

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
 200 Oceangate, Suite 1000
 Long Beach, CA 90802-4302
 (562) 590-5071



Filed: March 28, 2001
 49th Day: May 16, 2001
 180th Day: September 24, 2001
 Staff: ALK-LB
 Staff Report: August 23, 2001
 Hearing Date: September 11-14, 2001
 Commission

Item Tu 23a**STAFF REPORT: REGULAR CALENDAR**

APPLICATION NUMBER: 5-00-459

APPLICANT: Laidlaw Family Trust

AGENT: Jordan Architects, Inc.

PROJECT LOCATION: 354 Paseo de Cristobal, San Clemente, Orange County

PROJECT DESCRIPTION: Construction of a new two-story, 5888 square foot single-family residence with basement and attached 525 square foot two-car garage on an existing vacant lot at the convergence of Trafalgar Canyon and the coastal bluff. The project also involves approximately 800 cubic yards of cut and 100 cubic yards of fill for basement construction and light well excavation and site preparation. Excess material will be disposed of outside the coastal zone.

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends the Commission **APPROVE** the proposed development with eight (8) special conditions. The subject site is located on a vacant lot at the convergence of a coastal bluff and coastal canyon. Primary issues raised by the project include public access, avoidance of geologic hazard and protection of environmentally sensitive habitat areas (ESHA). The proposed development conforms to the blufftop setback requirements of the certified LUP, as the proposed structure will be sited 25 feet from the bluff edge. However, the proposed basement level light wells will encroach into the area that may be required for a "privacy buffer" should a future prescriptive rights case prevail. The proposed development conforms to the canyon setback policies in the certified LUP, as the structure will be set back 30% the depth of the lot and more than 15 feet from the canyon edge.

Special Condition 1 requires the applicant to submit plans that show evidence of conformance with geotechnical recommendations, including those regarding site preparation, foundation design and drainage. Special Condition 2 requires submittal of revised project plans showing removal or relocation of the window wells on the bluffward side of the structure in order to demonstrate conformance with the 25' blufftop setback and potential privacy buffer requirements. Special Condition 3 requires conformance to the landscape plan, which shows that only drought-tolerant native species will be used. Special Condition 4 requires compliance with the grading and drainage plan. Special Condition 5 requires the recordation of an assumption of risk deed restriction. Special Condition 6 requires the recordation of a no future protective device deed restriction. Special Condition 7 requires the applicant to record a deed restriction, which ensures that the applicant and future landowners are aware that future development requires a coastal development permit. Special Condition 8 informs the applicant that the Commission's approval of the project does not constitute a waiver of any public rights that may exist on the property.

STAFF NOTE: *This item has been continued from the August 2001 Commission hearing for further evaluation of potential public rights of access acquired at the subject site through historical use. Staff has since conducted a preliminary prescriptive rights analysis that involved distribution of questionnaires, local newspaper notice, posting on the Commission's website and review of aerial photographs.*

LOCAL APPROVALS RECEIVED: Approval-in-Concept from the City of San Clemente Community Development Department dated July 9, 2001.

SUBSTANTIVE FILE DOCUMENTS:

City of San Clemente certified Land Use Plan; Coastal Development Permits 5-93-035 (Klinkert); *Geotechnical and Engineering Geologic Investigation, Single Family Residential Lot, 354 Paseo de Cristobal, San Clemente, California*, Project No. FG 9241-00 prepared by Geo-Etka, Inc. dated September 27, 2000; *Supplemental Geotechnical / Geologic Investigation for 354 Paseo de Cristobal* prepared by Peter and Associates dated March 26, 1993 and *Geotechnical Investigation* prepared by South Coast Geologic, Inc. dated August 7, 1989.

EXHIBITS

1. Vicinity Map
2. Assessor's Parcel Map
3. Coastal Canyons
4. Coastal Access Points
5. Project Plans
6. 5-93-035 (Klinkert) Original Staff Report
7. 5-93-035 (Klinkert) Revised Findings Staff Report (without exhibits)
8. Addendum to Revised Findings Staff Report (with Chain of Title Search Results)
9. Results of Prescriptive Rights Survey Results and Correspondence
10. Sun Post Newspaper Notice of August 14, 2001

STAFF RECOMMENDATION:

Staff recommends that the Commission **APPROVE** the permit application with special conditions.

MOTION:

I move that the Commission approve CDP #5-00-459 pursuant to the staff recommendation.

Staff recommends a **YES** vote. This will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION:

I. APPROVAL WITH CONDITIONS

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned, located between the first public road and the sea, will be in conformity with the policies of Chapter 3 of the Coastal Act

and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. 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**

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 permittee 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 this permit is reported to the Commission. 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 permittee to bind all future owners and possessors of the subject property to the terms and conditions.

III. **SPECIAL CONDITIONS**

1. Conformance of Design and Construction Plans to Geotechnical Report
 - A. All final design and construction plans, including foundation, grading and drainage plans, shall be consistent with all recommendations contained in the *Geotechnical and Engineering Geologic Investigation, Single Family Residential Lot, 354 Paseo de Cristobal, San Clemente, California*, Project No. FG 9241-00 prepared by Geo-Etka, Inc. dated September 27, 2000.
 - B. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, evidence that an appropriately licensed professional has reviewed and approved all final design and construction plans and certified that each of those final plans is consistent with all of the recommendations specified in the above-referenced geologic evaluation approved by the California Coastal Commission for the project site.

- C. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

2. Submittal of Revised Plans

- A. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit, for the Executive Director's review and approval, two (2) full size sets of revised project plans that demonstrate conformance with the following blufftop and canyon setbacks:
- 1) Neither the structure nor the window wells shall be constructed nearer than 25 feet from the designated "top of bluff," or nearer than 15 feet from the canyon edge, as generally depicted in Exhibit 5, attached in the current staff report, and
 - 2) No ancillary development or hardscape features (i.e. patios, decks, fencing) shall be constructed nearer than 15 feet from the designated "top of bluff," or nearer than 5 feet from the canyon edge, as generally depicted in Exhibit 5, attached in the current staff report.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

3. Conformance with Landscape Plan

- A. The applicant shall comply with the landscape plan submitted on July 13, 2001 prepared by M. Paul Ramsey. In addition, the applicant shall comply with the following provisions:
- (a) All planting shall provide 90 percent coverage within 90 days and shall be repeated if necessary to provide such coverage;
 - (b) All plantings shall be maintained in good growing condition throughout the life of the project, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with the planting plan;
 - (c) Landscaped areas in the rear and side yard (canyon and bluff-facing) areas shall be planted and maintained for erosion control and native habitat enhancement purposes. To minimize the need for irrigation and minimize encroachment of non-native plant species into adjacent existing native plant areas, all landscaping adjacent to Trafalgar Canyon shall consist of native, drought resistant plants. Invasive, non-indigenous plant species that tend to supplant native species shall not be used;
 - (d) Landscaped areas in the front yard area can include ornamental or native, drought-tolerant plants. Vegetation installed in the ground shall consist of native, drought tolerant plants. Vegetation which is placed in above-ground pots or planters or boxes may be non-invasive, non-native ornamental plants;

- (e) Native vegetation shall be utilized to screen the above-grade drainpipe along the bluff slope leading to the canyon mouth; and
 - (f) No permanent in-ground irrigation systems shall be installed on site. Temporary above ground irrigation is allowed to establish plantings.
- B. The permittee shall undertake development in accordance with the approved plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.
- C. Five years from the date of issuance of Coastal Development Permit No. 5-00-459 the applicant shall submit for the review and approval of the Executive Director, a monitoring report, prepared by a licensed biologist, landscape architect or qualified resource specialist, that certifies the on-site landscaping is in conformance with the mitigation plan approved pursuant to this special condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

If the landscape monitoring report indicates the landscaping is not in conformance with or has failed to meet the performance standards specified in the landscaping plan approved pursuant to this permit, the applicant, or successors in interest, shall submit a revised or supplemental landscape plan for the review and approval of the Executive Director. The revised landscaping plan must be prepared by a licensed landscape architect or a qualified resource specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

4. Conformance with Grading and Drainage Plan

- A. The applicant shall comply with the Grading and Drainage Plan submitted July 13, 2001 prepared by Jordan Architects, Inc. and with all recommendations contained in the *Conclusions and Recommendations* section of the *Geotechnical and Engineering Geologic Investigation, Single Family Residential Lot, 354 Paseo de Cristobal, San Clemente, California*, Project No. FG 9241-00 prepared by Geo-Etka, Inc. dated September 27, 2000. In addition, the applicant shall comply with the following provisions:
- (a) Run-off from all roofs, patios, driveways and other impervious surfaces and slopes on the site shall be collected and discharged via pipe or other non-erosive conveyance to the frontage street or designated canyon mouth outlet point to avoid ponding or erosion either on- or off- site.
 - (b) The drainpipe along the bluff slope leading to the canyon mouth outlet point shall be above-grade;
 - (c) Run-off shall not be allowed to pond adjacent to the structure or sheet flow directly over the sloping surface;
 - (d) The functionality of the approved drainage and runoff control plan shall be maintained throughout the life of the development.

- B. The permittee shall undertake development in accordance with the approved plan. Any proposed changes to the approved plan shall be reported to the Executive Director. No changes to the approved plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

5. Assumption-of-Risk, Waiver of Liability, and Indemnity Deed Restriction

- A. By acceptance of this permit, the applicant acknowledges and agrees (i) that the site may be subject to hazards from geologic instability; (ii) to assume the risks to the applicant 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, (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 injury or damage due to such hazards.
- B. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant and landowner shall execute and record a deed restriction, in a form and content acceptable to the Executive Director incorporating all of the above terms of subsection A of this condition. The deed restriction shall include a legal description of the applicant's entire parcel. The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens that the Executive Director determines may affect the enforceability of the restriction. The deed restriction and lease restriction shall not be removed or changed without a Commission amendment to this coastal development permit.

6. No Future Blufftop of Canyon Slope Protective Device

- A. By acceptance of this permit, the applicant agrees, on behalf of himself and all other successors and assigns, that no blufftop or canyon slope protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 5-00-459, including the patios and any future improvements, in the event that the property is threatened with damage or destruction from bluff or canyon slope failure in the future. By acceptance of this permit, the applicant hereby waives, on behalf of himself and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235.
- B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall execute and record a deed restriction in a form and content acceptable to the Executive Director, which reflects the above restriction on development. The deed restriction shall include a legal description of the applicant's entire parcel. The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens that the Executive Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without a Commission amendment to this coastal development permit.

7. Future Development Deed Restriction

- A. This permit is only for the development described in Coastal Development Permit No. 5-00-459. Pursuant to Title 14 California Code of Regulations Section 13253(b)(6),

the exemptions otherwise provided in Public Resources Code Section 30610 (a) shall not apply to the entire parcel. Accordingly, any future improvements to the development authorized by this permit, including but not limited to repair and maintenance activities identified as requiring a permit in Public Resources Section 30610(d) and Title 14 California Code of Regulations Sections 13252(a)-(b), shall require an amendment to Permit No. 5-00-459 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

- B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall execute and record a deed restriction in a form and content acceptable to the Executive Director, reflecting the above restrictions on development within the parcel. The deed restriction shall include legal descriptions of the applicant's entire parcel(s). The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens that the Executive Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without a Commission amendment to this coastal development permit.

8. Public Rights

The Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that may exist on the property. The permittee shall not use this permit as evidence of a waiver of any public rights that may exist on the property.

IV. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. PROJECT LOCATION AND DESCRIPTION

The proposed development is located on a vacant lot at the convergence of a coastal canyon and a coastal bluff in the City of San Clemente, Orange County (Exhibits 1 & 2). The project site is located between the first public road and the sea at the end of the Paseo de Cristobal cul-de-sac, which runs parallel to the shoreline. The site is located directly inland of the OCTA railroad tracks and adjacent to the mouth of Trafalgar Canyon, identified in the City of San Clemente Certified Land Use Plan (LUP) as one of seven environmentally sensitive coastal canyon habitat areas (Exhibit 3). The site is bound by the cul-de-sac to the southeast, an existing residence to the northeast, a coastal canyon to the northwest and an approximately 40' high coastal bluff to the southwest. The nearest formal public coastal access is available via the T-Street overpass approximately 500 feet downcoast (Exhibit 4).

The proposed development consists of the construction of a new two-story, 5888 square foot (1621 sq. ft. first floor, 2131 sq. ft. second floor and 2136 sq. ft. basement) single-family residence and an attached 525 square foot two-car garage, decks, hardscape and landscape improvements (Exhibit 5). The applicant is proposing four (4) window wells supported by 4' deep retaining walls within the 25' blufftop setback and 15' canyon setback to provide natural light to the basement. The below-grade light wells will extend 4' into the required setbacks. The project also involves approximately 800 cubic yards of cut for basement and light well excavation and approximately 100 cubic yards of fill for site preparation. Export will be taken to a disposal site outside the coastal zone. All rooftop, driveway, front and side yard runoff and will be taken to the street, while the existing gradual slope

around the canyon/bluff convergence will continue to drain to the canyon mouth. This portion of rear yard runoff will be conveyed to a controlled discharge point at the base of the bluff slope adjacent to the canyon mouth.

The proposed development conforms to the bluff and canyon setback policies in the certified LUP, as the residence will be set back 25 feet from the bluff edge to the southwest and 30% the depth of the lot and more than 15 feet from the canyon edge to the northwest. However, the proposed window wells will encroach 4 feet into the blufftop setback area. As will be discussed in Section E, Public Access, the entire 25-foot blufftop setback area must be kept free of encroachments because of the possibility of a future public rights claim prevailing in court.

There is no existing native vegetation on the proposed building pad. The pad area is vegetated by annual grasses and weeds. Coastal sage scrub exists along the adjacent bluff and canyon slopes. The applicant is proposing to retain all coastal sage brush along the slopes.

B. PRIOR COMMISSION ACTION AT THE SUBJECT SITE

5-93-035 (Klinkert)

On May 13, 1993, the Commission denied CDP application 5-93-035 for construction of a 25-foot high, 4159 square foot single-family residence with a 450 square foot garage and spa at the subject site. The project also included reconstruction of the existing curb, gutters and sidewalk in a right-of-way to be abandoned by the City of San Clemente and construction of a retaining wall at the rear of the property. No grading was proposed.

The Commission denied the application because the applicant at the time (Klinkert) was not able to demonstrate proof of ownership of a portion of the project site. As stated in the staff report,

“Because the applicant cannot demonstrate proof of legal ownership over the blufftop right-of-way, the applicant can not comply with Coastal Act Section 30601.5. Therefore, any proposed development including the blufftop right-of-way must be denied.”

At the time the application was considered, there was disagreement between Commission staff and the applicant as to the existence and location of rights-of-way on the subject property. As described in the original staff report (Exhibit 6),

“The project involves two right-of-ways. One right-of-way is located on the cul-de-sac of Paseo de Christobal (hereinafter referred to as the cul-de-sac right-of-way), and the applicant has reached agreement with the City on abandoning this right-of-way, but has not obtained a coastal development permit for the abandonment. The second easement or right-of-way is a 20 foot wide strip of property located on the coastal bluff (herinafter referred to as the blufftop right-of-way). This right-of-way which is alleged to have been abandoned leads from the shoreline and navigable waters back to other public rights-of-way.”

The applicant's agent refuted the existence of the “blufftop right-of-way” at the May 1993 hearing, but was unable to present proof that the 20 foot wide strip of land was in private ownership prior to passage of the Coastal Act in 1972. In a letter dated July 5, 1993, the agent provided results of a “chain of title search” performed by Chicago Title in Santa Ana, which clarified ownership issues at the subject property and concluded that the “blufftop right-of-way” had not been in public ownership since 1927 (Exhibit 8). The letter also explained that the proposed abandonment of the “cul-de-sac right-of-way” was contingent upon approval of the coastal development permit. As the permit was denied by the Commission, so was the right-of-way abandonment.

On July 15, 1993, the Commission adopted Revised Findings that incorporated the comments of the Commission's Chief Counsel at the May 1993 hearing that provided a legal interpretation of the basis for the finding of denial (Exhibit 7).

The current application (5-00-459) involves development on private property. No development is proposed on the one public "cul-de-sac right-of-way" that exists over the property. As such, the proposed project is consistent with Section 30601.5 of the Coastal Act. While the applicant requested City abandonment of the cul-de-sac easement in March 2000, the City Council denied the request. Concerns raised at the City Council hearing related to potential loss of on-street parking spaces and private view impacts.

C. GEOLOGIC STABILITY

The subject site is located at the convergence of a coastal bluff and coastal canyon. This type of development poses potential adverse impacts to the geologic stability of coastal bluffs and canyons, to the preservation of coastal visual resources, and to the stability of residential structures. Blufftop stability has been an issue of historic concern throughout the City of San Clemente. Coastal bluffs in San Clemente are composed of fractured bedding which is subject to block toppling and unconsolidated surface soils which are subject to sloughing, creep, and landsliding. The setback and stringline policies of the Commission were instituted as a means of limiting the encroachment of development seaward to the bluff edges on unstable bluffs and preventing the need for construction of revetments and other engineered structures to protect development on coastal bluffs, as per Section 30253 of the Coastal Act. Stringlines have also been applied to limit canyonward encroachment into sensitive habitat areas, as will be discussed in Section D, ESHA. A stringline does not apply in this instance. Therefore, the City's 25-foot blufftop setback and 15-foot canyon setback will be utilized.

1. Coastal Act Policies

Section 30253 of the Coastal Act states:

New development shall:

(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Section 30235 of the Coastal Act states, in relevant part:

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...

2. City of San Clemente Policies

The City of San Clemente Certified LUP contains policies establishing stringlines for purposes of limiting the seaward encroachment of development onto eroding coastal bluffs and into sensitive

coastal canyons. Although the standard of review for projects in San Clemente is the Coastal Act, the policies of the Certified LUP are used as guidance. These policies include the following:

Policy VII.13:

Development shall be concentrated on level areas (except on ridgelines and hilltops) and hillside roads shall be designed to follow natural contours. Grading, cutting, or filling that will alter landforms (e.g.; bluffs, cliffs, ravines) shall be discouraged except for compelling reasons of public safety. Any landform alteration proposed for reasons of public safety shall be minimized to the maximum extent feasible.

Policy VII.14 states:

Proposed development on blufftop lots shall be set back at least 25 feet from the bluff edge, or set back in accordance with a stringline drawn between the nearest corners of adjacent structures on either side of the development. This minimum setback may be altered to require greater setbacks when required or recommended as a result of a geotechnical review.

Policy VII.16 states:

In a developed area where new construction is generally infill, no part of a proposed new structure, including decks, shall be built further onto a beachfront than a line drawn between the nearest adjacent corners of the adjacent structures. Enclosed living space in the new unit shall not extend further seaward than a second line drawn between the most seaward portions of the nearest corner of the enclosed living space of the adjacent structures.

Policy VII.15 requires new development on coastal canyon lots to be set back as follows:

*New development shall not encroach into coastal canyons and shall be set back either:
a. a minimum of 30% of the depth of the lot, and not less than 15 feet from the canyon edge;
or b. a minimum of 30% of the depth of the lot, and set back from the line of native vegetation (not less than 15 feet from coastal sage scrub vegetation or not less than 50 feet from riparian vegetation); or c. in accordance with house and deck/patio stringlines drawn between the nearest corners of the adjacent structures.*

The development setback shall be established depending on site characteristics."

3. Project Site Geotechnical Reports

In 1993, a similar development project was proposed at the subject site. At that time, site specific geotechnical information was submitted. The applicant provided a "Supplemental Geotechnical / Geologic Investigation for 354 Paseo de Cristobal" prepared by Peter and Associates dated March 26, 1993. The report incorporated findings from a previous investigation performed by South Coast Geologic, Inc. dated August 7, 1989. These reports have been used as reference documents in the Commission's current consideration of the proposed development.

For the current application (5-00-459), the applicant submitted a geotechnical and engineering geologic investigation prepared by Geo-Etka, Inc. dated September 27, 2000. The geotechnical investigation was carried out to "explore and evaluate existing soil and geologic conditions at the site and to present opinions as to the adequacy of the site for development; provide recommendations for mitigation of unsuitable soil and/or groundwater conditions; and provide

geotechnical design parameters for foundations and grading.” The investigation consisted of 1) review of geologic maps, geotechnical reports and other geotechnical data for the site and surrounding area; 2) reconnaissance level geologic mapping of the site and immediate vicinity; 3) excavation, sampling, and logging of exploratory borings; 4) laboratory testing of relatively undisturbed and representation bulk samples taken from exploratory excavations; and 5) engineering and geologic analysis of the collected data.

The subject site is described in the Geo-Etka geotechnical report as a level pad with descending graded slopes on the southwest and northwest sides of the lot. As stated in the report, *“graded slopes include a 20 to 25 foot high 1 ½ to 1 (horizontal to vertical) fill over cut slope on the southwest side of the lot descending to the railroad tracks and a 20 to 30 foot high 2 to 1 (horizontal to vertical) fill over cut on the northwest side of the lot descending to a drainage course”* [Trafalgar Canyon]. The report goes on to provide a description of the regional and local geologic conditions at the subject site. As stated in the report, *“the site appears to have been previously developed by cut and fill terraced grading of the original hillside surfaces.”* The artificial fill soils were likely placed during development of the tract and range from about eight to sixteen feet in thickness across the site. Fill soils consist of mixtures of terrace and bedrock materials along with gravel, cobbles, and construction debris such as asphalt. Both marine and non-marine terrace deposits are present beneath the fill soils. As described in the report, the bedrock underlying the terrace deposits at this site belongs to the *“Siltstone facies of the Pliocene age Capistrano Formation.”*

The Geo-Etka report addresses potential affects of groundwater, faulting, and seismicity at the subject site. According to the report, groundwater is not expected to be a factor during or after construction of this project. However, *“moderate to severe ground shaking will affect the subject site sometime within the life of the structure.”* No other potentially hazardous conditions, such as historic landsliding or slope instability, were discussed in the report.

However, the Peter and Associates report states *“the site’s location is known to be in the area of an ancient landslide, as indicated in the California Division of Mines and Geology Special Report 98. According to South Coast Geologic, Inc.’s findings, the upper zone of the bedrock appears to have undergone rotational or block-glide sliding.”* The report states that the landslide debris under the subject site is considered to be static and assures that no movement in the subject site area is known to have occurred in the last 30 years. The report presents the results of a slope stability analysis, which shows that *“the factor of safety for the subject site slope, based on the subject slope gradient, is 1.0 percent.”* The Peter and Associates report concludes *“the site is suitable for the proposed development, and the development will not have any adverse effect on the neighboring property, provided the following recommendations are incorporated during grading and subsequent construction.”* Recommendations include the use of a caisson and grade beam foundation system.

The Geo-Etka report concludes, *“the site can be made suitable for the construction of the proposed single family residence, provided the recommendations presented in this report are incorporated into the project plans and specification of the project. The site appears grossly stable; however, upper portions of the existing fill soils are not suitable for support of traditional foundation, slabs or compacted fills. All in-situ uncertified fill soils should be removed and recompacted to provide a property compacted fill pad.”* The report recommends that a continuous wall or conventional spread footing system be used to support the proposed structure.

While the foundation recommendations differ, both geotechnical reports conclude that the site is suitable for development.

3. Project Analysis/Special Conditions

Section 30253(2) of the Coastal Act states that new development shall assure stability and structural integrity and shall not contribute to erosion, geologic instability or destruction of the site or require the construction of protective devices which would substantially alter natural landforms.

Geotechnical Recommendations

The Geo-Etka geotechnical report states that the construction of the proposed residence is feasible provided the applicant complies with the recommendations contained in the report. The geotechnical report includes recommendations focusing on foundation design and drainage. The report recommends that a continuous wall or conventional spread footing system be used to support the proposed structure and discusses allowable bearing capacity to be used in determining footing depth. As stated in the report, the footings should be *"founded a minimum of 18 inches into dense, engineered fill, with the concrete placed against in-place, undisturbed engineered fill."* The applicant has not submitted a foundation plan for the proposed structure. As described below, final foundation plans (signed and stamped by the geotechnical consultant) must be submitted prior to permit issuance.

Regarding drainage the report advises, *"the on-site earth materials are not considered resistant to erosion. Water should not be allowed to collect and discharge over the top of slopes. Area drains should be installed and maintained where necessary. Positive drainage should be established to drain away from the foundations."* As submitted, all rooftop, side yard and front yard runoff will be directed to the street. Runoff from the rear yard and patio areas will be collected in an area drain and directed to a discharge point at the base of the bluff slope.

As discussed previously, approximately 900 cubic yards of grading (800 cubic yards of cut and 100 cubic yards of fill) is proposed for excavation and site preparation. The geotechnical report contains recommendations for 1) clearing, grubbing and removal of compressible materials, 2) processing of natural soils, 3) fill placement, 4) fill slopes, 5) compacted fill material, 6) shrinkage and subsidence, 7) sulfate potential, 8) utility trench backfill, construction observation, plan review, and footing inspection. The report also provides recommendations for site excavation and construction of basement retaining walls, including a recommendation that *"all retaining walls should be provided with adequate backdrainage systems."*

Since the recommendations provided by the geotechnical consultant include measures to mitigate any adverse geologic effects, the Commission finds that Special Condition 1 ensures that the consulting geotechnical expert has reviewed the development plans and verified their conformance with the geotechnical recommendations. The condition requires the applicant to submit two (2) full-size copies of the project plans (including final foundation plans) that have been reviewed and approved by the geotechnical consultant prior to issuance of the coastal development permit. As such, Special Condition 1 guarantees that all final development plans are consistent with Section 30253 of the Coastal Act.

Setback Requirements

1. Coastal Bluff Setback

The site is located at the terminus of a cul-de-sac with Trafalgar Canyon to the northwest; an approximately 35'-40' high bluff face, railroad tracks and ocean to the southwest; and a residence immediately inland. Only the 25-foot bluff setback policy could be applied in this situation because the configuration of the lot is such that a stringline setback would be inappropriate.

The coastal bluffs in San Clemente are not subject to direct wave attack because they are separated from the beach by the OCTA railroad tracks and right-of-way. The railroad tracks have a rip-rap revetment which protects the tracks from erosion and wave overtopping. Though not subject to direct wave attack, the bluffs are subject to weathering caused by natural factors such as wind and rain, poorly structured bedding, soils conducive to erosion and rodent burrowing. Bluffs may also be subject to erosion from human activities, such as irrigation, improper site drainage and grading.

To meet the requirements of the Coastal Act, bluff and cliff developments must be sited and designed to assure stability and structural integrity for their expected economic lifespans while minimizing alteration of natural landforms. The Commission typically requires that structures be setback at least 25 feet from the bluff edge and hardscape features (including decks and patios) be setback at least 10 feet from the bluff edge to minimize the potential that the development will contribute to slope instability. Bluff and cliff developments (including related storm runoff, foot traffic, site preparation, construction activity, irrigation, waste water disposal and other activities and facilities accompanying such development) must not be allowed to create or contribute significantly to problems of erosion or geologic instability on the site or on surrounding geologically hazardous areas which would then require stabilization measures such as caissons, pilings or bluff re-structuring.

As shown on page 1 of Exhibit 5, the structure proposed by the applicant will be set back 25 feet from the bluff edge. While all above-grade development is consistent with the setback requirement, the applicant is proposing window wells within the 25' blufftop setback to provide natural light to the basement. The below-grade light wells will extend 4' into the setback. The 4' deep light wells will not serve as stabilization devices, nor will they be visible from the shoreline. Also, the window wells are not habitable space. Additionally, the applicant's geologist attests, *"provided all unsuitable fill is removed beneath structural areas there should be no problems with having light wells. The light wells should have no adverse affect on the site, as long as adequate support and drainage is provided for these excavations."* Nonetheless, the light wells proposed on the bluffward side of the structure will be sited in an area that may be necessary for a future privacy buffer if a prescriptive rights claim is successful. (Public access will be discussed further in Section E.) Those on the canyon side will not affect potential public access.

According to the geotechnical report, the 25-foot setback is appropriate to ensure long-term stability of the proposed development. No blufftop protective devices are proposed or anticipated. With implementation of proper drainage and erosion control measures, erosion of the blufftop will not adversely affect the subject property. In addition, the site is not subject to erosion from wave attack. As such, the proposed development is consistent with the geologic hazard policies of the Coastal Act.

2. Coastal Canyon Setback

The City's certified LUP (Policy VII.15), to which the Commission may look for guidance, requires new development on coastal canyon lots to be set back either: *"a. a minimum of 30% of the depth of the lot, and not less than 15 feet from the canyon edge; or b. a minimum of 30% of the depth of the lot, and set back from the line of native vegetation (not less than 15 feet from coastal sage scrub vegetation or not less than 50 feet from riparian vegetation); or c. in accordance with house and*

deck/patio stringlines drawn between the nearest corners of the adjacent structures.” These canyon setback requirements serve the purpose of appropriately siting new development to avoid geologic hazard and/or adverse impacts to environmentally sensitive habitat areas (ESHA). (ESHA impacts will be discussed in Section D.)

The proposed development conforms to the canyon setback requirements in the certified LUP, as development will be set back 30% the depth of the lot (or 30% from the rear of the lot at the canyon bottom) and more than 15 feet from the canyon edge (Exhibit 5). However, as discussed previously, the applicant is proposing window wells within the 15' blufftop setback to provide natural light to the basement. The below-grade light wells will extend 4' into the setback. The light wells will not serve a stabilization purpose. As such, the light wells may be sited nearer the canyon edge than the proposed residence. The light wells on the canyon side of the proposed residence will not affect potential public access.

3. *Revised Project Plans*

The siting restrictions placed on the proposed development serve to avoid geologic hazard impacts as well as to avoid native plant species within the canyon. Based on the information provided in the geotechnical report, the siting of the proposed development is found to be appropriate from a geologic hazard perspective. However, public access concerns (which will be discussed in Section E of the current staff report) necessitate a modification of the project plans to eliminate the proposed window wells, as the window wells on the bluffward side of the structure would encroach into the required “privacy buffer” should a public trail be established in the future. Special Condition 2 requires the submittal of revised project plans, which show the residence and all hardscape features sited in conformance with the required blufftop and canyon setbacks. The condition specifies that no portion of the structure or the light wells may be sited nearer than 25 feet from the bluff edge to avoid potential interference with potential public use.

Landscaping

Developments on both coastal canyon and blufftop lots in San Clemente are required to submit landscaping and irrigation plans, consisting primarily of native, drought-tolerant plants, in order to be found in conformance with Section 30253 of the Coastal Act. Review of landscaping plans is necessary to assure that appropriate plant species are selected and limited watering methods are applied. Appropriate vegetation can help to stabilize slopes. Native, drought-tolerant plants common to the local area do not require watering after they become established, have deep root systems which tend to stabilize soils, are spreading plants and tend to minimize the erosive impact of rain, and provide habitat for native animals. Landscaping that involves in-ground irrigation may lead to overwatering or sprinkler line breaks that can contribute to slope instability. Therefore, review and approval of final landscaping and irrigation plans is necessary prior to the issuance of a coastal development permit.

The applicant has submitted a “Landscape Plan” prepared by M. Paul Ramsey that shows use of entirely native, drought tolerant species throughout the project site (Exhibit 5, page 3). The plan demonstrates that the building pad will be planted with native species such as Coyote Bush, Black Sage, Hummingbird Sage and Coast Sunflower, while the existing coastal sage brush on the slopes will remain undisturbed. No in-ground irrigation is proposed. A “*temporary surface piped drip irrigation*” system will be installed initially so that the new planting can take root.

To ensure that the project is carried out in conformance with the plan submitted, the Commission imposes Special Condition 3. The condition specifies that only drought tolerant plant species may be planted in the ground throughout the entire lot and affirms that no in-ground irrigation systems may

be installed on the site. The special condition allows non-native, non-invasive ornamental plants to be utilized in above-ground pots and planters and allows the use of temporary irrigation systems to help plantings establish. Lastly, the condition requires that the plantings be maintained in good growing conditions throughout the life of the project, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with the landscape plan. These requirements are necessary to protect nearby environmentally sensitive habitat area (ESHA) and to minimize erosion of the bluff slope and canyon slope from uncontrolled site runoff.

Site Drainage

Since the manner in which a site drains is important to site stability on canyon lots, a grading and drainage plan has been submitted which documents how site drainage will be accomplished. The plan (prepared by Jordan Architects, Inc.) shows how runoff from impervious surfaces will be diverted toward the street and canyon in a non-erosive manner. As shown on page 2 of Exhibit 5, runoff from the rear yard will be collected in an area drain and conveyed to the toe of the slope near the canyon mouth via an above-grade pipeline. The pipeline will be screened by native vegetation. All rooftop, front yard and side yard runoff will be directed toward the street. To ensure that the project is carried out in accordance with the plan, the Commission imposes Special Condition 4. Special Condition 4 requires the applicant to carry out the project in conformance with the grading and drainage plan submitted, which incorporates the recommendations of the geotechnical report. The special condition also requires that drainage devices be maintained throughout the life of the development.

As noted above, the geotechnical report provides recommendations regarding site drainage. These recommendations are provided by the geologist in order to avoid any adverse effects that improper site drainage may have upon site stability. For instance, improper site drainage could cause an area subject to slope creep and/or failure to activate and cause damage to the structure. Excessive water infiltration at the subject site will result in potentially hazardous conditions. The geologist's recommendations regarding site drainage are designed to avoid such adverse effects.

Assumption of Risk, No Future Protective Devices and Future Improvements

Although the proposed project will be constructed in conformance with the geologic recommendations, risk from development on a coastal bluff and coastal canyon is not eliminated entirely. Specifically, development on a coastal bluff is inherently risky. While the project is deemed entirely adequate at this time to minimize any potential hazard, future protection and repair may be required as subsurface conditions continue to change. In addition, a prior geotechnical report identified potentially hazardous conditions at the subject site. Therefore, the standard waiver of liability condition has been attached through Special Condition 5. By this means, the applicant is notified that the residence is being built in an area that is potentially subject to geologic hazard that can damage the applicant's property. The applicant is also notified that the Commission is not liable for such damage as a result of approving the permit for development. Finally, recordation of the condition ensures that future owners of the property will be informed of the risks and the Commission's immunity for liability.

Special Condition No. 6 of the permit requires the applicant to record a deed restriction on the property placing the applicant and their successors in interest on notice that no bluff protective devices shall be permitted to protect the structure, patios or future improvements if threatened by bluff failure. The development could not be approved if it included provision for a bluff protective device. Instead, the Commission would require the applicant to set the development further landward. The condition states that in the event any bluff protective work is proposed in the future, the applicant acknowledges that as a condition of filing an application for a coastal development permit, the applicant must provide the Commission or its successor agency with sufficient evidence enabling it to consider all alternatives to bluff protective works, including consideration of relocation

of portions of the residence that are threatened, structural underpinning, or other remedial measures identified to stabilize the residence that do not include bluff or shoreline stabilization devices.

Whereas Special Condition No. 6 applies to bluff protective measures, Special Condition No. 7 is a future development deed restriction which states that any future improvements or additions on the property, including hardscape improvements, grading, landscaping, vegetation removal and structural improvements, require a coastal development permit from the Commission or its successor agency. This condition ensures that development on coastal bluffs which may affect the stability of the bluffs and residential structures or may require future bluff protective structures, require a coastal development permit. Future development includes, but is not limited to, structural additions, landscaping and fencing. (ESHA and Public Access will be discussed in the following sections.)

4. Conclusion/Project Consistence with Coastal Act

The Commission has found that in order to assure that the proposed development minimizes risks to life and property in areas of high geologic hazard and assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area the applicant shall be conditioned to: 1) conform to recommendations prepared by the geotechnical consultant, Geo-Etka, Inc.; 2) submit revised plans showing conformance with the required blufftop, canyon and privacy buffer setbacks; 3) conform to the landscape plan; 4) conform to the grading and drainage plan submitted and the recommendations of the geotechnical consultant; 5) execute and record an assumption-of-risk deed restriction; and 6) execute and record a deed restriction regarding future improvements to the subject site. Only as conditioned does the Commission find that the proposed development is consistent with Section 30253 of the Coastal Act.

D. ENVIRONMENTALLY SENSITIVE HABITAT AREA (ESHA)

1. Coastal Act and Land Use Plan (LUP) Policies

Section 30240 of the Coastal Act states:

- (a) *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

San Clemente's certified Land Use Plan (LUP) discusses the importance of coastal canyons and states:

In most cases, coastal canyons are designated for natural open space, which limits potential development and helps to ensure preservation.

Policy VII.12 of the certified LUP states:

Encourage activities which improve the natural biological value, integrity and corridor function of the coastal canyons through vegetation restoration, control of alien plants and animals, and landscape buffering.

Policy XV.13 of the certified LUP states:

The removal of native vegetation and the introduction of non-native vegetation in the canyons shall be minimized. The use of native plant species in and adjacent to the canyons shall be encouraged.

The policy in the certified LUP concerning setbacks on coastal canyons is found in Chapter 3, Section 302 G, policy VII.15, and states:

New development shall not encroach into coastal canyons and shall be set back either:

- a. a minimum of 30% of the depth of the lot, and not less than 15 feet from the canyon edge; or*
- b. a minimum of 30% of the depth of the lot, and set back from the line of native vegetation (not less than 15 feet from coastal sage scrub vegetation or not less than 50 feet from riparian vegetation); or*
- c. in accordance with house and deck/patio stringlines drawn between the nearest corners of the adjacent structures.*

The development setback shall be established depending on site characteristics.

2. Site Analysis

The proposed development is located adjacent to Trafalgar Canyon, one of seven coastal canyons designated as environmentally sensitive habitat area (ESHA) in the certified LUP. Trafalgar Canyon is located in the central portion of San Clemente. The proposed development is consistent with LUP canyon setback policies contained in the City's LUP. The proposed structure will not be sited within 15' of the canyon edge, 15' of native vegetation or 50' of riparian vegetation.

The existing building pad contains annual grasses and weeds, which are regularly cut and cleared. Vegetation in the adjacent coastal canyon consists of a mixture of natives and exotics. The Landscape Plan provided by the applicant shows that all yard areas on the pad area will be landscaped with native, drought-tolerant trees, shrubs, and groundcovers. The adjacent canyon slope and bluff slope contain coastal sage that will remain undisturbed. No permanent irrigation is proposed. The Landscape Plan states that a *"temporary surface piped drip irrigation will be installed initially so that the new planting can take root only and the it shall be removed."*

3. Special Conditions

The previous section on geologic hazards includes findings to support the special conditions requiring conformance with geologic recommendations, conformance with the setback requirements, conformance with the landscape plan, conformance with the grading and drainage plan, assumption of risk deed restriction, no future protective device deed restriction and future development deed restriction. These conditions are necessary to ensure compliance with Section 30253 of the Coastal Act concerning prevention of erosion and promotion of geologic stability. They also serve to ensure conformance with the certified LUP and Section 30240 of the Coastal Act with regard to protection and enhancement of environmentally sensitive habitat area (ESHA).

San Clemente's certified LUP advocates the preservation of native vegetation and discourages the introduction of non-native vegetation in coastal canyons. While no rare or endangered species have been reported to exist within the coastal canyon habitat of San Clemente, the City has designated all coastal canyons, including Trafalgar Canyon (adjacent to the subject site) as environmentally sensitive habitat areas. The coastal canyons act as open space and potential wildlife habitat, as well as corridors for native fauna. Decreases in the amount of native vegetation due to displacement by non-native vegetation have resulted in cumulative adverse impacts upon the habitat value of the canyons. As such, the quality of canyon habitat must be assessed on a site-by-site basis. The canyon adjacent to the subject site is considered a somewhat degraded ESHA due to the presence of both native and non-native plant species.

To ensure that the proposed development does not have any significant adverse effects on the canyon as an environmentally sensitive habitat area, the Commission imposes Special Conditions 3, 4 and 6. Special Condition 3 requires the applicant to conform to the landscape plan submitted demonstrating that all in-ground landscaping be of native, drought tolerant species. The condition also requires monitoring of the landscaping over a five-year period. As such, non-native species will not be allowed to encroach into the adjacent canyon and establishment of appropriate plantings will be assured.

The applicant is informed through Special Condition 4 (Conformance with Grading and Drainage Plan) that all water intercepted by the proposed structure must be conveyed in a non-erosive manner to the street or to the designated outlet along the base of the bluff slope near the mouth of the canyon by the use of roof and area drains to reduce excessive runoff, erosion, and sedimentation. The condition requires that the grading and drainage plan ensure that sedimentation in the canyon, which may adversely affect the designated environmentally sensitive habitat area, will be prevented. Special Condition 3, the landscaping condition, also requires the drainpipe to be effectively screened by vegetation. Special Condition 6, the future development special condition, ensures that no development, including landscaping, takes place that would adversely impact the existing designation of the adjacent Trafalgar Canyon as an environmentally sensitive habitat area.

4. Consistency with Section 30240 and Land Use Plan (LUP) Policies

The proposed development is sited on a building pad adjacent to Trafalgar Canyon, which is identified in the certified LUP as an environmentally sensitive habitat area (ESHA). The special conditions of this staff report are designed to protect and enhance Trafalgar Canyon as an environmentally sensitive habitat area. Therefore, as conditioned, the Commission finds that the proposed development is consistent with Section 30240(b) of the Coastal Act and the policies of the certified LUP.

E. PUBLIC ACCESS

Section 30211 states:

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

Section 30212(a)(2) of the Coastal Act states, in pertinent part:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(2) adequate access exists nearby

Section 30604(C) of the Coastal Act requires that permit applications between the nearest public road and the shoreline of any body of water within the coastal zone shall include a public access and recreation finding. The proposed development is located between the first public road and the sea at the convergence of a coastal bluff and coastal canyon inland of the OCTA railroad tracks. The nearest formal vertical coastal access is available approximately 500 feet downcoast of the subject site via the T-Street public access point (Exhibit 4). The T-Street public access point is an enclosed overpass leading from Paseo de Cristobal to the beach below. Lateral access to the Pacific Ocean and sandy beach is available adjacent to the T-Street access point, seaward of the OCTA railroad tracks.

At the August 2001 Coastal Commission hearing in Redondo Beach, members of the public testified to the Commission that pedestrians have historically crossed the subject property at 354 Paseo de Cristobal to reach a vertical accessway to the beach at the mouth of Trafalgar Canyon and also to access a lateral accessway on the opposite side of the canyon. As described by the speakers at the hearing (and since supported by responses to a Prescriptive Rights Questionnaire), an informal vertical accessway exists immediately upcoast of the subject site beneath the train trestle at the mouth of the canyon. The path on the opposite side of the canyon is said to be used to reach the Pier Bowl area of the City.

In order to more fully investigate potential public use of the subject site, Commission staff distributed a "Prescriptive Rights Study Public Use Questionnaire and Declaration" to owners and occupants within 100 feet of the subject site, speakers on the item at the August 7, 2001 hearing, City staff in the Planning Division and the San Clemente Sun Post News. The questionnaire and accompanying documents were also posted on the Coastal Commission's website at <http://www.coastal.ca.gov/access/prc-access.html>. (Questionnaire results are included as Exhibit 9.) The Sun Post News printed a brief write-up on August 14, 2001 informing readers of the prescriptive rights analysis underway (Exhibit 10). In addition, aerial photographs from the years 1972-1993 were reviewed to determine if trails were present historically.

To approve the proposed project, the Commission must find the project to be consistent with the policies of Chapter 3 of the Coastal Act, including the public access policies outlined in Sections 30211 and 30212 listed above. The project's consistency with each of these policies is described below.

1. Consistency with Section 30211

Section 30211 states, in part, that “*development shall not interfere with the public’s right of access to the sea where acquired through use or legislative authorization.*” Applicants for coastal development permits must demonstrate that their proposed development are consistent with the Coastal Act, including the requirements of Section 30211. In implementing this section of the Act, the permitting agency, in this case the Commission, must consider whether a proposed development will interfere with or adversely affect an area over which the public has obtained rights of access to the sea. If the agency finds that there may be such an interference or effect, then it also must determine whether there is substantial evidence to support the conclusion that the areas has been impliedly dedicated to public use. Because the authority to make the final determination on whether such a dedication has taken place resides with the courts, both the Commission’s Legal Division and the Attorney General’s Office have recommended that agencies dealing with implied dedication issues should use the same analysis as the courts. Essentially, this requires the agencies to consider whether there is substantial evidence indicating that the basic elements of implied dedication have been met.

A right of access through use is, essentially, an easement over real property which comes into being without the explicit consent of the owner. The acquisition comes into being without explicit consent of the owner. The doctrine of implied dedication was confirmed and explained by the California Supreme Court in Gion v. City of Santa Cruz (1970) 2 Cal.3d 29. The right acquired is also referred to as a public prescriptive easement, or easement by prescription. This term recognizes the fact that the use must continue for the length of the “prescriptive period,” before an easement comes into being.

The rule that an owner may lose rights in real property if it is used without consent for the prescriptive period derives from common law. It discourages “absentee landlords” and prevents a landowner from a long-delayed assertion of rights. The rule establishes a statute of limitation, after which the owner cannot assert normal full ownership rights to terminate an adverse use. In California, the prescriptive period is five years.

For the public to obtain an easement by way of implied dedication, it must be shown that:

- a) The public has used the land for a period of five years or more as if it were public land;
- b) Without asking for or receiving permission from the owner;
- c) With the actual or presumed knowledge of the owner;
- d) Without significant objection or bona fide attempts by the owner to prevent or halt the use, and
- e) The use has been substantial, rather than minimal.

In general, when evaluating the conformance of a project with Section 30211, the Commission cannot determine whether public prescriptive rights actually do exist; rather, that determination can only be made by a court of law. However, the Commission is required under Section 30211 to prevent development from interfering with the public’s right of access to the sea where acquired through use or legislative authorization. As a result, where there is substantial evidence that such rights may exist, the Commission must ensure that proposed development would not interfere with any such rights.

In the present case, the applicant has not proposed public access as part of the project. The applicant wishes to construct a new single-family residence with associated hardscape and landscape on the lot. (No fencing is proposed along the bluff-facing portion of the property, where potential public access rights may exist.) If the applicant were to propose public access, the Commission would be required to evaluate any evidence of implied dedication to determine that extent to which the proposed public access were equivalent in time, place and manner to any public

use that has been made of the site in the past. To the extent any proposed dedication of access is equivalent, proposed development will not interfere with any existing public access rights. Here, however, no dedication of public access is proposed, and an analysis of public rights of access is required to ensure that the project is consistent with Section 30211.

a. Potential for Development to Interfere with Public's Right of Access to Sea

As described previously, the applicant's proposed project involves the construction of a new two-story single-family residence with basement, attached two-car garage and associated landscaping and hardscape. The proposed structure would be sited on a vacant lot, which members of the public contend has been used for coastal access via the adjacent canyon mouth. As depicted on a majority of the questionnaires returned, the lot has typically been crossed diagonally from the northeastern corner to the southwestern corner. A review of the Commission's aerial photographs also shows a path crossing the lot in this manner. While construction of a house on the lot would obstruct diagonal access across the site, passage would still be possible along the seaward perimeter of the property if development is sited accordingly.

b. Nature of Any Implied Dedication of Access

Although staff was not able to conduct an exhaustive prescriptive rights analysis in the time available between the August Commission hearing and the mail-out date for the September hearing, substantial evidence has been provided which indicates potential public rights at the subject site. The Commission has before it a variety of information regarding the presence of implied dedication over the subject Laidlaw property. The format of the information that suggests that an implied dedication may have taken place includes 1) twenty-four (24) responses to the questionnaire, 2) five (5) letters from the public, and 3) the previously described aerial photographs.

The survey responses and letters from the public indicate that the writers had used the subject site over the years for access to the beach, ocean viewing, viewing of fireworks on the Fourth of July and dog walking. The time periods specified in the letters range from 1952 to the present. They state that the site has only been effectively fenced in recent months, but that the 3' high fence is easily climbable. Respondents state that the site was either previously unfenced (from the early 1950s through approximately 1998), the fence had been torn down, or the gate was typically open. (See Exhibit 9)

As discussed in the following section, the owner states that he has had the property fenced and maintained. Based on the survey responses and letters received by the Commission, it appears that many people have been using the subject property for public access purposes without the express permission of the property owner.

c. Sufficiency of Landowner Attempts to Negate Implied Dedication of Access

There are some limitations that prevent property from being impliedly dedicated, even if the basic elements of implied dedication have been met. The court in Gion explained that for a fee owner to negate a finding of intent to dedicate based on uninterrupted use for more than five years, he must either affirmatively prove he has granted the public a license to use his property or demonstrate that he made a bona fide attempt to prevent public use. Thus, persons using the property with the owner's "license" (e.g. permission) are not considered to be the "general public" for purposes of establishing public access rights. Furthermore, various groups of persons must have used the property without permission for prescriptive rights to form in the public. If only a limited and definable number of people have used the land, those persons may be able to claim a personal easement, but not dedication to the public. Moreover, even if the public has made some use of the property, an owner may still negate evidence of public prescriptive rights by showing bona fide affirmative steps to prevent such use. A court will judge the adequacy of an owner's efforts in light of the character of the property and the extent of public use.

The applicant states that the site has been fenced and that "private property" signage has been placed on the fence ever since he originally owned the property in 1968. However, the property changed ownership over the years before the current owner re-purchased the property. Commission staff has asked for more specific information about maintenance and upkeep of the fencing and signage over the years, but has not yet received a response.

The courts have recognized the strong public policy favoring access to the shoreline, and have been more willing to find implied dedication for that purpose than when dealing with inland properties. A further distinction between inland and coastal properties was drawn by the Legislature subsequent to the Gion decision when it enacted Civil Code Section 1009. Civil Code Section 1009 provides that if lands are located more than 100 yards from the Pacific Ocean and its bay and inlets, unless there has been a written, irrevocable offer of dedication or unless a governmental entity has improved, cleaned, or maintained the lands, the five years of continual public use must have occurred prior to March 4, 1972. In this case, the subject site is within 100 yards of the sea; therefore, the required five year period of use need not have occurred prior to March of 1972 in order to establish public rights.

It is important to note that Section 1009 explicitly states that it is not to have any effect on public prescriptive rights existing on the effective date of the statute (March 2, 1972). Therefore, public use of property for the prescriptive period prior to the enactment of Section 1009 or utilization of application procedures set forth in the section is sufficient to establish public rights in the property. Assuming that the fencing and signage was posted at the time Mr. Laidlaw re-acquired the property in the late 1990s, there would have been ample time for an implied dedication to occur prior to that time.

d. Provision of Public Access Equivalent in Time, Place and Manner

As noted previously, where there is substantial evidence of the existence of a public access right acquired through use, and a proposed development would interfere with that right, the Commission may deny a permit application under Public Resources Code Section 30211. As an alternative to denial, the Commission may condition its approval on the development being modified or relocated in order to preclude the interference or adverse effect. This is because the Commission has not power to extinguish existing public rights, even though it may authorize development which affects the exercise of those rights.

A full assessment of the degree to which the criteria for implied dedication has been met in this case could only be made after a more intensive investigation of the issue has been performed. A more

broad survey of potential users of the site would provide very helpful information to augment the information gathered between the August 2001 hearing and the date of this staff report.

In this case, although there is an unresolved controversy as to the existence of public prescriptive rights, the maintenance of a 25-foot blufftop setback excluding both the structure and the window wells could serve to protect any existing public rights which might otherwise be eliminated by the proposed development. Section 30214 of the Coastal Act directs the Commission to implement the public access policies of the Act in a manner that balances various public and private needs. This section applies to all the public access policies, including those dealing with rights acquired through use. Therefore, the Commission must evaluate the extent to which a protected area is in fact equivalent in time, place and manner to the access use made of the site in the past. If the Commission determines that the protected area is, in fact, equivalent in time, place, and manner to the access use made of the site in the past, the Commission need not do an exhaustive evaluation to determine if substantial evidence of an implied dedication exists because regardless of the outcome of the investigation, the Commission could find it consistent with Section 30211. If an investigation indicated substantial evidence of an implied dedication exists, the proposed project would not interfere with such public rights because it protected an area which is equivalent in time, place and manner to the access previously provided in the area subject to the implied dedication. As such, the Commission could find the proposed project consistent with Section 30211. If an investigation indicated that substantial evidence of an implied dedication was lacking, the Commission could also find that the proposed project could be consistent with Section 30211.

The letters and survey responses submitted by members of the public about prior public use of the Laidlaw site provide an indication of the time, place and manner of public access use that has occurred prior to the fencing and signage that may have been erected by the applicant in the late 1990s. Based on Civil Code Section 1009, if signage was posted at the site continuously, posting of the signs may have precluded an implied dedication from arising after the late 1990s. The responses from the public indicate that the site has been used for access to the beach, view of fireworks, viewing of the ocean, and walking dogs. The responses contain no indication that the uses made of the site were limited to certain days of the week or times of day. It appears that people used the lot anytime they wanted. According to responses received, no permission to use the property had been requested or granted.

The applicant does not propose public access as part of the currently proposed development. However, if a future public rights case were to be successful, the structure is appropriately set back from the blufftop of the property to allow the establishment of a potential trail. Fifteen (15) feet would be sufficient to accommodate a meandering trail along the seaward perimeter of the property. However, the proposed window wells would encroach into the 10 feet required to accommodate a privacy buffer between the structure and the trail. Therefore, the Commission imposes Special Condition 2, which requires the structure and window wells to be sited 25 feet from the bluff edge in order to protect this area. While a potential blufftop trail would be in a different location than the diagonal configuration currently used by the public, the route would provide equivalent access opportunities to the adjacent canyon. Although there is an unresolved controversy as to the existence of public prescriptive rights, there is sufficient area to accommodate public access should public rights be proven. Therefore, the Commission finds the proposed project, as conditioned to submit revised plans eliminating development from within the 10' privacy buffer area, to be consistent with Section 30211 of the Coastal Act.

2. Consistency with Section 30212

Section 30212 of the Coastal Act states that public access from the nearest public roadway to the shoreline and along the coast need not be provided in new development project where 1) it would be inconsistent with the protection of fragile coastal resources or 2) adequate access exists nearby. However, the Commission notes that Section 30212 is a separate section of the Act than Section

30211, the policy which states that development shall not interfere with the public's right of access to the sea where acquired through use. The limitation on the provision of new access imposed by Section 30212 does not pertain to Section 30211. Whether or not public prescriptive rights of access have accrued over trails that pass through environmentally sensitive area or in areas near other public access, Section 30211 requires that development not be allowed to interfere with those rights. As such, despite the presence of nearby formal public access, the potential for public rights on the subject site is not precluded by the Commission's approval of development at this site.

The nearest formal vertical coastal access is available approximately 500 feet downcoast of the subject site via the T-Street public access point (Exhibit 4). The T-Street public access point is an enclosed overpass leading from Paseo de Cristobal to the beach below. Lateral access to the Pacific Ocean and sandy beach is available adjacent to the T-Street access point, seaward of the OCTA railroad tracks. Therefore, public access exists nearby.

As conditioned to be adequately set back from the bluff edge, the proposed development will not impact public access either directly or indirectly to the ocean. As such, the development will not create adverse impacts, either individually or cumulatively, on public access and will not block public access from the first public road to the shore. Therefore, the Commission finds that the proposed development, as conditioned, is consistent with Section 30212 of the Coastal Act.

3. Conclusion

As discussed previously, the Commission cannot approve development that is inconsistent with the public access policies of the Coastal Act. Substantial evidence has been presented to indicate that prescriptive rights of access to the ocean may have been acquired at this site and may be adversely impacted by development at this location. As such, the development has been conditioned to be appropriately set back should a prescriptive rights case be successful in the future. The setback requirements of Special Condition 2 ensures that sufficient space is provided to allow a 15' wide public trail area and a 10' wide privacy buffer should a successful public rights case prevail. In addition, Special Condition 8 states that the Commission's approval of this permit does not constitute a waiver of any public rights that may exist on the property. As conditioned, development at the subject site does not preclude access should a successful prescriptive rights claim occur.

As conditioned for appropriate setback from the bluff edge and the recordation of a future development deed restriction, the Commission finds that the proposed development is consistent with the public access policies of the Coastal Act.

F. LOCAL COASTAL PROGRAM

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program which conforms with Chapter 3 policies of the Coastal Act. The Commission certified the Land Use Plan for the City of San Clemente on May 11, 1988, and certified an amendment approved in October 1995. On April 10, 1998, the Commission certified with suggested modifications the Implementation Plan portion of the Local Coastal Program. The suggested modifications expired on October 10, 1998. The City re-submitted on June 3, 1999, but withdrew the submittal on October 5, 2000.

The proposed development is consistent with the policies contained in the certified Land Use Plan. Moreover, as discussed herein, the development, as conditioned, is consistent with the Chapter 3 policies of the Coastal Act. Therefore, approval of the proposed development will not prejudice the City's ability to prepare a Local Coastal Program for San Clemente that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a).

G. CONSISTENCY WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment.

The proposed project has been conditioned in order to be found consistent with the geologic hazards, water quality and environmentally sensitive habitat policies of the Coastal Act. Mitigation measures, in the form of special conditions, require 1) conformance with geologic recommendations and submittal of a final foundation plan; 2) submittal of a revised site plan showing appropriate setbacks; 3) conformance with the landscaping plan submitted; 4) conformance with the drainage and runoff plan; 5) recordation of a deed restriction regarding assumption of risk; 6) recordation of a no future blufftop protective device deed restriction; 7) recordation of a deed restriction regarding future development, and 8) informs the applicant that the Commission's approval of development does not preclude a future prescriptive rights claim. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment. Therefore, the Commission finds that the proposed project can be found consistent with the requirements of the Coastal Act to conform to CEQA.