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

Th21a

Click here to go
to the staff report addendum.

Appeal filed:	7/6/2010
49th day:	waived
Staff report prepared:	11/17/2011
Staff report prepared by:	Susan Craig
Staff report approved by:	Dan Carl
Hearing date:	12/8/2011

APPEAL STAFF REPORT
SUBSTANTIAL ISSUE DETERMINATION

Appeal number.....**A-3-SCO-10-033, Arthur SFD**

Applicant.....Brian Arthur

Appellants.....Patrick Murphy

Local government.....Santa Cruz County

Local decision.....Approved by the Santa Cruz County Board of Supervisors on June 15, 2010 (Coastal Development Permit (CDP) Application Number 09-0139).

Project location.....South side of Oakhill Road (between 735 and 749 Oakhill Road) on the bluffs above Las Olas Drive in the unincorporated Seacliff/Aptos area of Santa Cruz County (APN 038-151-89).

Project description.....Construct an approximately 2,544 square-foot single-family dwelling (SFD), including other associated development (e.g., retaining wall, grading, etc.).

File documents.....Administrative record for Santa Cruz County CDP Number 09-0139; Santa Cruz County certified Local Coastal Program (LCP).

Staff recommendation ...**No Substantial Issue**

A.Staff Recommendation

1. Summary of Staff Recommendation

On June 15, 2010, Santa Cruz County approved a CDP for construction of a 2,544 square-foot single-family dwelling at the top of a coastal bluff above the Las Olas Drive residential community in the unincorporated Seacliff/Aptos area of Santa Cruz County. The project parcel is one of the few remaining parcels without a residence along Oakhill Road (although a portion of the existing neighboring SFD and its driveway encroach over the parcel line onto this site), and SFDs are located both upcoast and downcoast of the project site along Oakhill. The Appellant (the owner of the immediately adjacent upcoast property and SFD) contends that the County-approved project is inconsistent with the LCP because: (1) the County approved a three-story home and the LCP limits single-family residential development to a maximum of two stories; and (2) the County approved an SFD on a parcel that was not legally created (and thus on which an SFD of this type is not allowed).

The appeal raises some interesting questions with respect to lot legality, as well as the way in which the County's LCP addresses the number of residential stories. On the former, even though it appears from the facts that the County's non-LCP code should probably have been applied such that the subject parcel is actually part of a larger parcel on which is sited the existing neighboring (downcoast) SFD, the subject parcel was a legal parcel at the time CDPs were initially required, and there have been no CDPs issued since to combine it with the adjacent parcel. Thus, for the purposes of this appeal, the subject parcel is legal under the LCP. On the latter, even though the project includes three-story SFD development, the three stories in this case do not result in significant public view impacts. As a result, in both cases, staff recommends that the Commission determine that the appeal contentions do not raise a substantial LCP conformance issue, and that the Commission decline to take jurisdiction over the CDP for this project. The single motion necessary to implement this recommendation is found directly below.

2. Staff Recommendation on Substantial Issue

Staff recommends that the Commission determine that **no substantial issue** exists with respect to the grounds on which appeal A-3-SCO-10-033 was filed. Staff recommends a **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds No Substantial Issue, the Commission will not hear the application de novo and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

> **Motion:** I move that the Commission determine that Appeal Number A-3-SCO-10-033 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 yes vote.
>
> **Resolution to Find No Substantial Issue:** The Commission finds that Appeal Number A-3-SCO-10-033 does not present 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 Plan and/or the public access and recreation policies of the Coastal Act.

Report Contents

Click on the links below to go to the exhibits.

C. Exhibits

Exhibit 1: Location Map and Photograph of Project Site
Exhibit 2: Appeal Contentions
Exhibit 3: Correspondence:
Exhibit 3A: Applicant's Correspondence
Exhibit 3B: Appellant's Correspondence
Exhibit 3C: Other Correspondence
Exhibit 4: Applicable LCP Policies and Standards and County's (non-LCP) Combination Ordinance
Exhibit 5: County's Trial Brief
Exhibit 6: Superior Court Decision
Exhibit 7: County's Final Local Action Notice, including County-Approved Project Plans

B. Findings and Declarations

The Commission finds and declares as follows:

1. Project Setting and Description

The proposed project site (APN 038-151-89; "Parcel 89") is located at the top of a coastal bluff above the Las Olas residential neighborhood (that is located at the base of the bluffs) on the ocean/south side of Oakhill Road, about 380 feet west of the intersection of Seacliff Drive in the unincorporated Seacliff/Aptos area of Santa Cruz County. Parcel 89 is located on a knoll of sorts extending from the lower elevation of Oakhill Road to a higher elevation seaward of the road and then sloping down the coastal bluff from the top of the knoll, ultimately to Las Olas Drive and the series of residences located there. Three retaining walls that are about four feet in height are located on the site, one of which extends under the neighboring SFD on the adjacent downcoast parcel (APN 038-151-90; "Parcel 90") at the point where that structure encroaches across the parcel line onto Parcel 89.[1] The driveway that serves the adjacent SFD on Parcel 90 also extends onto Parcel 89. The project site is one of the few remaining parcels along Oakhill Road without an SFD (except for the encroaching SFD development from Parcel 90), with SFD residential development being located upcoast (the Appellant's house) and downcoast of the project site along Oakhill Road. See Exhibit 1 for a location map of the site and for a photograph of the project site and the surrounding area.

Parcel 89 is located in the LCP's R-1-10 (single-family residential – 10,000 square-foot minimum) zoning district. The parcel is substandard because it is about 8,786 square feet in gross size (and is about 5,100 square feet in net site area per the LCP after the deduction of the portion of the site that consists of coastal bluff). The County-approved project would allow construction of a 2,544 square-foot residence, including a 450 square-foot attached garage and an elevator. The approved residence would be located

[1] An approximately 14-foot section of the house on Parcel 90 encroaches by up to 2 feet onto Parcel 89, and the roof eaves of the house on Parcel 90 encroach onto Parcel 89 by approximately 1-foot, for a total of encroachment of about 42 square feet.

33 feet landward of the blufftop edge. The geologic and geotechnical reports prepared for the project indicate that a building envelope sited inland of the 33-foot mark would provide a stable site for 100 years. The County conditioned the project to prohibit any development (such as a deck, patio, spa, or other surfaced areas or structures) within the 100-year/33-foot setback.

The project includes removal of a portion of an existing brick retaining wall and walkways on the site that are associated with SFD development on Parcel 90, including a portion of the wall that extends onto Parcel 89 from Parcel 90.[2] The approved project includes construction of a new 3.5-foot tall retaining wall within the front yard setback (i.e., nearest Oakhill Road, and not on the seaward coastal bluff side of the property) and other associated development (e.g., grading, etc.). A 48-inch diameter redwood tree on the property would be retained.

See Exhibit 7, pages 12-24, for the County-approved project plans.

2. Santa Cruz County CDP Approval

On September 17, 2007 the Applicant applied to Santa Cruz County for a CDP to construct a 3,083 square-foot single-family dwelling (County CDP application number 07-0548). That application included a request for an exception to the LCP standard prohibiting most grading within the LCP-required 100-year setback area to allow 43 cubic yards of grading within this area. Ultimately, that CDP application was denied by the County Zoning Administrator on January 16, 2009, primarily due to the proposed grading encroachment within the 100-year setback area (see Exhibit 7 pages 55-82). The design of the proposed SFD was also determined to be incompatible with the homes in the neighborhood with respect to roof forms, building materials, and overall architectural style. LCP Implementation Plan (IP) Section 18.10.135 allows for immediate CDP reapplication following such denial, and the Applicant reapplied to the County for a modified project designed to conform to the County's LCP, including a significant reduction in the amount of grading compared to the original proposal.

On January 15, 2010, the County Zoning Administrator approved a CDP for the revised project (County CDP application number 09-0139 – see Exhibit 7 pages 177-201) to construct a 2,544 square-foot SFD along with related development, including 16 cubic yards of grading within the 33-foot blufftop (estimated 100-year) setback area. Although grading is generally not allowed within the 100-year setback area (as measured inland from the blufftop edge), IP Section 16.10.070(h)2(i) defines grading as any earthwork "...other than minor leveling of the scale typically accomplished by hand, necessary to create beneficial drainage patterns...that does not excavate into the face or base of the bluff." The proposed earthwork was expressly designed to establish positive drainage away from the bluff, and the County conditioned its approval to allow such grading within the 100-year setback area so long as it was performed by hand for this purpose. The Zoning Administrator's approval was appealed to the Planning Commission by Patrick and Laura Murphy (again, the owners of the neighboring upcoast property – see Exhibit 7 pages 171-176).

[2] The Applicant's structural engineer determined that the adjacent residence on Parcel 90 does not depend upon the presence of this brick retaining wall for any structural support (see page 106 of Exhibit 7).

On March 25, 2010, the Planning Commission upheld the Zoning Administrator's action to approve the project (see Exhibit 7 pages 158-170). The Planning Commission's approval included two revised conditions: one to require detailed landscaping plans for drought-tolerant plants to be planted along the bluff portions of the site, and a second to require an engineered drainage plan. The Planning Commission's approval of the project was then appealed to the Board of Supervisors, again by Patrick and Laura Murphy (see Exhibit 7 pages 46-54). Prior to the Board of Supervisors' hearing on the appeal, and in response to the Murphy's appeal, the Applicant modified the proposed project by removing a basement and deleting a deck chair storage area from the garage. On June 15, 2010 the Board of Supervisors approved the modified project with conditions (see Exhibit 7, and in particular pages 2-36). Notice of the County's action on the CDP for the project was received in the Coastal Commission's Central Coast District Office on June 21, 2010 (see Exhibit 7 page 1). The Commission's ten-working-day appeal period began on June 22, 2010 and concluded at 5 pm on July 6, 2010. One valid appeal was received during the appeal period (see below).

3. 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 a major energy facility is appealable to the Commission. This project is appealable because: (1) it is located between the sea and the first public road, and; (2) it is located within 300 feet of the top of the seaward face of the coastal bluff.

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.[3] Under

[3] The term "substantial issue" is not defined in the Coastal Act or in its implementing regulations. In previous decisions on appeals, the Commission has generally been guided by the following factors in making substantial issue determinations: the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the local government; the significance of the coastal resources affected by the decision; the precedential value of the local government's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance. Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of a local government's CDP decision by filing a petition for a writ of mandate pursuant to the Code of Civil Procedure, Section 1094.5. In this case, for the reasons discussed further below, the Commission exercises its discretion and determines that the development approved by the County does not raise a substantial issue with regard to the Appellant's contentions.

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. This project is located between the nearest public road and the sea, and thus this additional finding would need to be made if the Commission were to approve the project following a de novo hearing.

The only persons qualified to testify before the Commission on the substantial issue question are 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.

4. Summary of Appeal Contentions

The County's CDP approval was appealed by Patrick Murphy, the immediately upcoast neighboring property owner and the same person who also appealed the project locally to the Planning Commission and ultimately to the Board of Supervisors. The Appellant contends that the County-approved project is inconsistent with the LCP because: (1) the County approved a three-story home and the LCP limits single-family residential development to a maximum of two stories; and (2) the County approved an SFD on a parcel that was not legally created (and thus on which an SFD of this type is not allowed). See the Appellant's complete appeal documents in Exhibit 2 and additional correspondence from the Appellant's representative in Exhibit 3B.

5. Substantial Issue Determination

A. Applicable Policies

With respect to the Appellant's contention that the lot approved for residential development is not a legal lot, the Appellant cites County Code Section 14.01.110(a) (Combination of Parcels by Action of Owner). Although this code section is not a part of the certified LCP (see Exhibit 4 pages 2-5), the Commission notes that only one SFD may be constructed per lot pursuant to the LCP at this location. Thus, if the proposed development site is not a separate legal lot, the development cannot be found consistent with the certified LCP.

With respect to the Appellant's contention that the County approved a three-story home but that the LCP limits single-family residential development to two stories, LCP Section 13.10.323(b) limits the maximum number of stories in LCP single-family residential districts, including the R-1-10 zoning district, to two. See page 1 of Exhibit 4 for applicable LCP policies and standards.

B. Substantial Issue Analysis

1. Lot Legality

Background and History

In 2001, the County received a request (see pages 315-316 of Exhibit 7) from the then owner (Oswalt Trustees) of the property made up of current Parcels 89 and 90 to establish the legality of the property as two separate legal parcels (i.e., as now described as Parcels 89 and 90).[4] At that time, these parcels were in common ownership and were described by a single APN (APN 038-151-85). This request required the County to undertake a lot legality determination to evaluate whether the two parcels in question could be presumed to be lawfully created pursuant to Government Code Section 66412.6 and therefore entitled to Unconditional Certificates of Compliance (UCOCs) pursuant to Government Code Section 66499.35 and Santa Cruz County Code (i.e., non-LCP) Sections 14.01.109, 14.01.110, and 14.01.111 (see Exhibit 4).

The chain of title presented to the County showed that APN 038-151-85 comprised three separate deed descriptions, with the two parcels in question described within separate deed instruments since at least 1938/1941. According to the County, a residence was constructed on the property circumscribed by APN 038-151-85 in 1938.[5] In 1952, this property was subdivided into two parcels through conveyance of a portion of the overall property in a deed dated June 23, 1952 and recorded on July 7, 1952 in the official records of Santa Cruz County. In 1963, it appears that a bedroom that straddled the described parcel line (between current Parcels 89 and 90) was added to the residence. In 1981, an application for the addition of an elevator shaft and deck to the residence was made to the County by the then-owners of both parcels (Sherwood and Kathy Grover), with the application materials showing the property as one large lot (i.e. the lot line separating the parcels was not shown) where, had the lot line been depicted on the plans, both the existing SFD at that time and the proposed elevator shaft and deck would have encroached over the lot line. The County issued a building permit for the elevator and deck addition (County building permit number 67984), and the Coastal Commission sent a letter to the owners advising them that a CDP was not needed for the elevator and deck addition development (see page 18 of Exhibit 3B).[6] In 1988, the two APNs for the parcels were combined into one APN, and the property was assessed as a single property for property tax purposes once the APNs were combined.

County Code Section 14.01.109(a) (not a part of the LCP) states the criteria that a parcel needs to meet to qualify for a UCOC (see Exhibit 4 for these criteria). The County evaluated the 2001 request for a lot legality determination based on these criteria. One of the criteria that must be met is that "the parcel in question has not been combined by the owner and is not subject to merger." Thus, the County considered whether the parcels may have been merged or combined. In terms of the merger component, in 1981 County Code Section 13.08.102(b)(5) stated that parcels "shall be deemed merged for purposes of this Chapter [when] [l]ots or parcels on which a dwelling or commercial structure or portion thereof has been built by the owner of such lots or parcels across the common boundary line of those lots or

[4] Again, Parcel 89 is the Applicant's parcel, and Parcel 90 is the adjacent downcoast parcel with the residence and related development that encroaches onto Parcel 89.

[5] Although, according to the Appellant's representative, the Assessor's records show that the house was constructed in 1948.

[6] The County did not have a certified LCP in 1981, so the development was within the Commission's CDP jurisdiction.

parcels, and which has thereafter been taxed as one building site." In terms of the combination component, when the parcels were consolidated from two parcels/APNs to one parcel/APN (in 1988), County Code Section 14.01.110(a)(2) (not part of the LCP) stated that "parcels shall be considered combined when they have been combined into one assessor's parcel number by the Assessor upon the request of the owner" (see pages 343-344 of Exhibit 7). However, this County Code Section also states an exception to this rule; namely that if the owner demonstrates to the Planning Director's satisfaction that "no significant financial, land use or planning benefit resulted from the combination into one assessor's parcel," then the lots will not be considered to have been combined (see pages 349-350 of Exhibit 7).

In a June 12, 2001 letter to the Oswalts' representative, the County Zoning Administrator considered whether certificates of compliance should be issued to recognize that APN 038-141-85 was two legal parcels (see pages 318-320 of Exhibit 7 for this letter). The County found that there were residential improvements on the property that significantly encroached over the property line by over 10 feet[7] and that the owner in 1981 had full knowledge of the encroachment. The County also found that this significant encroachment could not be resolved through a lot line adjustment because a site area variance would be required, given that the one lot (Parcel 89 – the Applicant's lot) was substandard (i.e., it is less than the 10,000 square-foot minimum lot size of the R-1-10 zoning district**)**. The County also found that the owner of the properties in 1988 (Grover) formally requested that the property receive only one tax bill for one combined APN. The County based this conclusion, in part, on the input of the Assessor's office, including from Assessor's office staff who confirmed that "a written request from the owner would have been required at that time" to combine the two APNs into one. Therefore, based on the construction of an encroachment over a parcel line (in 1981), based on the parcels being combined into one APN by action of a previous owner of the property (in 1988), and based on the property being taxed as one building site (since 1988), the County in 2001 found that the two parcels making up APN 038-151-85 had been merged (per Code Section 14.01.109(a)) and combined (per Code Section 14.01.110(a)(2)), and thus did not constitute two separate legal parcels, and did not warrant recordation of either a UCOC or a Conditional Certificate of Compliance (CCOC).

The Oswalts appealed the County Zoning Administrator's denial of the COC (see pages 322-327 of Exhibit 7 for the appeal document). On July 3, 2001, the County (through the County Planning Director's designee, Don Bussey, Principal Planner) denied the appeal and upheld the Zoning Administrator's previous decision that APN 038-151-85 "constitutes only one legal parcel and does not warrant the recording of an Unconditional Certificate of Compliance" (see pages 343-345 of Exhibit 7).

Subsequently, more than a year later on August 27, 2002, the County (through the County Planning Director's then designee, Glenda Hill, also Principal Planner) reversed its previous decision by finding that the parcels had <u>not</u> been merged or combined based on the above-described facts applicable to 1981 and 1988 actions (see pages 349-350 of Exhibit 7). The County based this revised decision on the

[7] According to the plans for the elevator and deck addition in 1981, portions of the residence at that time significantly encroached over the boundary line, including the previously described bedroom. The bedroom was subsequently removed, but there is no record of permits for such demolition.

following factors: (1) the County should have required the combination of the parcels in 1981, when the building permit allowing the encroachment was approved, but "found no evidence of the requirement" to do so; (2) the 1988 combination noted in the Assessor's records was dated on a Saturday, and the County noted that while County staff do work weekends occasionally, the "notation was irregular"; (3) the County found no written record of the request to combine APN numbers on file with Assessor's office; (4) the County indicated that, even if the owners did request the combination of parcels in 1988, the combination ordinance states that parcels shall not be deemed combined if no benefit results from the combination, and that in this case the County's research determined that no financial, land use, or planning benefit would have been derived by combining the parcels in 1988 because no planning or building applications were submitted at that time nor were there property transfers, and; (5) the existing encroachment over the property line was deemed by the County to be minor and inadvertent in nature and could be eliminated through a boundary adjustment (the County did state, however, that it was "necessary" to correct the encroachment either through demolition of the portions of the residence that were encroaching across the property line or through a lot line adjustment).

Nearly a year later, on June 9, 2003, the County issued an internal memorandum (see page 347 of Exhibit 7) to clarify that the word "necessary" in the Planning Director's August 2002 reversal "should not be construed as a condition of the appeal determination, as this is an Unconditional Certificate of Compliance," but rather should be construed as an opinion and suggestion. Unconditional Certificates of Compliance for both lots were then issued on June 10, 2003 (see pages 352-356 of Exhibit 7). The approval of the UCOCs was not challenged within 90 days of the County's decision on the matter (as is required by Government Code Section 66499.37). It is not clear that interested parties would have known to challenge such UCOC issuance, though, because the County is not required to notify the public, including neighboring properties, when a UCOC is issued, and apparently did not in this case. In addition, the Commission was not provided with notice of the County's issuance of the UCOCs in this case either.[8]

In 2004, the owners of both parcels (Tom and Emily Oswalt) applied for permits to "demolish the deck and elevator shaft." The County subsequently approved a CDP for demolition of the deck and elevator shaft on March 4, 2005 (County CDP number 04-0531) and sent a final local action notice to the Commission after its approval (Commission reference number 3-SCO-05-119). The notice included no discussion of parcel legality questions or issues, and there is no evidence that Commission staff was provided with any information regarding lot legality or issuance of the UCOCs at that time. Commission staff reviewed the notice and noted at that time that it appeared that the proposed demolition development was likely being done to facilitate development of the adjacent parcel (i.e., Parcel 89), for which it was not clear whether or not Parcel 89 had been legally created. Commission staff's note to the local action notice file indicated that the demolition development approved by the County did not raise significant coastal resource issues by itself, and that any issues associated with potential parcel legality would come to the fore if and when development were proposed on Parcel 89, and could be addressed then. The County's CDP action for the demolition development was not appealed.

[8] The Santa Cruz County LCP does not require that notice of UCOC's be sent to Commission staff.

Prior to the County's action on the demolition CDP, in April 2005, Amy Love and Marile Robinson purchased the parcel with the residence (Parcel 90) from the Oswalt Trust for $1,436,000. Also in April 2005 a Grant of Easement and Easement Agreement (Agreement) was made between the Oswalt Trust and Love/Robinson. The Agreement describes that an approximately 15-20-foot section of the house located on Parcel 90 encroaches by a few inches onto the adjacent parcel (Parcel 89), and that the roof eaves of the house on Parcel 90 encroach onto Parcel 89 by about 2 feet. The Agreement required Love/Robinson to remove the elevator and decking from the house, which was subsequently authorized by the County's demolition CDP approved in March 2005, and which was subsequently accomplished sometime thereafter (pursuant to County CDP 04-0531). Following deck/elevator removal, and because the bedroom that had been constructed across the parcel line in 1963 (and that was still shown as existing in the 1981 plans proposing the addition of the elevator and deck) and that constituted a significant encroachment over the property line had also by this time been removed,[9] the 15-20-foot section of the house mentioned above, as well as the roof eaves, still encroached onto Parcel 89, and they still encroach across the parcel line today. The Agreement also allowed for the Oswalts to use Parcel 90's water line for the irrigation needs of Parcel 89 and allowed Love/Robinson to use the existing driveway through Parcel 89 for ingress and egress purposes for Parcel 90, for no more than one year. The Agreement required the easement for the house encroachment to run with the land and be binding on all successors in title to the parcels.

In May 2007, Brian Arthur (the Applicant for the proposed project that is the subject of this appeal) purchased Parcel 89 from the Oswalt Trust for $750,000. Mr. Arthur was aware that the County had issued a UCOC for the parcel he purchased. Mr. Arthur then undertook the permitting process for a single-family dwelling, described above in the section entitled "Santa Cruz County CDP Approval."

On April 14, 2009, the Appellant and his wife (Patrick and Laura Murphy) filed a lawsuit challenging the legality of the UCOC. The Murphys filed a Writ of Mandate with the Santa Cruz County Superior Court (see pages 295-313 of Exhibit 7) with Santa Cruz County named as the defendant/respondent (see Exhibit 5 for the County's brief in opposition to the writ of mandamus and complaint) and Brian Arthur and Tom Oswalt named as the respondents/real parties in interest. The Murphys sought to compel the respondents to consult with the Coastal Commission per Title 14 of the California Code of Regulations (CCR) Section 13569 about whether a CDP was required to create Parcel 89, and sought to compel the respondents to require a CDP for Parcel 89. The petitioners contended that the County issued COC was actually conditional and thereby subject to the provisions of the Coastal Act, including requiring the issuance of a CDP.

The Superior Court found that the Petition was barred under the statute of limitations for challenging decisions regarding subdivision under the Subdivision Map Act, specifically Government Code Section 66499.37, which requires that a petition be filed within 90 days of the decision (see Exhibit 6). The Court also considered other potentially applicable statutes of limitations and found that "[n]o case law authority was provided to allow a challenge six years, post-determination. No explanation was offered as to why the Petitioners delayed in their due diligence requirement when it was clear to them, in 2005,

[9] Without the benefit of a CDP.

that two lots were present and being sold, separately. The Petition is time barred based upon a failure to comply [with] any of the Statutes of Limitation outlined above" (see page 3 of Exhibit 6). The Court went on to say, however, that even if the case had not been barred by the Statute of Limitations, issuance of UCOCs is not "development" under the Coastal Act, so no CDP was required for their issuance in this case. Thus, the Court denied the petition for a Writ of Mandate and the Court entered a final judgment in favor of the defendants/respondents (Santa Cruz County) and respondents/real parties in interest (Brian Arthur and Tom Oswalt), and ruled against the plaintiffs/petitioners (Patrick and Laura Murphy). The plaintiffs/petitioners have appealed this ruling to the California Appellate Court. The Court did not opine on the appropriateness of a COC versus a UCOC in this case.

Lot Legality Determination

The proposed development is construction of a single-family dwelling on what the Applicant claims is a legal parcel and what the Appellant contends is not a legal parcel. The lot at issue is in an area designated by the LCP Land Use Plan (LUP) as R-UL (Urban Low Density Residential) and is zoned by the LCP Implementation Plan (IP) as R-1-10 (Single-Family Residential, 10,000 square-foot minimum lot size). Under this LCP designation and zoning, only one SFD may be constructed per lot, so if the proposed development site is not a separate legal lot, the development cannot be found consistent with the certified LCP. Thus, in order to determine whether the appeal presents a substantial issue of conformity with the certified LCP, the Commission must determine whether the proposed development would be constructed on a separate, legal lot.

The threshold question for the Commission, when examining lot legality under the Coastal Act and the LCP, is the legal status of the lot at the time it became subject to coastal permitting requirements (in this case, February 1973)[10] and the manner in which subsequent development affecting lot status was or was not countenanced by CDPs since that time. In this case, it appears that the lot at issue was a legal lot in February 1973.[11] Specifically, the two parcels were called out by deed since the late 1930s/early 1940s. Around that time, the original residence was constructed over the parcel line, and subsequently expanded over the parcel line via a bedroom in the 1960s.[12] Although the existing residential structure straddled the property line in 1973, there is no evidence that the parcels had been merged by virtue of these encroachments across the property line or otherwise prior to 1973. Thus, in February 1973, the two parcels were considered two separate legal parcels.

The next question presented here is whether, under Proposition 20, the Coastal Act, and the LCP, the lot was subsequently legally combined. Coastal Act Section 30106 and LCP Section 13.20.040 include

[10] CDPs were first required at this location pursuant to 1972's Proposition 20 (The Coastal Initiative) starting in February 1973, and that CDP requirement was subsequently reaffirmed and continued starting in 1977 throughout the then newly defined coastal zone (including this location) based on 1976's Coastal Act.

[11] The Applicant and the County claim that the lot has been a legal lot since 1952, long before February 1973. In their legal briefs in the case mentioned above, the earliest date the Appellant claims that the lot was combined with the neighboring lot was 1981, so based the information available to Commission as of the date of this report, the lot appears to have been legal at least between 1952 and 1981.

[12] In addition to the driveway that was constructed over the parcel line at some point in the development history of the site. Although it is not clear when the driveway was constructed over the parcel line, the existing driveway that is present today was also shown as existing on the 1981 project plans for the then proposed elevator shaft and deck.

within the definition of development "change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act…, and any other division of land." Lot combinations or mergers change the density or intensity of the use of land, and the Commission has consistently found that lot combinations or mergers are divisions (or re-divisions) of land that require issuance of a CDP to be legally valid under the Coastal Act. Thus, if two or more lots within the coastal zone are combined or merged, the Commission, or the appropriate local government (Santa Cruz County in this case), must issue a CDP for such combination or merger. As applied here, that means that any combination/merger of Parcel 89 with Parcel 90 since February 1973 would have required a CDP. The Commission is not aware of any evidence that an application for a CDP for merger or combination of Parcel 89 with Parcel 90 was ever submitted, processed or issued by the Commission or the County. As a result, because the two parcels were legal parcels at the time when CDP requirements commenced, the two parcels are still legal parcels under the Coastal Act and LCP today.

Thus, while there appear to be significant questions of fact and law related to whether the lot at issue should have been considered to be combined or merged with the neighboring lot under the relevant County code sections, including with respect to the conclusions and then modified conclusions of the County from 2001 to 2003, any such combination or merger is "development" under the Coastal Act and LCP and would require a CDP. Thus, even if the combination/merger took place per the County code, the combination/merger would be considered unpermitted development under the LCP unless and until recognized by a CDP. When considering CDP applications where there is potentially unpermitted development, the Commission considers the applications as if the unpermitted development had never taken place. As a result, the Commission need not reconsider all of the facts and related County code sections considered by the County and the court in relation to whether the lot was effectively combined or merged with the neighboring lot under the relevant County code sections. Whether it was combined at the County level or not pursuant to the County code, no CDP was issued for the combination, so at best a lot combination was unpermitted development. In fact, even if the County had stuck with its original 2001 decision (that lots 89 and 90 did not constitute two separate legal parcels, and did not warrant COCs), the County did not compel combination/merger and there has been no CDP to recognize a combination/merger, as indicated above, and thus the two parcels remain two legal parcels under the Coastal Act and LCP.

The Commission must therefore consider the appeal before it as if the lot combination/merger never took place. For purposes of determining whether the proposed appeal is consistent with the certified LCP, the Commission must therefore consider that the proposed development will take place on a legal lot. As a result, this appeal contention does not raise a substantial issue.

2. Number of Stories

The Appellant also contends that the County-approved residence is inconsistent with the LCP because the County approved a three-story house when the LCP limits single-family residential development in the County to a maximum of two stories (see Exhibits 2 and 4). Although not explicitly called out by the Appellant, contentions regarding number of stories most typically raise issues of consistency with the LCP's policies and standards with respect to protection of community character and visual resources

(see page 1 of Exhibit 4).

The project is located in the Seacliff area of the unincorporated Aptos portion of south Santa Cruz County. The project site is located on a sloping lot at the upcoast edge of the Seacliff area, which then transitions to undeveloped State Park lands atop the blufftop that extend to and include the beach (see page 2 of Exhibit 1 for a photograph of the project site). The surrounding neighborhood is developed with single and multi-story SFDs, both along Oakhill Road and at the base of the bluff below the project site on Las Olas Drive.

LCP IP Section 13.10.323(b) (see page 1 of Exhibit 4) limits single-family residential structures to a maximum of two stories and 28 feet in height in the R-1-10 zoning district. LCP IP Section 13.10.700-S defines a story as:

> *For planning and zoning purposes, that portion of a building included between the upper surface of any floor and the lower surface of the floor or ceiling above. An attic, basement, mezzanine, or under floor does not count as a story.*

Thus, a story per the LCP is any area with a floor and a ceiling, except that attics, basements, and mezzanines are explicitly not considered stories. The LCP IP defines attics, basements, and mezzanines as follows:

> ***Attic.*** *For planning and zoning purposes, an attic is the space between the underside of the roof framing (rafters or beams that directly support the roof sheathing) and the upperside of the ceiling framing. Attics are not considered a story. If any part of an attic is 7 feet 6 inches or higher, then all areas greater than 5 feet 0 inches in height shall count as area for F.A.R. calculations.*
>
> ***Basement.*** *For planning and zoning purposes, a basement is the space below the bottom of the floor framing (joists or girders that directly support the floor sheathing) and the basement floor. To qualify as a basement more than 50% of the basement exterior perimeter wall area must be below grade and no more than 20% of the perimeter exterior wall may exceed 5 feet - 6 inches above the exterior grade. If any part of a basement is 7 feet 6 inches or higher, then all areas greater than 5 feet 0 inches in height shall count as area for F.A.R. calculations. Basements are not considered as a story.*
>
> ***Mezzanine.*** *For planning and zoning purposes, a mezzanine is an intermediate floor between stories that opens into another room so that the floor area of the mezzanine does not exceed 1/3 of the room area onto which it opens. (Adjacent rooms or area which are more than 50% open to a mezzanine are considered part of that space). If the mezzanine is more than 1/3 of the room area that it opens onto then it is a story.*

In addition, the measurement of height is related to the number of stories as it affects mass and bulk considerations. Height is defined by the LCP IP as:

> *The height of a structure is the vertical distance between the existing or finish grade, whichever*

is lower, to the uppermost point of the structure.

Thus, although the definition of stories seems relatively clear, it does not provide detail on how stories should be counted on sloping sites like the one in question in this appeal. Historically, the County's practice (and the Commission's on appeal in recent Santa Cruz County cases)[13] has been to base story count on the number of stories in relation to one another in cross-section view. Specifically, those portions of a house with different stories stacked atop one another (e.g., as seen in a cross section) are counted separately (as first, second, third, etc), but portions of a house with different stories not stacked atop one another (e.g., as is often the case on sloping sites) are not.

For non-sloping sites, this story count methodology is fairly clear and obvious, but for sloping sites it can be confusing because houses that "step" down sloped sites can present as three-story (or more) structures as seen from certain views (e.g., looking towards the slope), but these haven't historically been counted as three stories because there are no sections of the house in cross-section with a story on top of a story on top of a story. The County landscape includes many examples of such stepped single-family residential development that may appear in some views as greater than two stories but that were counted as two stories based on the cross-section methodology (see pages 19-21 of Exhibit 3A for photos provided by the Applicant of stepped residential structures located on sloped properties in Santa Cruz County). Of course, taken to the extreme, such LCP interpretation of stories could lead to development considered to be one-story but that extended in many, many steps (e.g., even 5, 6, 7 steps) up a slope, thus presenting as a much more massive structure.

The alternate LCP interpretation is that the lowest portion of a house constituting a story per the LCP definition is called the first story, the next lowest portion the second story, and so on. Under this alternate interpretation, story counts would be about the same as the first methodology above for most relatively flat sites, but they would increase substantially per the alternate interpretation on sloped sites, like the subject site.

In the case of the County-approved residence, the property slopes gently uphill from Oakhill Road toward the coastal bluff edge. The proposed project includes a garage that is mostly offset from the rest of the SFD's living space. The garage meets the definition of story per the LCP,[14] as do the two different levels of living space. The offset garage is at a lower grade than the two stories of living space that constitute the remainder of the house (see pages 15-17 of Exhibit 7). Using the cross-section methodology described above, the house would be mostly two stories, but a portion of the house would be three stories at the point where there are two living space stories above the rear portion of the garage (see Exhibit 7 pages 15-16); this area accounts for about 1/5 of the proposed house. Using the alternate methodology, the house would be considered a three-story house (because the garage would be the first story, the first floor of living space the second story, and the upper floor of living space the third story). As a result, in either case, the County-approved project is not consistent with the LCP because the LCP

[13] For example, appeals A-3-SCO-08-010 (Vaden SFD) in 2008 and 2009 and A-3-SCO-09-019 (Lloyd SFD) in 2009.

[14] Although partially below grade, the garage does not qualify as a basement per the LCP because it does not meet the 50% and 20% criteria. As a result, the garage is a story per the LCP definition.

limits single-family residential development at this location to 2 stories maximum.

However, despite this inconsistency, the County-approved project would not result in significant public viewshed impacts. Once completed, the portion of the house that will present as three stories will be primarily seen from inland Oakhill Road (the north elevation view), with more limited areas presenting as three stories as seen from a more sidelong view from along Oakhill approaching the site from either direction. Oakhill Road is not a primary visitor destination and thus these views along Oakhill are not significant public views. And, in the context of other development in this view, the impacts would be insignificant.

The significant public view that includes the site is the view from the seaward side of the site along the beach. As seen from the beach below the bluff, the residence would appear to be two stories because the garage is not visible in the south elevation (which is the elevation that will face the beach and Monterey Bay). The side views of the house from the beach would be mostly obscured due to the orientation of the bluffs in relation to house siting, they are more distant in any case, and they would generally make it so the house presented as two stories. Thus, from the more critical and significant public beach view, the house would generally appear as two stories (and would meet the LCP's 28-foot residential height limit in this beachside elevation),[15] and would be seen in context with other blufftop and base of bluff residential development (see photo in Exhibit 1). The impact on the beach view due to the proposed project would not be significant.

In short, the County-approved development is of a size and scale that is consistent with other residential development in the surrounding area, it constitutes infill development in an existing residential area, and it will not obstruct any significant public views. Thus, the fact that the County-approved project does not meet the LCP's 3-story limitation on single-family residential development will not adversely affect coastal resources in this case, and thus this appeal contention does not raise a substantial issue.

C. Substantial Issue Determination Conclusion

The appeal raises questions with respect to lot legality as well as the way the County's LCP addresses the number of single-family residential stories. On the former, although there are some significant questions of fact and law related to whether the lot at issue should have been considered to be combined/merged with the neighboring lot under the relevant non-LCP County codes, for purposes of the Commission's review under the LCP and Coastal Act, the relevant facts are that the subject parcel was a legal parcel at the time the parcel became subject to CDP requirements, and there have been no CDPs issued to combine/merge it with the adjacent parcel. Thus, for the purposes of this appeal the subject parcel is legal under the LCP. On the issue of the number of stories, even though the project includes three-story single-family residential development (under any LCP interpretation), the three

[15] Although height is not an appeal contention, the LCP's residential height limit is one of the LCP's primary tools for limiting the mass and scale of development as necessary to protect coastal zone visual resources and community character. The LCP height limit is typically applied in tandem with other mass/scale tools (e.g., setbacks, lot coverage, floor area ratio, etc.) to achieve mass/scale LCP conformity. In this case, all other applicable residential siting and mass/scale standards (coverage, setbacks, floor area ratio, required onsite parking, etc.) have been met by the proposed project.

stories in this case do not result in significant public view impacts and thus there are no significant coastal resources affected by the decision. Also, the extent and scope of the approved development is fairly limited in-fill residential development, and it will not lead to an adverse precedent for future interpretations of the LCP, rather it is the facts in this case that indicate that public viewshed impacts from the proposed project are not significant. Finally, in this particular case, the appeal does not raise issues of regional or statewide significance. As a result, the appeal contentions do not raise a substantial LCP conformance issue and thus the Commission declines to take jurisdiction over the CDP for this project.

Moving forward, the Commission notes that it would make good planning and public policy sense for the County and the Commission to develop a better working protocol with respect to the County's processing of COCs, including challenges associated with whether such County COCs also require CDPs (per CCR Section 13569 and LCP IP Section 13.20.085). On this point, the Appellant's representative alleges that there is a pattern of COC decision making in the County's coastal zone that raises significant questions about whether CDPs should have been issued in conjunction with issuance of the COCs, and this lack of necessary CDPs could lead to problems and issues associated with future development of these sites.[16] It is in all parties' best interest to ensure that relevant questions are asked and answered as soon as possible for COC cases in relation to LCP and CDP requirements so that lot legality is clear and determinative when development proposals are considered under the LCP. In addition, there have been instances when the Commission should have been notified of County COC actions and when the dispute resolution process under CCR 13569 and LCP Section 13.20.085 should have been triggered. Ideally, the County and Commission should to work together on revised protocols to address these issues, including potentially an LCP amendment, so as to facilitate such coordination in the future.[17]

In addition, with respect to the 2-story limitation, the Commission encourages the County to pursue clarifying LCP language through an LCP amendment to help more clearly define what is allowed, where, when, and why in relation to the number of stories. Such LCP amendment might logically also tie together other aspects of the LCP's mass and bulk standards (including height, FAR, coverage, etc.) that likewise include certain known issues that would benefit from better LCP clarity, including the way these various standards interact in relation to good site planning and design, particularly in sensitive coastal resource areas.

[16] The Appellant's representative has provided information on numerous cases in the County coastal zone that appear to raise valid questions about whether certain COCs are warranted, including in relation to required CDPs.

[17] Commission and County staff are currently collaborating on potential changes to the LCP's coastal zone regulations chapter (LCP Chapter 13.20), including with respect to the parameters and process associated with CDP challenges pursuant to LCP Section 13.20.085.