are no feasible alternatives or additional feasible

mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, is the least environmentally damaging feasible alternative and consistent with the requirements of the Coastal Act and CEQA.

APPENDIX A: Substantive File Documents

City of Newport Beach LCP; City of Newport Beach Planning Department Approval-in-Concept No. PA2022-0284 dated 12/2/22.