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

W16cde

Appeals filed:	1/8/2009
49th day:	waived
Staff report prepared:	6/24/2010
Staff report prepared by:	Susan Craig
Staff report approved by:	Dan Carl
Hearing date:	7/7/2010

APPEAL STAFF REPORT
SUBSTANTIAL ISSUE DETERMINATION & 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 J. Comfort

Local government .....Santa Cruz County

Local decisions.....Approved by the Santa Cruz Zoning Administrator on December 5, 2008 (Santa Cruz County Coastal Development Permits (CDPs) 08-0221, 08-0223, 08-0224).

Project location .....On the bluff above Hidden Beach and adjacent to a coastal arroyo downcoast from Bayview Drive in the unincorporated area of Aptos, Santa Cruz County.

Project descriptions .....**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) on a vacant blufftop property; remove 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) on a vacant blufftop property; remove 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) on a vacant blufftop property; remove 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 ...**Substantial Issue Exists; 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. 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. 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 are three sets of motions and resolutions necessary for each Commission action (see pages 4-6).

2. Summary of Staff Recommendation

In 2008, Santa Cruz County approved the construction of three two-story single-family residences and associated improvements on three contiguous vacant blufftop lots located above Hidden Beach in the unincorporated Aptos-Rio del Mar area of 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 County's CDP actions on the approved projects were appealed to the Coastal Commission. **Staff recommends that the Commission find that the appeals raise a substantial issue and that one of the residences be approved with special conditions and that two of the residences be denied.**

The Santa Cruz County Local Coastal Program (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 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 potential future sea level rise, the coastal bluff retreat rate, and slope stability analysis and determined that the County-approved 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 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 natural hazards policies. However, the proposed developments on Lots 2 and 3 cannot meet the 116-foot setback requirement. Thus, the proposed developments on Lots 2 and 3 would be significantly out of conformance with the LCP's natural hazards policies. Staff is unaware of any modifications that could make residential structures on Lots 2 and 3 consistent with the geological 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 three vacant 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 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 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 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 an arroyo just east 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 and 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 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 for mapped scenic resource areas and views from beaches and parks. Staff recommends that the proposed development on Lots 2 and 3 be denied.

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 or under Section 30010 of the Coastal Act. The first step in this analysis is to define the property interest against which the taking will be measured. In this case, the single "parcel" subject to a potential takings claim consists of all three lots purchased by the Applicant. Thus, the 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 projects on Lots 2 and 3 would be consistent with Coastal Act Section 30100.

To ensure that the properties are always considered as a single economic unit for purposes of determining whether a taking has occurred, as well as to ensure that these three parcels are never placed into divided ownership with a future owner separately owning the undeveloped parcels, staff recommends that the Commission attach a special condition requiring that the three parcels be combined and treated as a single parcel of land for all purposes and that these parcels never be 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 view corridor on the property; 3) appropriate landscaping to ensure that the viewshed is not adversely impacted; 4) that drainage components are kept out of the arroyo; 5) a prohibition on the construction of any future shoreline protective devices to protect the approved residence over its lifetime; 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 that binds the Applicant and all successors in interest to the terms and conditions of this permit.

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 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 Substantial Issue

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeals were filed. A finding of substantial issue would bring the projects under the jurisdiction of the Commission for hearing and action. The Commission needs to make three motions to act on this recommendation.

Motion #1. I move that the Commission determine that Appeal Number A-3-SCO-09-001 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act. I recommend a no vote.

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

Resolution to Find Substantial Issue. The Commission hereby finds that Appeal Number A-3-SCO-09-001 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.

Motion #2. I move that the Commission determine that Appeal Number A-3-SCO-09-002 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act. I recommend a no vote.

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

Resolution to Find Substantial Issue. The Commission hereby finds that Appeal Number A-3-SCO-09-002 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.

Motion #3. I move that the Commission determine that Appeal Number A-3-SCO-09-003 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act. I recommend a no vote.

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

Resolution to Find Substantial Issue. The Commission hereby finds that Appeal Number A-3-SCO-09-003 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.

4. 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 subject to the standard and special conditions below.

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.

Staff recommends that the Commission, after public hearing, **deny** CDP applications A-3-SCO-09-002 and A-3-SCO-09-003 for the proposed developments.

Motion #2. I move that the Commission approve Coastal Development Permit Number A-3-SCO-09-002 for the development as 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 the coastal development permit on the grounds that the development will not conform to the policies of the Santa Cruz County certified Local Coastal Program. Approval of the coastal development permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

Motion #3. I move that the Commission approve Coastal Development Permit Number A-3-SCO-09-003 for the development as 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 the coastal development permit on the grounds that the development will not conform to the policies of the Santa Cruz County LCP. Approval of the coastal development permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

Report Contents

Click on the links above to go to the exhibits.

B.Findings and Declarations

The Commission finds and declares as follows:

1. Project Location

The project sites are located on a vacant blufftop located just downcoast from the end of Bayview Drive in the unincorporated Aptos-Rio del Mar area of Santa Cruz County. The blufftop area overlooks Hidden Beach and extends down into a coastal arroyo. Just downcoast of the arroyo lays Hidden Beach County Park[1] including its blufftop coastal overlook and its heavily-used public access path that connects to the sand at Hidden Beach proper. A second publicly-used path extends along the bluff on the upcoast side of the arroyo from Hidden Beach to Hidden Beach Way. The bluff, beach, arroyo, and park area are located between the Beach Drive (beach level) and Bayview Drive (blufftop level) residential areas 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.[2] See Exhibit 1 for location maps and Exhibits 2 and 12 for site area photos.

Although the blufftop area where the three residences are proposed is undeveloped, there is substantial residential development located upcoast and downcoast 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. As a result, the elevation at the proposed project sites ranges from about 50 to 90 feet above sea level. In addition, although there is no residential 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 significant development.

The beach area 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 landowner.[3] Per the settlement agreement, the owner was permitted to construct a "bunker house" at the downcoast end of Beach Drive, provided that the owner offered to dedicate fee title to the Hidden Beach property and arroyo property to the State or other public entity to be maintained as open space for public recreational use. As a result of that settlement, this entire area 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

[1] 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.

[2] This represents an anomaly within the Central Coast, where such beach level development is uncommon.

[3] Mark de Mattei.

property. See Exhibit 8 for a copy of the settlement agreement/offer to dedicate.

The project area consists of three[4] 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. The coastal bluff is located on the south side of Lot 2. Lot 3 is about 13,601 square feet. Lot 3 is the lot that is located farthest from Bayview Drive. Lot 3 is at the lowest elevation of the three lots (50 to 60 feet above sea level), with the coastal bluff and coastal 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 R-UL and O-U (Urban Open Space) and is zoned R-1-6 and PR (Parks, Recreation, and Open Space).[5] See page 1 of Exhibit 10 for the land use designation map and lot configuration.

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:[6]

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 constitutes a private right-of-way that would provide access to Lots 2 and 3). Remove three trees with the following diameters: 40" (dead), 33", and 14".

Lot 2: Construct a three-bedroom, two-story single-family residence of about 3,721 square feet on a 7,354 square-foot lot. Remove three trees with the following diameters: 51", 40" (dead), and 27".

Lot 3: Construct a four-bedroom, two-story single-family residence of about 5,547 square feet on a

---

4 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.

5 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) applied to a "trail" lot. Although the lot lines were adjusted in 2008, the underlying LCP designation and zoning were not changed.

6 Santa Cruz County approved three separate CDPs and thus there are three separate appeals. 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. Each of the three proposed residences shares similar issues and the applications are best understood if evaluated jointly. As a result, these CDPs/Appeal matters are combined in this report.

13,601 square-foot lot (of which 1,404 square feet is a private right-of-way that would provide access to this lot only). Remove two trees with the following diameters: 44" (dead) and 10".

Associated improvements common to all three lots include a shared access driveway (within the private right-of-way of Lot 1) 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. 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.

3. Santa Cruz County CDP Approval

On December 5, 2008, the Santa Cruz County Zoning Administrator approved CDPs 08-0221, 08-0223, and 08-0224. Each approval allowed for the development of a two-story single-family residence on a vacant lot (see Exhibits 3A, 3B, and 3C for the County's adopted conditions and findings on these projects; see Exhibits 4A, 4B, and 4C for the County-approved project plans). Notices of the County's actions on the CDPs were received in the Coastal Commission's Central Coast District Office on December 23, 2008. The Coastal Commission's ten-working day appeal period for these actions began on December 24, 2008 and concluded at 5 p.m. on January 8, 2009. Two valid appeals (see below) of each County action were received during the appeal period.

4. Appeal Procedures

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. In these case, these projects are appealable because they involve development that is located seaward of the first public road, within 300 feet of the inland extent of the beach, and within 300 feet of the blufftop edge. In addition, for that portion of the proposed development located on the O-U (PR) portion of the property, residential development is not the principally permitted use and thus it is appealable for this reason as well.

The grounds for appeal under Section 30603 are limited to allegations that the development does not conform to the certified LCP or to the public access policies of the Coastal Act. Section 30625(b) of the Coastal Act requires the Commission to conduct a de novo CDP hearing on an appealed project unless a

majority of the Commission finds that "no substantial issue" is raised by such allegations. Under Section 30604(b), if the Commission conducts a de novo hearing and ultimately approves a CDP for a project, the Commission must find that the proposed development is in conformity with the certified LCP. If a CDP is approved for a project that is located between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone, Section 30604(c) also requires an additional specific finding that the development is in conformity with the public access and recreation policies of Chapter 3 of the Coastal Act. These projects are located between the nearest public road and the sea, and thus this additional finding would need to be made if the Commission approves the project(s) following a de novo hearing.

The only persons qualified to testify before the Commission on the substantial issue question is the Applicant, persons who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing. Any person may testify during the de novo CDP determination stage of an appeal.

5. Summary of Appeal Contentions

The Appellants contend that the County-approved projects raise issues with respect to the projects' conformance with core LCP policies related to geological hazards and appropriate blufftop setbacks, public viewshed impacts, public access, and drainage. Specifically, the Appellants contend that the projects approved by the County would significantly impact the public viewshed by introducing new two-story development in a scenic resource area where there is limited existing blufftop development. The Appellants also contend that the bluff in this area is unstable and highly erosive and that the County-approved blufftop setbacks may not be adequate to address LCP long term stability issues, and that the proposed drainage plan may increase erosion that will impact an existing public access trail. One of the Appellants also contends that the proposed project on Lot 1 will exclude the use of an historic public access trail. Please see Exhibit 5 for the complete appeal documents.

6. Substantial Issue Determination

A. Visual Resources

The LCP requires protection of public viewsheds, community and general character, and aesthetics within the County's coastal zone (including LCP Policies 5.10.1, 5.10.2, 5.10.3, 5.10.7 - see pages 2-3 of Exhibit 9 for relevant policies and Implementation Plan (IP) standards). Such policies and protections specifically protect this viewshed as a matter of "regional public importance" because of its natural beauty. The Appellants contend that the proposed project would adversely impact this significant public viewshed, inconsistent with the LCP.

The three lots proposed for development are located within an LCP-mapped and designated scenic resource area. These lots are located within the viewshed of the beach to the south and the beach access path from Hidden Beach County Park to the east, including the park's main beach and ocean overlook area. Views to and from beaches and parks (including the public access path from Hidden Beach County

Park) and significant public viewshed areas, such as this area, are protected visual resources under the LCP.

The proposed project sites are located on a section of undeveloped coastal bluff that forms a peninsula. This peninsula slopes down from the higher coastal bluff (110 to 130 feet above sea level) located just upcoast and terminates in an arroyo just east of the project site. The elevation of the lots ranges from 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. In addition, the existing residential development directly upcoast of the project site is single story and less intense than the residential development located farther upcoast and downcoast of the project site. Finally, the way in which the site is located on a sloping peninsula in the foreground of the significant ocean and beach view from the park's coastal overlook is particularly problematic (see photos of this view on page 5 of Exhibit 2 and on pages 9-10 of Exhibit 12). Given the low elevation of the bluff here and the project location directly adjacent to Hidden Beach County Park and the associated park path and overlook (especially with respect to Lot 3), development of three two-story houses ranging in size from 3,207 square feet to 5,547 square feet will be extremely visible from the beach, the overlook, and from the public access path. The proposed residence on Lot 3 would especially stand out against the natural backdrop and be highly visible in the public viewshed. This is because Lot 3 is located on the lowest portion of the coastal bluff (50 to 60 feet above sea level), and 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 overlook and pathway that leads from Hidden Beach Park to the beach, and would be at an elevation of only 50 to 60 feet above the beach. Lot 2 would have similar issues, and both would partially block views of the coast and ocean as seen from the overlook and the path.

Given the topography of the project sites and the size and scale of the proposed residential developments, the proposed projects will have a detrimental impact on the natural setting and the public viewshed as seen from the beach and the park, including the overlook and the public access trail. 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). As such, the County-approved projects are inconsistent with the LCP's visual resource policies and substantial LCP conformance issues are raised by the County's CDP actions.

B. Geological Hazards and Drainage

The LCP requires that development be sited to ensure long-term stability, including at a minimum providing a stable building site over a minimum 100-year period (as required by LUP Chapter 6 and Implementation Plan (IP) Chapter 16.10 – see pages 3-6 of Exhibit 9). Per the LCP, new development must also avoid the need for shoreline armoring with its attendant impacts. The Appellants contend that

the proposed projects would be located on an actively eroding bluff and that the County-approved projects would not be sited for 100 years of minimum of stability, inconsistent with the LCP.

It appears that the County-approved projects do not meet the required LCP stability tests, and it appears that shoreline armoring would be required to protect such development in the future. Although the Applicant's geological representatives have established blufftop setbacks[7] for the residences that are in the range of about 28-32 feet, the Commission's staff geologist has analyzed the proposed project setbacks in terms of future potential applicable coastal hazards (including sea level rise, the coastal bluff retreat rate, and slope stability analysis) and determined that the County-approved blufftop setbacks are much too narrow and that these setbacks would need to be greatly increased to 116 feet in order to meet the LCP's minimum 100-year stability requirements (see Exhibit 6 for the Commission's staff geologist's memorandum regarding the proposed projects).

The Appellants also assert that the projects' drainage plan, which consists of shared drainage improvements with a drainage line to be bored through the coastal bluff that will outlet onto the sand in the downcoast arroyo, may induce erosion and that this erosion may damage an existing public access trail that traverses the upcoast side of the arroyo along the bluff to Hidden Beach Way (see page 12 of Exhibit 2 for a photo of this trail). The County's approval (and the Applicant's geotechnical investigation) did not evaluate the potential impacts of the proposed drainage improvements. It is possible that drainage could exacerbate erosion as alleged, but the full potential impact in this respect is somewhat speculative given the lack of analysis to date. Perhaps more importantly, 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 (see page 5 of Exhibit 8). The proposed development would not minimize hazards, would not avoid landform alteration, would not provide 100 years of stability, would not avoid the need for shoreline armoring, and would not adequately address coastal hazards, inconsistent with the LCP's natural hazards requirements. For all of the reasons listed above, substantial LCP conformance issues are raised by the County's CDP actions.

C. Public Access

One Appellant contends that the proposed project will exclude the use of an historic public access trail that is located on Lot 1. Specifically, prior to the 2008 lot line adjustment, a lot described as a "trail lot" extended across a portion of the blufftop of Lot 1, starting at the top of the coastal arroyo bluff and connecting to the end of Bayview Drive (see page 1 of Exhibit 10 for the location of the trail lot prior to the lot line adjustment). The Appellant contends that this trail was historically used to provide public access from the beach/arroyo[8] to the top of the bluff. The Appellant also notes that while evidence of this trail still exists on the property, deviations in the historical trail location would need to be made if the trail were to be restored, due to sloughing of the bluff and heavy growths of poison oak that have

[7] The LCP requires a 100-year development setback from the blufftop edge or a minimum setback of 25 feet, whichever is greater.

[8] The portion of the trail that extended up the arroyo's bluff face was not located on the Applicant's property.

covered the trail through the years. Although the fact that a portion of the property was once referred to as a "trial lot" raises some questions, aside from some anecdotal evidence (i.e., the Appellant's contention), it is not clear whether and to what degree public access was or is provided across the property. Given that Bayview Drive loops back inland at the bluff, it seems reasonable to presume that, in the past, some beachgoers would attempt beach access by scrambling across the property and down the bluff. However, it does not appear that access users currently gain access in this way. In fact, the lot appears vegetated with little evidence of recent access. In addition, there are two existing well-used and well-maintained trails (one on each side of the arroyo – see pages 1 and 12 of Exhibit 2) that provide access to and from the beach, including to and from the existing residential neighborhood and Hidden Beach County Park. In addition, given the erosive and steep nature of the bluff face, redevelopment and maintenance of the "trail lot" into a usable trail may not be practical or desirable. Furthermore, access across the "trail lot" would be almost exclusively for neighborhood access, and its utility for the broader public would be somewhat limited. In short, public access at this location is adequately provided by the two existing public vertical access trails. Thus, this aspect of the appeal does not raise a substantial issue with respect to the County-approved projects' conformance with the public access policies of the Santa Cruz County LCP.

D. CEQA Contentions

One Appellant contends that the County may have inappropriately granted a CEQA Categorical Exemption for the projects. However, the only appropriate grounds for appeal are in terms of consistency with the certified LCP and the Coastal Act's public access polices. Thus, any CEQA contentions are not appropriate grounds for appeal.

E. Substantial Issue Determination Conclusion

In conclusion, the County-approved projects raise substantial issues with respect to their conformance with applicable LCP provisions related to protection and enhancement of visual resources and geological hazards and drainage. Therefore, the Commission finds that a substantial issue exists with respect to the approved projects' conformance with the certified Santa Cruz County LCP, and takes jurisdiction over the CDP applications for the proposed projects.

7. Coastal Development Permit Determination

The standards of review for these applications are the Santa Cruz County certified LCP and the public access and recreation policies of the Coastal Act (see Exhibit 9 for applicable Coastal Act and LCP policies). All Substantial Issue Determination findings above are incorporated herein by reference.

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 100 years. The 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" (IP 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 100-year stability requirement: first, there must be a portion of the site in question that itself will be stable for 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 into the site must also be stable for 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 development. See pages 3-6 of Exhibit 9 for the applicable LUP policies and IP standards.

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).

The Applicant has also submitted the following documents in response to the Commission's staff geologist's initial verbal comments 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).

The Commission's staff geologist (Dr. Mark Johnsson) reviewed the all the above documents and

reports and issued a Geotechnical Review Memorandum on June 18, 2009 (Exhibit 6). Subsequent to this memorandum, the Applicant submitted the following additional correspondence regarding the projects:

- *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[9] 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 steep 45-50 degree slope. The southwest edge of the terrace faces the sea and plunges near vertically toward the beach for about 6 to 8 feet before 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 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[10] 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. No erosional landforms such as gullies, aside from the arroyo, 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. The groundwater 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

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 100 years. In both cases, the 100 years of stability must be established without reliance on engineering measures, and the safety of the development must be established

[9] Defined by www.Answers.com as "produced by the action of a river or stream."

[10] Defined by www.Answers.com as "a loose deposit of rock debris accumulated through the action of rain-wash or gravity on or at the base of a slope."

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 coastal bluff edge range between about 120 feet for lot 1, and about 28 to 32 feet for lots 2 and 3. Dr. Johnsson has determined that the 25-foot setbacks on the arroyo side of the project site are adequate for all three project sites. He has concurred with the County-approved coastal bluff setback for lot 1; however, he has also determined that the County-approved setbacks on the coastal bluff side are inadequate for lots 2 and 3 and that if these lots were developed, the residences would be endangered by coastal erosion and bluff retreat well in advance of the LCP's 100-year minimum 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 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 residences (such as the proposed development) while "critical facilities" should assume a more conservative (i.e. 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 (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. The memorandum also notes that the Commission has recently been recommending that analysis for the effects of sea level rise with respect to proposed development 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). 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, and episodic landsliding processes associated with intense rainfall and seismic shaking. 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. This 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.[11]

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 bluff at this site plunges near vertically toward

[11] 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.

the beach for about 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. Thus, the bluff at this location is not vertical, but rather exhibits retreat 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 100-year lifetime of the structure. 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 result in increased instability of the upper bluff. This increased instability may result in future bluff failures which will cause the bluff to retreat far faster than the 1 to 2 feet per year long-term average cited by the 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, 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.

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 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.[12] Barring additional analysis for this site, this condition can be 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 released a report that evaluated the long-term 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.[13] These numbers are consistent with those previously reported by other experts in the field[14] and are consistent with those used by the Applicant's geologist (Zinn 2009 – see pages 43-51 of Exhibit 7). 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 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 100-year coastal blufftop setback for the project sites would be 116 feet. This is based on using the long-term average annual erosion rate of 0.98 feet per year from the USGS study.[15] This rate of erosion would equal 98 feet of coastal bluff erosion over 100 years. Additionally, the slope stability analysis concluded that a static factor of safety

---

[12] For appeals A-3-SCO-08-029 and A-3-SCO-08-042 (Trousdale SFDs).

[13] 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, 51p.

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

[15] The higher value is based on the precautionary principle that dictates using the worst case scenario where uncertainty is present, and taking into account a potential increase in the historic erosion rate due to accelerated sea level rise exacerbating erosional forces (e.g., such as a greater frequency of storm waves hitting the bluff).

of 1.5 is attained about 18 feet landward of the present bluff edge on the directly adjacent upcoast property.[16] Using the method outlined by Dr. Johnsson, these two numbers (98 feet and 18 feet) are added together to create the appropriate 100-year coastal blufftop setback of 116 feet.

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 100-year period.

As discussed above, the LCP requires that a site demonstrate a minimum of 100 years of stability for new development.[17] At the 100-year minimum threshold, the 116-foot setback will render two of the lots (Lots 2 and 3) 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 4A), 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 ensure that development potential that may be perceived as accruing to Lots 2 and 3 is not misunderstood in the future, Special Condition 2 requires that the three lots be merged in perpetuity.

Given that the residential component on Lot 1 meets the LCP's 100-year minimum setback requirement, and is therefore not expected to require the construction of a shoreline protection device or bluff retaining structure(s) during the life of the development (as required by the LCP), Special Condition 6 prohibits future construction of a seawall, shoreline protection device, bluff retaining wall, or similar structures. 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.

As discussed in the "Substantial Issue Determination" section above, 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 and where such development is prohibited). 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.

---

[16] 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.

[17] Although, of course, 100 years is the minimum, and a larger number of years could be used to generate appropriate setbacks, in this case the 100-year setback, or 116 feet, is appropriate for LCP site stability purposes, including because this is the method typically applied by the Commission and because such a setback would move residential development inland sufficiently to address the LCP's long-term stability requirements.

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.

The Commission finds that as modified by these special conditions, including elimination of two of the three proposed residences, the project can be found consistent with the blufftop setback and coastal hazards requirements of the certified Santa Cruz County LCP.

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) 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[18]; Lots 2 and 3 are designated for residential use). See pages 2-3 of Exhibit 9 for the applicable 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 viewshed associated with the public access path and overlook components of Hidden Beach County Park.

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 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 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. 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

[18] Lot 1 contains the former "trail lot" – see the substantial issue public access finding above for discussion of this "trail lot."

and overlook area. In particular, a portion of the beach and ocean view would be 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 and be highly visible from the public viewshed and 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). 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 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 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 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. 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 a substantially reduced-scale development would raise similar concerns at this location, and such substantially-reduced development could not be found consistent with the LCP's coastal hazard requirements. As a result, the 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 is 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. 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 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. 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 merged with Lot 1 in perpetuity. With these conditions, the project can be found consistent with the visual resource protection policies of the certified LCP.

C. Public Access

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. Coastal Act Section 30240(b) also protects parks and recreation areas, such as the adjacent park and beach areas. These overlapping policies protect the park, the beach (and access to and along it) and offshore waters for public access and recreation purposes, including lower-cost access and recreational opportunities. See pages 1-2 of Exhibit 9 for these 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.[19] 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. As a result, the project site is not necessary for direct public access, and development of the project site with one single family dwelling on Lot 1 will not impact existing public access. Thus, the Commission finds that, as conditioned, the project is consistent with the public access and recreation policies of the Coastal Act and the LCP.

D. CDP Determination Conclusion – Denial of A-3-SCO-09-002 and A-3-SCO-09-003

[19] As previously indicated, this beach is the subject of an offer in fee title, along with the arroyo. The Commission has long envisioned the County as the appropriate long-term owner of this land, including so it could be combined and integrated with the County's public park holdings at Hidden Beach. Commission staff has long encouraged county acceptance of the offer. However, to date, the County has not accepted the property.

1. Denial

As discussed in the above findings, two of the proposed residential developments are inconsistent with the policies of the LCP. 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 Coastal Act or LCP. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission denies the 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 unavoidable 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 the Coastal Act, and there are no obvious feasible alternatives consistent with the LCP and the Coastal Act 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.*

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. If the Commission concludes that its action might constitute a taking, then Section 30010 requires the Commission to approve some level of development, even if the development is otherwise inconsistent with Coastal Act policies. In this latter situation, the Commission will propose modifications to the development to minimize its Coastal Act inconsistencies while still allowing some

reasonable amount of development.[20]

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, 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."[21] Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation…has first been paid to, or into court for, the owner."

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

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

[20] 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 LCP (which was the standard of review in that case).

[21] 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).

"extreme circumstances"]).[22]

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 parcel of property against which the taking claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable parcel of property on which development is proposed. The issue is complicated in cases where the landowner owns or controls adjacent or contiguous parcels that are related to the proposed development. In these circumstances, courts will analyze whether the lots are sufficiently related so that they should be aggregated as a single parcel for takings purposes. In determining whether lots should be aggregated, courts have looked to a number of factors, such as unity of ownership, the degree of contiguity, the dates of acquisition and the extent to which the parcel has been treated as a single unit (e.g., *District Intown Properties, Ltd. v. District of Columbia* (D.C.Cir.1999) 198 F.3d 874, 879-880 [nine individual lots treated as single parcel for takings purposes]; *Ciampitti v. United States* (Cl.Ct. 1991) 22 Cl.Ct. 310, 318).

In this case, the Applicant owns three undeveloped contiguous lots, each of which is proposed to be developed with a single-family residence. Applying the above factors, the Commission concludes that the property to be analyzed for takings purpose is a single parcel that is comprised of three lots. First, there is unity of ownership because the Applicant acquired all three lots in 2006 and is still the owner of all of the subject properties.[23] Second, 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).[24] Third, the date of acquisition 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

[22] 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).

[23] The lots were adjusted from four lots to three lots in 2008.

[24] One of the parcels (which includes the former "trail lot") 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.

same time as part of a unified development scheme.

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.) 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 been merged with the other lots[25]) 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.

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 parcels are never placed into divided ownership with a future owner 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 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

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

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, and there is no categorical taking.

Therefore, 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 single lots valueless and does not constitute a categorical taking under *Lucas.*

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. This 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 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.

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. LCP Policies 5.10.6 and 6.2.15 state, respectively:

> ***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.*
>
> ***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.*

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 in relation to the Applicant's 2006 purchase of the subject property.[26]

[26] 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.

Address	Year Sold	Sale Price	Lot Square Footage
Applicant's Lots	**2006**	**$2,660,000**[27]	**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
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 more than $2.4 million, with the most comparable property (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%).[28] 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 geologic and physical hazards, and the preservation of scenic resources and community character. At the same time, the Commission's action involves no physical

[27] 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.

[28] According to the County's 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.

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.

3. Conclusion

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

8. 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 4A, 4B, and 4C), 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 4B and 4C (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 4A) 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 provide for an engineered drainage system to retain 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 public viewshed 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. The deed restriction shall include a legal description and graphic depiction of the 3 parcels being recombined and unified. The deed restriction 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 restriction described in the prior paragraph is recorded, the Permittee shall provide evidence to the Executive Director that the applicant has provided a copy of the recorded deed restriction to the 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 IP 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 (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 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 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 waves, bluff erosion, storm conditions, 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 Santa Cruz County LCP Policy 6.2.16.

7. **Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit for Executive Director review and approval documentation demonstrating that the Permittee has executed and recorded against the lot 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 lot 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.

9. California Environmental Quality Act (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with 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.

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

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 the proposed project, 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 the proposed project 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 the proposed project, as modified, would have on the environment within the meaning of CEQA. If so modified, 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).