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Substantial issue found:	7/7/2010
Staff report prepared:	11/23/2010
Staff report prepared by:	Susan Craig
Staff report approved by:	Dan Carl
Hearing date:	12/17/2010

APPEAL STAFF REPORT - DE NOVO HEARING

Appeal numbers ....**A-3-SCO-08-029 and A-3-SCO-08-042, Trousdale SFDs**

Applicants ....Kelley and Cindy Trousdale

Appellant.........................Fay Levinson

Local government ....Santa Cruz County

Local decision ....Approved by the Santa Cruz County Zoning Administrator on May 2, 2008 (A-3-SCO-08-029: County Coastal Development Permit (CDP) Application Number 07-0117) and on July 11, 2008 (A-3-SCO-08-042: County CDP Application Number 07-0325).

Project location ....On the blufftop above Hidden Beach at 660 Bayview Drive in the unincorporated Aptos area of Santa Cruz County.

Project description.........**A-3-SCO-08-029:** Demolish a portion of an existing one-story single-family residence and construct a new two-story single-family residence of about 5,000 square feet; removal of one tree (APN 043-161-58).

A-3-SCO-08-042: Demolish the remaining portion of an existing one-story single-family residence and construct a new two-story single-family residence of about 4,200 square feet; remove two trees (APN 043-161-57).

File documents................Administrative record for Santa Cruz County CDP Numbers 07-0117 and 07-0325; Santa Cruz County certified Local Coastal Program (LCP).

Staff recommendation ...**Denial**

A. Staff Recommendation

1. Staff Note

Santa Cruz County approved two separate CDPs and thus there are two separate appeals/CDP applications. However, the Applicants are the same for each CDP/appeal and the property involved consists of two contiguous parcels. Each of the two proposed projects shares similar issues and the applications are best understood if evaluated jointly. As a result, these CDP/appeal matters are combined

in this staff report, and the hearing on these items will be combined as well. Even so, because of the way the applications were considered separately by the County, there is a separate motion and resolution necessary for each Commission action (see page 4).

2. Summary of Staff Recommendation

The Applicants propose to demolish an existing single-family residence that straddles two lots, and to construct two new two-story single-family residences and associated improvements on these same two lots that are located above Hidden Beach in the unincorporated Aptos area of south Santa Cruz County. The proposed residences would range in size from about 4,200 square feet to about 5,000 square feet and would be located within an LCP-mapped scenic resource area. The Commission previously found that each of the County's original CDP actions raised a substantial issue and took jurisdiction over the CDP applications for the proposed projects on July 7, 2010. The standard of review for the proposed projects is the certified Santa Cruz County LCP and the public access and recreation policies of the Coastal Act.

The Santa Cruz County LCP requires that risks be minimized and long-term stability and structural integrity be provided, and that development be sited, designed, and built to allow for natural shoreline processes to occur. All of this is required to be accomplished without the benefit of protective devices or other shoreline altering construction. The LCP also requires that a coastal bluff building site be stable for a minimum of 100 years in its pre-development application condition, and that any development on it be set back an adequate distance to provide stability for the development's lifetime, and at least 100 years. The project sites are located on top of an actively eroding bluff. While the Applicants' geological representatives have established blufftop setbacks for the residences that are in the range of about 27-32 feet, the Commission's staff geologist has analyzed the proposed projects' setbacks in terms of applicable coastal hazards, including potential future sea level rise, coastal bluff retreat, and slope stability, and has determined that the proposed blufftop setbacks are significantly too narrow for long-term stability, and that these setbacks would need to be greatly increased (to 116 feet) to meet minimum LCP requirements. The proposed developments do not meet the required 116-foot setback identified and could not even if they were moved inland because there is insufficient space inland of a 116-foot setback on the properties within which to site residential development. Thus, the proposed developments are significantly out of conformance with the LCP's coastal hazards policies. Staff is unaware of any modifications that could make residential structures on these lots consistent with the coastal hazards policies and standards of the LCP. As a result, Staff recommends that the proposed developments be denied.

In addition, the LCP has multiple provisions that require development to be sited and designed to ensure protection of significant visual resources, including views within mapped scenic resource areas. The two lots proposed for development are located within an LCP-mapped scenic resource area. The proposed project sites are located on a section of gently downsloping coastal bluff. This gently sloping coastal bluff surface continues downcoast across the adjacent undeveloped properties to a beach-level arroyo. The proposed project sites are prominent in the foreground of views out to the ocean from significant public use areas at Hidden Beach County Park, including from the main beach/ocean overlook and the

beach access trail, as well as from the sandy beach at Hidden Beach itself. Views from beaches and parks are protected visual resources under the LCP. Such policies and protections specifically protect areas having regional public importance for their natural beauty and prohibit the placement of new permanent structures which would be visible from a public beach, except where allowed on existing parcels of record, or for allowable shoreline protection and for public beach access. Given the topography of the project sites and the size and scale of the proposed residential developments, the proposed projects will have a significant detrimental impact on the natural setting and viewshed as seen from the beach and from the Hidden Beach County Park public access trail and overlook area. As such, the proposed developments are inconsistent with the LCP's visual resource policies, including those that specifically provide protection for mapped scenic resource areas and views from beaches and parks.

Staff recommends that the Commission deny CDPs for the proposed development.

When the Commission denies a project, the question sometimes arises whether the Commission's action constitutes a "taking" of private property without just compensation, as this is not allowed under the Fifth Amendment of the United States Constitution, Section 30010 of the Coastal Act, or the LCP. The first step in this analysis is to define the property interest against which a taking will be analyzed and measured. In this case, the single property subject to a potential takings claim consists of both of the lots on which the Applicants' home is located (i.e., as indicated previously, the residence straddles the two lots). Denial of the proposed demolition and the proposed new residences would not constitute a taking because denial would not constitute a taking under any of the tests that the courts have identified for establishing a taking. First, if the Commission denies the Applicants' request to demolish the existing single-family dwelling that straddles both lots and construct a new residence on each lot, this denial would not preclude the Applicants from applying for LCP-consistent improvements to the existing structure on the site, and/or for continued use of that existing structure. In these circumstances, it cannot be said that the Commission has made a final and authoritative decision about the use of the project site. Therefore, the Commission's denial cannot be a taking because a taking claim is not "ripe." Also, the lots contain an existing blufftop single-family residence and associated development. That makes the property extremely valuable even after the denial of this project and provides a reasonable economic use, and thus the Commission's denial would not result in a categorical taking. Finally, the Commission's action does not constitute a taking under any of the three factors weighed by a Court under the established Penn Central analysis. Consequently, the Commission's denial of the projects would be consistent with the LCP and Coastal Act Section 30010 (and the United States Constitution).

3. Staff Recommendation on CDP Applications

Staff recommends that the Commission, after public hearing, deny a coastal development permit for each of the proposed developments. The Commission must act on two motions to effect this recommendation.

A. Motion/Action 1: Denial of CDP Application Number A-3-SCO-08-029

Motion #1. I move that the Commission approve coastal development permit number A-3-SCO-08-029 for the development proposed by the Applicants. I recommend a no vote.

Staff Recommendation of Denial. Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Deny a Coastal Development Permit. The Commission hereby denies a coastal development permit for the proposed development on the grounds that 1) the development will not conform with the policies of the Santa Cruz County Local Coastal Program, and 2) denial of the proposed development a) will not constitute a taking of private property for public use without payment of just compensation, and b) is an action to which the California Environmental Quality Act does not apply.

B. Motion/Action 2: Denial of CDP Application Number A-3-SCO-08-042

Motion #2. I move that the Commission approve coastal development permit number A-3-SCO-08-042 for the development proposed by the Applicants. I recommend a no vote.

Staff Recommendation of Denial. Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Deny a Coastal Development Permit. The Commission hereby denies a coastal development permit for the proposed development on the grounds that 1) the development will not conform with the policies of the Santa Cruz County Local Coastal Program, and 2) denial of the proposed development a) will not constitute a taking of private property for public use without payment of just compensation, and b) is an action to which the California Environmental Quality Act does not apply.

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Click on the link at left to go to the exhibits.

B. Findings and Declarations

The Commission finds and declares as follows:

1. Project Location

The proposed development sites are located atop the coastal bluff overlooking Hidden Beach at the southeast end of Bayview Drive in the unincorporated Aptos area of south Santa Cruz County. The project sites consist of two lots (APNs 043-161-57 and 043-161-58). The lot line between the two APNs is straddled by an existing one-story single-family dwelling (i.e., a portion of the existing single-family dwelling is located on each APN). Together the lots total about 18,419 square feet: parcel 043-161-57 is 7,985 square feet, and parcel 043-161-58 is 10,434 square feet.

The project sites are located along the blufftop at the edge of a single-family residential neighborhood with homes located upcoast and inland of the project sites. Just downcoast of the project sites is undeveloped and vacant property located along the top of the coastal bluff as it descends to a coastal

arroyo.[1] Just downcoast of and partially including a portion of the arroyo is Hidden Beach County Park,[2] including its blufftop coastal overlook and its heavily-used public access path that connects to the sand at Hidden Beach proper. A second publicly-used path extends along the bluff on the upcoast edge of the arroyo from Hidden Beach to Hidden Beach Way. The bluff, beach, arroyo, and park area are located between the Beach Drive residential area (beach level) and Bayview Drive residential area (blufftop level) upcoast, and the terraced Aptos-Seascape residential area extending above the beach inland of the Via Gaviota seawall downcoast, and provide a natural landform respite from the up and downcoast fairly densely built environment, including because the Beach Drive and Via Gaviota neighborhoods are constructed on top of what was historically beach sand and extend onto the beach landform.[3]

There is an existing wood retaining wall and an existing shotcrete retaining wall located on the bluff face below and outside the boundaries of the Applicants' property (see pages 6-7 of Exhibit 2). The Applicants do not own the property that contains these retaining walls.[4] The slope adjacent to the retaining walls has experienced recent failures and the wood retaining wall itself appears to be being undermined by slope failure and erosion. A variety of shoreline protective structures, including upper bluff wooden retaining walls and upper bluff shotcrete walls, are found upcoast of the project sites, but none are located downcoast until the Via Gaviota seawall, which is located downcoast of the arroyo and Hidden Beach (see photos of these areas in Exhibit 2).

The parcels proposed for development are designated in the LCP Land Use Plan (LUP) as Urban Low Density Residential and are zoned R-1-6 Single-Family Residential – 6,000 square foot minimum lot size.

Both lots are located within the LCP-designated and mapped scenic resource area associated with the public beach, park, and access path. See Exhibit 1 for location maps. See Exhibit 2 and Exhibit 5 for photographs of the project sites, the arroyo, the two public access paths on either side of the arroyo, and the existing upcoast and downcoast residential development.

2. Project Description

[1] The County approved a single-family residence on each of the lots making up this undeveloped property southeast of the Applicants' site in late 2008. These County decisions were likewise appealed to the Commission, the Commission took jurisdiction over the appeals, and is considering the associated CDP applications at the same Commission meeting as this appeal matter (see appeals/CDP application numbers A-3-SCO-09-001, -002, and -003).

[2] Hidden Beach County Park is a 1.5-acre public park facility maintained by the County that provides a tot play area, lawn area, picnic tables, and public parking. The park extends linearly along the arroyo edge to the blufftop overlook and sandy beach at Hidden Beach.

[3] Such residential development atop beach areas represents an anomaly within the Central Coast, where such beach level development is uncommon.

[4] And the property on which these retaining walls are located is subject to an offer to dedicate fee title borne from a settlement agreement between the Commission and the then landowner. Per the settlement agreement, the owner was permitted to construct a "bunker house" at the downcoast end of Beach Drive, provided that the owner offered to dedicate fee title to the Hidden Beach property and bulk of the arroyo property to the State or other public entity to be maintained as open space for public recreational use. As a result of that settlement, this entire area, including the bluff fronting this site, was offered to the public as open space land for public recreational use. The settlement agreement and the resultant fee offer prohibit structures or improvements, such as the retaining walls, within this dedicated property.

The proposed projects include: 1) demolition of the existing one-story single-family residence that straddles the Applicants' two blufftop lots; 2) construction of a new two-story single-family dwelling of about 5,000 square feet (including an attached garage), grading to include about 98 cubic yards of cut and 40 cubic yards of fill, and removal of one tree that is 18-inches in diameter on APN 043-161-58 (A-3-SCO-08-029); and 3) construction of a new two-story single-family dwelling of about 4,200 square feet (including an attached garage), grading to include about 79 cubic yards of cut and 159 cubic yards of fill, and removal of two trees (38-inch diameter and 58-inch diameter) on APN 043-161-57 (A-3-SCO-08-042). See proposed project plans in Exhibits 3 and 4.

3. Coastal Development Permit Determination

The standard of review for these applications is the certified Santa Cruz County LCP and the Coastal Act's public access and recreation policies (see Exhibit 8 for applicable policies).

A. Geologic Conditions and Hazards

1. Applicable Policies

The LCP requires that a coastal bluff building site be stable for a minimum of 100 years in its pre-development application condition, and that any development on it be set back an adequate distance to provide stability for the development's lifetime, and at least 100 years. The minimum 100 years of stability must be established through the use of appropriate setbacks and siting, and without reliance on engineering measures "such as shoreline protection structures, retaining walls, or deep piers" (LCP Section 16.10.070(h(3)). Also, the LCP allows shoreline protection structures only "to protect existing structures from a significant threat" (LUP Policy 6.2.16). Thus, the LCP has a two-part minimum 100-year stability requirement: first, there must be a portion of the site in question that itself will be stable for at least 100 years in a pre-development (i.e., no project) scenario, without reliance on structural development to make it so; and second, ostensibly if the first test is met, any development then introduced onto the site must also be stable for its lifetime measured for at least 100 years without reliance on engineering measures.

On the whole, these LCP policies recognize that development is not appropriate in coastal hazard areas for which 100 years (minimum) of site and structural stability cannot be guaranteed (without relying on engineering measures) and allows shoreline protection in only very specific and limited circumstances for already existing structures. See Exhibit 8 for the applicable LCP requirements.

2. Reports Submitted

The Applicants have submitted the following geologic and geotechnical engineering reports for the site:

- *Geologic Investigation, Lands of Trousdale, Aptos, California, County of Santa Cruz APN's 043-161-50* by Zinn Geology, dated August 17, 2006 (Zinn 2006).
- *Geotechnical Investigation for Lands of Trousdale, 660 Bayview Drive, Rio del Mar, California* by Pacific Crest Engineering Inc., dated August 2006 (PCEI 2006).

In addition, the following documents (see Exhibit 7) were submitted in response to initial verbal comments from the Commission's staff geologist, Dr. Mark Johnsson, regarding the above reports:[5]

- *Projecting Future Sea-Level Rise: What is a Reasonable Estimate for the Next Century?* by G.E. Weber, Geologic Consultant, dated February 24, 2009 (Weber 2/2009).

- *Response to California Coastal Commission comments, Lands of Frank, Bayview Drive, A.P.N. 043-161-51, -40, -39, Rio del Mark, Santa Cruz County, California* by Pacific Crest Engineering, Inc., dated February 26, 2009 (PCEI 2009).

- *Supplemental Analysis in Response to California Coastal Commission comments, Parcels southeast of Bayview Drive, Aptos California, County of Santa Cruz, APN's 043-161-51, -40, & -39* by Zinn Geology, dated February 26, 2009 (Zinn 2009).

Dr. Johnsson reviewed all of the above documents and reports and developed a Geotechnical Review Memorandum, dated June 18, 2009, that synthesized his comments and recommendations on the geologic conditions and hazards applicable to the proposed projects (see Exhibit 6). Subsequent to Dr. Johnsson's memorandum, the Applicants submitted the following additional correspondence regarding the proposed projects (see Exhibit 7):

- *Appeal Numbers A-3-SCO-09-001, -002, -003 (Frank),* letter and attachments from G.E. Weber, Geologic Consultant, dated December 15, 2009 (Weber 12/2009).

- *Projections of Sea-Level Rise in the 21st Century,* letter from G.E. Weber, Geologic Consultant, dated February 2, 2010 (Weber 2010).

The geologic description of the site that follows derives primarily from the Zinn 2006 and PCEI 2006 reports.

3. Site Geologic Characteristics

The project site includes two lots straddled by an existing one-story single-family dwelling (i.e., a portion of the existing single-family dwelling is located on each of the lots). The majority of the project site is located on top of an uplifted marine terrace surface that slopes gently downward to the southeast toward adjacent undeveloped property and ultimately to a beach level arroyo that extends from the sandy beach inland. The gently sloping marine terrace surface transitions to a gently sloping inset fluvial[6] terrace surface, which continues across the adjacent undeveloped property to the downcoast arroyo. The marine terrace also drops off along the coastal bluff that is located just slightly seaward of

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[5] These documents specifically reference the immediately adjacent downcoast undeveloped property that is the subject of appeals/CDP application numbers A-3-SCO-09-001, -002, and -003, described previously. The Applicants for appeals/CDP applications A-3-SCO-08-029 and A-3-SCO-08-042 have requested that all geological and other data developed and submitted to the Commission for the adjacent property be used to evaluate their proposed projects as well.

[6] Defined in the *Glossary of Geology* as: a) Of or pertaining to a river or rivers. b) Existing, growing, or living in or about a stream or river c) Produced by the action of a stream or river. (J.A. Jackson, 1997, *Glossary of Geology*, Fourth edition: Alexandria, Virginia, American Geological Institute, 769 pp.)

the southwestern (seaward) edge of the property, dropping near vertically toward the beach at the blufftop edge for about 6 to 8 feet before it inflects to a shallower gradient. During the bluff's descent to the beach, another inflection is encountered between about 25 and 35 feet above the beach, with the slope tapering to between 37 and 40 degrees. A broad, sandy beach extends seaward at the base of the coastal bluff.

The project site lies on top of a blanket of marine terrace deposits that transition into an eastward-thickening wedge of relatively unconsolidated fluvial terrace sands up to 27 feet thick, which in turn overlie an ancestral wave-cut platform (marine terrace deposits) and an eastward-descending ancestral stream-cut terrace (fluvial terrace deposits) in the underlying Purisima formation sandstone bedrock. The coastal bluff is partially buttressed by a steeply-dipping wedge of colluvium[7] that is likely an agglomeration of many years of mass sloughing from the bluff.

Drainage at the site is primarily by sheet flow eastward toward the arroyo. Other than some minor rilling, no significantly large erosional landforms, such as gullies, appear to be actively developing upon the marine terrace surface on the property. Groundwater was not encountered in any of the borings across the property, which were done between 16½ and 38 feet below the ground surface. Although no groundwater was encountered, the Applicants' geologist indicated that it should be assumed that groundwater perches on top of the wave-cut platform, within the marine terrace deposits, as is commonly encountered in this stretch of coastline.

4. Stability Requirements

As stated above, the LCP requires that a coastal bluff building site be stable for a minimum of 100 years in its pre-development application condition, and that any development on it be set back an adequate distance to provide stability for the development's lifetime, and at least 100 years. In both cases, the minimum 100 years of stability must be established through the use of appropriate setbacks and siting, and without reliance on engineering measures. For bluff properties that are subject to erosion, the setbacks and siting must consider both the factor of safety for the overall slope as well as the expected erosion of the site over the life of the proposed development. In this case, the setbacks between the proposed residences and the edge of the coastal bluff are in the range of 27 to 32 feet. Dr. Johnsson has determined that the proposed blufftop setbacks are inadequate for both of the project sites, and that if these lots were developed the residences would be endangered by coastal erosion and bluff retreat well in advance of the LCP's 100-year minimum threshold (see Exhibit 6). See below for a discussion of projected future coastal erosion and bluff retreat for the proposed project sites.

5. Future Sea Level Rise

The premise that sea level will continue to rise is based on a number of factors, including the warming of the earth that has taken place over the past several hundred years, and the projections that the earth

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[7] Defined in the *Glossary of Geology* as: a) A general term applied to any loose, heterogeneous, and incoherent mass of soil material and/or rock fragments deposited by rainwash, sheetwash, or slow continuous downslope creep, usually collected at the base of gentle slopes or hillsides. b) Alluvium deposited by unconcentrated surface runoff or sheet erosion, usually at the base of a slope. (J.A. Jackson, 1997, *Glossary of Geology*, Fourth edition: Alexandria, Virginia, American Geological Institute, 769 pp.)

will continue to warm over the next 100 years. This slow increase in temperature results in sea level rise due to thermal expansion of ocean water, which leads to a greater volume of water in the oceans, and also due to the melting of glacial ice and ice sheets, which increases the volume of the oceans as a result of the addition of water to the oceans. Estimating sea level rise is important with respect to the proposed projects because such changes in sea level will exacerbate the frequency and relative ferocity with which the ocean and ocean waves, including storm waves, impact the coastal bluff, resulting in accelerated coastal erosion and an increase in the rate of bluff retreat at the site.

The Applicants' sea level rise report (Weber 2/2009; see pages 1-8 of Exhibit 7) evaluated the amount of sea level rise that may occur over the next 100 years. This report referenced recent literature on sea level rise while emphasizing the uncertainty in predicting future sea level rise. Regarding uncertainty in estimating future sea level rise, this report states that the rates of change in the warming of the atmosphere and the oceans, and the relationship between these rates of change and the volume of carbon dioxide in the atmosphere, are not clear, and therefore all projections of the total amount of sea level rise that will occur in the next 100 years are based on interpretations and assumptions. The Weber report determined that the least conservative estimate for sea-level rise should apply to single-family residences (such as the proposed development) while "critical facilities" should assume a more conservative level (i.e., a higher rate) of sea level rise. Weber concluded that:

> *…a reasonable assumption for sea level rise in the next century, to be applied to geological hazard and risk analyses for single family residences…should be equal to or greater than the total sea level rise in the 20th century and consistent with the rate of rise (acceleration) over the past 20-30 years. This number would lie someplace between 300-340 mm, approximately 11 to 13 inches.*

Dr. Johnsson notes in his memorandum (again, see Exhibit 6) that this amount of sea level rise is at the low end of what most researchers are now predicting for sea level rise over the next 100 years, and that some of the assumptions in reports cited in the Weber report already appear to be outdated. Dr. Johnsson's memorandum also notes that the Commission has recently been recommending that analysis for the effects of sea level rise with respect to proposed development[8] assume a minimum rate of 3 feet of sea level rise per century and evaluate higher rates in order to determine the amount of sea level rise that could put the proposed project at risk. In this case, Dr. Johnsson estimates a minimum of 3 feet of sea level rise over the next century. Currently, the ocean reaches the base of the bluff during storms or periods of higher tides (see pages 8-9 of Exhibit 2 and pages 17-19 of Exhibit 5 for photographs).[9] For

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[8] Contrary to Weber's conclusion in this respect, all development is treated equally in terms of this analysis, and residential development is not somehow subject to some lower or less conservative standard.

[9] The Applicants' geologist states that he is aware of only one coastal storm event (January 1983) in the last 70 years that has touched the colluvial wedge (see page 43 of Exhibit 7). It is reasonable to presume that the significant El Niño storms of 1982/83 (sometimes referred to as the 100-year storm) to which the Applicants' geologist refers resulted in ocean waters inundating the beach and attacking the bluffs here. However, it is also clear that such events are not limited to that single winter storm period alone. In fact, recent photographic evidence indicates that such events are more commonplace, with ocean waters reaching the subject bluffs in this location at least also in the winters of 1994/1995, 2001, and 2010 (again see, for example, photos in Exhibits 2 and 5). Lacking a more rigorous survey, it is difficult to say how often the ocean reaches the bluffs here, but it is clearly more often than the one time in 70 years identified by the Applicants. The fact that up and downcoast residential developments are fronted by significant armoring, albeit located

this site, the expected result of an increase in sea level is that the higher water level will result in wave/tidal impacts against the bluff taking place on a more frequent basis. An increase in the frequency of waves hitting the bluff face will lead to greater erosion of the bluff and an increase in the bluff retreat rate, which will lead to the proposed residences being endangered by erosion well before 100 years.

6. Coastal Bluff Retreat

The retreat of the slopes and the bluffs along this portion of Monterey Bay results from erosion, which occurs at the base of sea cliffs by hydraulic impact and scour from wave action, as well as from episodic landsliding processes associated with intense rainfall, seismic shaking, and undermining of the lower bluff. Using aerial photographs, the Zinn 2006 report found that the top of the coastal bluff at the project site has eroded at an average rate of between 0.09 and 0.30 feet per year since 1928. In a more recent report (dated February 26, 2009), Zinn assumes that if the ocean attacks the toe of the bluff, the bluff will retreat at a rate of approximately one foot per year. Regarding landslides, the 2006 report noted that the upper coastal bluff above the beach has retreated episodically through the process of terrestrial landsliding.[10] In terms of long-term average annual retreat rates, the report ignored the effect of the retaining walls[11] constructed on the bluff below the property because the walls will likely be undermined as the base of the bluff retreats.

According to Dr. Johnsson's memorandum (Exhibit 6):

> *The Zinn reports assume that in order for the proposed structures to be threatened, the beach fronting the coastal bluff would need to be removed by coastal erosion or drowned by rising sea level; then the colluvial wedge at the base of the bluff would need to be eroded; and finally the coastal bluff would need to be eroded until a vertical projection of the base of the bluff would intersect the buildings' foundations. Working backwards from the latter condition, and assuming a bedrock erosion rate of 1 to 2 feet per year, the reports* [specifically the Zinn 2009 report] *estimate the buildings sited as proposed would be threatened in 120.5 to 176 years (for the Trousdale parcels)...*

Dr. Johnsson disagrees with a number of assumptions built into the Applicants' analysis. First, he notes that the reports by Zinn Geology use the estimated sea level rise figure from the Weber 2/2009 (11 to 13 inches over the next century) instead of the 3 feet of sea level rise more commonly accepted for Commission siting decisions. Second, Dr. Johnsson notes that the assumption that the buildings will be threatened by upper bluff retreat at the same time that the bedrock has been eroded to a point located vertically beneath the buildings' foundations is inappropriate. Coastal bluffs are typically not vertical. In fact, as described in the Zinn 2006 report, although the top of the bluff at this site is vertical for the first 6 to 8 feet, it then inflects to a shallower gradient. During the descent to the beach, yet another inflection

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slightly more seaward than the toe of bluff location below the Applicants' property, is indicative of at least a perceived need for protection from such occurrences, and are more evidence that such occurrences at this location are more common than not (see photos of bluffs and nearby armored areas in Exhibit 2).

[10] And such a landslide occurred just downcoast of the site in early 2009 (see page 10 of Exhibit 6 for a photograph of the landslide area).

[11] Id (the walls are not on the Applicants' property).

is encountered between 25 and 35 feet above the beach, with the slope tapering to between 37 and 40 degrees. In other words, the bluff at this location is not vertical but rather exhibits retreat and a configuration that is typical and indicative of a combination of erosive processes that leave the bluff materials with insufficient strength to retain a vertical profile. In short, the upper bluff edge will intersect the buildings' foundations long before the toe of the bluff lies vertically beneath the foundations.

Third, the residences will be threatened by erosion long before the upper bluff edge intersects the foundations. As mentioned above, the LCP requires that stability be demonstrated for the development's lifetime, and at least 100 years. The industry standard definition of stability for slopes is typically taken as a factor of safety against sliding of 1.5, meaning that the forces tending to resist slope movement (essentially the strength of the bluff materials) must exceed forces tending to initiate slope movement (essentially the weight of the bluff materials as projected onto the most likely slide plane) by 50%. As discussed below, this level of stability is achieved at a point some distance landward of the bluff edge.

Although the colluvial wedge at the base of the bluff will help to reduce the erosion rate of the bluff, its gradual removal will ultimately result in increased instability of the upper bluff. This increased instability may result in future bluff failures which will cause the bluff to retreat far faster than the 1 to 2 feet per year long-term average cited by the Applicants in the Zinn 2009 report. According to Dr. Johnsson, it is far preferable to evaluate the movement of the upper bluff edge through time and, taking into account the distance from the upper bluff edge at which a factor of safety of 1.5 is achieved, evaluate setbacks with respect to the upper bluff edge rather than the location of the base of the bluff.

7. Slope Stability

The field of slope stability encompasses the analysis of static and dynamic stability of natural and artificial slopes. If the forces available to resist movement are greater than the forces driving movement, then the slope is considered stable. A factor of safety is calculated by dividing the forces resisting movement by the forces driving movement. A higher factor of safety means that a slope is less likely to fail; a lower factor of safety indicates slope instability. Generally, a factor of safety of 1.5 is considered suitable for new development (sometimes referred to as the "static" factor of safety). In earthquake-prone areas, such as the project site, an additional analysis is typically included where the seismic forces from a potential earthquake are added to the analysis (sometimes referred to as the "pseudo-static" factor of safety). In cases such as this, a pseudo-static factor of safety of 1.1 is generally considered adequate for new development.

The initial slope stability analysis for the project site (PCEI 2006) did not determine a minimum factor of safety for all potential failure modes. The calculated factor of safety for the assumed failure surface was deemed to be 1.89 for the project site. According to Dr. Johnsson, this is a higher factor of safety than typically reported for coastal bluffs of this height and inclination. Indeed, a failure of the upper bluff directly downcoast of the project sites that occurred in early 2009 (see page 10 of Exhibit 6) demonstrates that the bluffs at this location do not have such an unusually high factor of safety. Such a bluff failure indicates that, at that time, the forces driving the slide exceeded the forces resisting the slide, meaning that the factor of safety dropped below 1.0.

Dr. Johnsson requested that the project's geotechnical engineer provide additional information regarding the calculation of the factor of safety with respect to the soil strength parameters used and the minimum factor of safety for a circular failure surface. PCEI 2009 subsequently provided supporting materials for the soil strength parameters, and Dr. Johnsson reviewed these materials and concluded the parameters were reasonable. The PCEI 2009 report contained an analysis of a circular failure of the upper bluff terrace deposits (which is the most likely type of failure to occur and the analysis that was requested by Dr. Johnsson) but did not include an analysis of the global stability of the entire bluff. In any event, the results of these slope stability analyses indicate that a factor of safety of 1.5 is reached about 18 feet landward of the bluff edge on the Trousdale parcels. A pseudo-static analysis (used to approximate stability during a seismic event) showed that the 1.1 factor of safety line is seaward of this point (located about 8 feet landward of the bluff edge), indicating that the static condition is determinative for stability.

8. Regional Studies by the U.S. Geological Survey and the California Energy Commission

In 2007 the U.S. Geological Survey (USGS) released a report that evaluated the long-term bluff erosion rate along the California coast. For the stretch of coast located in the area of the project sites, the rates were generally 0.66 to 0.98 feet per year.[12] These numbers are consistent with those previously reported by other experts in the field[13] and are consistent with those ultimately used by the Applicants' geologist (Zinn 2009).[14] In March 2009, the California Energy Commission released a report that evaluated the impacts of future sea level rise on the California coast. This report cited sea level rise forecasts between 1.0 meter (about 3 feet) and 1.4 meters (about 4.5 feet) of rise by 2100. The report included a set of hazard maps showing the project area at high risk from coastal erosion using the erosion rate from the 2007 USGS study in combination with the predicted increase in wave attack based on the 1.4 meter sea-level rise scenario. For the project sites, this "erosion high hazard area" included the first 112 feet inland from the current bluff edge.

9. Hazards Conclusion

Given all of the above, Dr. Johnsson concludes that the recommended LCP-required 100-year minimum coastal blufftop setback for the project sites would be 116 feet. This is based on using the long-term average annual erosion rate of 0.98 feet per year from the USGS study.[15] This rate of erosion would equal 98 feet of coastal bluff erosion over 100 years. Additionally, the slope stability analysis concluded

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[12] Hapke, C.J., and Reid, D., 2007, National Assessment of Shoreline Change, Part 4: Historical Coastal Cliff Retreat along the California Coast, U.S. Geological Survey.

[13] For example: Griggs, G., Patsch, K., and Savoy, L., 2005, *Living with the changing California Coast:* Berkeley, California, University of California Press.

[14] Zinn originally estimated long-term average erosion between 0.09 and 0.3 feet per year at the top of the bluff (Zinn 2006) and later adjusted this estimate to be 1 to 2 feet per year over the whole bluff (Zinn 2009).

[15] The use of the higher of the two USGS values from the range identified is based on applying the precautionary principle that dictates using the worst case scenario where uncertainty is present, and it is also appropriate as a means of taking into account a potential increase in the historic erosion rate due to accelerated sea level rise. This value also compares to the lower of the rates most recently identified by the Applicants' geologist where he ultimately estimates such retreat at this location to range from 1 to 2 feet per year (Zinn 2009). Although the higher of the Applicants' geologist's identified erosion rates (i.e., 2 feet per year) could be used applying the same precautionary principle, it is reasonable in this case to use the 0.98 feet per year so as to recognize recent significant literature findings, and to not unfairly penalize the Applicants by using the highest of the rates their geologist identifies in this context.

that a static factor of safety of 1.5 is attained about 18 feet landward of the present bluff edge on the project sites. Using the method outlined by Dr. Johnsson, these two numbers (98 feet and 18 feet) are added together to create the appropriate LCP-required 100-year minimum coastal blufftop setback of 116 feet. In other words, residential development sited inland of the 116-foot setback area should be safe from erosion for the LCP required minimum of 100 years.[16]

While this setback is required to meet LCP provisions, other homes in the area have been constructed with smaller setbacks. Many neighboring homes, however, were built before the California Coastal Act was adopted. Moreover, those other homes are not before the Commission at this time, and in most cases the County's approvals of CDPs for those homes were not appealed to the Commission, so the Commission did not have the opportunity to examine the appropriate coastal blufftop setback in those cases. The proposed projects, along with the adjacent Frank projects (appeals/CDP applications A-3-SCO-09-001, -002, and -003), present the Commission with its first opportunity to assess the appropriate blufftop setbacks for new development in this area on parcels without shoreline protective devices.

The proposed blufftop setbacks for the projects range from about 27 to 32 feet. As discussed above, the LCP requires that a site demonstrate a minimum of 100 years of stability for new development.[17] At the 100-year minimum threshold, the 116-foot setback means that both lots are essentially undevelopable (i.e., the required setback will occupy essentially all of these two lots), and there are not any feasible project modifications that could make the projects meet the required blufftop setback. As such, the projects are inconsistent with the geological hazards requirements of the Santa Cruz County LCP and the projects must be denied.

B. Visual Resources

1. Applicable Policies

The LCP has multiple provisions that require development to be sited and designed to ensure protection of significant visual resources, including views within mapped scenic resource areas. Such policies and protections specifically protect areas having regional public importance for their natural beauty by ensuring that new development is appropriately sited and designed to have minimal to no adverse impact upon identified visual resources. Views from beaches and parks (including the public access overlook and path associated with Hidden Beach County Park in this case) are protected visual

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[16] Of course, such minimum setback would also need to be appropriately tied to the development's lifetime, and after 100 years such development would be expected to be endangered. Such issues would need to be addressed through additional enforceable mechanisms (e.g., required removal/relocation of endangered structures, etc.) to be able to find such development LCP consistent for other LCP reasons.

[17] Although, of course, 100 years is the minimum, and a larger number of years could be used to generate appropriate setbacks. In this case the 100-year setback, or 116 feet, is appropriate for LCP site stability purposes, including because this is the method typically applied by the Commission and because such a setback would move residential development inland sufficiently to address the LCP's long-term stability requirements. Again, of course, there would also need to be associated requirements to avoid shoreline armoring and/or other shoreline altering development (if such residential development were threatened by erosion and/or related coastal hazards in the future) and to tie the development's duration to its lifetime more directly to be LCP consistent in those regards as well.

resources under the LCP. See applicable policies in Exhibit 8.

2. Analysis

The property proposed for redevelopment is located within an LCP-mapped scenic resource area. This property is located within the public beach viewshed as well as the public beach/ocean viewshed associated with the public access path and overlook components of Hidden Beach County Park (see photos in Exhibit 2).

The proposed project sites are located on a section of coastal blufftop that slopes gently to the southeast toward the adjacent undeveloped and vacant property and ultimately the beach level arroyo (see page 1 of Exhibit 2). The elevation of the two project sites ranges from about 105 feet above sea level (A-3-SCO-08-029) to about 85 feet above sea level (A-3-SCO-08-042). Upcoast from the project sites, the bluff elevation reaches about 130 feet above sea level. Thus, these lots are much more visible from the adjacent beach and nearby Hidden Beach County Park public access path and overlook compared to the blufftop lots located just upcoast on Bayview Drive that are at a higher elevation and are not located directly adjacent to components of the Park.

Given the relatively low elevation of the bluff here and the projects' proximity to Hidden Beach County Park, including the associated park path and overlook, development of two two-story houses ranging in size from about 4,200 square feet to 5,000 square feet will be extremely visible from the beach, the overlook, and from the public access path. Given the topography of the project sites and the size and scale of the proposed residential developments, the proposed projects will have a detrimental impact on the natural setting and the public viewshed as seen from the beach and the park, including the overlook and the public access trail. Such visual impact will reduce the overall value and utility of these important public beach[18] and park resources.

The proposed development would not minimize viewshed disruption, would not retain ocean vistas to the maximum extent possible, would not keep non-recreational structures out of the blufftop, would not integrate development into the character of the surrounding area, would not result in development that is subordinate to the natural character of the site, and overall would not adequately protect significant public views recognized by the LCP as "areas having regional public importance for their natural beauty" – all of which are LCP requirements (see applicable LCP policies in Exhibit 8). Thus, the proposed residences cannot be approved as proposed. Even a substantially reduced-scale development would raise similar concerns at this location, and such substantially-reduced development could not be found consistent with the LCP's coastal hazard requirements. As a result, the proposed developments cannot be found consistent with the LCP and must be denied.

C. CDP Determination Conclusion – Denial

1. Denial

As discussed in the above findings, the proposed residential developments are inconsistent with the

[18] Including a public beach that was dedicated to the public to resolve prescriptive rights litigation, as previously described.

policies of the LCP. When the Commission reviews a proposed project that is inconsistent with an LCP, there are several options available to the Commission. In many cases, the Commission will approve the project but impose reasonable terms and conditions to bring the project into conformance with the LCP. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission denies the proposed projects because the proposed projects are significantly out of conformance with the LCP, due to inadequate coastal blufftop setbacks and unavoidable impacts on visual resources. For these two lots there are no feasible conditions that could bring the projects into conformance with the LCP, and there are no obvious feasible alternatives consistent with the LCP that the Commission might suggest to the Applicants. Thus, the Commission is denying these two projects without further guidance to the Applicants.

2. Takings

As discussed above, the two houses proposed for development are inconsistent with the LCP and must be denied. When the Commission denies a project, a question may arise as to whether the denial results in an unconstitutional "taking" of the applicant's property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

> *The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

Similarly, the LCP indicates as follows:

> *Neither the County General Plan, the County LCP Land Use Plan, nor any implementing ordinance shall be construed as authorizing the County or any agency thereof to exercise its power to approve, conditionally approve, or deny any land use application in a manner which will take or damage private property for public use, without the payment of just compensation therefor. The County General Plan, County LCP Land Use Plan, and each and every implementing ordinance thereof shall be interpreted so as to avoid such taking in the absence of a duly adopted resolution of necessity for eminent domain proceedings. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States of America.*

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Coastal Act and the LCP impose on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project while still complying with Section 30010 and the LCP. If the Commission concludes that its action might constitute a taking, then Section 30010 and the LCP require the Commission to approve some level of development, even if the development is otherwise inconsistent with LCP policies. In this latter

situation, the Commission will propose modifications to the development to minimize its LCP inconsistencies while still allowing some reasonable amount of development.[19]

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010 and the LCP, its denial of the proposed projects would constitute a taking. The Commission finds that, under any of the prevailing takings tests, the denial of the projects would not constitute a taking.

General Takings Principles

The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."[20] Article 1, Section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation…has first been paid to, or into court for, the owner."

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee, supra,* 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). The Commission's actions here would be evaluated under the standards for a regulatory taking.

The Supreme Court itself has recognized that case law offers little insight into when, and under what circumstances, a given regulation may be seen as going "too far" (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014). In its recent takings cases, however, the Court has identified two circumstances in which a regulatory taking might occur. The first is the "categorical" formulation identified in *Lucas, supra.* In *Lucas,* the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved (*Id*. at p. 1014). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" or rendered it "valueless" (*Id.* at pp. 1016-1017 [emphasis in original]) (see *Riverside Bayview Homes, supra,* 474 U.S. at p. 126 [regulatory takings occur only under "extreme

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[19] For example, in CDP A-3-SCO-00-033 (Hinman), the Commission in 2000 approved residential development on a site that was entirely ESHA even though it was not resource dependent development and thus was inconsistent with the Santa Cruz County LCP (which was the standard of review).

[20] The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

circumstances"]).[21]

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co.* (*Penn Central*) *v. New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations (*Id*. at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *id.* [rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*]).

Before A Landowner May Establish A Taking, Government Must Have Made A Final Determination Concerning The Use To Which The Property May Be Put

Before a landowner may seek to establish a taking under either the Lucas or Penn Central formulations, however, it must demonstrate that the taking claim is "ripe" for review. This means that the takings claimant must show that government has made a "final and authoritative" decision about the use of the property (e.g., *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Premature adjudication of a takings claim is highly disfavored, and the Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it" (*Id.* at p. 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (e.g., *McDonald, supra*).

In this case, although the Commission has denied the Applicants' request to demolish the existing single-family dwelling that straddles both parcels and construct a new residence on each parcel, the Commission's denial does not preclude the Applicants from continued use of the existing structure or from applying for LCP-consistent improvements to the existing residential development. In these circumstances, it cannot be said that the Commission has made a final and authoritative decision about the use of the project site. Therefore, the Commission's denial cannot be a taking because a taking claim is not "ripe."

Even If The Taking Claim Were Ripe, The Commission's Action Would Not Constitute A Taking

As a threshold matter, before a taking claim can be analyzed it is necessary to define the parcel of property against which the taking claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable parcel of property on which development is proposed. The issue is

[21] Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra,* 505 U.S. at pp. 1028-1036).

complicated in cases where the landowner owns or controls adjacent or contiguous parcels that are related to the proposed development. In these circumstances, courts will analyze whether the lots are sufficiently related so that they should be aggregated as a single parcel for takings purposes. In determining whether lots should be aggregated, courts have looked to a number of factors such as unity of ownership, the degree of contiguity, the dates of acquisition and the extent to which the parcel has been treated as a single unit (e.g., *District Intown Properties, Ltd. v. District of Columbia* (D.C.Cir.1999) 198 F.3d 874, 879-880) [nine individual lots treated as single parcel for takings purposes]; *Ciampitti v. United States* (1991) 22 Cl.Ct. 310, 318).

Applying these factors, the Commission concludes that the property to be analyzed for takings purpose is a single property comprised of two lots (APNs 043-161-57 and 043-161-58), which are each proposed for development with a single-family residence, after the existing residence that straddles the lots is demolished. There are many reasons to support this. First, this property has been treated as a single unit since at least 1938, when the existing house was constructed almost equally across the two parcels (i.e. about 50% of the house is located on each lot). The Applicants purchased the entire property and the existing house for a single purchase price, and the parties to the sale did not assign separate values or purchase prices to the two lots. Second, both lots were purchased by the Applicants at the same time, so the date of acquisition supports aggregation. In addition, both lots were part of one APN at that time (APN 043-161-50), further indicating that the lots were treated as a single entity. Third, the two lots are contiguous, framed by Bayview Drive inland and the bluff and the beach seaward, and are subject to the same LCP land use designation (R-UL, Residential – Urban Low Density) and zoning (R-1-6). Finally, there is unity of ownership because the Applicants purchased both lots and still currently own both lots.[22]

In summary on this point, takings doctrine treats APN 043-161-57 and APN 043-161-58 as a single property for the purpose of determining whether a taking occurred. Because this single property contains a residential structure and provides the Applicants substantial use of both lots, the Commission's denial of demolition of the existing residence that straddles both lots and construction of two new houses, one on each lot, is not a taking under any formulation of the takings doctrine.

Even if the two lots were not considered together as a single economic parcel for purposes of a takings analysis, the Commission's action still would not be a taking under the court's holding in *Lucas*. *Lucas* provides that a regulatory action does not constitute a taking if the restrictions inhere in the title of the affected property; that is, "background principles" of state real property law would have permitted government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036). These background principles include a State's traditional public nuisance doctrine or real property interests that preclude the proposed use, such as restrictive easements. Here, the proposed project, if allowed, would constitute a public nuisance, and for this additional reason the Commission's denial of the project would not constitute a taking.

[22] While the Applicants are currently on title for both lots, there was apparently some sort of transfer of a 50% interest in one of the lots in 2008, after this appeal was filed. Based on the recorded grant deed, in 2008, the Applicants granted a 50% interest in APN 043-161-57 to another party (Trent and Michele West). The documentary transfer tax on this grant was $0. The Applicants still clearly control the use of this lot, as approximately 50% of their home is located on the lot.

The Commission has found that the proposed homes cannot be sited in a location where they will be safe from geologic hazards for the LCP minimum 100 years and their expected economic life. The proposed homes would be subject to danger from coastal hazards including but not limited to episodic and long-term shoreline retreat and coastal erosion, high seas, ocean waves, storms, tsunami, coastal flooding, landslides, bluff and geologic instability, and the interaction of same in the future. If the new homes were approved and constructed, then a bluff failure could cause all or portions of the homes and accessory development to slide from the blufftop onto the bluff and to the public beach below the proposed homes. Such falling debris would have a high potential to injure the public using the beach, and could lead to further public injury should it be resuspended by ocean processes. It would also have the potential to damage adjacent structures if it were moved around in a storm setting. This would lead to additional costs that the public would bear for repairing damage to public facilities and perhaps private structures under government disaster relief programs. The falling debris could also injure habitat resources in the area, particularly if some debris were washed into the ocean and/or the arroyo. Thus, the proposed new homes pose an unreasonable risk to public health and safety and would be a public nuisance.

The Denial Of The Project Would Not Constitute A Categorical Taking

As discussed, the first test is whether there has been a categorical taking of property under the *Lucas* standards. To constitute a categorical taking, the regulation must deny all economically viable use of property; in other words, it must render the property "valueless" (*Lucas, supra,* 505 U.S. at p. 1012). If the property retains any value following the Government's action, the *Lucas* categorical taking formulation is unavailable and the property owner must establish a taking under the three-part *Penn Central* test (see *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 330; *Palazollo, supra,* 533 U.S. at pp. 630-632). Because permit decisions rarely render property "valueless", courts seldom find that permit decisions constitute takings under the *Lucas* standard.

In *Norman v. US*, the court found that "if there is no destruction of *all* use, then there is no categorical taking" (*Norman v. US*, (2004) 63 Fed.Cl. 231, 258. [emphasis in original]). There is no categorical taking of property even if the government takes away a property's most beneficial use (*Ibid*). "[T]he destruction of one "strand of the bundle [of property rights] is not a taking. Only where Congress takes away every beneficial use does a categorical taking occur" (*Maritrans, Inc. v. United States* (2003) 342 F.3d 1344, 1354). In *Maritrans*, the Federal Circuit found no categorical taking of property where a statute limited plaintiff's use of its single hull tank barges but plaintiff still had some other beneficial use of its barges for shipping operations (*Id*). Moreover, in *Cooley v. United States* ((2003) 324 F.3d 1297, 1305), the court found no categorical taking when the Corps of Engineers denied a Section 404 wetland fill permit, resulting in a 98.8% decrease in the economic value of plaintiff's property.

In this case, the relevant property (including both lots) contains an existing blufftop single-family residence and associated development. Even with the recent economic downturn, blufftop residential properties and development in Santa Cruz County remain highly valued. In fact, although not a complete sample, recent sales for blufftop properties with residences in the area range from $950,000 (for a 6,098 square foot lot) to $3,500,000 (for an 18,210 square foot lot). Thus, this property and the residential

development on it will remain extremely valuable even after the denial of this project, and there is no categorical taking.

Therefore, the Commission's denial of demolition of the existing residence and construction of two new residences leaves the Applicants with significant uses, all of which have economic value to the Applicants, for which the Applicants would (and did) pay valuable consideration. In these circumstances, the Commission's denial does not render APN 043-161-57 and APN 043-161-58 valueless and does not constitute a categorical taking under *Lucas.*

The Denial Of The Permit Is Not A Taking Under The Ad Hoc Penn Central Test

If a regulatory decision does not constitute a taking under *Lucas*, a court may consider whether the permit decision would constitute a taking under the ad hoc inquiry stated in *Penn Central Transp. Co. v. New York City* ((1978) 438 U.S. 104, 123-125). This ad hoc inquiry generally requires an examination into factors such as the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations. When applied to the facts of this case, each of these factors demonstrates that the Commission's denial is not a taking.

Reasonable Investment-Backed Expectations. The absence of reasonable investment-backed expectations is usually dispositive of a takings claim under the *Penn Central* standards (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005, 1008-1009). The reasonableness of an investment-backed expectation must be based on more than a "unilateral expectation or an abstract need" (*Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 161). In addition, a government action that prevents an applicant from either pursuing the most profitable or "the highest and best use" of his property does not, in and of itself, constitute a taking (*MacLeod v. County of Santa Clara*, (1984) 749 F.2d 541, 547-548, *cert. denied*, 472 U.S. 109 (1985)). In the case of this project, the Applicants cannot show that the denial of their proposal to demolish the existing residence and construct two new residential structures, one on each lot, deprives them of their reasonable investment-backed expectations.

As discussed above, when the Applicants purchased the property, the entire property had a single APN assigned (APN 043-161-50). Subsequent to the purchase of the property, the Applicants applied for and ultimately received an unconditional certificate of compliance from the County to establish the legality of the two lots then known as APN 043-161-50, which resulted in the current designation of APN 043-161-57 and APN 043-161-58. The Applicants purchased the entire property, which included the existing approximately 3,500 square foot residence (on then APN 043-161-50) on an 18,419 square foot lot,[23] for a single purchase price of $2,600,000 in 2002.[24]

When the Applicants purchased the property in 2002, the entire site was already being used to support the existing residential development that straddled both lots, leading a reasonable person to conclude

[23] This square footage includes both lots.

[24] As indicated above, in 2008, the Applicants granted a 50% interest in APN 043-161-57 to another party. The documentary transfer tax on this grant was $0. The Applicants retain ownership of 50% of APN 043-161-57, including the portion of the house that is located on this parcel.

that that was the appropriate use of the lots. A reasonable person also would have viewed the lots and investigated the physical constraints to redevelopment. This investigation would have revealed the lots' hazardous location atop an actively eroding bluff.

A reasonable person also would have investigated the regulatory constraints regarding redevelopment of the site that existed at the time, including the relevant LCP provisions applicable to the site (e.g., geologic hazards and required setbacks, visual resources, etc.). When the Applicants purchased the property, the LCP prohibited new development of the type proposed in coastal hazard areas such as this site. For example, LCP Policies 5.10.2, 5.10.3, 5.10.6, 5.10.7, and 6.2.15, and LCP Section 16.10.070(h) state, respectively:

> ***5.10.2 - Development Within Visual Resource Areas:*** *Recognize that visual resources of Santa Cruz County possess diverse characteristics.... Require projects to be evaluated against the context of their unique environment and regulate structure height, setbacks and design to protect these resources consistent with the objectives and policies of this section....*
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> ***5.10.3 - Protection of Public Vistas:*** *Protect significant public vistas...from all publicly used roads and vistas points by minimizing disruption of landform and aesthetic character caused by grading operations,... inappropriate landscaping and structure design.*
>
> ***5.10.6 - Preserving Ocean Vistas:*** *Where public ocean vistas exist, require that these vistas be retained to the maximum extent possible as a condition of approval for any new development.*
>
> ***5.10.7 - Open Beaches and Blufftops:*** *Prohibit the placement of new permanent structures which would be visible from a public beach, except where allowed on existing parcels of record, or for shoreline protection and for public beach access...*
>
> ***6.2.15 - New Development on Existing Lots of Record:*** *Allow development activities in areas subject to storm wave inundation or beach or bluff erosion on existing lots of record, within existing developed neighborhoods, under the following circumstances: (a) A technical report (including a geologic hazards assessment, engineering geology report and/or soil engineering report) demonstrates that the potential hazard can be mitigated over the 100-year lifetime of the structure. Mitigations can include, but are not limited to, building setbacks, elevation of the structure, and foundation design; (b) Mitigation of the potential hazard is not dependent on shoreline or coastal bluff protection structures, except on lots where both adjacent parcels are already similarly protected; and (c) The owner records a Declaration of Geologic Hazards on the property deed that describes the potential hazard and the level of geologic and/or geotechnical investigation conducted.*
>
> ***16.10.070(h) - Coastal Bluffs and Beaches:*** *1. Criteria in Areas Subject to Coastal Bluff Erosion: Projects in areas subject to coastal bluff erosion shall meet the following criteria: (i) for all development and for non-habitable structures, demonstration of the stability of the site, in its current, pre-development application condition, for a minimum of 100 years as determined by either a geologic hazards assessment or a full geologic report. (ii) for all development, including*

> *that which is cantilevered, and for non-habitable structures, a minimum setback shall be established at least 25 feet from the top edge of the coastal bluff, or alternatively, the distance necessary to provide a stable building site over a 100-year lifetime of the structure, whichever is greater. (iii) the determination of the minimum setback shall be based on the existing site conditions and shall not take into consideration the effect of any proposed protection measures, such as shoreline protection structures, retaining walls, or deep piers. (iv) foundation replacement and/or foundation upgrades that meet the definition of development per Section 16.10.040(s) and pursuant to Section 16.10.040(r), shall meet the setback described in Section 16.10.070(h)(1), except that an exception to the setback requirement may be granted for existing structures that are wholly or partially within the setback, if the Planning Director determines that: a) the area of the structure that is within the setback does not exceed 25% of the total area of the structure, OR b) the structure cannot be relocated to meet the setback because of inadequate parcel size. (v) additions, including second story and cantilevered additions, shall comply with the minimum 25 foot and 100 year setback. (vi) The developer and/or the subdivider of a parcel or parcels in an area subject to geologic hazards shall be required, as a condition of development approval and building permit approval, to record a Declaration of Geologic Hazards with the County Recorder. The Declaration shall include a description of the hazards on the parcel and the level of geologic and/or geotechnical investigation conducted. (vii) approval of drainage and landscape plans for the site by the County Geologist. (viii) service transmission lines and utility facilities are prohibited unless they are necessary to serve existing residences. (ix) All other required local, state and federal permits shall be obtained.*

In other words, in an LCP-mapped scenic resource area, such as the proposed project sites, development must protect visual resources to the maximum extent feasible, and such development must be stable for a minimum of 100 years. A reasonable person would have investigated the applicable LCP policies and determined their impact on the potential development of these lots. Had the Applicants undertaken this investigation, they would have known that the LCP prohibited redevelopment of the lots that they purchased in the manner proposed by the Applicants (i.e., construction of two new single-family dwellings). Also, real estate agents and sellers familiar with the site likely would have assumed that the buyers were buying the property for its existing residential use, which has been in effect since the late 1930s, instead of for the purpose of demolition of the existing residence and redevelopment of the site with two residences. Given these considerations, a purchaser of this property should not have expected to be able to develop two homes on the one property. Moreover, the fact that the Applicants ultimately felt the need to pursue certificates of compliance is proven evidence that extraordinary efforts were deemed necessary to bolster an argument that the property should be considered two properties, notwithstanding the property's history and pedigree. Subsequent extraordinary tactics, such as deeding 50% of APN 043-161-57 to another party for zero transfer tax and a portion of a house on the lot, only further shows that the more obvious answer to most reasonable people is that this is one property for the purposes of commerce and development.

Ultimately, the effect of the Commission's action is to prevent the Applicants from constructing two separate homes, but it allows them to continue to use their property in the manner in which it was used when they purchased it. The Applicants are still free to reside in their single-family residence or to sell

the home and lots as a unit, as they have been bought and sold for more than 70 years. While the Commission's action may not allow the Applicants to obtain a different, potentially more profitable use of these lots, courts have routinely rejected landowners' attempts to satisfy the reasonable investment-backed expectation element with speculative profit expectations, finding that the Fifth Amendment does not protect such expectations (*Andrus v. Allard* (1979) 444 U.S. 51, 66; *Penn Central*, *supra*, 438 U.S. at p. 130; *Macleod*, 749 F.2d at pp. 547-549). Thus, the Commission's action merely prohibits the Applicants from pursuing an additional use of their property, but it does not prevent them from continuing to use it for its original purpose – one single-family residence.

In summary on this point, the Applicants did not have a reasonable, investment-backed expectation that they could demolish the existing residence and construct two new residences on the site.

Economic Impact. The second prong of the *Penn Central* analysis requires an assessment of the economic impact of the regulatory action on the Applicants' property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished (see *Tahoe-Sierra Pres. Council, Inc., supra,* [citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 [applying *Penn Central*, court finds that diminution of property's value by 91% not a taking]). In this case, the evidence demonstrates that the Commission's action would likely have little impact on the value of the Applicants' property, and that at a minimum it would not create such diminution in value to constitute a taking.

The Applicants acquired the property, including the existing residence, for $2,600,000 and, even after the Commission's actions, the Applicants retain an approximately 3,500 square foot blufftop ocean-view single-family dwelling that straddles the two lots.

The following chart of single-family home sales prices for blufftop ocean view homes along the immediate shoreline located on Bayview Drive and nearby Seaview Drive and Kingsbury Drive in Aptos from 2006 to 2009 shows the prices for single-family homes on larger lots in this area.

Address	Year Sold	Sale Price	Lot Square Footage
426 Seaview	2009	$3,500,000	18,210
337 Kingsbury	2008	$2,900,000	12,632
313 Kingsbury	2008	$2,400,000	13,939
307 Kingsbury	2008	$2,810,000	11,326
611 Bayview	2007	$1,095,000	8,276
668 Bayview	2007	$1,100,000	6,970
350 Kingsbury	2006	$1,850,000	6,534
678 Bayview	2005	$950,000	6,098
453 Seaview	2005	$2,150,000	8,276
334 Kingsbury	2005	$1,300,000	6,534
352 Kingsbury	2005	$1,000,000	13,504

Source: Santa Cruz County Assessor's Office Transaction Database and www.realquest.com.

The only property with approximately the same square footage as the Applicant's property sold in 2009, after the recent economic downturn, for $3.5 million. A smaller property, at 307 Kingsbury Drive, sold for $2.8 million in 2008 (this property was purchased for approximately $2 million in 2002, the same year the Applicants purchased their home, providing a relative measure for the Applicants' property). Similarly, according to the County's Assessor's Office, homes at 347 Kingsbury and 655 Bayview that remained in the same ownership and did not undergo major remodeling or renovations also increased significantly in value between 2003 and 2006 (approximately $325,000 and $800,000, respectively). Although fluctuations in the real estate market are to be expected, the available data show that the Applicants' property has likely at least retained its value as a single-family residence or that it has increased in value since 2002. Thus, even after the Commission's denial of two separate single-family dwellings, the Applicants retain significant value in their real estate, and they cannot demonstrate that the Commission's action has so diminished the value of their property interest that it constitutes a taking of their property without just compensation.

These lots continue to retain their value because of the lots' location and the existing residential use. The Commission's action does not appear to have a substantial impact on the value of the lots, and it has a far smaller economic impact than other regulatory actions for which the courts have rejected taking claims.

Ad-Hoc Takings: Character of the Commission's Action. The final prong of the *Penn Centr*al test requires a consideration of the character or nature of the regulatory action. A regulatory action that is an exercise of the police power designed to protect the public's health, safety, and welfare is much less likely to effect a taking (*Keystone Bituminous Coal Ass'n*, *supra,* 480 U.S. at pp. 488-490; *Penn Central*, *supra*, 438 U.S. at p. 127) than, for example, a government action that is more like a physical appropriation of property (see *Loretto*, *supra*, 458 U.S. 419).

In this case, the Commission's denial of a portion of the Applicant's proposal promotes important policies that protect the public's health, safety, and welfare. Detailed earlier in this report, these policies include the fostering of public safety from coastal hazards, and the preservation of scenic resources and character, and the protection of public access, including existing public park/accessway and beach facilities. At the same time, the Commission's action involves no physical occupation or appropriation of the Applicants' property interests. Consequently, application of the third prong of *Penn Central* strongly weighs against a finding that the denial of this project constitutes a taking.

For all of these reasons, the Commission's denial of this project would not constitute a taking under the ad hoc *Penn Central* standards.

3. Conclusion

For all of the above reasons, the Commission concludes that its denial of the Applicants' proposal would not constitute a taking and therefore is consistent with Coastal Act Section 30010 and the LCP.

4. California Environmental Quality Act (CEQA)

Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and 15042 (CEQA Guidelines) of Title 14 of the California Code of Regulations (14 CCR) state in applicable part:

> ***CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects.*** *[Relevant Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*
>
> ***Public Resources Code (CEQA) Section 21080(b)(5). Division Application and Nonapplication.*** *...(b) This division does not apply to any of the following activities: ...(5) Projects which a public agency rejects or disapproves.*
>
> ***CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved.*** *(a) CEQA does not apply to projects which a public agency rejects or disapproves.*

Section 13096 (14 CCR) requires that a specific finding be made in conjunction with coastal development permit applications about the consistency of the application with any applicable requirements of CEQA. This staff report has discussed the relevant coastal resource issues with the proposals. All public comments received to date have been addressed in the findings above. All above findings are incorporated herein in their entirety by reference. As detailed in the findings above, the proposed projects would have significant adverse effects on the environment as that term is understood in a CEQA context.

Pursuant to CEQA Guidelines (14 CCR) Section 15042 "a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." Section 21080(b)(5) of the CEQA, as implemented by section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in these findings, is necessary to avoid the significant effects on coastal resources that would occur if the projects were approved as proposed. Accordingly, the Commission's denial of these projects represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.