

## CALIFORNIA COASTAL COMMISSION

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## Combined Staff Report: Two Appeals De Novo Hearing

**Appeal Numbers** .....A-3-PSB-06-002 and A-3-PSB-06-003

**Applicant** .....Mark S. Yandow

**Local government**.....City of Pismo Beach

**Local Decision**.....Local Permit Numbers 05-0146A & 05-0146B Approved with conditions.

**Appellants** .....Tim Page and Commissioners Meg Caldwell and Sara Wan

**Project location**.....188 Seacliff Drive, Pismo Beach (APN 010-505-014).

**Project description** .....Application for after-the-fact approval to install a 30-inch high, 70-foot long wrought iron fence parallel to the coastal bluff at the rear of the site as approved by City Permit 05-0146(A) (A-3-PSB-06-003); and installation of a 42-inch high, 5-foot long chain link fence across an existing vertical access path to Spyglass Park and the beach as approved by City Permit 05-0146(B) (A-3-PSB-06-002).

**File documents**.....City of Pismo Beach certified Local Coastal Program; Coastal Development Permits 05-0146(A) and 05-0146(B); CDP Appeal File Nos. A-3-PSB-06-002 and A-3-PSB-06-003.

**Staff recommendation**...**Denial (A-3-PSB-06-002); Approve w/conditions (A-3-PSB-06-003)**

**Summary:** In the fall of 2004, the owner of 188 Seacliff Drive installed fencing that blocks a trail historically used by the public to gain access to and along the shoreline. Following Commission staff and citizen complaints that this development was undertaken in violation of coastal development permit (CDP) requirements and in conflict with the coastal access and recreation policies of the Coastal Act and City of Pismo Beach certified Local Coastal Program (LCP), the City approved CDPs for the portion of the new fencing located behind the house within the 100-year bluff retreat setback (approximately 45'), and determined that the portions of the new fencing in front of and adjacent to the house but outside the bluff setback did not require a CDP.<sup>1</sup> The locally approved permits for the backyard fencing were appealed to the

<sup>1</sup> Resolution of the Commission staff's disagreement with the City's permit exception for portions of the new fencing outside the bluff setback area that block historic public access is being pursued as a separate enforcement matter.



**California Coastal Commission**  
**June 15, 2006 Meeting in Santa Rosa**

Staff: Mike Watson Approved by:

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Commission, and determined to raise a substantial issue on February 10, 2006. A staff report for the De Novo hearing on the appealed permit applications was prepared for the March 2006 Commission meeting, in response to which the applicant exercised his one right for a postponement pursuant to Section 13073 of the Commission’s Administrative Regulations.

Commission staff recommends that the Commission **deny** CDP application A-3-PSB-06-002, which requests approval for the segment of fencing installed between 182 and 188 Seacliff Drive and within 17 feet of the coastal bluff. This fence prevents public use of the historic coastal accessway, and is inconsistent with Coastal Act access and recreation standards that call for maximum public access and prohibit new development from interfering with or restricting public access to and along the shoreline.

CDP Application A-3-PSB-06-003 requests after-the-fact approval for fencing installed along the bluff edge at the rear of the property. Staff recommends that the Commission **approve a permit with conditions** that require removal of any portion of the blufftop fence that extends into the historic access path within 60 days of the Commission’s action; require the fence to be relocated inland as necessary to comply with LCP bluff setback requirements; and, restrict future development within the historic path to public access improvements.

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## Exhibits

- 1. Vicinity Map
- 2. Parcel Map with Area Parks
- 3. Site and Project Plans
- 4. Revised Site Plan per Special Condition 1
- 5. Commission / City Correspondence



6. Site Photographs
7. Other Correspondence

## 1. Project Procedural History

On December 6, 2005 the Pismo Beach City Council upheld the Planning Commission decision [denied an appeal by Tim Page] on permit application 05-0146A authorizing installation of a 70' long wrought iron fence in the rear yard and overruled the Planning Commission decision [approved appeal by Mark Yandow] on permit application 05-0146B, denying installation of a 5' long chain link fence across the pathway used for public access to the shoreline (i.e., between the adjacent properties at 188 and 182 Seacliff Drive). Tim Page, and Commissioners Meg Caldwell and Sara Wan appealed these decisions to the Coastal Commission. On February 10, 2006 in Chula Vista, the Commission found that the appeals raised a substantial issue regarding project conformance to Coastal Act and LCP policies that require maximum public access and prohibit new development from interfering with the public's right of access to the sea. As a result, the Commission took jurisdiction over the coastal development permit (CDP) applications. A staff report for the De Novo hearing on the appealed permit applications was prepared for the March 2006 Commission meeting, in response to which the applicant exercised his one right for a postponement pursuant to Section 13073 of the Commission's Administrative Regulations.

## 2. Staff Recommendation On De Novo Permits

### A. Motion on A-3-PSB-06-002

The staff recommends that the Commission, after public hearing **deny** a coastal development permit for the proposed development.

***MOTION:*** *I move that the Commission approve Coastal Development Permit Number A-3-PSB-06-002 for the development proposed by the applicant.*

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

**RESOLUTION TO FIND SUBSTANTIAL ISSUE:** The Commission hereby denies a coastal development permit for the proposed development on the ground that the development will not conform with the policies of Chapter 3 of the Coastal Act. Approval of the 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.



## B. Motion on A-3-PSB-06-003

The staff recommends that the Commission, after public hearing **approve** a coastal development permit for the proposed development subject to the standard and special conditions below.

***MOTION:*** *I move that the Commission approve Coastal Development Permit Number A-3-PSB-06-003 pursuant to the staff recommendation.*

**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 THE PERMIT:** The Commission hereby approves the coastal development permit on the ground that the development as conditioned, will be in conformity with the provisions of the San Luis Obispo County certified 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 feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the amended development on the environment.

## 3. Conditions of Approval (A-3-PSB-06-003)

### 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 Project Plans.** WITHIN 30 DAYS OF THE COMMISSION'S ACTION ON THE COASTAL DEVELOPMENT PERMIT, permittee shall submit final plans to the Executive Director for review and approval, which shall illustrate the following:

- a. **Location and Alignment.** The location of the rear yard fencing shall be setback a minimum of 6 feet from the bluff edge and not extend any further upcoast than the alignment of the existing wood fence as shown in Exhibit 4. The final site plan illustrating this alignment shall identify property lines, the existing wood fence in the northwest corner of the site, and the existing residence as reference points.
- b. **Height and Materials.** Fencing shall be a maximum of 30 inches in height and made of wrought iron or similar "see-through" material. Fencing shall be secured with ¾" rebar posts driven into the ground. In order to facilitate relocation of the fencing in response to erosion events and maintain a continuous 6' setback from the bluff edge, concrete or similar materials shall not be used to found the fence or fence posts.

### **2. Public Access.**

- a. No development, as defined in section 30106 of the Coastal Act, shall be allowed in the area used for public access as generally depicted in Exhibit 4, and as described and depicted in the legal description and graphic depiction provided pursuant to SC 2.b, except for development designed to protect and enhance public access to and along the shoreline, including but not limited to pathway improvements, access signing, etc.
- b. WITHIN 30 DAYS OF THE COMMISSION'S ACTION ON THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit for review and approval of the Executive Director, and upon such approval, for attachment as an exhibit to this special condition, a formal legal description and graphic depiction of the portion of the subject property used for public access, as generally described and shown on Exhibit 4 attached to this staff report.

**3. Condition Compliance.** WITHIN 30 DAYS OF THE EXECUTIVE DIRECTOR'S APPROVAL PURSUANT TO SPECIAL CONDITION 1 OF FINAL PROJECT PLANS, or within such time as the Executive Director may grant for good cause, the Applicant shall make any changes to the as-built fencing necessary to comply with said plans as well as with the requirements of Special Condition 2. Failure to comply with this requirement may result in the institution of action to enforce those conditions under the provisions of Chapter 9 of the Coastal Act.



- 4. Rear Yard Fence Maintenance.** The Applicant shall be responsible for maintaining the rear yard fence installed under this permit, as follows:
- a. In the event of erosion, it will be the Applicant's responsibility to relocate the approved fencing adequately to maintain a minimum 6' setback from the bluff top edge.
- 5. Public Rights.** By acceptance of this permit, the applicant acknowledges that issuance of the permit shall not constitute a waiver of any public rights which may exist on the property. The applicant shall also acknowledge that issuance of the permit and construction of the permitted development shall not be used or construed to interfere with any public prescriptive or public trust rights that may exist on the property.
- 6. Revisions and Amendments.** The Permittee shall undertake development in accordance with the approved final plans identified in Special Condition 1. Any proposed changes to the approved final plans (including any changes in fence design, public access availability, or materials) shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that the change is immaterial or that no amendment is necessary.
- 7. Deed Restriction.** WITHIN 90 DAYS OF THE COMMISSION'S ACTION ON THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded 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 (hereinafter referred to as the "Standard and Special Conditions"); and (2) imposing all Standard and 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 of the applicant's entire parcel or parcels. 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.
- 8. Permit Expiration and Condition Compliance.** Because some of the proposed development has already commenced, this coastal development permit shall be deemed issued upon the Commission's approval and will not expire. Failure to comply with the special conditions of this permit may result in the institution of an action to enforce those conditions under the provisions of Chapter 9 of the Coastal Act.



## 4. De Novo Permit Findings and Declarations

### A. Project Location

The project is located at 188 Seacliff Drive in the St. Andrews Planning area of Pismo Beach. The planning district is located northwest of the Shell Beach neighborhood planning area and directly adjacent to [southeast] of the Spyglass Planning area and Spyglass Park. Development in this neighborhood is comprised of single-family residences on lots ranging between 6,000 square feet and roughly 12,000 square feet.

The site of the proposed development is located in the southwest corner of the planning area on a roughly 10,000 square foot blufftop lot (please see Exhibit 3) that is improved with a single-family home of approximately 4,820 square feet. The property is oriented in a northeast – southwest alignment and backs up to the coastal bluffs above the shoreline and Spyglass Park. Along the northern property line there is an informal path, approximately 10' in width that has been used by the public to gain lateral and vertical access to the shore. The pathway has been in use since prior to construction of the residence in 1978 and continuing until mid-2004 when the homeowner erected a fence in the front of the house blocking use of the path. The existing homeowner purchased the property in June 1996.

The St. Andrews planning area geology is comprised of unconsolidated marine terrace deposits overlaid on top of more consolidated bedrock materials such as Monterey Shale and Obispo Tuff. The bluff face in the vicinity of the project is rather steep, rising nearly vertically to 50'+ above sea level. There is no improved trail to the cove beach or surf area below, which are accessed by the public using informal trails that traverse the bluff face. See Exhibit 6 for aerial photos of the site. The access path along the property's northwest boundary provides a vital pedestrian link to the adjacent Spyglass Park and the informal trails that lead to the shoreline below, as well as a lateral coastal act route that provides pedestrian connections between coastal recreation areas

### B. Coastal Development Permit Findings

#### 1. Public Access and Recreation

##### a. Relevant Coastal Act Provisions

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 the



beach. Coastal Act Sections 30210, 30211, and 30212 specifically relate to the public access issues raised by the development application and state:

***Coastal Act Policy 30210***

*In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

***Coastal Act Policy 30211***

*Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

***Coastal Act Policy 30212***

*Public access from the nearest public roadway to the shoreline and along the coast shall be provided in all new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) Adequate access exists nearby, or (3) Agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.*

*(b) For purposes of this section, "new development" does not include:*

*(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.*

*(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.*

*(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.*

*(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not a seaward of the location of the former structure.*





*(5) Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the commission determines that the activity will have an adverse impact on lateral public access along the beach.*

*As used in this subdivision "bulk" means total interior cubic volume as measured from the exterior surface of the structure.*

*(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.*

## b. General Background

### **1978 Coastal Development Permit**

On February 10, 1978, the South Central Coast Regional Commission issued a coastal development permit (152-01) for the construction of a single-family residence at 188 Seacliff Drive in the City of Pismo Beach, subject to special conditions requiring execution and recordation of an offer to dedicate (OTD) a public access easement along the upcoast boundary of the property. Specifically, the conditions of the permit required dedication of a 5' wide easement along the northern boundary of the property for "public access to the beach." As evidenced from early aerial photos, the access path had been in use by members of the public long before the Commission's action to approve development of the site (i.e., before 1978). The residence was constructed in late 1978 with a full 10' wide area available for public use between the residence at 188 Seacliff and the adjacent fence on the northern property line. As indicated in a July 5, 1979 letter from the Commission to the original property owner, the CDP [#152-01] also authorized construction of a six-foot fence setback five (5) feet from the property boundary in the northwest corner of the site. Installation of the fencing reduced the width of a portion of the area available for public access (along the northwest corner of the site) to approximately 5.5 feet. The width of the area along the first 85' from the Seacliff Drive frontage remained at 10 feet. The OTD expired in December 1990, based upon a unique term that allowed it to expire if the area was not identified as an accessway in the certified LCP. Nonetheless, daily public access continued unabated until the owners of the property erected a fence in the front of the residence to preclude public passage in the fall of 2004. The property has been held in the same ownership since 1996.

### **2005 Coastal Development Permits**

In January 2005, the Commission appealed (A-3-PSB-05-002) the decision of the City of Pismo Beach (04-0167) authorizing the expansion of the garage and a portion of the residence at 188 Seacliff Drive. The proposed garage expansion was shown to encroach into the existing access path by as much as 5 feet near the northeast corner of the site. On March 22, 2005, the



Commission found Substantial Issue with the proposed development on the basis that it would interfere with the public's right of access to the sea. Prior to the de novo hearing on the project, the Applicant withdrew his application from the City and rescinded any rights conferred by the application.

Thereafter, prior to obtaining the necessary coastal permits, the Applicant installed permanent fencing in at least two locations along the access path, which are now the subject of enforcement actions, as discussed more fully in the findings below.

On December 6, 2005, the City of Pismo Beach approved two additional and separate coastal permits authorizing fencing at the rear of the home site. The first segment of fence is proposed to be approximately 5 feet in length and span two existing fence posts between 182 and 188 Seacliff Drive. The purpose of the fencing is to obstruct the seaward entrance to the existing access path along the northwest property boundary at 188 Seacliff Drive. The second segment of fencing is proposed to reduce the impact of human and animal activity near the bluff edge at the rear of the site. Although the project description indicates that this segment is a rear yard fence, the submitted site plans are not detailed enough to accurately identify the full extent of the approved fencing. In addition, the City's approval did not adequately condition the permit to ensure that the fencing will not be extended into the area that has been historically used for public access. Accordingly, the Commission found that both appeals raised a substantial issue regarding the projects' consistency with the access and recreation policies of the LCP and Coastal Act.

### **History of Access**

There is a significant amount of evidence establishing that the public has acquired a right of access across the property to the beach and ocean. Aerial photos of the site clearly indicate that members of the public were using the property to gain access to the ocean and shoreline by crossing the property in roughly the same location for at least 6 years prior to the approval and construction of the original house in 1978. Subsequent photos also indicate that use of the path by the public continued without interruption over a period of 30+ years. In addition to photographic evidence, a prescriptive rights investigation initiated by the Commission's staff has yielded over 200 written surveys (completed and returned) documenting almost daily use of the access path by neighborhood residents, city, county and statewide visitors, as well as out-of-state citizens. Based on the content of the survey responses, and the aerial photographs, the Commission finds that there is substantial evidence of a public prescriptive right to use the access path located at 188 Seacliff Drive. In addition to the photographic and written evidence collected, the coastal access path has been identified in the Commission's California Coastal Access Guide, 1<sup>st</sup> – 6<sup>th</sup> Editions (since 1981) and until recently, the City of Pismo Beach helped maintain the pathway by clearing brush and other material from the adjacent property at 188 Seacliff Drive.



### c. Project Impacts and Analysis

#### **A-3-PSB-06-002: Access Path Fence Between 182 and 188 Seacliff Drive and Within 17 Feet of the Coastal Bluff**

The Applicant proposes to install a 5-foot segment of 42-inch tall chain link fencing across an established and well used informal path that provides lateral and vertical access to the shoreline. The Applicant proposes the fencing as a means to curtail public use of the pathway, increase security, and reduce liability on his property. Installation of the fencing will interfere with existing public access opportunities in several ways. First, it will severely constrain lateral access along the shore by eliminating the safest, direct, and most convenient access connection between the St. Andrews and Spyglass planning neighborhoods and corresponding blufftop parks. The existing access path represents the shortest distance between Seacliff Drive and the shoreline north of the St. Andrews planning area, and provides lateral connectivity between three public blufftop parks (i.e., the Vista Point Overlook, Memory Park, and Spyglass Park). If the access path is fenced off as proposed, lateral access along the blufftop and shoreline will be severely impaired. The nearest alternative route follows inland from the coast through the neighborhood and requires an approximate one-quarter mile detour to reach the shore.<sup>2</sup> Formal access to Spyglass Park requires a significantly longer detour to the upcoast planning area neighborhood. As noted above, the access path located on the Yandow property provides an important link in lateral shoreline access and may, in fact, prove to be a logical link in the California Coastal Trail. Coastal Act Section 30212 as well as certified LCP policy 17.066.010 require public access from the nearest public roadway to the shore be provided in all new development. Installation of fencing across the access path will eliminate public access from the nearest public roadway to the shore. Accordingly, the proposed fencing is not consistent with the relevant Coastal Act and LCP policies and the project must be denied.

Installation of the proposed fencing will eliminate an existing vertical connection to the shore, which is a critical component of the local pedestrian circulation network and an important vertical access route. Due to the geology and steep topography of the bluffs, there are few access opportunities to the shoreline – the vertical access path at Spyglass Park being among the sole alternatives. The bluffs in the St. Andrews planning area are nearly vertical and as such, safe shoreline access is not available. Installation of the proposed fencing will eliminate safe and direct access to the shoreline and may actually lead to the use of unsafe informal pathways down the bluff. As a result, installation of the proposed fencing is inconsistent with Coastal Act policies requiring public access to be maximized consistent with public safety needs (Section 30210). The proposed fencing will block a path that is currently used by the public to gain access to the beach and over which the public has acquired a right to use through historic use.

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<sup>2</sup> This route also traverses private property. The City maintains it has an easement over the private roadway that extends partway down to Spyglass Park from Colburn Lane in the northern corner of the St. Andrews planning district. The status of the roadway easement is unknown, as the City has yet to provide conclusive evidence that the terms of the easement allow public pedestrian and bicycle access across the private property.



Therefore, the fence extension is inconsistent with section 30210 and 30211 of the Act and must be denied.

With respect to the applicant's alleged need to increase security and limit liability, the access path is approximately 135 feet in length and generally 10 feet in width. There is an existing 6' wooden fence at the rear towards the rear of the site at 188 Seacliff Drive that encloses and separates the rear yard from the access path. The pathway narrows to roughly 5.5 feet in this location. See Exhibit 4. The Applicant claims installation of the proposed new fencing is needed to increase safety and reduce personal liability, but has not provided any evidence that people have been injured or harmed while using the path. Furthermore, the California Recreational Use Statute (Civil Code sec. 846) protects private property owners by providing immunity from liability for injuries sustained by persons using the property for recreational use. Landowners are not required to make their premises safe for use by others or to warn others of hazardous conditions on their property, as far as persons entering their property for any recreational purpose are concerned. The path is generally flat and the bluff edge is located on public property more than 15 feet from the pathway entrance / property line. Accordingly, the proposed fencing is unnecessary for the security of the residents and is therefore further inconsistent with Section 30210 of the Coastal Act and must be denied.

Installation of the fencing will also interfere with the public's right to use the accessway. If constructed, the fencing will entirely obstruct the safest and most direct route along the shoreline. As noted above, the access path provides vertical access to the shoreline and lateral access between three blufftop parks. Access has been occurring over the pathway for at least 30+ years and began before construction of the residence itself. Staff has collected substantial evidence establishing historic use of the path that includes aerial photographs, written surveys, and verbal statements from path users. Ongoing access has occurred without permission of the owner, who has been aware of this use and not attempted to halt such use until recently. Thus, substantial evidence exists that the public has acquired a right to use the access corridor that would be blocked by the project. In addition, the location of the pathway has been identified and described in the Commission-sponsored California Coastal Access Guide in each of its 1<sup>st</sup> – 6<sup>th</sup> Editions (i.e., since 1981). Section 30211 of the Coastal Act prohibit development from interfering with the public's right to access the sea where acquired through use. Installation of the perimeter fencing will interfere with such access and therefore cannot be found consistent with Section 30211 of the Act and must be denied. Furthermore, Coastal Act Section 30212c prohibits the approval of any development that would restrict [existing] public access.

### **A-3-PSB-06-003: Rear Yard Fence 2 (70' long, 30" tall)**

The Applicant requests after-the-fact authorization to install approximately 70' of fencing across the rear yard in the area of the blufftop edge. The wrought iron fencing is proposed to be 30" in height, setback a minimum of 6' from the bluff edge, and tie into existing fencing on either side of the property. The fence will be attached to rebar side posts that will be driven 24" into the ground (no concrete) to facilitate removal or relocation. The Applicant maintains the fencing is



needed to forestall erosion by reducing human and animal activity adjacent to the bluff edge and to provide additional protection and security for the residents, guests, and animals residing at 188 Seacliff Drive.

As noted elsewhere in the report, the site contains a well-known and heavily used lateral and vertical coastal access path to Spyglass Park and the shoreline below. The path is relatively flat and obstacle free (i.e., safe), and is located between the dwelling at 188 Seacliff Drive and the existing shared property line fence at 182 Seacliff Drive. The nearest alternate access point to Spyglass Park and the beach access path requires a 0.25 mile detour through the Seacliff neighborhood. Additional public access to Spyglass Park can be gained through the Spyglass planning area about 1 mile to the west of the access path. Access along the path by the public has been documented by a significant amount of evidence of daily use of the path by persons from all over the City, County, and State. Staff has uncovered evidence documenting use of the path that extends back more than 30 years.

Similar to the impacts identified in the findings above, the proposed rear yard fencing has the potential to obstruct lateral and vertical access to the shore because the site plans submitted for the development are not adequate to allow staff to determine whether the new rear yard fencing encroaches within the path historically used for public access. The Coastal Act requires that maximum public access be provided in all new development (30210). The Act further prohibits development from interfering with the public's right to gain access to the sea (30211) and requires public access from the nearest roadway to the shore be provided in all new development (30212). As currently proposed, installation of the rear yard fencing may interfere with such access and therefore is not consistent with the Public Access policies of the Coastal Act. The project can be made to conform, however, to applicable Coastal Act and LCP policies with the imposition of special conditions that require the Applicant to remove and relocate any development that encroaches within the path used for public access to the shoreline. Such conditions are necessary to ensure that public lateral and vertical access will be preserved and that the approved development will not interfere with the public's right to gain access to the sea. Special Condition 1 limits the northern extent of the proposed rear yard fencing to no further upcoast than the alignment of the existing wood fence as shown in Exhibit 4. Special Condition 2 expressly prohibits any development within the area used for public access and further requires the applicant to prepare a legal description of the access path to be recorded along with a deed restriction.

Section 30211 also requires that Commission actions on shorefront projects ensure that the development does not interfere with the public rights of access acquired through use. In light of the evidence of historic use of the site as described above, Special Condition 5 notes that the Commission's approval does not in any way waive any public rights that may exist on this site, and that the permit shall not be used or construed to interfere with and public prescriptive or public trust rights. Only with these conditions will the project comply with Coastal Act Section 30211.



Finally, Special Condition 7 is attached that requires the recordation of a deed restriction that imposes all standard and special conditions on the permit as covenants, conditions, and restrictions on the use of the property. The condition is needed to ensure that maximum public access will be provided and the right to gain access to the shore will be preserved for all persons for the life of the project.

Only as so conditioned, can the project be found consistent with Sections 30210, 30211, and 30212 of the Coastal Act.

#### d. Public Access Conclusion

The proposed development will reduce coastal access and recreation opportunities inconsistent with Coastal Act Sections 30210, 30211, and 30212. The project will adversely impact the public's ability to access the beach from the St. Andrews planning neighborhood and travel laterally along the coast. Approval of the fencing will not ensure that the public's right to gain access from the first public road to the sea will be preserved. Denial of CDP application A-3-PSB-06-002 and conditional approval of CDP application A-3-PSB-06-003 described above is necessary to carry out the applicable Coastal Act policies.

## 2. Bluff Top Development

### a. Relevant Local Coastal Program Provisions

The following bluff top development policies are relevant:

#### ***S-3 Bluff Setbacks***

*All structures shall be set back a safe distance from the top of the bluff in order to retain the structures for a minimum of 100 years, and to neither create nor contribute significantly to erosion, geologic instability or destruction of the site or require construction of protective devices that would substantially alter natural landforms along the cliffs.*

*The City shall determine the required setback based on the following criteria:*

- a. For development on single family residential lots subdivided prior to January 23, 1981, the minimum bluff setback shall be 25 feet from the top of the bluff... A geologic investigation may be required at the discretion of the City Engineer, and a greater setback may be applied as the geologic study would warrant.*

#### ***LU-E-2 Bluff Setback and Protection***

*Development along the bluffs shall be setback a minimum of 25 feet from the top of the bluff. A geology study and report shall be required for any development near the top of the bluff and a greater setback may be required based on findings of the report.*



*Appropriate erosion control measures shall be required for any project along the bluff-tops and shall specify methods for maintenance.*

***17.102.050 Exceptions to Minimum Side or Rear Yard Setback Requirements for Coastal Blufftop Developments***

*All uses in any zone with side or rear yard abutting coastal bluffs and beaches are subject to the standards adopted in the Local Coastal Program Land Use Plan policies and programs. Development permitted in the areas reserved for public beach access or recreation shall be limited to structures and facilities designed to accommodate passive recreational use of the area, including but not limited to stairways, benches, tables, refuse containers, bicycle racks, and public parking facilities. In no case shall any development except public access paths and public stairways be permitted within the bluff retreat setbacks identified in site specific geologic studies, except as follows for R-1 zones:*

- 1. Ninety percent (90%) see-through, non-permanent, 42-inch maximum height fences may be permitted with a Coastal Permit...*
- 2. Fences described above shall be designed and sited in such a manner as to permit the easy removal or relocation of the structure in order to continually maintain a five (5) foot minimum setback from the top edge of the bluff. A document to this effect shall be recorded with the title of the property in a manner and format approved by the City Attorney.*
- 3. A site specific geologic study by a registered geologist shall be prepared for structures permitted by section 1 above. This report shall assess the impact of the development in the retreat area on the stability and erosion of the bluff and shall make a finding that the proposed location would not contribute to the erosion or failure of the bluff, or proposed alternative locations to achieve this result.*
- 4. It shall be the duty of the Building Official to periodically review all such fences, in bluff retreat areas to ensure that minimum bluff top setbacks are maintained. Owners of properties receiving permits for these improvements shall permit continuous, announced entry by the Building Official to permit these periodic inspections.*

### c. Project Impacts and Analysis

The certified LCP stipulates that development on coastal blufftop lots must be setback adequately to ensure structural stability for a period of 100 years and not create or contribute to erosion, geologic instability, or destruction of the site (S-3). At a minimum, structures must be setback 25' or more if warranted by findings of a site-specific geologic investigation (S-3 and LU-E-2). The LCP limits development in areas reserved for public beach access and recreation to development designed to accommodate passive recreational use of the area (17.102.050). And finally, the LCP prohibits development other than public access paths and stairways within the



bluff retreat setback with one exception for low profile, see-through, non-permanent fencing in R-1 zoned areas (17.102.050).

In this instance, the Applicant proposes to install two separate fencing segments on a residentially zoned (R-1) coastal blufftop lot well inside the estimated 100-year bluff retreat area. The access path fence is a relatively short segment (approximately 5.5 feet) that will be installed in the northwest corner of the property approximately 12' – 15' from the bluff edge. The design height and chain link material meet the exception criteria identified for fencing within the bluff retreat setback. However, the applicant proposes to install the fencing between two existing semi-permanent fence posts and as such, the fencing would not comply with the LCP requirement that the fencing be non-permanent. In addition, the fence will obstruct public use of an access path that provides vertical and lateral connectivity to and along the shoreline. It is purposefully designed to exclude rather than accommodate access. As a result, installation of this fence segment is not consistent with LCP blufftop development policies. Additionally, because the intent here is to eliminate public use of an existing access path it must be denied.

The proposal for the second fence segment includes installation of approximately 70' of fencing across the rear yard in the area of the blufftop edge. The wrought iron fencing is proposed to be 30" in height, setback a minimum of 6' from the bluff edge, and tie into existing fencing on either side of the property. The fence will be attached to rebar side posts that will be driven 24" into the ground. The fencing is needed to forestall erosion by reducing human and animal activity adjacent to the bluff edge and to provide additional protection and security for the residents, guests, and animals residing at 188 Seacliff Drive.

The Applicant consulted with a local geotechnical firm to prepare a geologic investigation of the site that identified the need for mitigation measures to forestall disturbance and erosion of the blufftop edge and increase safety of the residents. The report evaluated the impact of installing the fence and concluded that installation would not create or contribute significantly to erosion of the bluff. It also assessed the impact of the fencing itself on bluff stability and determined that it would not cause or exacerbate erosion, and highlighted the need for additional protection measures due to the steepness of the bluff. The proposed 30 inch high wrought iron fence appears to comply with the requirement of the certified LCP, particularly as they relate to design, materials, and installation methods. However, as noted in the Access findings above, there is some uncertainty regarding the location and placement of the fencing as it relates to the blufftop edge and pathway used for access. Section 17.102.050.2 requires that all fencing retain a five (5) foot minimum setback from the bluff edge. The provided site plans are not accurate enough to ascertain the precise location of the proposed fencing and assess whether it will encroach within the area used for public access or minimum bluff setback area. Accordingly, Special Condition 1 requires the applicant to submit final plans showing the precise location and alignment of the rear yard relative to the edge of bluff and area used for public access. Special Condition 1 further requires the Applicant to maintain a minimum 6' setback from the bluff edge and limits the northern extent of any fence or fencing materials to the existing wood fence as shown in Exhibit 4. In addition, Special Condition 1b requires the fencing be secured with rebar posts (no





concrete) to facilitate relocation of the fence in response to erosion events and Special Condition 4 makes it the Applicant's responsibility to maintain a continuous 6' setback from the bluff edge.

Lastly, Section 17.102.050.2 of the LCP, requires a document be recorded with the title of the property that memorializes the Applicant's commitment and responsibility to maintain a minimum setback from the edge of the bluff. Pursuant to Special Conditions 1 and 4 of the permit, the Applicant is required to maintain a continuous minimum 6' setback from the bluff edge. To satisfy the requirement of the LCP, Special Condition 7 is attached that requires the applicant to execute and record a Deed Restriction that imposes all standard and special conditions of this permit as covenants, conditions, and restrictions on the property.

Only as so conditioned, will the proposed rear yard fencing comply with the relevant policies and standards of the certified LCP.

### 3. Violation

Unpermitted development has occurred on the subject parcel prior to submission of this permit application including the installation of additional fencing at three locations along the northern property boundary that has forestalled public use of the access path over the past 16 months. Please see page 2 of Exhibit 6: Site Photos. The Applicant asserts that there is no violation of coastal permitting requirements because the City exempted the installation of fencing outside of the bluff retreat setback. Commission staff disagrees with this assertion and has informed the Applicant and the City of why a coastal development permit is required pursuant to the City's certified Local Coastal Program and the Coastal Act. This issue has been the subject of an ongoing dispute between the Commission staff, the Applicant, and the City of Pismo Beach. The City maintains that even though fences meet the definition of development contained in the LCP (which is the same definition as that which is contained in the Coastal Act), the City historically has not required a coastal development permit for fences outside of the established 100-year bluff retreat area. Commission staff notes that the proposed fencing and the other fencing installed without a permit represent development that will change the intensity, use, and access to coastal waters, and as such, is subject to the coastal permitting requirements of the LCP. Commission planning and enforcement staff has written the City to dispute the Applicant's claim for an exception to the permitting requirements and request their assistance in bringing the matter to resolution. The letters indicate that the fencing which blocks historic public access is development that cannot be supported under either the certified LCP or Coastal Act access policies and should therefore be removed. The City has not responded to the Commission's letters and thus, resolution of the unpermitted fencing is the subject of ongoing enforcement by the Commission.

As detailed in the previous findings of this report, the Applicant's proposal to retain the fencing does not comply with the certified LCP or the access policies of the Coastal Act. In order to ensure that the matter of unpermitted development is resolved in a timely manner, the conditions of this permit must be satisfied within specified time frames and the permit action implemented



by the applicant. See Special Condition 3. If the applicant withdraws this request or does not meet the conditions as approved by the Commission, formal enforcement action may be pursued to resolve the noted violations of the permit requirements of the Coastal Act.

Consideration of this application by the Commission has been based upon the certified LCP and access policies of the Coastal Act. Review of this permit does not constitute a waiver of any legal action with regard to the alleged violations nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal permit.

#### 4. 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 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. This staff report has discussed the relevant coastal resource issues with the proposal, and has recommended appropriate mitigations to address adverse impacts to said resources. Accordingly, Coastal Development Permit Application #A-3-PSB-06-003 is being approved subject to conditions that require the applicant to modify the project and implement measures that will avoid and mitigate project impacts. As such, 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.

