

CALIFORNIA COASTAL COMMISSION

SAN DIEGO DISTRICT OFFICE
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4402
VOICE (619) 767-2370
FAX (619) 767-2384



F15a

Staff: C. Jander-SD
Staff Report: 3/28/24
Hearing Date: 4/12/24

STAFF REPORT: DISPUTE RESOLUTION ON AMENDMENT REJECTION

Application No.: 6-16-0340-EDD

Applicant: Steve and Janet Moss

Agent: Geo-Law, Attn: Benjamin T. Benumof

Location: 5015 Tierra Del Oro, Carlsbad, San Diego County.
(APN: 210-020-15-00)

Project Description: Appeal of the Executive Director's determination that the amendment application for after-the-fact approval of construction of bluff retaining walls, grading, and landscaping seaward of the identified bluff edge lessens and avoids the intended effect of the permit (pursuant to regulation § 13166); install new landscaping and hardscape; and improve private staircases on a 13,576 sq. ft. bluff top lot.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission **uphold** the Executive Director's determination to reject the proposed amendment pursuant to Coastal Commission regulation Section 13166. The Commission must uphold the Executive Director's Determination unless the Commission finds that either: (1) the proposed amendment would not lessen or avoid the intended effect of an approved or conditionally approved permit or (2) if the proposed amendment does lessen or avoid the intent of the permit, the Commission may accept the amendment if the applicant has presented newly discovered material information, that could not, with reasonable diligence, have been discovered and produced before the original permit, as amended, was granted.

In February 2008, the City of Carlsbad approved the redevelopment of the subject site, including demolition of an existing home and construction of a new home and rear yard improvements. The project was appealed by the Commission and at the June 2008 hearing, the Commission found Substantial Issue. In its August 2008 de novo review, of CDP No. A-6-CII-08-028, the Commission approved demolition of the existing 1-story, 2,100 sq. ft. home and construction of a 3-story, 5,450 sq. ft. home with garage. Of note, the approval included special conditions that prohibit any development seaward of the established bluff edge, including previously proposed pool, spa, patios, retaining walls, on the finding that such development would impact the bluff and would not be capable of being removed. The Commission interpreted the LCP policies to mean that only at-grade accessory structures are permitted on a bluff face, in other words, structures that do not require grading. A majority of the special conditions of approval were never met and the permit was not issued. In 2015, and associated with the applicant's sixth extension request, the Executive Director made the determination that there were changed circumstances that may affect the proposed project's consistency with the certified LCP and the public access and recreational policies of the Coastal Act. Thus, the request for extension of the approval for CDP No. A-6-CII-08-028 was denied by the Commission on May 11, 2016.

Subsequent to the extension request denial, the Commission heard the application for CDP No. 6-16-0340 at the May 11, 2016 hearing and approved a substantially similar project with 15 recommended Special Conditions. The project description included demolition of an existing one-story 2,100 sq. ft. home and the subsequent construction of a three-story 5,450 sq. ft. single-family residence, including a 1,078 sq. ft. basement and a 440 sq. ft. garage on a 13,576 sq. ft. lot. As proposed, all development was to be located inland of the established bluff edge (+36' MSL). Consistent with prior Commission action on the site, no development on the bluff face was proposed. In order to find the project consistent with the City of Carlsbad LCP policies that limit shoreline and bluff protective devices to protect existing structures, the Commission found that only as conditioned to prohibit the construction of future protection could the project be consistent with the policies of City's LCP, as well as the applicable policies of the Coastal Act. Therefore, Special Condition #3 was imposed to ensure that the new home will not result in the construction of additional shoreline or bluff protection devices, which cannot be used to protect the new structure. Special Condition #3 "No Future Bluff or Shoreline Protective Devise(s) to Protect the Proposed Development" required, in part, that "No new shoreline or bluff protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 6-16-0340 including, but not limited to, the residence, foundations, patios, balconies and any future improvements [...]".

In March 2023, the applicant submitted an amendment application to construct multiple improvements on the bluff face, some of which have already been constructed without a coastal development permit. The proposed amendment to the project description includes the following: after-the-fact approval of construction of several bluff retaining walls, grading, and landscaping seaward of the identified bluff edge; installation of new landscaping and hardscape; and improvements to existing private staircases ([Exhibit 2](#)).

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The entire proposed project description for the amendment would occur seaward of the bluff edge established at the time of the Commission's original authorization.

After consultation with the Commission's staff Coastal Engineer and geologist, staff determined that the retaining walls function as bluff protective devices. The retaining walls retain fill and therefore impede the natural erosion expected to occur on the bluff face. Therefore, since the amendment application includes after-the-fact approval of the retaining walls, which are identified as bluff protective devices, the amendment application is inconsistent with and lessens the intent of Special Condition #3 of CDP No. 6-16-0340. Therefore, the Executive Director rejected the amendment in May 2023 ([Exhibit 3](#)), pursuant to Section 13166 of Commission regulations.

On May 17, 2023, Commission staff received a letter from the applicant's representative requesting to enter into the dispute resolution process to appeal the Executive Director's determination that the non-buttressed, subterranean garden wall "serves as a shoreline protective device and lessens and avoids the intent of CDP #6-16-0340." The applicants are seeking interpretation of the requirements included in Special Condition #3. The applicants contend that the four ft. high non-buttressed, subterranean garden wall does not serve as a shoreline or bluff protection device, and thus is consistent with Special Condition #3 and that acceptance of the application would not lessen or avoid the intent of the Special Condition. Commission staff disagrees with the applicants' contention. The Executive Director determined that the applicants' request is inconsistent with Special Condition #3 and that the condition specifically bans grading of the bluff face and installation of any bluff protective devices.

We note that there are outstanding Coastal Act violations at the site, as described in Section F, below. The matter has been referred to the Commission's enforcement division to consider options for future action to address the violations.

Staff recommends that the Commission, after public hearing, **uphold** the Executive Director's determination that the CDP amendment application be rejected. The motion is on page 5.

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I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **uphold** the Executive Director's determination that the CDP amendment application be rejected. To implement this recommendation, staff recommends a **NO** vote on the following motion. Passage of this motion will result in rejection of the CDP amendment application, and the terms and conditions of CDP No. 6-16-0340 will remain unchanged. The motion passes only by affirmative vote of a majority of the Commissioners present.

Motion:

I move that the Commission **overturn** the Executive Director's decision to reject Coastal Development Permit Amendment Application Number 6-16-0340-A2, and I recommend a **no** vote.

Resolution to Concur with the Executive Director's Determination:

The Commission hereby concurs with the Executive Director's determination to reject Coastal Development Permit Amendment Application No. 6-16-0340-A2 on the grounds that the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit and that there is no newly discovered material information which, in the exercise of reasonable diligence, could not have been discovered and produced before the permit was granted.

II. FINDINGS AND DECLARATIONS

A. Project Location, History, and Prior Commission Action

The subject site is located at 5015 Tierra Del Oro, in the City of Carlsbad, County of San Diego ([Exhibit 1](#)). The site slopes from the street (Tierra Del Oro), towards the ocean, transitioning to a steep coastal bluff. In 2016, the Commission approved a project on the subject site that included the demolition of an existing 2,100 sq. ft. single family home and subsequent construction of a three-level 5,450 sq. ft. home, including a 750 sq. ft. garage on a bluff top lot. As described further below, all bluff face development was removed from the project description prior to Commission action and as such, no bluff face development was approved.

The subject site has a complex permit history, which is relevant to the dispute resolution at hand.

- In February 2008, the City of Carlsbad approved the redevelopment of the subject site to include the following project description: demolition of the existing 2,100 sq. ft. home and the subsequent construction of a three-level 6,755 sq. ft. single-family residence including a 2,366 sq. ft. basement. The project also included an infinity edge swimming pool, spa and patio proposed to be located cascading down the face of the coastal bluff.

- The project was appealed by the Commission later in February 2008 (ref: CDP No. A-6-CII-08-028). At the June 2008 hearing, the Commission found Substantial Issue and then approved the demolition of an existing single-family residence and the construction of a new 6,755 sq. ft. single-family residence with 17 Special Conditions on de novo review in August 2008.
- On January 8, 2009, the applicants submitted a revised final plan as part of Condition Compliance for Special Condition #1 requirements. The plans removed the pool, spa, etc. from the project but left the “daylighted” basement and retaining walls on the face of the bluff which would require grading seaward of the established bluff edge. The revised final plans were subsequently rejected as the plans did not meet the intent of Special Condition #1.
- In April 2009, the applicants began the dispute resolution process to protest the rejection of the revised final plans. The applicant proposed to include the retaining walls and “daylighted basement.” The Commission heard the dispute resolution on May 6, 2009 (ref: CDP No. 6-09-016-EDD), and the Commission upheld the Executive Director’s interpretation of Special Condition #1.
- A majority of the Special Conditions of approval were never met and CDP No. A-6-CII-08-028 was not issued. The applicant submitted multiple extension requests on an annual basis and the approval term was extended five times. In 2015, and associated with the applicant’s sixth extension request (ref: CDP No. A-6-CII-08-028-E6), the Executive Director made the determination that there were changed circumstances that may affect the proposed project’s consistency with the certified LCP and the public access and recreational policies of the Coastal Act. Specifically, the approval authorized in 2008 failed to assure the safety of the proposed development, in that the geotechnical reports provided did not include any sea level rise analysis and failed to consider if the home could be sited such that the home would not require reliance on existing shoreline protection. Thus, the request for permit extension was denied on May 11, 2016.
- Subsequent to the extension request denial, the Commission heard CDP No. 6-16-0340 at the May 11, 2016 hearing and approved the project with 15 recommended Special Conditions. Consistent with the requirements of the prior permit, the applicant worked with Commission staff to remove all bluff face development from the project description, and the project description was modified to include the demolition of a single-level 2,100 sq. ft. home and the subsequent construction of a three-level 5,450 sq. ft. single-family residence, including a 1,078 sq. ft. basement and a 440 sq. ft. garage and on a 13,576 sq. ft. lot. All approved development was to be located inland of the established bluff edge (+36’ MSL). The permit was issued on December 18, 2017.
- In September 2019, the Commission issued an immaterial amendment (ref: CDP No. 6-16-0340-A1) that amended the project description to include the following changes: after-the-fact removal of a buried grade beam and unconsolidated fill located inland of the bluff edge; revisions to approved backyard improvements

consisting of removal of retaining wall that daylight the basement inland of the established bluff edge.

- In December 2021, the applicant conducted unpermitted development on the bluff face including demolition of a wood deck, vegetation removal and grading on the bluff face, demolition of the upper section of the private beach access staircase, and construction of a four ft. high retaining wall. At that time, the City of Carlsbad issued a stop work order and Commission staff confirmed with the applicant that no bluff work is permitted.
- In February 2022, the applicant submitted pre-application materials that characterized the unpermitted development as repair and maintenance of existing development. Commission staff advised the applicant to apply for a CDP to remove the unpermitted development as the proposed project description is not in compliance with the approved and issued CDP No. 6-16-0340.
- A Notice of Violation was issued by the Commission's Enforcement staff on September 2022 requiring that a CDP amendment be submitted to remove the unpermitted development. This subject amendment application, which does not request removal of the unpermitted development, was submitted in response.

The staff report reviews the March 2023 amendment application in Sections C, D, and E.

B. Description of Original Approval

On May 11, 2016, the Commission heard CDP No. 6-16-0340 and approved the project that consisted of the demolition of an existing single-family residence and the construction of a new 5,450 sq. ft. single-family residence with all 15 recommended Special Conditions. Consistent with prior Commission action on the site (ref: CDP No. A-6-CII-08-0028), the applicant worked with Commission staff to revise their previous project description and removed all bluff face development from the project description prior to hearing. All proposed and approved development was located inland of the established bluff edge (+36' MSL).

When the Commission reviewed the first proposal to redevelop this site in 2008 (ref: CDP No. A-6-CII-08-0028), the applicant had proposed significant development on the bluff face, including retaining walls, a pool, and spa. The Commission found that these structures on the bluff face were inconsistent with the certified City of Carlsbad LCP. Mello II LUP Policy 4-1(d) states:

No development shall be permitted on sand or rock beach or on the face of any ocean bluff, with the exception of access ways to provide public beach access and of limited public recreational facilities.

Section 21.204.050 of the Coastal Shoreline Development Overlay Zone states:

a. Grading and Excavation - Grading and excavation shall be the minimum necessary to complete the proposed development consistent with the provisions of this zone and the following requirements:

2) No excavation, grading or deposit of natural materials shall be permitted on the beach or the face of the bluff except to the extent necessary to accomplish construction pursuant to this section.

In that action, the Commission interpreted the LCP policies to mean that only at-grade accessory structures are permitted on a bluff face, structures that do not require grading. The Commission found that “the minimum necessary” for new development on the bluff face meant at-grade and ephemeral structures that do not require excavation. Therefore, the Commission approved the permit with Special Condition #1 that required the applicant to submit revised final plans showing the deletion of any and all development proposed seaward of the established 36' MSL contour bluff edge (i.e., the pool, spa, patios, retaining walls, etc.) cannot be considered ephemeral and capable of being removed.

As described above, the approval for CDP No. A-6-CII-08-0028 was extended multiple times until the Commission denied the sixth extension request due to changed circumstances and the approval expired. A similar project was subsequently reviewed and approved as CDP No. 6-16-0340. While this new permit did not explicitly prohibit development on the bluff face as a condition of approval, likely because development was no longer proposed on the bluff face, it did include special conditions that prohibited the construction of any future shoreline or bluff protective devices.

In 2016 when the application for CDP No. 6-16-0340 was brought to the Commission, the Commission reviewed the site-specific information to determine the stability of the home and consistency with LCP requirements that prohibit the construction of shoreline protection for new development.¹

The certified Carlsbad Mello II LCP Segment contains policies that address when reliance on shoreline protective devices can be permitted. The City's certified Mello II Land Use Plan (LUP) includes the following policies that address shoreline development and protection. The subject site is also located within, and subject to, the Coastal Resource Protection Overlay Zone and the Coastal Shoreline Development Overlay Zone; both which provide land use regulations along the coastline area including the beaches, bluffs, and the land area immediately landward thereof. The applicable policies that were reviewed by the Commission are listed below.

¹ In keeping with the previously approved appeal, the standard of review for CDP No. 6-16-0340 was the Carlsbad LCP policies and the public access provisions of Chapter 3 of the Coastal Act.

Policy 4-1, Subsection I Development Along Shoreline of the certified LUP states:

a. For all new development along the shoreline, including additions to existing development, a site-specific geologic investigation and analysis similar to that required by the Coastal Commission's Geologic Stability and Blufftop Guidelines shall be required; for permitted development, this report must demonstrate bluff stability for 75 years, or the expected lifetime of the structure, whichever is greater...

Policy 4-1, Subsection III Shoreline Structures of the certified LUP states:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. As a condition of coastal development permit approval, permitted shoreline structures may be required to replenish the beach with imported sand. Provisions for the maintenance of any permitted seawalls shall be included as a condition of project approval. Projects which create dredge spoils shall be required to deposit such spoils on the beaches if the material is suitable for sand replenishment.

Section 21.204.040.B. Conditional Beach Uses of the certified LUP states:

A. Uses substantially similar to the permitted uses listed above may be permitted on the beach subject to this chapter and Chapters 21.42 and 21.50 B. Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. As a condition of approval, permitted shoreline structures may be required to replenish the beach with imported sand.

Provisions for the maintenance of any permitted seawalls shall be included as a condition of project approval. As a further condition of approval, permitted shoreline structures shall be required to provide public access. Projects which create dredge spoils shall be required to deposit such spoils on the beaches if the material is suitable for sand replenishment. Seawalls shall be constructed essentially parallel to the base of the bluff and shall not obstruct or interfere with the passage of people along the beach at any time.

As stated above, the City's LCP requires, associated with any proposed development along the shoreline, the submittal of a geotechnical report that demonstrates bluff stability for 75 years, or the expected lifetime of the structure, whichever is greater. Thus, the applicant submitted a geotechnical report which demonstrated bluff stability and asserted the home's safety for its expected life, without benefit of the existing

shoreline protection. However, based on numerous factors, the Commission found that while the applicant had provided the information consistent with the obligations of the City's LCP, a determination for a safe setback for the home was not feasible. In addition, given the site-specific variables, Commission staff could not agree that there is certainty that the home will not ever be subject to geological hazards within the expected life of the structure if not for the existing unpermitted rock revetment.

However, despite these geologic uncertainties, the Commission found that only as conditioned to prohibit the construction of future protection, the project was consistent with the policies of City's LCP, as well as the applicable policies of the Coastal Act, that limit shoreline and bluff protection to the protection of existing structures in danger from erosion. Special Conditions #3 was imposed to ensure that the new home will not result in the construction of additional shoreline or bluff protection devices, which cannot be used to protect the new structure.

Special Condition #3 of CDP No. 6-16-0340 states (emphasis added):

3. No Future Bluff or Shoreline Protective Device(s) to Protect the Proposed Development.

- a) By acceptance of this permit, the applicant agrees, on behalf of itself and all other successors and assigns, that the existing rock revetment shoreline protective device on the subject site shall not be repaired, enhanced/augmented or reconstructed for purposes of protecting the development approved by this coastal development permit with the exception of maintenance necessary for the protection of existing and permitted structures located south of the development. **No new shoreline or bluff protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 6-16-0340** including, but not limited to, the residence, foundations, patios, balconies and any future improvements, in the event that the development is threatened with damage or destruction from erosion, landslides, waves, storm conditions, flooding, sea level rise or other natural coastal hazards in the future. By acceptance of this permit, the applicant hereby waives, on behalf of themselves and all successors and assigns, any rights to augment, maintain or construct such devices that may exist under Public Resources Code Section 30235 or the certified Local Coastal Program. [emphasis added]
- b) On acceptance of this Permit, the applicant and the landowner further agree, on behalf of themselves and all successors and assigns, that the landowner(s) shall remove the development authorized by this Permit, including the residence, foundations, patios, balconies and any other future improvements if any government agency has ordered that the structures must not to be occupied due to any of the hazards identified above. In the event that portions of the development fall to the beach before they are removed, the landowner shall remove all recoverable debris associated with the development from the beach and ocean and

lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit, unless the Executive Director determines a permit is not legally required.

Therefore, the intent of Special Condition #3 was included to specify that no future bluff or shoreline protective devices are permitted to protect the proposed development. Thus, the applicant's and any successor's right to future additional shoreline or bluff protection devices was waived and the approved development did not result in any new shoreline or bluff protection which is consistent with the City's certified LCP as stated above.

C. Description of Amendment Application

In March 2023, the applicant submitted a CDP amendment application to construct multiple improvements on the bluff face (ref: CDP No. 6-16-0340-A2). The proposed amendment to the project description includes the following: after-the-fact construction of several bluff retaining walls, grading, and landscaping seaward of the identified bluff edge; installation of new landscaping and hardscape; and improvements to existing private staircases ([Exhibit 2](#)). The entire proposed project description amendment would occur seaward of the bluff edge (+36' MSL) established at the time of the Commission's original authorization.

First, the amendment application includes after-the-fact construction of several retaining walls. There are three existing unpermitted bluff retaining walls of various heights on the bluff face: the most landward being a two ft. high retaining wall, the mid-bluff includes a four ft. high retaining wall, and the most seaward retaining wall height is unknown. The application did not provide details on why the retaining walls were installed, nor did they provide a geologic cross-section of the bluff slope in both its current state or prior to installation. The amendment application also lacked a description and analysis of the bluff face condition prior to the retaining wall installation, including the alleged erosion and instability issues. The project description for the amendment application included the reconstruction of the entire two ft. high retaining wall, and a request for after-the-fact approval of the four ft. high retaining wall.

The amendment application also includes the installation of new pavers to be located on an area that was previously graded without a permit and referenced as the "lower pad."

In addition, the amendment application includes improvements to several existing unpermitted staircases on the bluff face, including one staircase that is located on top of the unpermitted revetment and another along the southern property line.

Finally, the amendment application also includes the demolition of existing irrigated landscape, and replacement with non-irrigated native landscaping.

D. Executive Director’s Determination to Reject Amendment

Section 13166 of the Commission regulations (Cal. Code of Regs., tit. 14) requires that the Executive Director reject an amendment application if the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit, unless the applicant presents newly discovered **material** information, which they could not, with reasonable diligence, have discovered and produced before the permit was granted.

After consultation with the Commission’s staff Coastal Engineer and geologist, staff determined that the retaining walls function as bluff protective devices as the walls retain fill, which covers the natural slope and therefore impede the natural erosion expected to occur on the bluff face. Therefore, since the amendment application includes after-the-fact approval of the retaining walls, which are identified as bluff protective devices, and therefore are inconsistent with Special Condition #3, the amendment thus lessens the intent outlined in Special Condition #3 of CDP No. 6-16-0340.

A geological report was submitted as part of the amendment application. The Geotechnical Exploration, Inc. letter dated March 2, 2023 states that the four ft. high wall is “necessary to provide stabilization at the top of the western slope due to the failing railroad tie wall. This area of the site is underlain by loose fill soil and removal of the wall would cause instability and possible failure of the lower bluff slope.” The letter outlines that the walls are retaining in nature, and since the walls are located seaward of the established bluff edge, the retaining walls are therefore considered bluff protective devices.

In addition, the City’s LCP allows bluff retaining walls only when required to serve coastal-dependent uses or to protect existing structures. Mello II LUP Policy 4-1(d) states:

No development shall be permitted on sand or rock beach or on the face of any ocean bluff, with the exception of access ways to provide public beach access and of limited public recreational facilities.

Section 21.204.040(b) of the certified LCP states:

B. Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. As a condition of approval, permitted shoreline structures may be required to replenish the beach with imported sand.

Therefore, when the applicants decided to demolish the original single-family residence in order to construct the current structure, the existing structure status no longer applies

to the new development. New development may not require protective devices that would substantially alter the natural landform along the bluff. The bluff protective devices are not consistent with the City's LCP and therefore not approvable.

No newly discovered information was submitted as part of the amendment application that could not, with reasonable diligence, have been produced before the permit was granted. Therefore, the Executive Director rejected the amendment in May 2023 ([Exhibit 3](#)).

E. Applicants' Appeal of Executive Director Determination

On May 17, 2023, Commission staff received a letter from the applicant's representative requesting to enter into the dispute resolution process to appeal the Executive Director's determination that the non-buttressed, subterranean garden wall "serves as a shoreline protective device and lessens and avoids the intent of CDP #6-16-0340." ([Exhibit 4](#)).

The applicant's dispute resolution request letter included a number of contentions including that the non-buttressed, subterranean garden wall (as referenced by Commission staff as four ft. high retaining wall) does not serve as a shoreline protection device. The applicant asserts that the subject stairs have legal entitlement, which also includes the placement of wood decks, pavers, and any type of at-grade accessories on the "lower pad." The applicant contends that the applicant is entitled to repair and maintain the entire property that was approved in 2016 and that no permit is required to do such work.

The applicants are seeking interpretation of the requirements included in Special Condition #3. The applicant contends that the non-buttressed, subterranean garden wall (as referenced by Commission staff as a four ft. high retaining wall) does not serve as a shoreline protection device. However, based on the preliminary cross-section ([Exhibit 5](#)) provided, the four ft. high retaining wall appears to hold back fill placed on top of the bluff. After consultation with the Commission's staff Coastal Engineer and geologists, staff determined that the four ft. high retaining wall is considered a bluff protection device on the basis that the retaining wall and artificial fill it supports are reducing the natural erosion expected to occur on a natural bluff face. Special Condition #3 prohibits the development of all shoreline and bluff retaining walls and as such, the amendment application for after-the-fact approval of such walls lessens the intent of the original permit.

In addition, the applicant states that the subject stairs have legal entitlement, which also includes the placement of wood decks, pavers, and any type of at-grade accessories on the "lower pad." The applicant contends that the applicant is entitled to repair and maintain the entire property that was approved in 2016 and that no permit is required to do such work. Whether the proposed development has legal entitlement or not, any future improvements to the single-family residence, including but not limited to repair and maintenance shall require an amendment to permit CDP No. 6-16-0340. This is a

requirement set forth as Special Condition #4 ([Exhibit 6](#)).² All proposed development is therefore subject to a Coastal Development Permit amendment and must go through the entire permitting process prior to demolition or construction of any aspect of the project description.

Commission staff received further documentation from the applicant dated February 23, 2024 as correspondence ([Exhibit 7](#)). The documentation included statements from the following: licensed architect from Southern Cross Property Consultants, certified engineering geologists from Geocon Inc. and Geotechnical Exploration Inc., and the property owners. Below are excerpts that relate to the Commission staff analysis, regarding the four ft. high retaining wall and other associated improvements for the proposed amendment:

Geotechnical Letter from Geocon Inc. dated February 13, 2024 states:

In conclusion, our field observations, aerial photograph and geologic literature review of the rear of the subject property did not reveal any indications of current or historic slope instability from an engineering geologic perspective. In this regard, the vegetation on the slope is well established and there were no signs of slumps, soil slips or typical distress features that occur on unstable slopes.

Geotechnical Letter from Geotechnical Exploration, Inc. dated January 26, 2024 states:

In addition, the garden wall that was built in 2021 should remain. This wall is a 48-inch-high, non-structural subterranean garden wall terminating at grade with a benign effect on the slope. [...] The bluff is geologically stable as of our site visit on December 6, 2023, and should not have any stability issues, provided that the existing revetment and block wall remain in place.

The applicants contend that the grading and retaining walls should be allowed in order to maintain the rear yard function on the bluff face seaward of the established bluff edge (+36' MSL). New structures are not permitted to rely on shoreline or bluff protection devices, and protecting the current structure would be inconsistent with the original permit as well as the City's LCP and would result in impacts to coastal resources inconsistent with both the City's LCP and the public access and recreation policies of the Coastal Act.

Lastly, the applicants contend that the amendment application is legal, reasonable, necessary in comparison with the other bluff top single family residences in the area. The Commission recognizes that development on the bluff face exists at several other locations on Tierra Del Oro. However, based on evaluation by the Commission's current geologist, the established bluff edge at this site is approximately +36' MSL. Given the

² Additionally, development in sensitive resource areas, such as the bluff, generally requires a permit for improvements and for many types of repair and maintenance. See Commission regulation sections 13250(b)(1) and (2); 13252(a)(3).

City's LCP provisions restricting development on the face of a bluff to only public accessways, this proposal cannot be found consistent with the City's certified LCP.

In conclusion, the intent of Special Condition #3, as approved by the Commission at the May 11, 2016 hearing, was to prohibit the construction of new shoreline or bluff protective devices. The applicants are requesting the approval of after-the-fact development that includes both grading and development of the four ft. high retaining wall that functions as a bluff protection device on the bluff face. Commission staff concludes that the applicants' request is inconsistent with Special Condition #3 and that the Commission specifically banned grading of the bluff face and installation of any bluff protective devices.

F. Unpermitted Development

Violations of the Coastal Act and the City's certified LCP have occurred on the subject site including, but not necessarily limited to significant enlargement of a rock revetment and construction of a private access stairway located on top of the revetment, as described below and in more detail in the Commission's findings for CDP No. 6-16-0340 in 2016. A revetment was constructed on this site prior to the Coastal Act. However, aerial photography shows that sometime between May of 1979 and June of 1986 new rock was placed on the beach at the site to increase the size and footprint of the revetment on the beach and to prolong its life; all of which was done without benefit of the necessary Coastal Development Permit.

The applicant's geotechnical specialist has confirmed the placement of new rock and expansion of the revetment noted above. Commission staff asked the applicant to submit a geotechnical analysis estimating the amount of rock added to the revetment on the subject site between 1979-1986. The geotechnical report authored by Geotechnical Exploration Inc., and dated July 9, 2008 included the follow description of the revetment:

The old revetment, installed prior to the establishment of the Coastal Act, represents an area approximately 35 feet wide by 4 feet deep, totaling 140 square feet. The new revetment installed in the 1980s represents two areas; one approximately 55 feet wide by 16 feet deep and the other 20 feet wide by 4 feet deep, totaling 960 square feet.

Thus, the unpermitted portion of the revetment is approximately seven times the size of the pre-Coastal Act portion.

In addition to the unpermitted rock, aerials show that a private stairway was located on top of the revetment prior to the Coastal Act. However, given the amount of new rock added when the revetment was expanded, it is unlikely that the pre-Coastal stairway on the revetment could have remained in place when the revetment was substantially enlarged, but was instead removed and rebuilt on the expanded revetment. Thus, the private stairway located on top of the existing revetment is a new stairway, which does not predate the Coastal Act, and is also unpermitted and is prohibited by the City of Carlsbad's LCP. Development on the bluff, with exception of public access stairways, is prohibited by the City of Carlsbad's LCP.

More recently, further unpermitted development activity has occurred at the site, including, but not necessarily limited to: the demolition of an existing unpermitted wood deck, grading in order to terrace the mid bluff, installation of below-grade retaining walls to support the new terrace deck, landscaping, hardscaping, and demolition of the upper section of the private beach access staircase, all of which was undertaken in December of 2021. Commission staff was informed of the more recent unpermitted development activity by the City of Carlsbad Code Compliance office. The City issued a stop work order, and as a result, the applicant submitted application materials to the City. Commission enforcement staff addressed unpermitted development at the site in a Notice of Violation letter to the applicant dated September 8, 2022.

The letter informed the applicant, among other things, that Commission staff determined that the work that had taken place exceeded the provision of repair and maintenance and was in violation of the Future Development Special Condition No. 4 of CDP No. 6-16-0340. Enforcement staff subsequently informed the applicant's legal team that removal of the unpermitted development and restoration of the bluff face to as close to its natural state as possible was the appropriate path to resolution of the violation on the subject site. Additionally, the applicant was informed by staff to not proceed with any further development on the property. However, Commission staff received photographic evidence on November 9, 2021 that indicated that the majority of the private staircase has been either demolished and/or replaced without the benefit of a coastal development permit.

Although development has taken place without CDP authorization and in violation of past CDP authorization prior to the Applicants' appeal of the Executive Director's determination to reject the CDP amendment application, the Commission's consideration of this appeal has been based solely on the applicable California Code of Regulations provisions. Commission review and action on this appeal does not constitute a waiver of any legal action with regard to the alleged violations (or any other violations), nor does it constitute an implied statement of the Commission's position regarding the legality of any development undertaken on the site without a CDP, or any other development, except as stated herein. The Commission's concurrence with, or rejection of, the Executive Director's determination on the amendment application will not result in the resolution of the above violations: if the Commission concurs with the Executive Director's determination, the amendment application will be rejected and the violations will persist on the site. If the Commission overturns the Executive Director's determination, the amendment application will be accepted for processing; however, the Commission would retain its discretion to review and approve, approve with conditions or deny the proposed development. Until such time as an amendment is approved that authorizes the unpermitted development described herein, if that occurs, the unpermitted development will persist on the site in violation of the Coastal Act. Accordingly, the applicant remains subject to enforcement action just as it was prior to this Commission action for engaging in the unpermitted development and permit violations described herein. The matter is the subject of an active enforcement file, and the Commission's enforcement division will consider options for future action to address the violations.

6-16-0340-EDD

Moss

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

1. CDP No. A-6-CII-08-028
2. CDP No. A-6-CII-08-028-E6
3. CDP No. 6-09-016-EDD
4. CDP No. 6-16-0340-A1
5. CDP No. 6-16-0340-A1