CALIFORNIA COASTAL COMMISSION
CENTRAL COAST DISTRICT OFFICE
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877
WEB: WWW.COASTAL.CA.GOV

F8c/F8d/F8e

Appeals filed:	1/8/2009
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-09-001, A-3-SCO-09-002, and A-3-SCO-09-003, Frank SFDs**

Applicant.....Donald Neil Frank

Appellants.....Fay Levinson and William Comfort

Local government .....Santa Cruz County

Local decision .....Approved by the Santa Cruz Zoning Administrator on December 5, 2008 (County Coastal Development Permit (CDP) Application Numbers 08-0221, 08-0223, and 08-0224).

Project location .....On the undeveloped and vacant blufftop above Hidden Beach where it slopes down toward a coastal arroyo adjacent to Hidden Beach County Park downcoast from Bayview Drive in the unincorporated Aptos area of south Santa Cruz County.

Project description.....**A-3-SCO-09-001:** Construct a two-story single-family dwelling (about 3,207 square feet) with associated site improvements (including a shared roadway with retaining walls, grading, and removal of two significant trees).

A-3-SCO-09-002: Construct a two-story single-family dwelling (about 3,721 square feet) with associated site improvements (including a shared roadway with retaining walls, grading, and removal of three significant trees).

A-3-SCO-09-003: Construct a two-story single-family dwelling (about 5,547 square feet) with associated improvements (including a shared roadway with retaining walls, grading, and removal of one significant tree).

File documents.....Administrative record for Santa Cruz County CDP Numbers 08-0221, 08-0223, and 08-0224; Santa Cruz certified Local Coastal Program (LCP).

Staff recommendation ...**Approval of A-3-SCO-09-001 with Conditions; Denial of A-3-SCO-09-002 and A-3-SCO-09-003**

A. Staff Recommendation

1. Staff Note

Santa Cruz County approved three separate CDPs and thus there are three separate appeals/CDP applications. However, the Applicant is the same for each CDP/appeal and the property involved is in one contiguous location and owned entirely by the Applicant.[1] Each of the three proposed residences 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 pages 5 and 6).

2. Summary of Staff Recommendation

The Applicant proposes to construct three new two-story single-family residences and associated improvements on three contiguous undeveloped blufftop lots located above Hidden Beach in the unincorporated Aptos area of south Santa Cruz County. The proposed residences would range in size from 3,207 square feet to 5,547 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 Applicant's geological representatives have established ocean-facing blufftop setbacks for the residences that are in the range of about 28 to 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 ocean-facing 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 development on Lot 1 is located about 120 feet from the bluff edge and thus development on this lot can meet the required 116-foot blufftop setback. For this reason, the proposed development on Lot 1 can be found consistent with the LCP's coastal hazards policies. However, the proposed developments on Lots 2 and 3 do not meet the required 116-foot

[1] On July 7, 2010, two of the three lots were transferred from Donald Neil Frank to Arnold Land Company, LLC (Lot 2) and from Donald Neil Frank to Baltimore Land Company (Lot 3). As explained in greater detail in Section B below, Mr. Frank is authorized to act on behalf of these corporations and continues to control the development of all three parcels.

setback identified and could not even if they were moved inland because there is insufficient space inland of the 116-foot setback on the property within which to site residential development. Thus, the proposed developments on Lots 2 and 3 would be significantly out of conformance with the LCP's coastal hazards policies. Staff is unaware of any modifications that could make residential structures on Lots 2 and 3 consistent with the coastal hazards policies and standards of the LCP. As a result, Staff recommends that the proposed development on Lots 2 and 3 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 undeveloped lots proposed for development are located within an LCP-mapped scenic resource area. The proposed project sites are prominent in the foreground of views out to the ocean from significant public use areas at adjacent Hidden Beach County Park, including from the main beach/ocean overlook and the beach access trail, as well as from Hidden Beach itself. Views from beaches and parks are protected visual resources under the LCP. Such LCP 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. The proposed project sites are located on a section of undeveloped coastal bluff that forms a peninsula that is located across the bottom of the arroyo from the park. This peninsula slopes down from the higher coastal bluff (110 to 130 feet above sea level) located just upcoast, and terminates in the beach-level arroyo just downcoast of the project sites. The elevation of the three project sites ranges from about 50 to about 90 feet above sea level. The proposed development on Lot 1 is located about 120 feet inland from the edge of the coastal bluff and is the closest to Bayview Drive (i.e., Lot 1 is the farthest from the park and the primary park views) and thus is not highly visible from the park or the beach. Of the three lots, Lot 1 is located the farthest (hundreds of feet) from the nearby highly used park public access trail. Appropriately sited and designed development on Lot 1 would be integrated into the existing residentially-built environment and would be located a substantial distance away from the bluff and the edge of the peninsula. For these reasons, the proposed development on Lot 1 can be found consistent with the LCP's visual resource policies. However, given the topography and the location of the project sites and the size and scale of the proposed residential developments on Lots 2 and 3, the proposed projects on these lots will have a highly detrimental impact on the natural setting and viewshed as seen from the beach and from Hidden Beach County Park's overlook area and public access trail. Perhaps most critically, the overlook view toward the beach and ocean would be substantially adversely impacted by residential development on Lots 2 and 3. As such, the proposed developments on Lots 2 and 3 are inconsistent with the LCP's visual resource policies, including those that specifically provide protection to mapped scenic resource areas and views from beaches and parks.

Staff recommends that the Commission deny CDPs for the proposed development on Lots 2 and 3.

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 all three undeveloped and vacant lots purchased by the Applicant in 2006. Denial of two of the Applicant's proposed residences would not constitute a taking because the Commission is still approving construction of a residence on the property (i.e., on Lot 1), providing a reasonable economic use under the circumstances applicable here, including the significant constraints to development associated with this property. Consequently, the Commission's denial of the two additional residences on the rest of the property would be consistent with Coastal Act Section 30010 and the LCP.

To recognize the fatal difficulties for LCP-consistent development on Lots 2 and 3 of the Applicant's property, and to recognize the single underlying property appropriately (so as to not create potential future expectation for development of Lots 2 and 3), staff recommends that the Commission attach a special condition requiring that the three lots be formally combined and treated as a single parcel of land for all future purposes, including to ensure that these lots are not divided or sold separately.

Regarding the approvable residential development, staff recommends special conditions to require: 1) revised plans showing residential development on Lot 1 only; 2) an open space conservation easement over the required geologic setback areas and the significant public view corridor across the property; 3) appropriate landscaping to ensure that the viewshed is not adversely impacted; 4) drainage components located outside of the arroyo on the Applicant's property; 5) a prohibition on the construction of any future shoreline protective devices to protect the approved residence over its lifetime, and a requirement that the residence will be moved or removed if threatened by coastal hazards for which shoreline armoring and/or other shoreline altering development might otherwise be considered; 6) that the Applicant and all successors in interest assume all risks for development in an area subject to coastal hazards, including the project's location on an eroding bluff; and, 7) recordation of a deed restriction to ensure that the Applicant and all successors in interest clearly understand the terms and conditions of this permit as they apply to this property.

Staff believes that an approval for one residence at the site most appropriately addresses the significant coastal hazard and view issues, consistent with the LCP. The Applicant is thereby afforded residential development and, as modified by these special conditions, including elimination of two of the three proposed residences, the approved portion of the project can be found consistent with the requirements of the certified Santa Cruz County LCP and the public access and recreation policies of the Coastal Act.

3. Staff Recommendation on CDP Applications

Staff recommends that the Commission, after public hearing, approve CDP application A-3-SCO-09-001 for the proposed development on Lot 1 subject to the standard and special conditions below, and that the Commission deny CDP applications A-3-SCO-09-002 and A-3-SCO-09-003 for the proposed developments on Lots 2 and 3. The Commission must act on three motions to effect this recommendation.

A. Motion/Action 1: Approval of CDP Application Number A-3-SCO-09-001

Motion #1. I move that the Commission approve coastal development permit number A-3-SCO-09-001 pursuant to the staff recommendation. I recommend a yes vote.

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

Resolution to Approve a Coastal Development Permit. The Commission hereby approves the coastal development permit on the grounds that the development as conditioned will be in conformity with the policies of the Santa Cruz County Local Coastal Program and the public access and recreation policies of the Coastal Act. Approval of the coastal development permit complies with the California Environmental Quality Act because either: (1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the amended development on the environment; or (2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse effects of the amended development on the environment.

B. Motion/Action 2: Denial of CDP Application Number A-3-SCO-09-002

Motion #2. I move that the Commission approve coastal development permit number A-3-SCO-09-002 for the development proposed by the Applicant. I recommend a no vote.

Staff Recommendation of Denial. Staff recommends a **NO** vote. Failure of this motion will result in denial of the coastal development 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.

C. Motion/Action 3: Denial of CDP Application Number A-3-SCO-09-003

Motion #3. I move that the Commission approve coastal development permit number A-3-SCO-09-003 for the development proposed by the Applicant. I recommend a no vote.

Staff Recommendation of Denial. Staff recommends a **NO** vote. Failure of this motion will result in denial of the coastal development 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.

Report Contents

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Exhibit 9: Applicable Santa Cruz County LCP and Coastal Act Policies
Exhibit 10: Lot Configuration Maps (Pre and Post County Approval of Lot Line Adjustment)
Exhibit 11: Open Space Conservation Area
Exhibit 12: Correspondence (Opposed to the Projects) (Powerpoint Presentation)
Exhibit 13: Additional Correspondence (Opposed to the Projects)
Exhibit 14: Additional Correspondence from the Applicant
Exhibit 15: Ex Parte Communications
Exhibit 16: Attorney General's Office Response to the Applicant

B. Findings and Declarations

The Commission finds and declares as follows:

1. Project Location

The project sites are located on an undeveloped and vacant blufftop located just downcoast from the end of Bayview Drive in the unincorporated Aptos area of south Santa Cruz County. The blufftop area overlooks Hidden Beach and slopes down into a coastal arroyo adjacent to the property. 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. A second publicly-used path extends along the bluff on the upcoast side of the arroyo extending from the sand at Hidden Beach inland 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. This undeveloped bluff area between these built environments provides a natural landform respite from the more urban back-beach and bluff developments up and down coast, 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] See Exhibit 1 for location maps and Exhibits 2 and 12 for site area photos.

Although the sloping blufftop area where the three residences are proposed is undeveloped, there is substantial residential development located upcoast and downcoast of Hidden Beach County Park from the project site. On the upcoast side, residential neighborhoods on the blufftop extend back towards Aptos Creek. However, most of this existing residential blufftop development is at 110 to 130 feet above sea level. The elevation of the coastal bluff begins to drop dramatically in the vicinity of the proposed project sites as the bluff drops into the arroyo itself. As a result, the elevation at the proposed project sites range from about 50 to 90 feet above sea level. In addition, although there is no residential

[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.

development located on the beach directly below the project sites, the oceanfront residences on Beach Drive (just upcoast from the project sites) extend upcoast to the Aptos Creek area as well. Opposite the arroyo on the downcoast side, the natural bluffs were altered into a series of terraces and developed with residences starting in the 1960s. As a result, the natural bluff no longer exists and has been replaced with terraced residential development extending upslope from the Via Gaviota seawall, which is located downcoast of the arroyo and Hidden Beach (see photos of these areas in Exhibit 2).

The beach area at Hidden Beach between Beach Drive and Via Gaviota, as well as the arroyo area extending inland along Hidden Beach County Park, were the subject of a settlement agreement associated with prescriptive rights litigation between the Coastal Commission and the then fee-title landowner of this area. Per the settlement agreement, the property 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 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, the residence was constructed[4] and this entire area was offered to the public as open space land for public recreational use. The settlement agreement and the resultant fee offer prohibit new structures or improvements within this property. See Exhibit 8 for a copy of the settlement agreement/offer to dedicate.

The project area consists of three[5] undeveloped lots (see page 2 of Exhibit 10). Lot 1 is about 12,610 square feet. Lot 1 slopes down towards the coastal bluff and arroyo to the east. Lot 2 is about 7,354 square feet and is located adjacent to an existing single-story residence at 660 Bayview Drive. Lot 2 has the highest elevation of any of the three lots (about 65 to 90 feet above sea level). Lot 2 slopes down towards Lot 3 to the east, with the seaward coastal bluff located to the south. Lot 3 is about 13,601 square feet. Lot 3 is the lot that is located farthest from Bayview Drive and nearest to the beach/arroyo. Lot 3 is at the lowest elevation of the three lots (50 to 60 feet above sea level), with the coastal bluff and arroyo surrounding the lot on three sides.

Lots 2 and 3 are designated in the LCP Land Use Plan (LUP) as R-UL (Urban Low Density Residential) and are zoned R-1-6 (Single-Family Residential – 6,000 square foot minimum lot size). Lot 1 is designated in the LUP as partially R-UL and partially O-U (Urban Open Space) and is zoned partially R-1-6 and partially PR (Parks, Recreation, and Open Space).[6] See page 1 of Exhibit 10 for the land use designation map and lot configuration.

The proposed project includes shared drainage improvements with a drainage line to be bored through the coastal bluff that will outlet onto the sand in the downcoast arroyo in an area off the Applicant's property that is subject to the settlement agreement described above (again, see Exhibit 8).

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4 This residence can be seen on page 3 of Exhibit 2. It is the furthest downcoast (to the right in the photo) of the beach level residences.

5 On May 29, 2008 the County approved a lot line adjustment (application 07-0049; processed as a Coastal Exclusion (no CDP required) pursuant to LCP section 13.20.076) to reconfigure the boundaries of what were then four adjacent lots on the site to result in the three lots that are the subject of this appeal. Please see further discussion of this lot line adjustment in the "Public Access" finding below.

6 The O-U (PR) designation for a portion of Lot 1 appears to be connected to the previous lot configuration where the O-U (PR) designation applied to a "trail" lot. Although the lot lines were adjusted in 2008, the underlying LCP designation and zoning were not changed.

All three 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 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

The proposed project includes construction of three single-family residences on the three undeveloped blufftop lots:

Lot 1: Construct a three-bedroom, two-story single-family residence of about 3,207 square feet on a 12,610 square-foot lot (of which 4,911 square feet would be devoted to a driveway that would provide access to Lots 2 and 3).

Lot 2: Construct a three-bedroom, two-story single-family residence of about 3,721 square feet on a 7,354 square-foot lot.

Lot 3: Construct a four-bedroom, two-story single-family residence of about 5,547 square feet on a 13,601 square-foot lot (of which 1,404 square feet is a private driveway that would provide access to this lot only).

Associated improvements common to all three lots include a shared access driveway from Bayview Drive through Lot 1 and to Lots 2 and 3 that would provide vehicular access to all three lots. The shared access driveway includes construction of retaining walls that would extend up to 4.5 feet above and 8 feet below the driveway. Grading for all three projects would total approximately 437 cubic yards of cut and approximately 400 cubic yards of fill, and a total of eight trees (three dead and ranging from 10 inches to 51 inches in diameter) would be removed. Shared drainage improvements are proposed, with a drainage line proposed to be bored through the coastal bluff into a proposed rock dissipater to be constructed in the arroyo that is downcoast of the lots. See proposed project plans in Exhibits 3, 4, and 5.

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 9 for applicable LCP and Coastal Act 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 pages 3-6 of Exhibit 9 for the applicable LCP requirements.

2. Reports Submitted

The Applicant has submitted the following geologic and geotechnical engineering reports for the site:

- *Geologic Investigation, Lands of Frank, Aptos, California, County of Santa Cruz APN's 043-161-51, -40, & -39* by Zinn Geology, dated August 16, 2006 (Zinn 2006).

- *Response to Comments by County of Santa Cruz Planning Department, Parcels Southeast of Bayview Drive, Aptos, California, County of Santa Cruz APNs 043-161-51, -40, & 39* by Zinn Geology, dated July 23, 2007 (Zinn 2007).

- *Geotechnical Investigation for Lands of Frank, 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:

- *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) (see pages 1-8 of Exhibit 7).

- *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) (see pages 52-55 of Exhibit 7).

- *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) (see pages 43-51 of Exhibit 7).

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) (see pages 9-28 of Exhibit 7).

- *Projections of Sea-Level Rise in the 21st Century,* letter from G.E. Weber, Geologic Consultant, dated February 2, 2010 (Weber 2010) (see pages 29-42 of Exhibit 7).

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 three undeveloped lots located along the top of an ancestral fluvial[7] terrace surface that slopes gently to the southeast. The terrace is bordered to the east by a thickly-vegetated, nearly flat-bottomed arroyo, which has incised up to 40 feet into the terrace, creating a steepened 45-50 degree slope. The southwest edge of the terrace faces the sea and drops near vertically toward the beach for about the upper 6 to 8 feet, then tapers off to a shallower gradient of about 45 to 50 degrees, and then tapers again to between 37 and 40 degrees of slope between 10 and 30 feet above the broad sandy beach located below the project sites.

The project site lies on top of a wedge of poorly consolidated fluvial terrace sands ranging in thickness between about 12 and 35 feet, which in turn overlie an ancestral stream-cut terrace in the underlying Purisima formation sandstone bedrock. The coastal bluff side of the properties is partially buttressed by a steeply-dipping wedge of colluvium[8] that is likely an accumulation of many years of materials sloughing from the bluff.

Drainage at the site is primarily by sheet flow toward the arroyo, other than some minor rilling. No significantly large erosional landforms, such as gullies, aside from the arroyo itself, appear to be actively developing within the fluvial terrace surface of the project site. Surface borings done at the site encountered groundwater between 27 and 37 feet below the ground surface, where it appears to be perched on top of the bedrock shelf within the fluvial terrace deposits. The bedrock below the encountered groundwater does not appear to be saturated.

4. Stability Requirements

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[7] 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.)

[8] 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.)

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 without reliance on engineering measures, and the safety of the development must be established through the use of appropriate setbacks and siting. For bluff properties that are subject to erosion, setbacks and siting decisions must address individual potential hazards, but also hazards associated with the interplay of various hazards, such as 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 arroyo bluff edge are about 25 feet (the minimum required by the LCP), and the setbacks from the seaward bluff edge range between about 120 feet for Lot 1, to about 28 to 32 feet for Lots 2 and 3. Dr. Johnsson's analysis indicates that the proposed 25-foot setbacks on the arroyo side of the project site are adequate for all three project sites. In addition, although he agrees that the proposed setback for Lot 1 is adequate to meet the 100-year minimum LCP requirement,[9] the proposed coastal bluff setbacks are inadequate to meet the LCP's minimum requirements for Lots 2 and 3. Dr. Johnsson further concludes 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 stability requirement. 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 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 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 Applicant's 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. The Weber 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

[9] 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.

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[10] 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 and periods of higher tides (see pages 8-11 of Exhibit 2 and pages 17-22 of Exhibit 12 for photographs).[11] For 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 and the ocean 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 residences on lots 2 and 3 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 lower bluff retreat/undermining. 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 0.27 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

[10] 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.

[11] 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 12). 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 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).

bluff, the bluff will retreat at a rate of approximately one foot per year. The 2006 report additionally found that the arroyo that borders the properties to the east has eroded at an average rate of 0.05 feet per year since 1928. Regarding landslides, this report noted that the upper coastal bluff above the beach has retreated episodically through the process of terrestrial landsliding.[12]

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 – see pages 43-51 of Exhibit 7] *estimate the buildings sited as proposed would be threatened in…107 to 161.5 years.*

Dr. Johnsson disagrees with a number of assumptions built into the Applicant's analysis. First, he notes that the reports by Zinn Geology use the estimated sea level rise figure from the Weber 2/2009 report (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 near vertical for the first 6 to 8 feet, it tapers off to a shallower gradient of about 45 to 50 degrees, and then tapers again to between 37 and 40 degrees of slope between 10 and 30 feet above the beach. 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 building 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

[12] In fact, in the time since the Zinn 2006 report, a landslide occurred at the site – see page 7 of Exhibit 2 for a photo.

feet per year long-term average cited by the Applicant in the Zinn 2009 report (see pages 43-51 of Exhibit 7). 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). Generally, a pseudo-static factor of safety of 1.1 is 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 2.54 for the project site. According to Dr. Johnsson, this is a much higher factor of safety than typically reported for coastal bluffs of this height and inclination. Indeed, a failure of the upper bluff below 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 (see pages 52-55 of Exhibit 7) provided supporting documentation for the soil strength parameters, and Dr. Johnsson reviewed this documentation and concluded that 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 is the analysis that was requested by Dr. Johnsson) but did not include an analysis of the global stability of the entire bluff. In addition, the Applicant provided a pseudo-static analysis, but not a static analysis. In any event, the Applicant's slope stability analysis under pseudo-static conditions indicates that a factor of safety of 1.1 was found to be located about 8 feet landward of the bluff edge. On the immediately adjacent property, the static analysis found that a factor of safety of 1.5 would be attained 18 feet inland of the bluff edge.[13] Barring additional analysis for this site, this condition can be

[13] For appeal/CDP applications A-3-SCO-08-029 and A-3-SCO-08-042 (Trousdale SFDs). 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.

assumed to prevail at this site, which is geologically and topographically very similar.

For the arroyo-facing slope, the static factors of safety were 1.6 to 2.2, indicating that the arroyo bluffs are currently stable.

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 average bluff erosion rate along the California coast. For the stretch of coast located adjacent to the project sites, the rates were generally 0.66 to 0.98 feet per year.[14] These numbers are consistent with those previously reported by other experts in the field[15] and are consistent with those ultimately used by the Applicant's geologist (Zinn 2009; see pages 43-51 of Exhibit 7).[16] 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.[17] This rate of erosion would equal 98 feet of coastal bluff erosion over 100 years. Additionally, the slope stability analysis concluded that a static factor of safety of 1.5 is attained about 18 feet landward of the present bluff edge on the directly adjacent upcoast property.[18] 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

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[14] 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, 51pp.

[15] For example: Griggs, G., Patsch, K., and Savoy, L., 2005, *Living with the changing California Coast:* Berkeley, California, University of California Press, 540 pp.

[16] 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).

[17] 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.

[18] As indicated previously, no static factor of safety was calculated for these three proposed project sites, but it is appropriate to use the factor of safety calculated for the neighboring site as a proxy as it is directly adjacent to these sites and appears to share similar characteristics.

area should be safe from erosion for the LCP required minimum of 100 years. [19]

While this setback is required to meet LCP provisions, the Applicant has noted that many other homes in the area have been constructed with smaller setbacks. Although this is true, many neighboring homes were built before the California Coastal Act was adopted. Moreover, those other cases are not before the Commission at this time, and in most cases the County's approval of 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 Trousdale projects (appeals/CDP applications A-3-SCO-08-029 and A-3-SCO-08-042), 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.

Although the Applicant claims that Dr. Johnsson's calculations are factually incorrect, the erosion rate he used is taken from independent reports and is ultimately nearly the same rate as that used by the Applicant's geologist. In addition, as noted above, the erosion high hazard area identified in the March 2009 sea level rise report issued by the California Energy Commission depicts a very similar hazard area for the bluffs at issue. Thus, Dr. Johnsson's conclusions are consistent with those of an independent agency with no stake in the outcome of this particular application for development.

The slopes on the arroyo side of the lots exceed a 1.5 factor of safety and are seldom subject to wave attack. Thus, a much smaller setback is necessary here, and the 25-foot LCP minimum setback recommended by the Applicant's consultants should be sufficient for the required 100-year minimum period.

As discussed above, the LCP requires that a site demonstrate a minimum of 100 years of stability for new development.[20] At the 100-year minimum threshold, the 116-foot setback means that two of the lots (Lots 2 and 3) are essentially undevelopable (i.e., the required setback will occupy essentially all of these two lots). However, as shown on the project plans (pages 2-3 of Exhibit 3), the proposed development on Lot 1 is set back about 120 feet from the edge of the coastal bluff. Thus, this lot can meet the minimum 100-year stability requirement and may be developed as proposed by the Applicant. To ensure LCP consistency, Special Condition 1 requires submittal of revised project plans that eliminate all residential development from Lots 2 and 3, and that retain the residential development on Lot 1 in substantial conformance with the residence approved by Santa Cruz County. To recognize the fatal difficulties for LCP and Coastal Act consistent development on Lots 2 and 3 of the Applicant's property, and to recognize the single underlying property appropriately (so as to not create potential

[19] Again, of course, after 100 years such development would be endangered, and such issues would need to be addressed through enforceable mechanisms (e.g., required removal/relocation of endangered structures, etc.) to be able to find such development LCP consistent for other LCP reasons.

[20] 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 to be LCP-consistent in that regard as well.

future expectation for development of Lots 2 and 3), Special Condition 2 requires that the three lots be formally combined and treated as a single parcel of land for all future purposes, including to ensure that these lots are not divided or sold separately (see also Section D below).

For the approvable development on Lot 1, the LCP further requires that it not lead to shoreline armoring and/or other bluff altering development should it be threatened by erosion and related coastal hazards in the future. The 100-year setback addresses this issue, but cannot by itself assure these LCP requirements are also met. Thus, this approval both prohibits future construction of a seawall, shoreline protection device, bluff retaining wall, or similar structures, and requires that the residence be moved or removed if threatened by coastal hazards for which shoreline armoring and/or other shoreline altering development might otherwise typically be considered (see Special Condition 6). Also, given the project's location on a blufftop area that is subject to extreme coastal hazards, and given that the Applicant is willingly pursuing residential development nonetheless, this condition also requires that the Applicant assumes all risks for developing at this location so as to ensure that the public is not unfairly burdened by any problems that may arise here.

The proposed drainage plan includes shared drainage improvements with a drainage line to be bored through the coastal bluff that would empty out into a rock dissipater that would be constructed in the adjacent arroyo on property not owned by the Applicant. Development of such a drainage system raises a number of LCP-conformity issues, including those related to arroyo resource protection. Perhaps more importantly in this case, such arroyo development is currently prohibited, and thus such a drainage apparatus could not be sited as proposed. Specifically, as stated above, the arroyo area is subject to an easement offer, which requires that this area be protected as public open space, and which prohibits the installation of structures such as the drainage structures proposed (see page 5 of Exhibit 8). Fortunately, the elimination of residential development on Lots 2 and 3 will allow for all drainage from Lot 1 to be handled on site, thus eliminating the need for a drainage line extending to the arroyo. Special Condition 1 requires submission of a drainage plan that shows all drainage retained through infiltration or other means on the undeveloped portions of the project site in such a way that does not exacerbate geologic hazards or degrade visual resources (see also visual resource findings that follow).

The terms and conditions of this approval are meant to be perpetual. In order to inform future owners of the requirements of the permit, this approval is conditioned to require recordation of a deed restriction that will record the project conditions against the affected property (see Special Condition 7).

The Commission finds that as modified by these special conditions, including elimination of two of the three proposed residences through denial of these two CDP applications, the project can be found consistent with the blufftop setback and coastal hazards requirements of the certified Santa Cruz County LCP, and thus development on Lot 1 (only) is conditionally approved here, and development on Lots 2 and 3 is 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 resources under the LCP.

The LCP also contains provisions for residential development for land designated Urban Low Density Residential and Parks and Recreation (Lot 1 has this dual designation[21]; Lots 2 and 3 are designated for residential use). See pages 2-3 of Exhibit 9 for the applicable LCP visual resource protection policies.

2. Analysis

The undeveloped property proposed for development 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 undeveloped coastal bluff that forms a peninsula of sorts between the County Park's public access path, overlook, and the beach. This peninsula slopes down from the higher coastal bluff (110 to 130 feet above sea level) located just upcoast, and terminates in the beach-level arroyo just east of the project sites. The elevation of the three project sites ranges from about 50 to 90 feet above sea level. Thus, these lots are much more visible from the adjacent beach and path compared to the blufftop lots located just upcoast on Bayview Drive that are at a higher elevation (110 to 130 feet above sea level) and that are not located directly adjacent to the Hidden Beach County Park public access path and overlook area. In addition, the existing residence directly upcoast of the project sites is single-story and less intense than the residential development located farther upcoast and downcoast of the project sites, and this residence is the first seen from the beach and park extending upcoast along the bluff. Given the low elevation of the coastal bluff here and the project location directly adjacent to the Hidden Beach County Park path and overlook (especially Lots 2 and 3), development of three two-story houses ranging in size from 3,207 square feet to 5,547 square feet would be extremely visible from the adjacent beach and extremely visible from the park's public access path and overlook area. In particular, a portion of the beach and ocean view from the existing park overlook would be directly blocked by proposed development on Lots 2 and 3. The proposed 5,547 square foot residence on Lot 3 would especially stand out against the natural backdrop, it would be highly visible from the public viewshed, and it would block views. This is because Lot 3 is located on the lowest portion of the coastal bluff (50 to 60 feet above sea level) and it is located directly between the beach and the park overlook. The proposed residence on Lot 3 would consist of a two-story, 5,547 square foot, 28-foot tall wall mass directly facing the public access pathway and overlook associated with Hidden Beach County Park, and would be at an elevation of only 50 to 60 feet above the beach. Similarly, the

[21] Id (Lot 1 formerly included a "trail lot" designated O-U (PR), and the underlying land use designations have not changed for this area).

proposed development on Lot 2 (3,721 square feet and 28-feet tall) would also be highly visible from the public path, the overlook area, and the beach and would result in similar visual degradation as development on Lot 3, albeit at a slightly reduced level given its location slightly upslope/upcoast of Lot 3. In both cases, the proposed homes on Lots 2 and 3 would only have setbacks of about 30 feet from the edge of the coastal bluff, which would likewise make them highly visible from the beach, given this limited setback and the relatively low topography of the sites, particularly as seen from downcoast on the beach (i.e., looking upcoast and toward the arroyo).

Given the topography of the project sites and the size and scale of the proposed residential developments on Lots 2 and 3, the proposed projects on these lots will have a highly detrimental impact on the natural setting and viewshed as seen from the beach and the Hidden Beach Park public access trail and overlook area. As such, the proposed projects on Lots 2 and 3 are inconsistent with the LCP's visual resource policies, including those that specifically provide protection for mapped scenic resource areas. Such visual impact will also reduce the overall value and utility of these important public beach[22] 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 off 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 policies in Exhibit 9). Thus, the proposed residences on Lots 2 and 3 cannot be approved as proposed. Even substantially reduced-scale development on these lots 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 development on Lots 2 and 3 cannot be found consistent with the LCP and must be denied.

With respect to the proposed development on Lot 1, the proposed residence would be located about 120 feet from the edge of the coastal bluff and would be the farthest away from the Hidden Beach County Park public access path and overlook area (i.e., it is farthest inland and closest to Bayview Drive). Also, at 3,207 square feet, the house proposed on Lot 1 is the smallest of the three proposed houses and will present a relatively reduced visual impact in terms of mass and scale than the proposed developments on Lots 2 and 3. Although development at this location will still be visible from within the protected public viewsheds, its location away from the bluff and near Bayview Drive (and directly adjacent to inland residential development) will temper its public viewshed impact, including because of intervening vegetation and topography. Thus the proposed development on Lot 1 can be found consistent with the visual resource protection policies of the LCP. Special Condition 1 requires revised plans showing only development on Lot 1. The project is also conditioned to ensure the long-term protection of the primary view across Lots 2 and 3 from/to the beach and park overlook. This viewshed area overlaps with the hazard setback area previously described (i.e., it doesn't result in additional restricted development area, it simply provides a different reason for a portion of the same restricted area). Specifically, Special

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

Condition 3 requires recordation of a deed restriction that prohibits future development in the viewshed across Lots 2 and 3. Special Condition 1 also requires that landscaping be appropriately maintained to protect the viewshed. To recognize the fatal difficulties for LCP and Coastal Act consistent development on Lots 2 and 3 of the Applicant's property, and to recognize the single underlying property appropriately (so as to not create potential future expectation for development of Lots 2 and 3), and to ensure that the lot pattern does not inappropriately induce development proposals on Lots 2 and 3, Special Condition 2 requires that Lots 2 and 3 be formally combined with Lot 1 and treated as a single parcel of land for all future purposes, including to ensure that these lots are not divided or sold separately (see also Section D below). With these conditions, the project can be found consistent with the visual resource protection policies of the certified LCP.

C. Public Access and Recreation

1. Applicable Policies

Coastal Act Section 30604(c) requires that every coastal development permit issued for any development between the nearest public road and the sea "shall include a specific finding that the development is in conformity with the public access and public recreation policies of [Coastal Act] Chapter 3." The proposed project is located seaward of the first through public road and thus such a finding is required for a CDP approval. Coastal Act Sections 30210 through 30213 and 30221 specifically protect public access and recreation. Likewise the LCP provides similar and related protection for such public recreational resources. See Exhibit 9 for these applicable Coastal Act and LCP policies.

2. Analysis

Public access to and from the beach is provided by two existing well-used public access trails, one located on each side of the arroyo (see pages 1 and 12 of Exhibit 2). On the upcoast side of the arroyo, the path is a narrow unpaved footpath that extends primarily adjacent to residential fences and related development from the sandy beach to Hidden Beach Way. Downcoast is the wider and partially paved Hidden Beach County Park trail. These trails provide public access to the beach from the existing residential neighborhood and through Hidden Beach County Park. In addition, the sandy beach at Hidden Beach is well used. Within this context, although clearly the subject property could augment and enhance public access in relation to existing public use areas, it is not required for Coastal Act and LCP consistency. Access, including over the offered arroyo, is adequate, and there is not a compelling need for use of the subject property for this purpose. Thus, the project site is not necessary for direct public access, and thus development on Lot 1 can also be found consistent with Coastal Act and LCP public access and recreation requirements.

D. CDP Determination Conclusion – Partial Approval and Partial Denial

1. Denial

As discussed in the above findings, one of the proposed residential developments can be found consistent with the LCP and the Coastal Act and can be conditionally approved (CDP application A-3-

SCO-09-001). However, two of the proposed residential developments are significantly inconsistent with the policies of the LCP (CDP applications A-3-SCO-09-002 and A-3-SCO-09-003), and must be denied. When the Commission reviews a proposed project that is inconsistent with the applicable standard of review, 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 and/or the Coastal Act. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission denies the project components on Lots 2 and 3 because the proposed residences are significantly out of conformance with the LCP, due to the lack of 100 years of geologic stability, including inadequate coastal blufftop setbacks, and would result in unavoidable and inappropriate impacts on LCP-protected 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 this Applicant. Thus, the Commission is denying these two project components. Conversely, the development on Lot 1 can be found consistent with the LCP and the Coastal Act's public access and recreation policies, and this part of the proposed project is approved subject to conditions designed to protect against future development inconsistent with the LCP and the Coastal Act, as well as conditions to ensure protection of visual and other coastal resources.

2. Takings

As discussed above, two of the three houses proposed for development are inconsistent with the LCP and must be denied. When the Commission denies a project in this way, a question may arise 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 imposes 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.[23]

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010 and the LCP, its denial of a portion of the project would constitute a taking. The Commission finds that, under any of the prevailing takings tests, the denial of the project 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."[24] 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

[23] 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 in that case).

[24] 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).

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 pg. 126 [regulatory takings occur only under "extreme circumstances"]).[25]

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*]).

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 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 complicated in cases where the landowner owns or controls adjacent or contiguous lots/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 property 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 property 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* (Cl.Ct. 1991) 22 Cl.Ct. 310, 318).

Applying the above factors, the Commission concludes that the property to be analyzed for takings purposes in this case is a single property that is comprised of three lots (Lots 1, 2, and 3) on which development is proposed in these applications. First, there is unity of ownership because the Applicant acquired all three lots[26] in 2006 and for the purposes of this analysis should still be considered the owner of all of the subject properties. In an apparent attempt to circumvent the Commission's application of the Coastal Act and the certified LCP, on July 7, 2010 the Applicant claims to have transferred

[25] 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 pages 1028-1036).

[26] The lots were adjusted from four lots to three lots in 2008; thus the Applicant actually acquired four lots made of up current Lots 1, 2, and 3 in 2006. The land area is the same.

ownership of Lot 2 to the Arnold Company, LLC and Lot 3 to the Baltimore Land Company, LLC (each of which was registered with the California Secretary of State on July 1, 2010 – one week after the Commission's staff issued a report recommending denial of the development on two of the Applicant's three properties).[27] "Ownership" for purposes of this factor of the test should not be based solely on the name on the property's title but on what entity has possession or control of the property. In a recent case, the Court of Appeal held that for purposes of merger statutes, local agencies may "look past the paper title in determining whether properties are under common ownership" (*Kalway v. City of Berkeley*, (2007) 151 Cal.App.4th 827, 833). In that case, a property owner transferred title to one of two contiguous parcels that he had inherited into his wife's name, in order to avoid merger of his parcels (*Id*. at 831). The court upheld the City of Berkeley's conclusion that this transfer had no effect on its merger proceedings (*Id*. at 835-36). In a similar case, a court upheld a local government's authority to prevent applicants from circumventing the Subdivision Map Act through a scheme designed to avoid its effects (*Pratt v. Adams* (1964) 229 Cal.App.2d 602, 606 (holding that Santa Cruz County could deny a building permit to applicants "where the permit is sought as the culmination of a plan to circumvent the law by one of the planners")).

Similarly, here, the Applicant transferred title to two of his properties into the names of two LLCs, although he still apparently controls those LLCs, as evidenced by his acting on their behalf when signing the form identifying his agent for purposes of this permit application (see Exhibit 14). His purpose in transferring ownership of these two lots to newly-created LLCs was to circumvent LCP policies preventing construction of homes on geologically unstable bluffs. The Applicant cannot avoid the application of the LCP and Coastal Act to his properties through "the simple expedient of transferring paper title to someone else" (*Id.* at 832). Thus, there is still unity of ownership here, weighing in favor of aggregating these lots for the takings analysis.

The second factor of the aggregation test also weighs in favor of aggregation because the lots are contiguous, framed by Bayview Drive inland, by the bluff and the beach seaward, and the arroyo downcoast, and are primarily subject to the same local land use designation (R-UL (Residential – Urban Low Density) and zoning (R-1-6).[28]

Third, the date of acquisition also supports aggregation of the lots. Even if the owner acquires parcels several months apart, so long as the owner foresees the parcels in a single development scheme, courts favor aggregation (*Walcek v. U.S.* (2001) 49 Fed.Cl. 248, 260). Here, all the lots were acquired by this Applicant at the same time as part of a unified development scheme. In fact, all of the lots were the subject of a 2008 lot line adjustment application to the County that reconfigured the property into current Lots 1, 2, and 3.

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[27] As of November 17, 2010, the Santa Cruz County Recorder's office shows no record of any transfer of ownership of lots 2 and 3, so if such transfers took place, they have yet to be recorded in the chain of title for either of the relevant lots.

[28] As indicated previously, one of the lots has the dual land use designation of O-U (Urban Open Space) and R-UL (Urban Low Density Residential) and the dual zoning of PR (Parks, Recreation, and Open Space) and R-1-6. As indicated previously, this dual designation appears to be due to the lot configuration prior to the 2008 lot line adjustment, and due to the presence at that time of what was described as a "trail lot" to which the O-U (PR) designation applications. The O-U (PR) designation continues to apply to that same area, but lot itself no longer exists.

Finally, the lots have historically been treated as a single unit. Courts are inclined to aggregate parcels when they are treated as one income-producing unit or when they comprise a single, comprehensive development scheme (*Norman v. U.S.* (Fed. Cl. 2004) 63 Fed.Cl. 231, 257-259). Here, as noted above, the Applicant purchased all of the lots together and has pursued a unified development scheme since then. He pursued (and obtained) approval from Santa Cruz County to reconfigure the property into the current Lots 1, 2, and 3. He also hired the same architect to design all three proposed homes, and he used the same technical consultants to analyze and produce reports that applied to the full development proposal (i.e., all three lots). Planning for development of these three lots was therefore coordinated as part of a single, comprehensive development scheme. Courts are also more likely to aggregate when a plaintiff finances and purchases property as a single parcel (*Ciampitti*, 22 Cl. Ct. at 319). The Applicant paid a single purchase price for all three lots combined and financed them as a unit. In this transaction, the Applicant did not assign separate values or purchase prices to the separate lots; rather they were treated as a single unit. Also, all of the lots (excluding the "trail lot" that has since been merged with the other lots[29]) have been in common ownership since 1971. Although the Applicant submitted three separate CDP applications for development of the three lots, they were submitted at the same time as part of a unified plan by the Applicant to develop all three. Thus, at least since 1971, the lots have been treated as a single unit, so this factor, too, weighs in favor of aggregation of the units.

In sum, all four factors courts consider in determining whether to aggregate lots for purposes of a takings analysis support aggregation in this case. Thus, when determining whether a "taking" may occur as a result of the Commission's decision, the relevant "parcel/property" is all three lots combined.

To ensure that the three lots are always considered a single economic unit for purposes of determining whether a taking has occurred, as well as to ensure that these three lots are never placed into divided ownership with a future owner (not controlled by the Applicant) separately owning the undeveloped parcels, the Commission attaches Special Condition 2, requiring that the three parcels be combined and treated as a single parcel of land for all purposes, including but not limited to sale, conveyance, development, taxation or encumbrance and that these parcels never be divided or sold separately. The condition requires the Applicant to execute and record a deed restriction, free and clear of prior liens, and including a legal description and graphic depiction of the three parcels being combined and unified, reflecting the restrictions set forth above. The imposition of this condition by the Commission is necessary to ensure both that the non-developable parcels are never conveyed separately and that neither the current nor a future owner can establish a separate takings challenge for either of the non-developable parcels.

The Denial Of A Portion 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

[29] The "trail lot" has been in common ownership with the other lots since 1994.

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, approval of one single-family residence and associated development on a blufftop lot will render the property extremely valuable, even after the denial of two of the proposed residences, thus there is no categorical taking.

The Commission's denial of two residential structures leaves the Applicant with the significant use of one single-family residence and associated development, all of which have economic value to the Applicant, for which the Applicant would (and did) pay valuable consideration. In these circumstances, the Commission's denial of two of the three proposed residences does not render the undeveloped lots valueless and does not constitute a categorical taking under *Lucas.*

Even if the three 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.

Specifically, the Commission has found that the proposed homes on Lots 2 and 3 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. In fact, the subject bluffs are vulnerable to episodes of landslides and sloughing, as evidenced by the landslide in 2009 on the bluffs below the subject sites. If the homes on Lots 2 and 3

were approved and constructed, then an event such as this recent bluff failure could cause all or portions of the homes and accessory development to slide from the cliff 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 on Lots 2 and 3 pose an unreasonable risk to public health and safety and would be a public nuisance.

The Denial Of A Portion 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 of a portion of the project is not a taking.

Reasonable Investment-Backed Expectations. The absence of reasonable investment-backed expectations is usually dispositive of a taking 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, even if a government action prevents an applicant from either pursuing the most profitable or "the highest and best use" of his property, this action 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 order to determine whether the Commission's action has deprived the Applicant of his reasonable investment-backed expectations, one must look at what he invested in the property and what reasonable expectations were and are for developing such property. In this case, the Applicant purchased the parcel (including all three lots) for $2,660,000 with a sale date of May 1, 2006. On May 5, 2006, a Grant Deed was recorded in the Official Records of the Santa Cruz County Recorder's Office, effectively transferring and vesting fee-simple ownership to the Applicant. Thus, the Applicant made a substantial investment in this property, so one must next consider the reasonable expectation for potential development in this area.

An applicant's knowledge of the pertinent regulatory framework is a relevant factor in determining whether or not an applicant has a reasonable investment-backed expectation (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 633, O'Connor, J., concurring; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 335-336 [citing O'Connor's concurring opinion in *Palazollo*]). If an applicant submits a CDP application, knowing that approval of his or her proposed development is contingent on it being consistent with either the relevant LCP policies or Chapter 3

policies of the Coastal Act, or both, then the reasonableness of the applicant's investment-backed expectations must be consistent with his or her knowledge of this regulatory backdrop (*Ruckelshaus v. Monsanto Co., supra*, 467 U.S. at pp. 1005-1006). Here, the Applicant has submitted permit applications to the County in the past and was aware that this property was in the coastal zone (including by virtue of the 2008 CDP exclusion processed by the County for the lot line adjustment). Thus, at the very least, the Applicant is aware that there are land use regulations that restrict certain development on his property.

In addition, the lots the Applicant purchased are blufftop lots, subject to specific LCP policies, such as protection from geological hazards. They are also located adjacent to the public access path and overlook components of a County park and a publicly-used beach, and are in an LCP-mapped and designated scenic resource area. A reasonable person would have viewed the lots and investigated the physical constraints to development in these terms. This investigation would have revealed that the lots are located atop an actively eroding bluff, and that they are prominent in a significant and LCP-protected public viewshed associated with important public park and public beach resources.

A reasonable person also would have investigated the regulatory restraints regarding development 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 Applicant 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.…*
>
> ***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 Applicant undertaken this investigation, he would have known that the LCP prohibited construction of homes on two out of three of the lots that he purchased. Finally, a reasonable person would also have investigated why the lots had not yet been developed. A neighborhood investigation would have revealed almost no undeveloped properties. A reasonable person would have concluded that the constraints to development had obviously been considered to be a huge impediment to development at this location.

Ultimately, the effect of the Commission's action is to prevent the Applicant from constructing two out of three proposed homes, but it still allows him to construct one large home in a highly desirable location. While the Commission's action may not allow the Applicant to obtain the profit from development of the lots that he had anticipated, 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, although the Commission's action will reduce the Applicant's expected return for development of the three lots, especially given that the lots were purchased under significantly better economic conditions than the developer faces today, such lost profits do not rise to the level of a "taking" under the Fifth Amendment.

In summary on this point, the Applicant did not have a reasonable, investment-backed expectation that he could construct single-family residences on sloping bluff-edge lots prominently located within significant public viewsheds when the LCP specifically prohibits such development. Thus, the Commission's action has not deprived him of his reasonable investment-backed expectations.

Economic Impact. The second prong of the *Penn Central* analysis requires an assessment of the economic impact of the regulatory action on the Applicant's 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 afford the Applicant the opportunity to construct a large home on a large lot in a highly desirable location. The following table shows recent single-family home sales for blufftop ocean view homes on large lots along or within several parcels of the immediate shoreline located on Bayview Drive and nearby Seaview Drive and Kingsbury Drive in Aptos from 2006 to 2009. The chart also shows, for comparison purposes, the Applicant's 2006 purchase of the subject undeveloped property.[30]

Address	Year Sold	Sale Price	Lot Square Footage
Applicant's Lots	**2006**	**$2,660,000**[31]	**31,798**
350 Kingsbury	2006	$1,850,000	6,534
611 Bayview	2007	$1,095,000	8,276
668 Bayview	2007	$1,100,000	6,970

[30] It is difficult to compare undeveloped lot sales as there are very few undeveloped lots in this area. As a proxy, single-family homes can be used, but it is acknowledged that a home on a property sells for a different price than an undeveloped property. The difference can be the cost to build a house and the associated infrastructure.

[31] The Applicant paid $2,660,000 for an undeveloped property. All of the other sales shown in this table were for an existing single-family home on a property.

307 Kingsbury	2008	$2,810,000	11,326
313 Kingsbury	2008	$2,400,000	13,939
337 Kingsbury	2008	$2,900,000	12,632
426 Seaview	2009	$3,500,000	18,210

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

While three of these homes sold for between $1 million and $2 million in this timeframe, all of the homes on lots larger than 10,000 square feet sold for $2.4 million or more, with the most comparable property in size (at 426 Seaview Drive) selling for $3.5 million after the recent decline in real estate values (this same property was sold by the Applicant for $4.5 million in 2007). Thus, even after the economic downturn, a smaller, but similarly situated property sold for more than what the Applicant paid for his undeveloped lots in 2006 and the lot value (without the house) was deemed to be comparable to the Applicant's purchase price even though the lot was significantly smaller (by about 40%).[32] Thus, there is clearly still a significant value associated with the construction of one single-family residence in such a desirable location, particularly where the resulting home will have ocean views and a location immediately adjacent to a protected natural area (the arroyo and beach) and the County park. Under these circumstances, the Applicant cannot show that the Commission's action will result in such a significant diminution in the value of his property that the action rises to the level of a regulatory taking. As noted above, courts have found that regulatory actions resulting in more than 90% diminution in the value of property do not constitute takings.

Ad-Hoc Takings: Character of the Commission's Action. The final prong of the *Penn Central* 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 community character, and the protection of public access resources, including existing public park/accessway, and beach facilities. At the same time, the Commission's action involves no physical occupation or appropriation of the Applicant's 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 two of three proposed residences would not constitute a taking under the ad hoc *Penn Central* standards.

[32] According to the County Assessor's Office, this property has a land value of $2,100,000 and an improvement value (i.e., the residence and related development) of $1,400,000.

3. Conclusion

For all of the above reasons, the Commission concludes that its denial of a portion of the Applicant's proposal (i.e., CDP applications A-3-SCO-09-002 and A-3-SCO-09-003) would not constitute a taking and therefore is consistent with Coastal Act Section 30010 and the LCP.

4. Coastal Development Permit Conditions of Approval

A. Standard Conditions

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.

B. Special Conditions

1. **Final Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT the Permittee shall submit two full-size sets of final plans to the Executive Director for review and approval. The final plans shall be in substantial conformance with the plans approved by Santa Cruz County on December 5, 2008 (as shown in Exhibits 3, 4, and 5), except that they shall be revised and supplemented to comply with the following requirements:

   (a) Lots 2 and 3. All residential development as shown in Exhibits 4 and 5 (except for drainage and landscaping – see below), including associated improvements such as driveways, fencing, walkways, retaining walls, etc., shall be eliminated from Lots 2 and 3 of the project site.

   (b) Lot 1. The plans for the residence on Lot 1 shall be in substantial conformance with the project plans approved by the County pursuant to County application number 08-0221 (Exhibit 3) with respect to house size, height, style, orientation, materials and colors, setback from coastal arroyo, and setback from coastal bluff edge, except that any development approved by the County on Lot 1 that provided access to Lots 2 and 3 shall be eliminated.

(c) Drainage Plan. The plans shall modify the drainage system to provide an engineered drainage system that retains all drainage from Lot 1 on the site through infiltration of runoff into Lots 1, 2, and 3, where such drainage apparatus is installed and maintained as close to the approved residence and Bayview Drive as possible. The drainage system may include, but not be limited to, curtain drains, french drains, tile drains, swales, vegetated wetlands, or some combination of these devices and methods. To ensure the stability of the site, multiple small drainage systems are preferred over a single drainage system. The drainage system shall be designed such that water will not flow over the coastal blufftop edge to the beach below or over the arroyo blufftop edge to the arroyo below. The drainage system shall not contribute to coastal bluff or arroyo bluff erosion. The drainage system shall be visually unobtrusive, including through use of plantings (see landscaping plan requirement below) so as to protect views of the site from the Hidden Beach County Park overlook. This onsite drainage system shall be maintained for the life of the project

(d) Landscaping Plan. For the areas of Lot 1 that are located outside of the open space conservation area (as shown in Exhibit 11) the landscaping plan shall provide for the following:

- Identification of all plantings and irrigation details for the site.
- No plant species that are listed on the *California Invasive Plant Council's* list.

For the areas that are located within the open space conservation area (as shown in Exhibit 11) the landscaping plan shall provide for the following:

- Maintenance of the existing natural vegetated state, except that California coastal strand native plant species that do not exceed four feet in height (so that at maturity the plants do not block the view toward the ocean from the Hidden Beach County Park path and overlook area) may be planted if desired to enhance habitat. If the plan includes the planting of native plant species, the plan shall include drip or other low-water use irrigation details that may be used until the plants are established.
- Removal of any invasive non-native plant species (as defined in the *California Invasive Plant Council's List*) that are present on the site.
- No tree removal (including dead trees), unless they are demonstrated to be posing a safety hazard.

All requirements above and all requirements of the approved revised plans shall be enforceable components of this coastal development permit. The Permittee shall undertake development in accordance with the approved revised plans,

2. Combination of Lots

(a) BY ACCEPTANCE OF THIS PERMIT, the Permittee agrees, on behalf of himself and all successors and assigns with respect to the subject property, that: (1) All portions of the 3 parcels

shall be recombined and unified, and shall henceforth be considered and treated as a single parcel of land for all purposes, including but not limited to sale, conveyance, lease, development, taxation or encumbrance; and (2) the single parcel created thereby shall not be divided, and none of the parcels existing at the time of this permit approval shall be alienated from each other or from any portion of the combined and unified parcel hereby created.

(b) PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall execute and record a deed restriction against each parcel described above, in a form acceptable to the Executive Director, reflecting the restrictions set forth above. Each restriction shall include a legal description and graphic depiction of the 3 parcels being recombined and unified. The deed restrictions shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens, including tax liens, that the Executive Director determines may affect the enforceability of the restriction.

(c) PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, but after the deed restrictions described in the prior paragraph are recorded, the Permittee shall provide evidence to the Executive Director that the permittee has provided a copy of the recorded deed restrictions to the Santa Cruz County Assessor's office and requested that the Assessor's office (1) revise its records and maps to reflect the combination of the parcels, including assigning a new, single APN for the unified parcel, and (2) send the Commission notice when it has done so, indicating the new, single APN.

3. **Open Space Conservation Area.** Development, as defined in Santa Cruz County LCP Section 13.20.040, shall be prohibited (except as described below) within the 116-foot coastal bluff setback, within the 25-foot arroyo bluff setback, and within the Hidden Beach County Park ocean and beach overlook view cone, which areas together make up an "Open Space Conservation Area" based on geologic hazard and public viewshed constraints (see Exhibit 11 for a graphic depiction of the Open Space Conservation Area). The Open Space Conservation Area shall be described and depicted in an exhibit attached to the Notice of Intent to Issue Permit (NOI) that the Executive Director issues for this permit. The only development allowed in this area is for drainage improvements and landscaping consistent with the terms of the approved revised plans and normal/typical public access maintenance activities associated with the beach area (see Special Condition 1).

   PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOI FOR THIS PERMIT, the Permittee shall submit for review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the portion of the subject property affected by this condition, which shall include all of the area as shown in Exhibit 11.

4. **Construction Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit for Executive Director review and approval two copies of a Construction Best Management Practices Plan (Construction Plan) to ensure sediment control and protection of the water quality of nearby coastal waters during construction. The Construction Plan shall identify the

types and locations of the measures that will be implemented during construction to prevent erosion, sedimentation, and the discharge of pollutants during construction, and to limit construction activities outside of the residential development footprint as much as possible. These measures shall be selected and designed in accordance with the California Storm Water Best Management Practices Handbook. Among these measures, the plans shall:

- Limit the extent of land disturbance to the minimum amount necessary to construct the project.
- Designate areas for the staging of construction equipment and materials, including receptacles and temporary stockpiles of graded materials, which shall be covered on a daily basis.
- Provide for the installation of silt fences, temporary detention basins, and/or other controls prior to commencement of construction to intercept, filter, and remove sediments and other pollutants contained in the runoff from construction, staging, and storage/stockpile areas.
- Contain any runoff and/or construction debris on the blufftop and prevent such runoff or debris from extending over the blufftop edge onto the arroyo, the beach, or the Pacific Ocean.
- Incorporate good construction housekeeping measures, including the use of dry cleanup measures whenever possible; collecting and filtering cleanup water when dry cleanup methods are not feasible; cleaning and refueling construction equipment at designated offsite maintenance areas; and the immediate clean-up of any leaks or spills.

The Construction Plan shall also provide that all construction work shall take place during daylight hours, and that construction (including but not limited to construction activities, and materials and/or equipment storage) is prohibited outside of the defined construction, staging, and storage areas.

All requirements above and all requirements of the approved Construction Plan shall be enforceable components of this coastal development permit. The Permittee shall undertake development in accordance with the approved Construction Plan.

5. Construction Site Documents & Construction Coordinator. DURING ALL CONSTRUCTION:

(a) Construction Site Documents. Copies of the signed coastal development permit and the approved Construction Plan shall be maintained in a conspicuous location at the construction job site at all times, and such copies shall be available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the coastal development permit and the approved Construction Plan, and the public review requirements applicable to them, prior to commencement of construction.

(b) Construction Coordinator. A construction coordinator shall be designated to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies), and their contact information (i.e., address, phone numbers, etc.) including, at a minimum, a telephone number that will be made available 24 hours a day for the duration of construction, shall be conspicuously posted at the job site where such contact

information is readily visible from public viewing areas, along with the indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The text, dimension, location, and materials associated with such posted information shall be identified on the construction plan (see Special Condition 4). The construction coordinator shall record the name, phone number, and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry.

6. **Assumption of Risk, Waiver of Liability, and Indemnity Agreement.** By acceptance of this permit, the Permittee acknowledges and agrees on behalf of himself and all successors and assigns:

(a) That the site is subject to extreme 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;

(b) To assume the risks to the Permittee and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development;

(c) To unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards;

(d) To indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards; and,

(e) That any adverse effects to property caused by the permitted project shall be fully the responsibility of the Permittee.

(f) That the Permittee shall not construct, now or in the future, any shoreline protective device(s) for the purpose of protecting the residential development approved pursuant to coastal development permit A-3-SCO-09-001 including, but not limited to, the residence, foundations, decks, or driveway, in the event that these structures are threatened with imminent damage or destruction from extreme 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 or other natural hazards in the future and by acceptance of this permit, the Permittee hereby waives any rights to construct such devices that may exist under Public Resources Code Section 30235 or the Santa Cruz County LCP, including LCP Policy 6.2.16.

(g) If the residential development approved pursuant to coastal development permit A-3-SCO-09-001 is threatened by coastal hazards in the future that would typically engender a shoreline armoring response (e.g., when the bluff has retreated to a point such that the residence is unsafe

to occupy), the Permittee shall remove/relocate threatened elements of the development away from such danger. Such removal/relocation shall require a separate CDP authorization.

(h) Any debris, including that related to the approved residential development itself, that falls from the blufftop onto the bluff, the beach, or the arroyo, shall be immediately removed and properly disposed of.

7. Deed Restriction. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AND AFTER THE LOTS HAVE BEEN COMBINED AND RECOGNIZED BY A SINGLE APN PURSUANT TO SPECIAL CONDITION 2, the Permittee shall submit for Executive Director review and approval documentation demonstrating that the Permittee has executed and recorded against the single APN governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the special conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description and site plan of the entire property governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

5. California Environmental Quality Act (CEQA)

The County, acting as the lead CEQA agency, exempted the projects from environmental review pursuant to Section 15303 of CEQA.

With respect to the two denied projects (appeals/CDP applications A-3-SCO-09-002 and A-3-SCO-09-003), 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 appeals/CDP applications A-3-SCO-09-002 and A-3-SCO-09-003. 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 associated with appeals/CDP applications A-3-SCO-09-002 and A-3-SCO-09-003 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 of appeals/CDP applications A-3-SCO-09-002 and A-3-SCO-09-003, 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.

With respect to the approved CDP (appeal/CDP application A-3-SCO-09-001), Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with such approved coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

Again, the Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. The Commission has reviewed the relevant coastal resource issues with appeal/CDP application A-3-SCO-09-001, and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources. All public comments received to date have been addressed in the findings above. All above findings are incorporated herein in their entirety by reference.

The Commission finds that only as modified and conditioned by this permit will CDP A-3-SCO-09-001 avoid significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of this part of the proposed project, as modified, would have on the environment within the meaning of CEQA. If so modified, this part of the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).