

CALIFORNIA COASTAL COMMISSION

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Wed 6a

Staff: GDC-SD
Staff Report: 4/17/03
Hearing Date: 5/6-9/03

STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of Encinitas

DECISION: Approved with Conditions

APPEAL NO.: A-6-ENC-01-47

APPLICANT: Conway and Associates

PROJECT DESCRIPTION: Subdivide an approximately 20,900 sq. ft. (.48 acre) blufftop lot into two approximately 10,450 sq. ft. (.24 acre) lots.

PROJECT LOCATION: 1410 Neptune Avenue, Encinitas, San Diego County
APN # 258-042-20

APPELLANTS: Commissioners Sara Wan and Patricia McCoy.

STAFF NOTES: The subject coastal development permit was approved by the City of Encinitas Planning Commission on February 8, 2001. The local decision was appealed to the Coastal Commission on March 14, 2001. On April 11, 2001, the Commission opened and continued the public hearing on this matter because the City file had not yet been received. On May 7, 2001, the applicant requested that the Substantial Issue hearing be delayed until such a time that he could provide additional geotechnical information relating to the grounds on which the appeals were filed and waived his right to a hearing within 49 days.

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed. The appeal raises two issues: whether the City used current geologic information to determine an adequate blufftop setback for new development and whether the stairway and seawall on the face of the bluff were authorized or consistent with the LCP. Based on a review of the City file, the City relied on geologic information from 1990 to assess the geologic stability of the site which would be inconsistent with the LCP requirement that current information be provided. In addition, the City's de facto after-the-fact approval of the stairway and failure to address the existing seawall appear to be

inconsistent with the LCP. Based on these concerns, staff recommends that substantial issue be found.

De Novo Recommendation:

The staff recommends that the Commission approve the proposed development with conditions. After review of updated geotechnical material by the Commission's staff geologist, it appears that the lots will have adequate area available following the proposed subdivision to accommodate single-family residences that will have sufficient geologic setbacks such that no future shoreline protective devices will be necessary to protect the future blufftop residences. In addition, while it has been determined that the property contains an unpermitted stairway and seawall on the bluff face, resolution of these unpermitted developments will need to be resolved separate from the subject permit application through future permitting action by the City, an amendment to the subject permit or enforcement measures. In addition, Special Conditions have been attached that include: 1) notification to the applicant that all future development on the site requires an amendment to this permit or a coastal development permit and a requirement that the feasibility of removing the stairway and seawall be included with any application for demolition of the existing residence; 2) a requirement that the applicant waive all future rights to shoreline protection and; 3) requiring an open space deed restriction over the face of the bluffs prohibiting future development on the bluffs; and 4) removal of any reference to reciprocal use of the stairway by both property owners on the Tentative Parcel Map.

The motions for the Substantial Issue portion of the staff report begin on Page 4. The motions for the De Novo portion of the staff report begin on Page 9.

SUBSTANTIVE FILE DOCUMENTS: Certified City of Encinitas Local Coastal Program (LCP); City of Encinitas Planning Commission Resolution No. PC 2000-11, Case No. 00-103 TPM/CDP/EIA; Notice of Final Action Case No. 00-103 TPM/CDP/EIA; "Preliminary Geotechnical Investigation" by A.R. Barry and Associates, dated July 1, 1990; Appeal Applications dated March 13, 2001; "Slope stability analysis and bluff study, 1410 Neptune Ave., Encinitas, Diego County" by Geosoils 2003, dated February 26, 2003; "Geologic Review Memorandum" by Mark Johnsson, staff geologist, dated April 14, 2003.

I. Appellants Contend That: The City's decision is inconsistent with several provisions of the City's LCP which require that new development on the blufftop be supported by a current geotechnical report that addresses the suitability of siting development based on overall site stability and the potential need of shoreline protection over the lifetime of the development. The appellants contend that the City failed to require a current geotechnical assessment of the site and instead based its decision on a geotechnical report performed in July of 1990. Because an updated geotechnical assessment was not

performed, the appellants contend that it is not known if adequate setbacks from the bluff edge exist to support future development on the proposed two lots. The appellants also contend that the City's requirement of a covenant to allow the continued use and maintenance of the stairway on the face of the bluff is inconsistent with provisions of the LCP which prohibit private access stairways on the face of the bluff. Finally, the appellants contend that the City's failure to address an existing unpermitted seawall located on the bluff is inconsistent with LCP provisions regarding construction of shoreline protective devices.

II. Local Government Action. The coastal development permit was approved by the City of Encinitas Planning Commission on February 8, 2001. Specific conditions were attached which required covenants be recorded that: preclude future development on the face of or at the base of the bluff; requires the property owner to maintain and repair an existing stairway on the bluff face as needed or, if unsafe and non-repairable, to seek its safe removal; consolidates the proposed two lots until such time that future development of the site is reviewed and approved by the City and the existing residence is removed and; requires that applications for future development of the site include the submission of site-specific soils and geotechnical reports that have been performed within six months of the application. Other specific conditions require: the applicant to provide a reciprocal access easement and maintenance agreement for use of the stairway by owners of the two proposed lots; the design of a drainage collection system that directs all runoff away from the bluff toward the street; and the use of automatic shut off mechanisms for any installed automatic irrigation systems.

III. Appeal Procedures. After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits. Projects within cities and counties may be appealed if they are located within mapped appealable areas. The grounds for appeal are limited to the assertion that "development does not conform to the certified local coastal program." Where the project is located between the first public road and the sea or within 300 ft. of the mean high tide line, the grounds of appeal are limited to those contained in Section 30603(b) of the Coastal Act. Those grounds are that the development does not conform to the standards set forth in the certified local coastal program or the access policies set forth in the Coastal Act.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless it determines that no substantial issue is raised by the appeal. If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to a de novo hearing on the merits of the project.

If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a

majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project. If the Commission conducts a de novo hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program.

In addition, for projects located between the sea and the first public road paralleling the sea, Sec. 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo hearing, any person may testify.

IV. Staff Recommendation On Substantial Issue.

MOTION: *I move that the Commission determine that Appeal No. A-6-ENC-01-47 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-6-ENC-01-47 presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

V. Findings and Declarations.

1. Project Description/Permit History. The proposed development involves the subdivision of an approximately 20,900 sq. ft. blufftop lot into two, 10,450 sq. ft. lots.

An existing 1,752 sq. ft. single-family residence constructed prior to the Coastal Act straddles the proposed lot lines and has been conditioned by the City to be removed prior to finalization of the subdivision. In addition, an existing private beach access stairway descends down the bluff face to the beach and an existing approximately three (3) ft. high seawall, which spans the width of the entire property, is located at the base of the 70 ft. high coastal bluff. Aerial photographs of the site taken in 1972, prior to the Commission's jurisdiction in this area, do not show the existence of the stairway or seawall. In addition, no record of any permits for the structures have been found in Commission files. Therefore, the legal status of these structures is unknown.

The approximately 20,900 sq. ft. subject site is located on the west side of Neptune Avenue in the Leucadia community of the City of Encinitas approximately 2 blocks south of the Grandview public access stairway.

It approving the proposed subdivision, the City included conditions that allowed the existing stairway to remain and allowed the property owner to maintain and repair the existing stairway on the bluff face as needed or, if unsafe and non-repairable, to seek its safe removal. In addition, the City's approval was conditioned on the establishment of a reciprocal access easement and maintenance agreement for use of the stairway by owners of the two proposed lots (ref. Case No. 00-103 TMP/CDP/EIA, specific conditions SCA, SCB and SCC).

2. Geologic Stability. Public Safety (PS) Policy 1.3 of the City's Certified LUP states that:

The City will rely on the Coastal Bluff and Hillside/Inland Bluff Overlay Zones to prevent future development or redevelopment that will represent a hazard to its owners or occupants, and which may require structural measures to prevent destructive erosion or collapse.

In addition, PS Policy 1.6 states, in part, that:

The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:

- a. **Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;**
... [emphasis added]

[. . .]

- f. Requiring new structures and improvements to existing structures to be set back 25 feet from the inland blufftop edge, and 40 feet from coastal blufftop edge with exceptions to allow a minimum coastal blufftop setback of no less than 25 feet. For all development proposed on coastal blufftops, a site-

specific geotechnical report shall be required. The report shall indicate that the coastal setback will not result in risk of foundation damage resulting from bluff erosion or retreat to the principal structure within its economic life and with other engineering evidence to justify the coastal blufftop setback.

Section 30.34.020(B)(9) of the certified Implementing Ordinances states, in part:

The City shall develop and adopt a comprehensive plan, based on the Beach Bluff Erosion Technical Report (prepared by Zeiser Kling Consultants Inc., dated January 24, 1994), to address the coastal bluff recession and shoreline erosion problems in the City. [. . .]

In addition, until such a comprehensive plan is approved by the City of Encinitas and the Coastal Commission as an amendment to the LCP, the City shall not permit the construction of seawalls, revetments, breakwaters, cribbing, or similar structures for coastal erosion except under circumstances where an existing principal structure is imminently threatened and, based on a thorough alternatives analysis, an emergency coastal development permit is issued and all emergency measures authorized by the emergency coastal permit are designed to eliminate or mitigate adverse impacts on local shoreline sand supply. (Ord. 95-21) [emphasis added]

In addition, Section 30.34.020 (D) of the certified Implementing Ordinances states, in part:

D. APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. The review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. Each review/report shall consider, describe and analyze the following: (Ord. 95-04)

[...]

2. **Historic, current and foreseeable-cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;** [emphasis added]

[...]

6. Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);

[...]

8. **Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data;** (Ord. 95-04) [emphasis added]

[...]

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. **The report shall use a current acceptable engineering stability analysis method** and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project. [emphasis added]

The appellants contend that the City's approval is inconsistent with the above-cited policies of the LCP in that a current geotechnical report was not required or reviewed as part of the subdivision approval. The above-cited LCP policies require that new development located in the coastal bluff overlay provide a current geotechnical report that addresses, among other things, current conditions and erosion rates. However, the geotechnical report relied on by the City was done in 1990 and did not include current information. Without a current geotechnical report, the appellants contend, the City could not determine if sufficient setbacks are available to support development on the two newly created lots.

The appellants also contend that the City's action was inconsistent with the LCP in that it failed to demonstrate that future development of the site will be reasonably safe from erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. Unless a current geotechnical assessment is performed for the subject site, the appellants contend it is not possible to determine whether development on the proposed new lots will be subject to threat or need shoreline protection. In fact, the 1990 geotechnical report which the City relied on in its review of the subject development, documents that the existing approximately 3 foot-high seawall structure had been partially undermined and may be in need of repairs or upgrading. However, the report did not identify whether the existing seawall was necessary to protect the existing residence. In addition, since a permit for the seawall's original construction has not been found, supporting documentation for the seawall's construction and need is not available. Since a current geotechnical report was not prepared for the site it is not known if the existing single-family residence or new development on the

blufftop needs shoreline protection over its lifetime. Therefore, the City's failure to require current geologic information in its review of the proposed development raises a substantial issue.

The appellants also contend that the City action to allow the stairway on the bluff face to remain is inconsistent with PS Policy 1.6(a) which does not allow the construction of private access stairways on the bluff face. The City action in approving the subdivision required through special conditions that the applicant perform any necessary maintenance of the stairway and that the stairway be accessible from both of the proposed lots. The City assumed the stairs were built before the Coastal Act of 1972 and found them to be a "legal non-conforming" structure. However, Commission staff has reviewed a photograph of the subject site taken in 1972 by the San Diego County Planning Organization ("San Diego County Regional Coastline Plan Photographs", June 25, 1972, Vol. III, photo #41) which does not show a stairway on the face of the subject bluff. In addition, no records of coastal permits have been found for the construction of a stairway at the subject site. Therefore, the City's action regarding the stairway may effectively constitute after-the-fact approval of development that appears to be inconsistent with the LCP's prohibition against private stairways on the bluff face. Therefore, the City's action concerning the stairway raises a substantial issue.

Finally, the appellants contend that the City failed to address an existing seawall that is located on bluff. The seawall consists of a concrete wall approximately 3 ft.-high and approximately 100 ft.-long that appears to rest on top of the bedrock on the face of the bluff approximately 3 ft. landward of the beach. The seawall is connected to similar walls that extend approximately 50 ft. north of the subject property and approximately 200 ft. south. In approving the subdivision, the City recognized that a seawall structure was located near the base of the bluff but identified it as being constructed prior to the implementation of the Coastal Act. However, based on a review of a photograph of the subject site from 1972 (as cited above), the seawall on the subject site (and neighboring sites) did not exist prior to the Coastal Act of 1972. In addition, no records of coastal permits for the subject seawall have been found. Therefore, the appellants contend that the City should have reviewed the seawall construction to determine whether its construction is consistent with the LCP. However, as cited above, until the City has a Commission approved Comprehensive Plan dealing with shoreline erosion (which has not occurred to date), Section 30.34.020B of the City's Certified Implementation Plan (IP) prohibits the City from approving the construction of shoreline protective devices unless the structure at the top of the bluff is "imminently threatened", a thorough alternatives analysis is performed, an emergency coastal development permit is issued and the emergency work is designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Because the City characterized the seawall as a legal nonconforming structure and did not evaluate the consistency of the seawall with the certified LCP, the appeal raises a substantial issue regarding the status of the seawall.

In summary, in approving the subdivision the City failed to determine an adequate geologic setback for new development on top of the bluff based on a current geologic

assessment of the bluff and current bluff erosion rate information as required by the LCP. Therefore, the City's action raises a substantial issue regarding the use of accurate and current geologic information. In addition, the City's action to effectively grant an after-the-fact permit for the stairway and failure to address an existing unpermitted seawall may be inconsistent with the LCP. For these reasons, the City's action raises a substantial issue with respect to the grounds on which the appeal was filed.

I. STAFF RECOMMENDATION ON THE COASTAL PERMIT

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission approve Coastal Development Permit No. A-6-ENC-01-47 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion 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 TO APPROVE THE PERMIT:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development will conform with the policies of the Certified Encinitas Local Coastal Program and with the public access and recreation policies of the Coastal Act. Approval of the permit will comply with the California Environmental Quality Act because there are no feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. Standard Conditions.

See attached page.

III. Special Conditions.

The permit is subject to the following conditions:

1. **Future Development.** This permit is only for the subdivision of the existing lot into two lots as described in coastal development permit No. A-6-ENC-01-47. Except as provided in Public Resources Code section 30610 and applicable regulations, any future development as defined in PRC section 30106, including, but not limited to, demolition of the existing residence, removal of the unpermitted bluff face stairway and unpermitted

seawall, or a change in the density or intensity of use land, shall require an amendment to Permit No. A-6-ENC-01-47 from the California Coastal Commission or shall require an additional coastal development permit from the City of Encinitas. Any application for a coastal development permit to demolish the existing residence shall include an analysis of the feasibility of removing the existing unpermitted stairway and seawall.

2. No Future Bluff or Shoreline Protective Device. By acceptance of this Permit, the applicant agrees, on behalf of itself and all successors and assigns, that:

No new bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-6-ENC-01-47 or to protect any future development on the lots approved pursuant to Coastal Development Permit No. A-6-ENC-01-47 including, but not limited to, future residences, foundations, decks or driveways in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. By acceptance of this Permit, the applicant hereby waives, on behalf of itself and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235.

3. Open Space. Except as provided in this condition, no development, as defined in section 30106 of the Coastal Act shall occur on the subject property seaward of the edge of the bluff as described and depicted in an Exhibit attached to the Notice of Intent to Issue Permit (NOI) that the Executive Director issues for this permit. Removal of the unpermitted stairway and the unpermitted seawall and restoration of the bluff face may occur seaward of the edge of the bluff pursuant to a coastal development permit or an enforcement order issued pursuant to Chapter 9 of the Coastal Act.

PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOI FOR THIS PERMIT, the applicant shall submit for the review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the portion of the subject property affected by this condition, as generally described above and shown on Exhibit #6 attached to this staff report.

4. Elimination of Reciprocal Access Easement. No reciprocal access easement shall be created that crosses the face of the bluff.

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit evidence satisfactory to the Executive Director that Note B of Tentative Parcel Map #00-103/Conway & Associates has been deleted.

5. No Authorization for Stairway or Seawall. This coastal development permit does not authorize the retention, the repair and maintenance, or any alteration to the existing beach or bluff face stairway or seawall located on the subject property.

6. Deed Restriction. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the landowner has executed and recorded a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property (hereinafter referred to as the “Standard and Special Conditions”); and (2) imposing all Standard and Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the applicant’s entire parcel or parcels. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

II. Findings and Declarations:

1. Project Description/Permit History. The proposed development involves the subdivision of an approximately 20,900 sq. ft. blufftop lot into two, 10,450 sq. ft. lots. An existing 1,752 sq. ft. single-family residence constructed prior to the Coastal Act straddles the proposed lot line. The City’s conditions of approval require the parcels created by the proposed subdivision to be considered consolidated until the existing residence is removed. In addition, an existing private beach access stairway descends down the bluff face to the beach and an existing approximately three (3) ft. high seawall, which spans the entire property, is located at the base of the 70 ft. high coastal bluff. Review of all available evidence by Commission staff indicates that the existing bluffslope stairway and seawall on site were constructed after the effective date of the Coastal Zone Conservation Act of 1972 (Proposition 20) without the required coastal development permit. Aerial photographs of the site taken in 1972, prior to the Commission’s jurisdiction in this area, do not show the existence of the stairway or seawall. In addition, no record of any permits for the structures have been found in Commission files. The applicant has submitted a declaration by a prior occupant of the existing residence that a stairway did exist prior to 1972, but no stairway is visible on the applicant’s property in the 1972 photograph.

The approximately 20,900 sq. ft. subject site is located on the west side of Neptune Avenue in the Leucadia community of the City of Encinitas approximately 2 blocks south of the Grandview public access stairway.

The City of Encinitas has a certified Local Coastal Program (LCP) and has been issuing coastal development permits since May of 1995. The proposed development, which is located on the blufftop above the public beach, is located within the permit jurisdiction of

the City's LCP and, therefore, the standard of review for the subject development is the certified Encinitas LCP and the public access and recreational policies of the Coastal Act.

2. Geologic Stability. Public Safety (PS) Policy 1.3 of the City's Certified LUP states that:

The City will rely on the Coastal Bluff and Hillside/Inland Bluff Overlay Zones to prevent future development or redevelopment that will represent a hazard to its owners or occupants, and which may require structural measures to prevent destructive erosion or collapse.

In addition, PS Policy 1.6 states, in part, that:

The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:

- b. Only permitting public access stairways and no private stairways, and otherwise discouraging climbing upon and defacement of the bluff face;

[. . .]

- g. Requiring new structures and improvements to existing structures to be set back 25 feet from the inland blufftop edge, and 40 feet from coastal blufftop edge with exceptions to allow a minimum coastal blufftop setback of no less than 25 feet. For all development proposed on coastal blufftops, a site-specific geotechnical report shall be required. The report shall indicate that the coastal setback will not result in risk of foundation damage resulting from bluff erosion or retreat to the principal structure within its economic life and with other engineering evidence to justify the coastal blufftop setback.
- h. Permanently conserving the bluff face within an open space easement or other suitable instrument.

In addition, RM Policy 8.5 of the LUP states, in part, that:

The City will encourage the retention of the coastal bluffs in their natural state to minimize geologic hazards and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible.

Section 30.34.020(B)(9) of the certified Implementing Ordinances states, in part:

The City shall develop and adopt a comprehensive plan, based on the Beach Bluff Erosion Technical Report (prepared by Zeiser Kling Consultants Inc., dated January

24, 1994), to address the coastal bluff recession and shoreline erosion problems in the City. [. . .]

In addition, until such a comprehensive plan is approved by the City of Encinitas and the Coastal Commission as an amendment to the LCP, the City shall not permit the construction of seawalls, revetments, breakwaters, cribbing, or similar structures for coastal erosion except under circumstances where an existing principal structure is imminently threatened and, based on a thorough alternatives analysis, an emergency coastal development permit is issued and all emergency measures authorized by the emergency coastal permit are designed to eliminate or mitigate adverse impacts on local shoreline sand supply. (Ord. 95-21)

(PS Policy 1.7 of the City's certified IP contains similar language)

In addition, Section 30.34.020 (D) of the certified Implementing Ordinances states, in part:

D. APPLICATION SUBMITTAL REQUIREMENTS. Each application to the City for a permit or development approval for property under the Coastal Bluff Overlay Zone shall be accompanied by a soils report, and either a geotechnical review or geotechnical report as specified in paragraph C "Development Processing and Approval" above. Each review/report shall be prepared by a certified engineering geologist who has been pre-qualified as knowledgeable in City standards, coastal engineering and engineering geology. The review/report shall certify that the development proposed will have no adverse affect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. Each review/report shall consider, describe and analyze the following: (Ord. 95-04)

[...]

2. Historic, current and foreseeable-cliffs erosion, including investigation or recorded land surveys and tax assessment records in addition to land use of historic maps and photographs where available and possible changes in shore configuration and sand transport;

[...]

6. Ground and surface water conditions and variations, including hydrologic changes caused by the development e.g., introduction of irrigation water to the ground water system; alterations in surface drainage);

[...]

8. Effects of marine erosion on seacliffs and estimated rate of erosion at the base of the bluff fronting the subject site based on current and historical data; (Ord. 95-04)

[...]

The report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. The report shall use a current acceptable engineering stability analysis method and shall also describe the degree of uncertainty of analytical results due to assumptions and unknowns. The degree of analysis required shall be appropriate to the degree of potential risk presented by the site and the proposed project.

The applicant proposes to subdivide an existing approximately 20,900 sq. ft. blufftop lot into two approximately 10,450 sq. ft. lots. An existing residence and detached garage are currently located on the top of the bluff and an unpermitted private beach access stairway and seawall lie on the bluff seaward of the residence. The size of the proposed lots will be consistent with the majority of the blufftop lots along Neptune Avenue. The existing residence is located as close as approximately 35 ft. from the edge of the bluff and the garage is located adjacent to the street approximately 125 ft. from the edge of the bluff. The applicant has indicated that the proposed lots will support the construction of residential units on each proposed lot with a 40 ft. setback from the edge of the bluff which is consistent with the certified LCP.

Subdivision

The primary concern with approving the subdivision on an eroding blufftop lot is whether the subdivision will result in lots that can accommodate development on each lot such that shoreline protection will not be required over the development's lifetime. To assess this question, the certified LCP requires the applicant to provide a thorough and current geologic assessment of the site. The applicant has submitted updated geotechnical information that addresses the specific setback requirements for new development on the blufftop. The Commission's staff geologist has reviewed the updated geotechnical information and concurs with the applicant's assessment.

According to the Commission's staff geologist, in order to determine the setback which is adequate to assure that no future shoreline protective measures will be necessary over the lifetime of any new development, it is necessary to:

- 1) Determine whether the bluff is grossly stable against landsliding; that is, if it meets certain minimum stability standards. The standard that is routinely applied in the grading industry, and that the Commission generally adopts in evaluating coastal bluff stability, is a factor-of-safety against sliding of 1.5 (1.1 for the pseudostatic, or seismic, case). If the bluff does not possess a factor of

safety of 1.5 or 1.1 (seismic), the position on the bluff face or bluff top at which this factor is attained must be determined.

- 2) Establish the expected bluff retreat over the economic life of the structure, based on either site specific or regional data on long-term erosion rates.

Based on the information provided by the applicant, it is the opinion of the Commission's staff geologist that the applicant has demonstrated that the minimum factor of safety against sliding of 1.5 (static) and 1.1 (pseudostatic) for the bluff stability is located at a point on the bluff face, seaward of the bluff edge. Therefore, based on current geologic information any development proposed with a setback at least a 40 ft. landward of the bluff edge will not currently be subject to landslide.

However, while any new development sited today at least 40 landward of the bluff is not currently subject to a threat from landslide, the bluff will be subject to long-term erosion and retreat and the geologic setback will need to be based on an accurate estimate of this retreat rate. No site-specific data has been provided on bluff retreat rate at this site. According to the Commission's geologist, in the absence of site-specific data, regional data from the literature may be substituted. The current state-of-the-art for establishing bluff retreat rates in this area is a FEMA-funded study done as part of a nationwide assessment of coastal erosion hazards. Data presented in Benumof and Griggs (1999), indicate that the long-term bluff retreat in the general area is from 0.15 to 0.49 feet per year. To allow for accelerated average bluff retreat rates in the future, which are a likely result of any acceleration in the rate of sea level rise, it is appropriate to establish the setback on the basis of the larger value (0.49 ft/yr). Given a 75-year design life as mandated by the LCP, about 37 feet of erosion might be expected. To this should be added a buffer, generally on the order of 10 feet, to allow for surficial slumping and so that the foundation is not actually being undermined at the end of the 75 years, and to allow for uncertainties in the analysis for a total setback of 47 feet. Although a 10 foot buffer is generally recommended, a buffer of only 3 feet, for a total setback of 40 feet (the "default value" under the LCP) is adequate at this site due to the very gentle slope of the upper bluff, which would cause bluff retreat to be somewhat lower for this area than for the Encinitas as a whole.

Therefore, it is the opinion of the Commission's staff geologist that, based on current site conditions, a setback of at least 40 ft. from the bluff edge will provide a safe location for any future residences such that they will not require shoreline protection over their lifetime consistent with of Section 30.34.020(D) of the City's Certified IP. There is adequate area on each of the proposed lots to accommodate a minimum 40-foot setback and residences of reasonable size. Therefore, the proposed subdivision is consistent with Section 30.34.020(D) of the City's Certified IP.

Since the applicant has documented that siting of new structures within the proposed subdivision will not require the construction of shoreline protective devices over its lifetime, Special Condition #2 has been attached which requires the applicant to waive all

rights to future protection for new development on the blufftop. Such a condition will assure that the bluff will be protected to the maximum extent possible from unnatural alteration of the bluff.

In addition, to further reduce the risk of unnatural bluff erosion and to protect the appearance of the coastal bluff, PS Policy 1.6(g) requires that the bluff face be placed within an open space easement or other suitable device. Therefore, Special Condition #3 places an open space restriction over that portion of the bluff face owned by the applicant. This restriction along with Special Condition #2 prohibits the alteration of the bluff or development on the bluff face. Special Condition #3, however, does not preclude future removal of the stairway and seawall or restoration of the bluff face. In this way, the bluff will remain in its natural state and retain its scenic value.

Stairway and Seawall.

The existing stairway and seawall on the face of the bluff were constructed after enactment of the Coastal Act in 1972 without the required coastal development permit. The stairway consists of a switchback wooden stairway structure with railings leading from the top of the bluff to the top of an approximately 3 ft. high concrete seawall. The seawall consists of a concrete wall approximately 3 ft.-high and approximately 100 ft.-long that appears to rest on top of the bedrock on the face of the bluff approximately 3 ft. landward of the beach. However, an approximately 12 step concrete stairway is located on the beach leading from the top of the seawall to the beach below. The seawall is connected to similar walls that extend approximately 50 ft. north of the subject property and approximately 200 ft. south.

The applicant has submitted a declaration by a previous occupant that a stairway to the beach did exist on the property prior to 1972. The Commission has a photograph taken in 1972 by the County of San Diego, however, documenting that no stairway or seawall existed on the subject property in 1972 (“San Diego County Regional Coastline Plan Photographs”, June 25, 1972, Vol. III, photo #41). In addition, no evidence of coastal development permits for the construction of a stairway or seawall at this location has been found.

Although these structures appear to be unpermitted, the applicant has not requested their retention or removal as part of this permit application. However, in approving the subdivision at the local level, the City incorrectly identified the seawall and stairway as existing prior to the Coastal Act and were considered by the City to be legal nonconforming structures. The City’s tentative map approval and coastal development permit (Case No. 00-103 TPM/CDP) was conditioned to require the subject lots be considered to remain consolidated until such time that the existing residence which straddles the proposed lots is removed following additional permit action by the City. Therefore an additional coastal development permit will be required from the City of Encinitas (or an amendment to the subject permit) in order to remove the existing residence before the proposed new lots can be treated as separate lots. In addition, any

new residences on the proposed new lots must also receive coastal development permit authorization.

The applicant has identified through the submission of an updated geotechnical report that the existing seawall is not necessary to protect any new development that is proposed with a 40 ft. setback from the bluff edge. In addition, the Commission's staff geologist recommends in his review of the applicant's geologic report that "the feasibility of removing the existing seawall be explored as a part of any future development of the site." (Ref. "Geologic Review Memorandum" by Mark Johnsson, dated April 14, 2003 attached as Exhibit #5) Since the applicant will likely propose to remove the existing residence in order to treat the proposed lots as separate lots, any need for the continued existence of the seawall will be eliminated. The site-specific geotechnical evidence that has been submitted in review of the proposed subdivision has indicated the existing structure on the project site is not currently threatened by erosion and the stability analysis was performed as if the existing seawall does not exist.

Therefore, Special Condition #1 has been attached which states that this permit is for the subdivision of an existing lot into two lots and requires the applicant to obtain a coastal development permit for all other development proposals for the site, including, but not limited to, demolition of the existing residence, removal of the unpermitted bluff face stairway and unpermitted seawall, and construction of residential structures or other structures, from the City of Encinitas under a separate coastal development permit or an amendment to this permit. Any application for removal of the existing residence shall include analysis of the feasibility of removing the existing unpermitted stairway and seawall associated with the residence. This requirement is necessary to assure that future owners do not acquire the property in the expectation that the unpermitted stairway and seawall will be retained. If resolution of the unpermitted stairway and seawall does not occur through future coastal development permits, the City can pursue enforcement measures. If the City does not resolve the unpermitted development issues, the Commission may take enforcement measures to assure compliance with the certified LCP. Therefore, while the legal status of the stairway and seawall will not be resolved by the subject permit request, its resolution will occur in the future through either an additional coastal development permit(s) or future enforcement action.

The City's conditions of approval and "Note B" on the tentative parcel map require a reciprocal access easement to be created to provide owners of both of the proposed lots with use of the existing stairway. The conditions also require the owners to provide routine repair and maintenance of the stairway. The Commission's action on this appeal supercedes the City's conditions of approval for the purposes of the Coastal Act. To clarify that the Commission is not authorizing the maintenance or use of the existing stairway, Special Condition #4 prohibits the creation of a reciprocal access easement and requires the applicant to submit evidence to the Executive Director that "Note B" on the tentative parcel map for the subject subdivision, which provides for such an easement, has been deleted. Because the local government's findings and conditions of approval suggest that the stairway and seawall are authorized to be retained, Special Condition #5

is necessary to clarify that this coastal development permit does not authorize retention, repair and maintenance, or any alteration to the existing bluff face stairway and seawall. In order to assure that future owners of the property receive notice of the conditions of this permit, Special Condition #6 requires that the terms and conditions of this permit be recorded as a deed restriction.

In summary, as conditioned, the proposed subdivision will not result in the need to construct residences in locations that would require shoreline protective devices over their lifetimes, consistent with (PS) Policy 1.7 of the Certified LUP and Sections 30.34.020(B)(9) and 30.34.020(D) of the Certified IP. Finally, as conditioned to prohibit future alteration of the bluff face, the proposed development is consistent with PS Policy 1.6 of the LUP.

3. Public Access. The project site is located on the blufftop west of Neptune Avenue. Neptune Avenue at this location is designated as the first public roadway. As the proposed development will occur between the first public roadway and the sea, pursuant to Section 30.80.090 of the City's LCP, a public access finding must be made that such development is in conformity with the public access and public recreation policies of the Coastal Act.

Section 30210 of the Coastal Act states:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

In addition, Section 30212 of the Act is applicable and states, in 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:
 - (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
 - (2) adequate access exists nearby....

Additionally, Section 30220 of the Coastal Act provides:

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.

The proposed development will occur on the top of the bluff above a public beach. The beach fronting this location is used by local residents and visitors for a variety of recreational activities.

The subject site is located between the Pacific Ocean and the first public roadway, which in this case is Neptune Avenue. The project site is located within a developed single-family residential neighborhood. Adequate public access to the shoreline is currently available at Grandview Stairs approximately 2 blocks north of the subject site. Therefore, vertical access through the site is not necessary nor warranted, given the fragile nature of the bluffs and the availability of public access nearby. As previously discussed, new development which would require the construction of shoreline protective devices over the lifetime of the development would be inconsistent with (PS) Policy 1.7 of the Certified LUP and Section 30.34.020(B)(9) of the Certified IP. Because shoreline protective devices such as seawalls are typically located on the public beach and adversely affect sand supply, public access would also be adversely affected. However, in this case, the applicant has provided documentation that asserts that shoreline protection will not be needed over the lifetime of any future development approved on the blufftop with geologic setbacks of at least 40 ft. In addition, the subdivision will not by itself result in the need to construct shoreline devices such that the proposed project will have no direct impact on public access, consistent with the public access policies of the Coastal Act. Therefore, as conditioned, the subject development is consistent with the certified Local Coastal Program and Sections 30210, 30212 and 30220 of the Coastal Act.

4. Unpermitted Development. The proposed development will occur on a site where several developments have occurred without the benefit of a coastal development permit. These include the construction of a stairway and seawall on the face of the bluff and the construction of concrete stairway leading from the seawall to the beach below. If resolution of the unpermitted stairway and seawall does not occur through a future coastal development permit, the City may pursue enforcement measures. If the City is unwilling to resolve the unpermitted development issues, the Commission may take enforcement measures to assure compliance with the certified LCP. Therefore, while the legal status of the stairway and seawall will not be resolved by the subject permit request, its resolution may occur in the future through either an additional coastal development permit(s) for removal of the unpermitted development and restoration of the site or future enforcement action. The Commission's enforcement division will evaluate further actions to address this matter.

Although these developments have taken place prior to submission of this permit application, consideration of the application by the Commission has been based solely upon the policies of the City's certified LCP and the public access and recreation policies of the Coastal Act. Approval of the permit does not constitute a waiver of any legal action with regard to these violations of the LCP or Coastal Act that may have occurred, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit.

5. Local Coastal Planning. Section 30604 (a) also requires that a coastal development permit shall be issued only if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act.

In November of 1994, the Commission approved, with suggested modifications, the City of Encinitas Local Coastal Program (LCP). Subsequently, on May 15, 1995, coastal development permit authority was transferred to the City. The project site is located within the City's permit jurisdiction and, therefore, the standard of review is the City's LCP.

The newly created lots resulting from the proposed subdivision are similar in lot size to other lots in the surrounding area. In addition, the existing community has adequate services to support the construction of new residential development on both proposed lots and such future residential development would be compatible with the character and scale of development in the surrounding area.

Based on specific policy and ordinance language requirements placed in the LCP by the Commission, the City of Encinitas is in the process of developing a comprehensive program addressing the shoreline erosion problem in the City. The intent of the plan is to look at the shoreline issues facing the City and to establish goals, policies, standards and strategies to comprehensively address the identified issues. To date, the City has conducted several public workshops and meetings on the comprehensive plan to identify issues and present draft plans for comment. However, at this time it is uncertain when it will be scheduled for local review by the Encinitas City Council or when the plan will come before the Commission as an LCP amendment.

In the case of the proposed project, site-specific geotechnical evidence has been submitted indicating that the existing structure on the project site is not currently threatened by erosion and that shoreline/bluff protection is not currently required. In addition, the geotechnical report asserts that future development setback 40 ft. from the edge within the proposed lots will not be threatened over their lifetime which is estimated to be 75 years.

Based on the above findings, the proposed subdivision has been found to be consistent with the Section 30.34.020(D) of the City's Certified IP and PS Policy 1.3 and 1.6 of the LUP which prohibits development in hazardous locations that would require the construction of shoreline protective devices. In addition, as conditioned, the project has been found to be consistent with Section 30.34.020(B)(9) of the Certified IP and PS Policy 1.7 of the LUP which restricts developments in advance of the comprehensive plan. Therefore, the Commission finds that approval of the subdivision will not prejudice the ability of the City of Encinitas to implement its certified LCP and to prepare a comprehensive plan addressing the City's coastline as required in the certified LCP.

6. California Environmental Quality Act (CEQA) Consistency. Section 13096 of the Commission's administrative regulations requires Commission approval of a Coastal Development Permit to be supported by a finding showing the permit is 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 which the activity may have on the environment.

The proposed project, as conditioned, is consistent with the policies of the City's LCP relating to geologic stability and, public access and recreation policies of the Coastal Act. Mitigation measures will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned, is the least environmentally-damaging feasible alternative and is consistent with the requirements of the City's LCP and the public access and recreation policies of the Coastal Act to conform to CEQA.

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 on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.