July 22, 2021, Planning Commission Item 2 Comments

These comments on a Newport Beach Planning Commission agenda item are submitted by:
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Item No. 2. 3309 OCEAN LLC ENCROACHMENT (PA2021-091)

I take sharp exception to the discussion of "Local Coastal Program" on page 3 of the staff report (handwritten page 5) and its incorporation as Fact in Support of Finding B.4 in the proposed resolution (starting on handwritten page 27).

The "fact" ends with the conclusion that with respect to the private improvements in the 50 foot wide public right-of-way between the Ocean Boulevard sidewalk and the private property line tht "*the encroachments are exempt from the requirement for a coastal development permit*" based on the author's reading of NBMC Subsection 21.52.035.C.1.

The author quotes from one sentence of this subsection to say it exempts development of this type associated with single family residences, "*unless they involve a risk of adverse environmental effects*."

Deciding they do not pose such a risk, he concludes the development is exempt.

This strikes me as very similar to the Community Development Director's attempt at the July 8 Planning Commission meeting to explain his Determination that for four hotels, allowing them to use 30% of their General Plan hotel room allocations for residential dwelling unit development, instead, would, if processed as an amendment to the General Plan, *not* require the need for a City Charter Section 423 public vote. In explaining this (see July 8 video at 14:13), he pointed to the first two sentences of Section 423, noting that they said the entire section applied only when the change to the General Plan significantly increased density or intensity of land use. In his opinion, adding an allowance for 247 new dwelling units in statistical area L1 and 245 in area L4 would not cause any change in density or intensity as long as they were required to be offset by the removal of a comparable number of hotel rooms. If one didn't know what density means, that might sound plausible until one reads the next sentence, which the Director carefully chose to ignore. It *defines* a significant increase in density as "over 100 dwelling units (density)" and says nothing about that standard not applying when the added dwelling units must be accompanied by a reduction in other kind of development.

Here, it is true that the first sentence of NBMC Subsection 21.52.035.C.1 exempts from the otherwise-applicable Coastal Development Permit requirement many kinds of development associated with "Existing Single-Unit Residential Buildings" that do not "*involve a risk of adverse environmental effects*."

But to reach the conclusion that exempts *these* improvements, if they were newly proposed, one has to ignore the following sentence, which introduces a number of instances in which the exemption explicitly does *not* apply.

The improvements that are the subject of this encroachment agreement would be *ineligible* for a CDP exemption for many of the reasons introduced by that second sentence.

Specifically:

1. Under **Subsections 21.52.035.C.1.a** and **21.52.035.C.1.b**, they would require a CDP because they are "*within fifty (50) feet of the edge of a coastal bluff*."
2. Under **Subsection 21.52.035.C.1.d.iii**, the establishment of "*any significant nonattached structure such as a garage, fence*" – which the resolution says are exempt – are explicitly *required* to have a CDP when they are, as here, "*located between the sea and first public road paralleling the sea*."

Staff's or the Planning Commission's opinion as to whether these improvements "*involve a risk of adverse environmental effects*" is irrelevant. Contrary to what they draft resolution says, they would have to have a CDP if they were newly proposed.

Likewise, under Subsections 21.52.035.C.1.d.i and 21.52.035.C.1.d.ii, the remodeling project that this seems related to would require a CDP if it adds more than 10% to the existing floor area or building height.

Moreover, the improvements in question here aren't even on a single-unit residential lot. They are in public right-of-way. Staff cites nothing in the NBMC that exempts development in the public right-of-way from CDP requirements, and I don't believe there is any. Indeed, proposals for private development on public land would seem precisely the kind of development *needing* Coastal Act scrutiny through the CDP process.

All this said, it is possible the present encroachment agreement does not require a CDP, but not for the reasons stated in the staff report or resolution.

Instead, if it is true, as the staff report implies, that the existing improvements have existed since before the Coastal Act and no changes to them are proposed, then it could be argued that no new development is being proposed in the right-of-way area. In the absence of a proposal to develop something, it would seem clear no development permit is needed, coastal or otherwise (unless the act of approving the agreement is itself regarded as development under the Coastal Act).