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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| ANDRE HURST,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CALIFORNIA COASTAL COMMISSION,<br><br>Defendant and Respondent. | D079549<br><br>(Super. Ct. No. 37-2019-00022851-CU-WM-NC) |

APPEAL from a judgment of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Affirmed.

Gaines & Stacey, Sherman L. Stacey, Nanci S. Stacey and Kimberly A. Rible for Plaintiff and Appellant.

Rob Bonta, Attorney General, Daniel A. Olivas, Assistant Attorney General, Jamee Jordan Patterson and Hayley Peterson, Deputy Attorneys General, for Defendant and Respondent.

Seawalls, caisson retention systems, and other forms of shoreline protection or armoring have been installed along the California coast to protect seaside homes from erosion and rising waters. Because these structures can block the natural return of sand toward the ocean, impacting beach development and public access, local coastal plans like the one in the City of Encinitas (the City) require new construction to be built without future need for shoreline protection.

Andre and Jennifer Hurst (the Hursts) bought a blufftop home at 808 Neptune Avenue. They applied for a permit to demolish the aging single-family home and build a larger one with a basement. The City granted the permit, allowing the Hursts to rely on existing shoreline protection to demonstrate geotechnical stability of their proposed new home, and the California Coastal Commission (Commission) appealed. But following an evidentiary hearing on appeal, the Commission denied the permit, concluding the Hursts could not rely on existing shoreline protection and finding that the basement design violated the applicable local coastal plan. The Hursts unsuccessfully petitioned for writ of administrative mandate and appeal the resulting judgment affirming the Commission's denial of a permit.

As we explain, we need not decide whether the Commission abused its discretion by precluding the Hursts from relying on existing shoreline protection in seeking a permit for new development. We concluded in *Martin v. California Coastal Com.* (2021) 66 Cal.App.5th 622, 643–645 (*Martin*) that the City's local coastal plan requires all new construction to be designed and constructed with future removal in mind. Accordingly, the Commission reasonably found that the basement proposed by the Hursts would not meet this requirement and properly denied the permit on this

independent ground. Rejecting the passing takings claim, we therefore affirm the judgment.

## COASTAL ACT OVERVIEW

Because some foundational knowledge is necessary to understand the procedural history of this case, we start with a brief overview of the Coastal Act.

The California Coastal Act of 1976, codified at Public Resources Code section § 30000 et seq., provides "a comprehensive scheme to govern land use planning for the entire coastal zone of California." (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565.)[1] The Coastal Act's overarching goal is to avoid the deleterious effects of development on coastal resources by protecting the coastal zone environment and maximizing public access. (*Pacific Legal Foundation v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 163; § 30001.5.) Because seawalls change erosion processes and alter the natural shoreline, they are only permitted to protect *existing* structures at risk from bluff erosion. (§ 30235.) New development, by contrast, must "[a]ssure 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*." (§ 30253, subd. (b), italics added.)

The Commission shares planning responsibility with cities and counties located in the coastal zone, which in turn must develop local coastal plans implementing the Coastal Act. (*Pacific Palisades Bowl v. City of Los Angeles* (2012) 55 Cal.4th 783, 794; §§ 30500–30526.) Proposed local coastal plans

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1 Further undesignated statutory references are to the Public Resources Code.

must be certified by the Commission. Once a plan is certified and implementing measures are put in place, "the commission delegates authority over coastal development permits to the local government." (*Pacific Palisades Bowl,* at p. 794, citing §§ 30519, subd. (a), 30600.5, subds. (a), (b), (c).)

Any person seeking to build new construction in the coastal zone must obtain a coastal development permit (CDP or permit). (§ 30600, subd. (a).) After its local coastal plan is certified, a local government has authority to approve a CDP so long as the proposed development comports with that plan and the Coastal Act's public access and recreation policies. (§ 30604, subds. (b), (c).)

The Commission certified the City's local coastal plan (LCP) in 1994. In 1995 it transferred permitting authority to the City.[2] The LCP regulates development of blufftop property in the Coastal Bluff Overlay Zone. (*Martin, supra,* 66 Cal.App.5th at p. 637; see LCP Public Safety Policy 1.3, Encinitas Mun. Code, § 30.34.020.) With limited exceptions, new structures must be set back at least 40 feet from the bluff edge. (Encinitas Mun. Code, § 30.34.020, subd. (B)(1).) Permit applications must include a geotechnical report that certifies "that the development proposed will have no adverse affect [*sic*] 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

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[2] As we explained in *Martin, supra,* 66 Cal.App.5th 622, which also involved a permitting decision in Encinitas, "[t]he LCP is comprised of a land use plan, which states the City's general goals and policies, as well as zoning regulations. The land use plan comprises a number of specific 'elements,' including land use and public safety elements. The City's zoning regulations, codified in Title 30 of the Encinitas Municipal Code, implement the goals of the land use plan." (*Martin,* at p. 637.)

bluff stabilization to protect the structure in the future." (Encinitas Mun. Code, § 30.34.020, subd. (D).)

LCP Public Safety Policy 1.6(f) lists actions the City must take to reduce "unnatural causes of bluff erosion." As relevant to this appeal:

> "In all cases, all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the applicant shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline protection problems in the City."

Once the City grants a CDP, "certain types of permit decisions may be appealed to the Commission by the applicant, any aggrieved person, or two members of the Coastal Commission." (*Lindstrom v. California Coastal Com.* (2019) 40 Cal.App.5th 73, 92 (*Lindstrom*); §§ 30603, 30625, subd. (a).) If the Commission finds that the appeal presents a " 'substantial issue,' " it reviews the permit application de novo. (*Lindstrom,* at p. 92; §§ 30621, subd. (a), 30625, subd. (b)(2).) But the Commission's jurisdiction on appeal is limited. It may deny a permit only if the proposed development does not conform to the LCP or the Coastal Act's public access policies. (*Lindstrom,* at p. 92; § 30603, subd. (b)(1).) The Commission also has authority to impose reasonable conditions in approving a CDP. (*Lindstrom,* at p. 92; § 30607.)

Following the Commission's ruling on the appeal, any aggrieved person may file a petition for writ of administrative mandate challenging that decision. (*Lindstrom, supra,* 40 Cal.App.5th at p. 93; § 30801; Code Civ. Proc., § 1094.5.) In evaluating that writ, the superior court determines whether the Commission abused its discretion by failing to proceed in accordance with law or making findings not supported by substantial evidence. (*Lindstrom,* at p. 93.) Our role on appeal from an order denying

writ relief is identical, and the superior court's conclusions and findings do not bind us. (*Ibid.*)

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Permit Request and Administrative Proceedings*

The Hursts purchased their home in 2014. The 8,624 square foot lot (105 feet from bluff to street) contained an existing 1,319 square foot single-family home. Built in 1949 long before the Coastal Act, the home was set 25 to 30 feet from the bluff edge.

In 1996 the property experienced a major landslide, causing the City and Commission to approve emergency permits to stabilize the upper and lower bluffs. A 17-foot-high, 42-foot-long reinforced concrete seawall secured by tiebacks was approved to protect and stabilize the lower bluff. A below-grade 40-foot-long caisson and grade beam retention system secured by tiebacks was constructed to protect the upper bluff.[3] The City later granted full permits for these structures.

The following pictures depict the home at 808 Neptune Avenue with existing shoreline protection from two different vantage points. Because the upper bluff retention system is underground, only the lower bluff seawall is visible.

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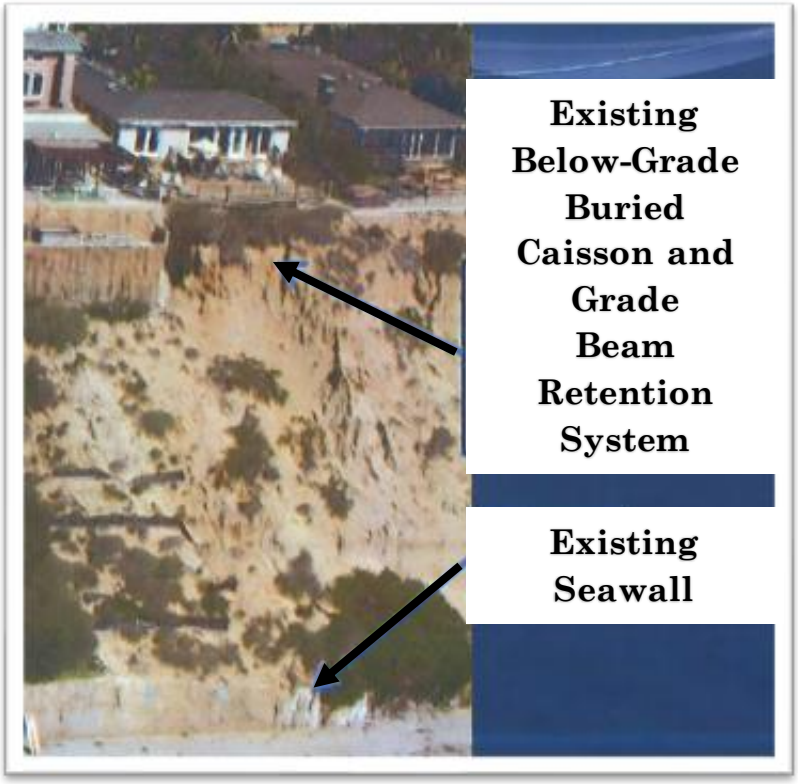
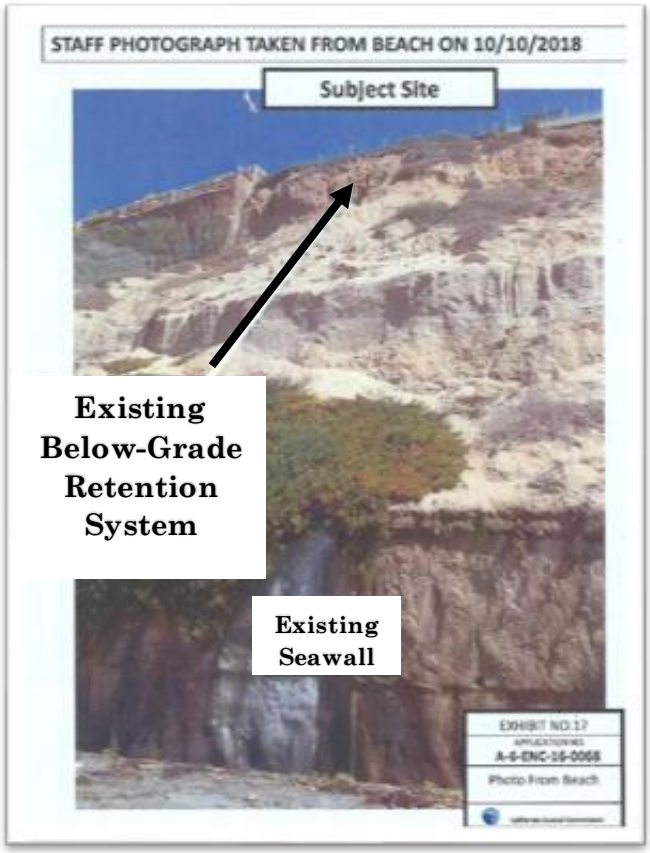
[3] As described in the opening brief, the lower bluff is secured by "a continuous concrete seawall across many properties" that is 17 to 20 feet high, 27 inches thick, and secured by steel tieback anchors drilled horizontally 80 feet into the bedrock. A caisson retention system generally consists of closely spaced steel-reinforced concrete caissons "30 inches in diameter and drilled 35-40 feet vertically into the soil" that are joined across the tops by a steel beam.


Existing Below-Grade Buried Caisson and Grade Beam Retention System
Existing Seawall


STAFF PHOTOGRAPH TAKEN FROM BEACH ON 10/10/2018
Subject Site
Existing Below-Grade Retention System
Existing Seawall
EXHIBIT NO.17
A-6-ENC-16-0068
Photo From Beach

In 2015, the Hursts applied for a CDP to demolish the existing home and construct a new two-story 2,818 square foot single family home in its place. The new home would rest on a 1,156 square foot below-ground basement that would serve as a foundation and be set back 40 feet from the upper bluff edge. The home would also have a 244 square foot attached garage. In designing this structure, the Hursts relied on existing upper and lower bluff armoring for stability. Geologist Walter Crampton of Terra Costa Consulting Group provided the requisite geotechnical report. (Encinitas Mun. Code, § 30.34.020, subd. (D).) He certified that the proposed development was consistent with the City's LCP, which "does not specifically state that new development cannot rely on existing protective structures."

Commission staff objected to the permit request, claiming stability analysis needed to be done without relying on existing shoreline protections. Staff further took issue with the proposed basement, which would be difficult to remove in the event of a bluff failure.

Notwithstanding these concerns, the City Planning Commission approved the CDP following a public hearing in June 2016. Relying on existing shoreline protection, the City determined that the proposed new construction would be "reasonably safe from failure and erosion over its lifetime" without the need for any new shore or bluff protection, provided that geotechnical recommendations were followed. It further concluded that adequate public beach access already existed north and south of the property, and that the steep bluff made beach access at 808 Neptune Avenue unfeasible.

Two Coastal commissioners appealed. (§ 30625, subd. (a).) Commission staff submitted a substantial issue report faulting the Hursts' geotechnical study for its reliance on existing bluff armoring. The staff report also found

that the proposed basement would be hard to remove in the future without altering the bluff. Receiving no objection to the staff recommendation, the Commission found a substantial issue on appeal in August 2016 and continued the matter for a de novo hearing. (§§ 30621, subd. (a), 30625, subd. (b)(2).)

The Hursts retained attorney Sherman Stacey, who wrote to the Commission that the Hursts' proposal was substantially similar to a permit granted in 2012 to Leonard Okun. (See note 6, *post*.) Stacey noted that in the Okun case, the Commission rejected a staff recommendation to ignore existing shoreline protection in evaluating a permit request. Commission staff replied asking for (1) "a site specific slope stability analysis assuming that the existing shoreline armoring was not in place," (2) "an alternatives analysis that examines revised project designs," and (3) "a feasible plan to remove the basement along with other portions of the home, or incrementally retreat from the bluff edge should erosion cause a reduction in the geologic setback in the future."

Stacey submitted an updated geotechnical report by Crampton in June 2017. Based on his analysis, Stacey informed the Commission that there was "no reduced building envelope that would allow for a new home to be sited safely on the site if you assume the existing shoreline protection did not exist." He further indicated that "no plan exists which could feasibly remove the basement without removing the structure above it, or to remove portions of the home to 'incrementally retreat from the bluff edge.' "

In his updated report, Crampton found that existing lower and upper bluff protection "should provide a minimum of 75 years of continued protection for all of the existing and future bluff-top improvements on the property." This finding was further corroborated in a report prepared by

John Niven of Soil Engineering Construction, Inc., which stated that the lower bluff seawall appeared in excellent condition and with normal maintenance "could be re-certified today for the 75-year life of a primary residence." Although the upper bluff retention system was not visible, Niven noted "only minor erosion . . . on various sections of the upper bluff face" over an 11 year period.

Commission staff submitted their final report in February 2019. The report reasoned that "allowing new development to rely on shoreline protection [was] not consistent with the LCP or past Commission action." Staff expressed concern that the lower bluff seawall was "nearing the end of its design life" on its 22-year permit. The report highlighted past Commission experience at the adjacent property to the north, 816 Neptune Avenue (816 Neptune), where upper bluff erosion had necessitated modifications to a caisson retention system installed around the same time as that found on the Hursts' property. Although the Hursts offered examples of other redevelopment projects the Commission had approved, the report distinguished these cases. Moreover, Commission staff believed the proposed basement could not safely be removed in the event bluff endangerment necessitated incremental retreat.

Among other documents, the Commission staff report attached an internal technical memorandum prepared by geologist Joseph Street and coastal engineer Lesley Ewing. This memorandum highlighted erosion risks and potential effects of sea level rise. Street and Ewing concluded that "the proposed 40-foot development setback would not, in the absence of the existing bluff stabilization, be sufficient to assure the stability of the proposed new development."

On March 1, 2019, attorney Stacey submitted to the Commission a demolition plan prepared by contractor Joseph Pavon of JP Construction. Pavon concluded that the home, including the basement foundation, could be safely removed. Crampton reviewed the plan and broadly agreed that demolition could proceed without adversely impacting the bluff.[4]

The Commission held a public hearing on March 7, 2019 in Los Angeles. Presentations were made by commission staff and the Hursts; Kailey Wakefield of the environmental nonprofit Surfrider Foundation also offered testimony. Commissioners debated at length whether the Hursts could rely on existing shoreline protection to demonstrate design stability. Some seemed persuaded by staff concerns about grandfathering a seawall in perpetuity, while others questioned the logic of ignoring existing armoring that halted bluff erosion, appeared in good condition, and could not safely be removed. Stating this was not an easy case, one of the commissioners asked if the permit could be granted with conditions. Specifically, commission staff proposed two main conditions—a 67-foot setback (as opposed to 40 feet) and eliminating the basement in the final plans. Stacey replied that the Hursts would accept neither of these conditions.

The matter was then put to a vote. Two commissioners moved to deny the permit. Three reluctantly followed suit, expressing disappointment that the Hursts did not budge on the basement. At that point, Stacey interjected that the Hursts were "ready to concede the basement," only to be told the public comment portion of the hearing had ended. The commissioners unanimously voted to deny the CDP, adopting the findings in the final staff report.

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4 To avoid repetition, we discuss the demolition plan in the discussion.

B. *Mandamus Petition and Complaint*

Andre Hurst (hereafter Hurst) filed a petition for writ of administrative mandate in San Diego Superior Court challenging the denial of a CDP.[5] The operative First Amended Petition and Complaint asserted three causes of action under section 1094.5 of the Code of Civil Procedure for abuse of discretion in denying the permit. A fourth cause of action alleged that the Commission's denial amounted to a regulatory taking. The parties filed briefs and made arguments before Judge Blaine Bowman on May 21, 2021.

In a lengthy written order dated May 24, Judge Bowman denied Hurst's writ petition. Encinitas Municipal Code section 30.34.020, subdivision(D)(2) required geotechnical stability analysis considering " '[h]istoric, current, and foreseeable cliff erosion,' " and Hurst questioned how an evaluation of current and foreseeable erosion could ignore the existing seawall. In rejecting this view, the court credited both practical and legal arguments raised by the Commission. From a practical standpoint, protective bluff armoring was designed as a stopgap measure to protect older homes throughout their usable life, with new homes built afterwards placed "on safe and solid territory *without* the previous safety measures." The court stated that this view made sense and did not appear to amount to arbitrary and capricious agency activity. From a legal standpoint, the trial court gave deference to the Commission's reading of Encinitas Municipal Code section 30.34.020, subdivision (D)(2). Although less deference might be warranted where an agency vacillates in its statutory interpretation (*Van Wagner Communications, Inc. v. City of Los Angeles* (2000) 84 Cal.App.4th 499, 509), the trial court reasoned that the Commission had adequately distinguished

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5 Jennifer Hurst was not party to the writ petition or this appeal.

its prior permitting decision in the Okun case.[6] Adopting the Commission's view, the court reasoned that "proper evaluation of *foreseeable* erosion [under section 30.34.020 of the Encinitas Municipal Code] requires assessment of the fact that the protective measures are only designed to be in place for a limited time," and the existing lower bluff seawall had a 22-year permit that was nearing expiration.

Concluding the Commission did not apply an incorrect standard, the court proceeded to consider Hurst's contention that its permit denial was not supported by substantial evidence. In making this argument, Hurst suggested that the experts agreed the existing armoring would protect the new home for its 75-year useful life. The court rejected this contention, explaining that it was premised on existing shoreline protection remaining in place beyond 2026, when the lower bluff seawall permit was set to expire.

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6 The Okun case (824 and 828 Neptune Avenue) involved an older 1929 home straddling two lots, each one larger than the Hursts'. During the 1996 landslide, 300 square feet of the home fell off the bluff, leaving the remaining 1,200 square foot home perched 10 feet from the bluff edge. Extensive shoreline protection was built in 2001 to protect that existing home. In addition to the lower bluff seawall, the Commission approved a 100-foot-long, approximately 14- to 20-foot-high upper bluff retaining wall placed seaward of the bluff edge, backfilled to increase the home's setback. Leonard Okun sought to demolish the aging structure and build two new homes set 40 feet back from the bluff edge. The home was significantly older than the Hursts' 1949 home, making maintaining the existing structure less feasible. Given the amount of armoring already in place on the Okun property (an upper bluff wall instead of a caisson system), the likelihood of needing new armoring in the future was low. By contrast, the Commission's experience at 816 Neptune led it to believe that the upper bluff at the Hursts' property would continue eroding despite the caisson system and one day necessitate an upper bluff wall. While noting that it typically did not endorse new development that relied on existing protective measures, the Commission granted an exception to Okun in 2012 given the unique circumstances presented and imposed special conditions to safeguard coastal resources.

Hurst voluntarily dismissed his regulatory takings cause of action in July 2021, and the court entered judgment for the Commission on August 3. On September 28, Hurst filed a notice of appeal.

## DISCUSSION

The bulk of Hurst's appeal turns on whether the Commission properly construed the LCP to preclude reliance on existing shoreline protection. He argues the Commission's interpretation of the LCP conflicts with section 30.34.020, subdivision (D) of the Encinitas Municipal Code and its prior permitting decision as to the nearby Okun property. Claiming that the seawall remained in good condition, he asserts the Commission's *speculation* that the home might not be safe in the future does not amount to substantial evidence to support the permit denial. As to the Commission's finding that the seawall was nearing the end of its useful life, Hurst maintains that the 22-year period for the permit pertained to fees for sand mitigation, not the continued viability of the structure itself.

Addressing each of these contentions in detail, the Commission urges us to dismiss the appeal as untimely or otherwise affirm the judgment. Citing this court's recent decision in *Martin, supra,* 66 Cal.App.5th 622, it claims that the existence of a basement in the design served as an independent basis to deny the CDP.

We conclude the appeal is timely, but agree with the Commission that the proposed basement furnished an independent basis for denying the permit. We further reject Hurst's contention that the Commission abused its discretion in rejecting his regulatory takings claim.

### A. *The appeal is timely.*

The Commission claims the appeal is untimely because it was filed more than 60 days after the trial court's May 24, 2021 order denying Hurst's

petition for writ of mandate. Hurst responds that the May 24 order was nonfinal and nonappealable where his regulatory takings claim remained pending. The trial court set a case management conference to address that cause of action, but the hearing was later canceled when Hurst voluntarily dismissed the claim. Hurst maintains that his appeal, filed within 60 days of the subsequent entry of judgment, was timely. We agree with Hurst.

" '[T]he denial of a petition for writ of mandate is not appealable if other causes of action remain pending between the parties.' " (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697, citing *Nerhan v. Stinson Beach County Water District* (1994) 27 Cal.App.4th 536, 540.) This flows from the one final judgment rule. (*Martis Camp Community Assn. v. County of Placer* (2020) 53 Cal.App.5th 569, 587.) "[T]he appealability of the denial of a petition for writ of mandate is based on whether the trial court contemplated taking any further action." (*Nerhan,* at p. 539.) The Commission suggests that although the takings claim remained in the case, "the order denying the writ found it without merit." But the trial court never adjudicated the takings claim. Instead, it considered in passing whether Hurst alleged the denial of a vested constitutional right in evaluating how much deference to afford the Commission's interpretation of the LCP. By setting a case management conference to proceed with that claim, the court's order plainly contemplated further action. Hurst later dismissed the takings claim and timely appealed within 60 days of the subsequent entry of judgment.

B. *The Commission reasonably rejected the CDP because of the basement.*

Public Safety Policy 1.6 of the LCP defines actions the City must take to reduce "unnatural causes of bluff erosion." For example, the City must ban private beach access stairways, improve drainage systems to divert surface

water, compel removal of irrigation systems near the bluff edge, allow certain forms of repair and erosion control measures, and take measures to conserve the bluff face. Subdivision (f) of Public Safety Policy 1.6 requires the City to implement minimum setback requirements for new and existing structures *and ensure that all new construction be removable*:

> "In all cases, all new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the applicant shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City."[7]

Construing the same language in *Martin*, we concluded that all new construction must "be designed and constructed for removal." (*Martin, supra,* 66 Cal.App.5th at p. 645.) As a result, the Commission could appropriately condition the granting of a permit on the homeowners removing a basement from the proposed project design. (*Id.* at pp. 644–647.) The administrative record in *Martin* indicated that the bluff was actively eroding and threatened by rising sea levels. (*Id.* at p. 646.) Various witnesses testified regarding potential damage to the bluff that construction and/or removal of the basement might cause. (*Id.* at pp. 646–647.) Notwithstanding contrary evidence in the record, we concluded sufficient evidence supported the Commission's finding that "removing or relocating the basement would alter and potentially destabilize the bluff." (*Id.* at p. 647.)

As we explain, a similar analysis follows here.

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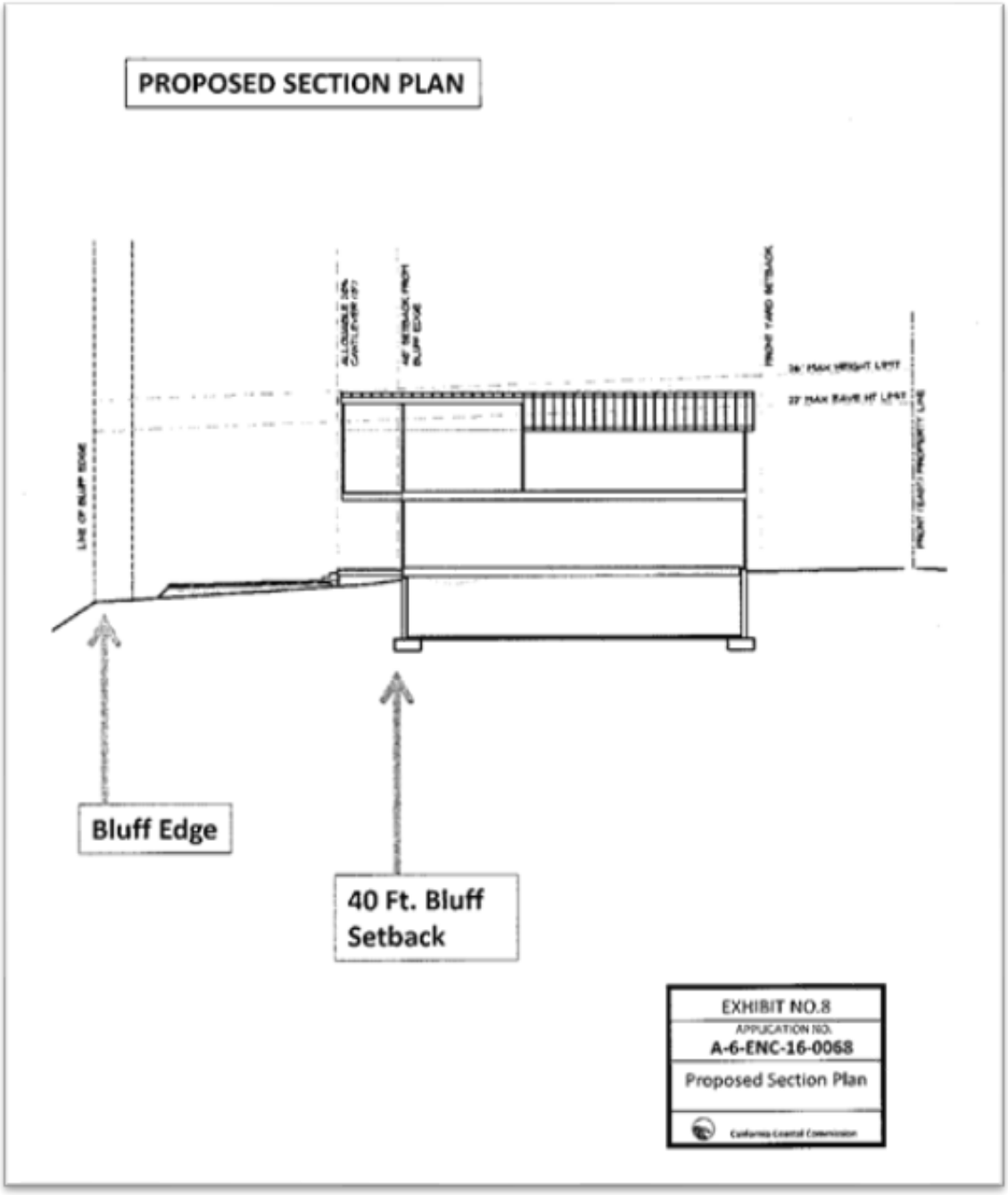
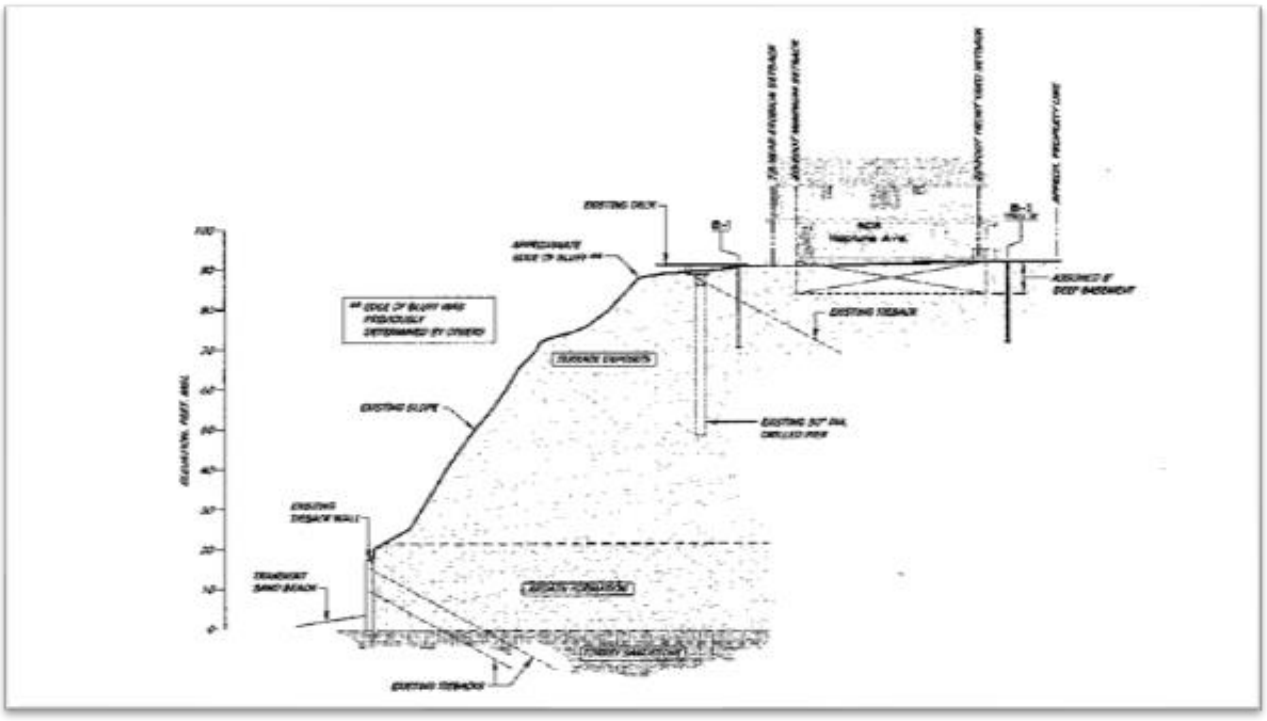
[7] This language is echoed in Encinitas Municipal Code section 30.34.020, subdivision (B)(1)(a): "Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City."

1. *Additional background*

The Hursts proposed a two-story home resting on a below-ground basement foundation buried into the upper bluff. Two side view diagrams provide a helpful visual:





At the Commission's request, the Hursts submitted a basement removal plan prepared by general contractor Joseph Pavon of JP Construction. Pavon indicated that the basement could be removed "to ensure that there is no damage to the bluff," with demolition "undertaken with saw cutting and non-impact methods rather than large mechanized breaking equipment in an effort to minimize vibration and impacts on surrounding geological conditions." Geologist Crampton reviewed the plan and found it similar to the demolition of existing older structures to construct new homes farther back from the bluff edge. As Crampton explained, any over excavation could be backfilled with imported soils of similar composition to the upper bluff materials under the direction of a licensed geotechnical engineer. Prior to any demolition work, the City would additionally require a geotechnical study "to ensure that the proposed demolition work will not directly or indirectly cause, promote, or encourage bluff erosion or failure, either on site or for an adjacent property."

Based on these submissions, Stacey argued at the public hearing that if the property faced endangerment, the basement "can easily be removed just like the structure above, the ground refilled and re-compacted. All of the walls that surround the basement and the floor of the basement can be taken out and the property restored to what it would look like without having had a house on the property."

By contrast, Commission staff maintained that "[b]asements by their nature include[ ] substantial alterations to the bluff and can be both difficult and destabilizing to remove." Kailey Wakefield of the Surfrider Foundation likewise testified that "removing the basement or relocating it to a safe location would require a great deal of alteration of the bluff and could even be infeasible and excavation could threaten the overall stability of the bluff."[8]

Joseph Street and Lesley Ewing prepared two geotechnical memoranda for the Commission. The first documented "signs of active erosion, including visible rilling, small to moderate failure scarps and active sand flows in the upper bluff materials," and found the site particularly susceptible to landslides.[9] It further noted indications of "subaerial erosion of the mid- and upper bluff" that could eventually expose and undermine the upper caisson system. Although the Hursts provided a basement removal plan, Street and Ewing noted in their follow-up review that the proposal envisioned a geotechnical review of the site, which might well conclude that the basement could not safely be removed. They noted that safe removal of the basement

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8 No foundation was provided as to Wakefield's knowledge of these matters.

9 The Hursts submitted a report by John Niven of Soil Engineering Construction, Inc., who characterized erosion of upper terrace sands as "minor."

relied on the continued efficacy of the existing seawall and upper caisson retention system, which in turn depended on continued maintenance and fluctuating shoreline conditions.

In denying the CDP, the Commission found that the Hursts failed to demonstrate "that the home, in particular the proposed basement, would be designed and constructed so that it could be safely removed in the event of endangerment." It explained that constructing a basement along the hazardous and unpredictable Encinitas bluffs was "inconsistent with the policies of the LCP." Greater than expected erosion could cause structural failure and expose the basement walls in the future. "Removing the basement or relocating it to a safe location would require a great deal of alteration of the bluff and could even be infeasible, and the excavation could threaten the overall stability of the bluff."

According to the Commission, the problem with the Hursts' removal plan was its assumption "that the existing shoreline armoring would provide the necessary site stability to ensure the basement could be removed without impacting the overall stability of the bluff." But there was no certainty the armoring would exist in perpetuity. It could fail with age or from coastal hazards. Or it might be required to be removed if no longer necessary to protect the existing structure or provide stability to adjacent homes.

In reaching this conclusion, the Commission relied on its experience with the directly adjacent property at 816 Neptune. That property, like the Hursts', had an upper bluff caisson retention system installed in 2001. In 2011, that system needed to be reinforced with an upper bluff wall due to erosion. Over a 10-year span at 816 Neptune, "erosion of the bluff fronting this property occurred more rapidly than was predicted at the time of construction of the caisson system." Citing several other examples in San

Diego County where seawalls and bluff armoring had failed, the Commission stated that while such structures are "formidable," they "have a finite life" and are susceptible to "erosion, wave scour and other forces that ultimately undermine and require repair and/or replacement." Given its experience at 816 Neptune, the Commission felt that similar reinforcement could be required to shore up the upper bluff caisson system at the Hursts' property.[10]

2. *Analysis*

Hurst suggests the Commission's finding that bluff instability *could* complicate basement removal is based on speculation, not evidence, given the existing armoring in place. We reject his foundational premise. Public Safety Policy 1.6(f) in the City's LCP requires all new construction to "be specifically designed and constructed such that it could be removed in the event of endangerment." This condition *presumes* endangerment, and it would violate the plain language rule to allow Hurst to avoid the requirement by showing that endangerment is unlikely. (See *Lindstrom, supra,* 40 Cal.App.5th at p. 96 [LCP is construed by its plain language].) The Hursts' demolition plan assumed that existing armoring would stabilize the upper and lower bluffs and allow for safe removal of the basement and other parts of the home. They never presented any plan suggesting that the basement could safely be removed in the event the existing armoring failed to prevent

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10 Hurst questions how the Commission can suggest on appeal that shoreline armoring might fail where its own final report concluded the project would be stable when relying on existing shoreline protection. But the same concluding paragraph Hurst cites in making this argument also states that "shoreline protection devices are not permanent." Moreover, the report elsewhere questions the longevity of existing armoring at the Hurst property given past Commission experience at 816 Neptune.

bluff endangerment. That fact alone would support denying the permit under Public Safety Policy 1.6(f) of the LCP.

Moreover, notwithstanding existing armoring, Street and Ewing opined that the subaerial soils in the upper bluff were actively eroding. In 2011, the caisson system next door to the Hurst residence needed reinforcement due to greater than expected upper bluff erosion. To safely remove the basement, Street and Ewing believed that temporary shoring might be needed to reinforce the existing caisson retention system. But by his own account, Hurst "agreed to waive the right to construct any such future shoreline protective device." Wakefield further testified that removing or relocating the basement "would require a great deal of alteration of the bluff." Although the evidence could also be reconciled with a contrary view, here as in *Martin,* sufficient evidence supports the Commission's finding that the proposed basement was not "specifically designed and constructed such that it could be removed in the event of endangerment." (LCP Public Safety Policy, § 1.6(f).)

The fact that the Commission previously approved Okun's construction of two new homes containing basements on Neptune Avenue does not render its decision here "arbitrary." In making discretionary permitting decisions, the Commission must "undertake a delicate balancing of the effect of each proposed development upon the environment of the coast." (*State v. Superior Court of Orange County* (1974) 12 Cal.3d 237, 247–248 [construing Coastal Act's predecessor].) The Commission's understanding of the risks involved in constructing a basement into the fragile upper bluff could reasonably evolve over time. Moreover, in denying the Hursts' CDP, the Commission noted several differences between the two project sites and explained why the Okun case was an exception to the general rule. (See note 6, *ante*.) Chief among them was the fact that the Okun property contained an upper bluff retaining

wall instead of a caisson system, reducing the likelihood that future reinforcement would be needed. The greater armoring at the Okun property could plausibly facilitate safer basement removal. That Hurst disagrees with the distinctions drawn by the Commission does not render its decision to deny his permit request arbitrary.

Finally, we reject Hurst's suggestion that the Commission could have imposed a basement-removal condition like it did in *Martin*. The Commission has no obligation to redesign a project through conditions to make it approvable. (*Reddell v. Cal. Coastal Com.* (2009) 180 Cal.App.4th 956, 971 (*Reddell*); *LT-WR, LLC v. Cal. Coastal Com.* (2007) 152 Cal.App.4th 770, 801.) Applying this rule is particularly appropriate here because the Hursts *rejected* the option suggested by Commission staff of building the new home without a basement. Only after voting began did the Hursts attempt to change their stance.

In short, the plain language of the LCP requires any new construction to be designed and constructed to be removable in the event of endangerment. Sufficient evidence supports the Commission's finding that the proposed basement did not meet that standard. Because the Commission could properly deny the Hursts their CDP on this ground alone, we affirm the judgment on this basis.

C. *Hurst does not show an abuse of discretion based on an alleged regulatory taking.*

Hurst claims in his opening brief that the permit denial deprived him of his reasonable investment-backed expectations, thereby amounting to a

regulatory taking.[11] Having voluntarily dismissed his takings cause of action below, he does not ask us to adjudicate a takings claim per se. Instead, he contends that by denying his permit request, the Commission abused its discretion by violating section 30010's proscription on decisions " 'which will take or damage private property for public use, without the payment of just compensation therefor.' " (§ 30010.) He does not address this claim in his reply brief, but protests that the Commission's decision "compels [him] to maintain an old home." The Commission responds that any takings claim fails because Hurst still can make reasonable use of his property. It dismisses his development expectations as unreasonable.

Without delving too far into takings jurisprudence, we decline Hurst's invitation to "acknowledge that the character of the Coastal Commission action has the inevitable effect of depriving [him] of his reasonable investment backed expectations." At the public hearing, Commissioners asked if the Hursts would accept a condition requiring removal of the basement; they said no. Implicit in Hurst's argument on appeal is that anything short of what was allowed for Okun deprives him of his reasonable

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11 "As a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner's future use of his or her property,[ ] except in the unusual circumstance in which the use restriction is properly found to go 'too far' and to constitute a 'regulatory taking' under the ad hoc, multifactored test discussed by the United States Supreme Court in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 (*Penn Central*)." (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 462, fn. 12 omitted.) The *Penn Central* factors include the economic impact of the regulation on the property owner, the extent to which it interferes with an owner's reasonable investment-backed expectations, and the character of the governmental action. (*Penn Central*, at p. 124; see *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617.)

investment-backed expectations such that a permit denial amounts to an abuse of discretion under section 30010. Considered in light of the administrative record, however, this argument amounts to little more than an attempt to reweigh the evidence. The Commission addressed the Hursts' takings claim and rejected it, finding that the family could live in the existing home and modernize it through improvements. Hurst faults the Commission for overemphasizing the use value of the home instead of his investment expectations. But the Commission considered his reasonable investment-backed expectations and found them met "[b]y any measure" where the home appreciated from a purchase price of $2.034 million in 2014 to a valuation of $3 million as of March 2019. On administrative mandamus, courts reverse an agency's decision only if, based on the evidence before the agency, no reasonable person could reach the same conclusion. (*Reddell, supra,* 180 Cal.App.4th at p. 962.) Hurst clearly takes issue with the result, but fails to demonstrate why the Commission's conclusion is an unreasonable one.

## DISPOSITION

The judgment is affirmed. The Commission is entitled to its costs on appeal.

DATO, J.

WE CONCUR:

McCONNELL, P. J.

DO, J.