

CALIFORNIA COASTAL COMMISSION

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Staff Report Addendum

Date: September 5, 2007
To: Commissioners and Interested Parties
From: Steve Monowitz, District Manager
Susan Craig, Coastal Planner

Subject: Addendum to the 8/23/07 Staff Report Prepared for the 9/6/07 Hearing (Agenda Item Th28a) Regarding the Collins Single Family Residence (Appeal No.A-3-SCO-06-059)

This addendum is in response to a letter received from the appellants' attorney (see Attachment #1), which contends that a denial of the proposed project would not represent a Constitutional taking of private property because the project would constitute a nuisance. As discussed in the staff report, staff has determined that even as modified through Special Conditions to reduce the size of the proposed residence from a three-story structure to a two-story structure, the amended project does not achieve full consistency with the LCP's policies and zoning regulations regarding landform alteration, natural hazards, and neighborhood compatibility. However, in view of the findings that the applicants had a reasonable investment-backed expectation that a residential use would be allowed on the property and in the absence of evidence that supports a judicially-recognized exception to the Constitutional taking guarantee (such as evidence that the proposed development would constitute a "nuisance"), staff has also determined that denial of a residential use based on the inconsistency with the LCP's landform alteration, natural hazards, and neighborhood compatibility policies and zoning regulations would constitute a taking of the applicants' property, contrary to the requirement of Coastal Act Section 30010.

The appellants' attorney's letter states, in part, that a denial of the proposed project would not constitute a taking because there is an overriding concern for public safety which must be enforced in this case and that development of the parcel would create a nuisance. However, as stated in the Commission's staff engineer and staff geologist's memoranda (attached to the staff report as Exhibits #7-#10), although development along Beach Drive is subject to an unusually high number of geologic and other hazards, these risks can be addressed through implementation of the extensive mitigation proposed by the applicants and required by the County, including the use of a design to both support the slope and bear the impact and weight of the worst conceivable landslide event. In addition, they state that the development will in no way increase the risk of road closure and may to some degree help to prevent road closures caused by landslides due to the increased stability that the project will lend to the hillside once complete and the storage capacity of the roof for retaining debris from a large landslide, and that the 25-foot minimum side-yard setbacks should be adequate to keep landslide material from impacting adjacent houses. Finally, the Commission's staff engineer states (see Attachment #2) that the building design will support any landslide debris and should not divert the landslide flow in a manner that

would aggravate the consequences of the landslide flow elsewhere. The Commission's staff engineer also notes that the project plans identify steps that will be taken to maintain site stability during construction and minimize the possibility of these actions triggering a landslide, and that by excavating soil and removing it from the site, there could be a very slight reduction of the general hazard to the area, i.e., the project will reduce the amount of landslide material that would be mobilized during an earthquake or landslide flow if the project were not built. For all the above reasons, staff does not believe that the proposed project constitutes a nuisance; therefore, a takings override is appropriate.

Additionally, the following modification to page 5 of the Commission's staff geologist's memorandum of November 20, 2006 (Exhibit #7 in the staff report) should be made (additions underlined, deletions ~~struckout~~).

Contention 4: The proposed project places others at risk by deflecting landslide debris to the sides:

The ~~applicants'~~ appellants' geologist states that since the landslide hazard is not mitigated, slope failures can run out around the structure and impact other structures or persons on the road below.... (*remainder of text unchanged*)



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Britt L. Haselton, Esq.
Joseph C. Haselton, Esq.

August 29, 2007

California Coastal Commission
725 Front Street
Santa Cruz, California 95050

**RE: Agenda Item Th28a to be heard on September 6, 2007
Appeal number A-3-SCO-06-059, Collins Single Family Residence**

Dear Commissioners:

**A Denial of this Building Permit would not be a Taking under Coastal Act
§30010**

The Staff report states, "...the project, even as revised by the Special Conditions, [emphasis added], is inconsistent with the landform alteration, natural hazards, and neighborhood compatibility policies and zoning regulations of the Santa Cruz County LCP. In total, these LCP inconsistencies could form the basis of a denial recommendation." Page 20, ¶2. It is of utmost importance that each Commissioner considers these statements because their sworn duty is to enforce the provisions of the Coastal Act and the local LCPs.

The chief reasons this is not a taking are the following:

1) There is an overriding concern for public safety which must be enforced in this case

The public agencies actions in this area enforcing these important restrictions are completely reasonable in that they, most importantly, seek to prevent injury, death and loss to the inhabitants of Beach Drive, the residents of Bay View Drive, the general public and rescue workers and their property. Additionally, the regulations have the goal of preserving our environmental resources. Thus, it is indeed a legitimate exercise of the government's police power to enforce the many restrictions violated by the proposed structure on Beach Drive.

Attachment 1
page 1 of 3

Where a state reasonably concludes that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany prohibition. [Emphasis added] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Here, it is of utmost importance that the relevant land use regulations be adhered to and that the neighbors and general public not be put in harms way by this dangerous structure.

Further, a given restraint will be seen as mitigating harm to the adjacent parcels or securing a benefit for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. *Lucas*, supra. Here, the regulations partly seek to mitigate harm to adjoining parcels and their occupants and this is a legitimate concern.

2) Mere denial of a development permit is not actionable

There is case law that states that the mere denial of a use permit or development permit is not actionable, at least in absence of evidence that it was denied for the sole purpose of depressing the market value of the property for purposes of acquisition. *Dictum in Redevelopment Agency v. Contra Costa Theatre, Inc.* 135 Cal. App. 3d 73 (1st Dist. 1982). The parameters of *Klopping* are yet unsettled, and "must be developed and refined on a case-by-case basis." (*City of Los Angeles v. Waller* (1979) 90 Cal.App.3d 766, 779 [154 Cal.Rptr. 12]), but it is established that mere denial of a use permit prior to condemnation is not compensable in money damages under its authority.

In *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110 [109 Cal.Rptr. 799, 514 P.2d 111], the city denied plaintiff's application for a building permit after adoption of general plan, and plaintiff thereafter brought declaratory relief and mandamus actions, along with a *Klopping* inverse condemnation suit. (*Id.*, at p. 119.) Plaintiff alleged a "scheme" to take its land without compensation, and that "in furtherance of that 'scheme' the city denied plaintiff a permit . . . for the purpose of 'extorting' plaintiff's land." (*Id.*, at p. 127.) The court found no taking of property, and further concluded: "Nor is a cause of action in inverse condemnation stated for the denial of a building permit." *Id.*

3) There is no undue restriction imposed on the applicant in this case

In this instance, the Applicant had clear notice that this was a potentially unbuildable lot when they purchased it: evidence shows it was one of the few remaining vacant parcels on Beach Drive, there had been 4 or 5 failed or expired building applications on this lot, on the parcel itself there are visible earthquake fissures, erosional damage and obvious slide threats from the upslope properties on Bay View Drive and there is a significant history of landslides, flooding and bluff erosion in this area. Due diligence would have supported that no structure could conform to the requirements of the LCP and the Coastal Act especially in the areas of alteration of natural land forms and the bluffs being a geohazards site.

Attachment 1
page 2 of 3

4) There is no vested right to construct a residence or receive a return on one's investment

One cannot obtain a vested right to build in reliance on the assurances of city officials that construction was permitted, or on spending large sums for preliminary development costs. *Long Beach Equities, Inc., v. County of Ventura*, 231 Cal. App. 3d 1016 (1991). The prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. The United States Supreme Court has rejected such arguments as quite simply untenable. The *U.S. Const. amend. V*, is not a panacea for less-than-perfect investment or business opportunities. *Long Beach Equities, id.*

Local government legislation regarding property use is constitutional on its face if it bears a substantial relationship to the public welfare and inflicts no irreparable injury on the landowner. This is true even where a substantial diminution in value of the property is alleged. *Long Beach, id.*

5) Development of the parcel as contemplated would create a nuisance

Two esteemed Geotechnical Engineers, Frank Rollo and John Wallace have testified that when a landslide occurs, this structure as designed would create a virtual launching pad whereby the bluff would catapult onto the Schreck's, Forsland's, Noren's and Vernor's homes and possibly others. Thus, there is substantial evidence that the proposed use would be a nuisance and this removes it from being a taking.

For the foregoing reasons full implementation of the LCP policies and zoning regulations to prevent residential use of the subject property is entirely appropriate in this case. A denial of the project would not constitute a taking within the constitutional or Coastal Act's definition.

Very truly yours,

ON BEHALF OF THE APPELLANT[S]

Britt Haselton, Esq.
Haselton & Haselton

CC: Albert Schreck and Rob Forsland

Attachment 1
page 3 of 3

CALIFORNIA COASTAL COMMISSION

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5 September 2007

To: Susan Craig, Coastal Program Analyst
From: Lesley Ewing, Sr. Coastal Engineer
Re: Appeal A-3-SCO-06-059 (Collins)

The principle issue with respect to development of this parcel concerns landslide hazards. As conditioned by the County, the building design will support any landslide debris and should not divert the landslide flow in a manner that would aggravate the consequences of the landslide flow elsewhere. The most vulnerable time will be during the construction phase when the contractor will cut into the slope and excavate the site in order to install the supporting walls and building. The project plans identify steps that will be taken to maintain site stability during construction and minimize the possibility of these actions triggering a landslide. With careful construction and absent a huge earthquake or other disaster coincident with construction, it should be possible to build this development without causing a landslide or debris flow. By excavating soil and removing it from the site, there could be a very slight reduction of the general hazard to the area, i.e. the project will reduce the amount of landslide material that would be mobilized during an earthquake or landslide if the project were not built.

**Attachment #2
A-3-SCO-06-059
Page 1 of 1**

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TH28a

Filed: 10/17/06
49-day Waiver: 10/24/06
Substantial Issue Found: 12/13/06
Hearing Continued: 3/14/07
Staff: Susan Craig
Staff Report Prepared: 08/23/07
Hearing date: 09/6/07
Item#: Th28a

APPEAL STAFF REPORT DE NOVO HEARING

Appeal numberA-3-SCO-06-059, Collins Single Family Residence
ApplicantsMichael & Deborah Collins
AppellantsAlbert & Joel Schreck; Robert & Mitzie Forsland
Local governmentCounty of Santa Cruz
Local decisionApproved with Conditions on September 26, 2006
Project location548 Beach Drive (inland side of Beach Drive) in unincorporated Aptos, Santa Cruz County (APN 043-152-71).
Project descriptionConstruct a three-story, approximately 5,800 square-foot single-family dwelling, involving approximately 1,250 cubic yards of grading.
File documentsCalifornia Coastal Act, County of Santa Cruz Certified Local Coastal Program, County of Santa Cruz Coastal Development Permit Application File 04-0255.
Staff recommendation ...Approval with Conditions

Summary of Staff Recommendation: The proposed project consists of a new three-story, approximately 5,800 square-foot single-family dwelling and approximately 1,250 cubic yards of associated grading on an extremely steep vacant residential parcel on the inland side of Beach Drive, in unincorporated Aptos in Santa Cruz County. Many of the parcels on Beach Drive are located on or seaward of a steep, eroding coastal bluff. Despite significant erosion and landslide hazards, this shoreline area has been largely developed with single-family residences, the vast majority of which predate the Coastal Act. To address potential flooding from high ocean waves, the proposed project avoids habitable living space and provides “break away” walls on the ground floor, consistent with Federal Emergency Management Agency (FEMA) regulations. Due to the extremely steep nature of the parcel (consisting entirely of greater than a 50% slope) the proposed project includes extensive mitigations, including the use of a reinforced concrete foundation and retaining wall to both support the slope and bear the impact and weight of a major landslide, earthquake, or flooding without collapse or structural failure.



California Coastal Commission
September 2007 Meeting in Eureka

Staff: Susan Craig Approved by: Charles Lester

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At the December 2006 meeting in San Francisco, the Commission determined that a Substantial Issue exists with respect to the grounds on which the appeal was filed. Specifically, the Commission requested additional analysis regarding the public safety issues of developing on such a steep slope and an evaluation of whether a reduction in the size of the house will equal a reduction in risk from geological hazards.

A *de novo* hearing regarding the project was held in Monterey in March 2007 to address the Commissioners' concerns described in the previous paragraph. Given the amount of grading required by the project (approximately 1,250 cubic yards) the Commission raised concerns about the project's consistency with the landform alteration policies of the Santa Cruz County LCP. The Commissioners continued the hearing to allow staff to address this issue.

As stated above, the proposed project will require approximately 1,250 cubic yards of grading to allow for the development of a single-family dwelling. Because there are feasible alternatives that would reduce grading, the project is inconsistent with LUP Policy 6.3.9(c), which requires that foundation designs minimize excavation or fill. Additionally, the proposed project is inconsistent with LUP Policy 5.10.3, which requires that grading operations that take place in scenic areas (the project site is located in a scenic mapped area) minimize disruption of landforms.

More fundamentally, Santa Cruz County LUP policy 6.2.10 requires that new development be sited and designed to avoid or minimize hazards. The proposed project site is located directly on an actively eroding bluff face with slopes ranging from 50% to over 70%. As such, the location of the proposed project directly on a steep bluff face is inherently hazardous, and has not been sited to avoid or minimize hazards. This is inconsistent with LUP Policy 6.2.10. Additionally, Santa Cruz County LUP policy 6.2.12 requires a minimum 25-foot setback from the edge of a bluff for all development, and also requires that the setback be sufficient to provide a stable building site over the 100-year lifetime of the structure. The proposed project site, however, is located directly on the bluff face, i.e. directly on the area that is subject to landslides. As such, the proposed project has a zero-foot setback from the bluff because it will be constructed into the bluff, and is fundamentally at odds with the purpose of policy 6.2.12, which derives directly from Coastal Act Section 30253. Thus, the proposed project does not comply with the setback requirements of LUP Policy 6.2.12, nor does it comply with the basic intent of this policy, which is to minimize safety hazards in areas subject to coastal erosion.

Regarding neighborhood compatibility, the square footage of the proposed residence is significantly larger than the majority of the homes located along this stretch of Beach Drive. Thus, the scale of the proposed residence is incompatible with the existing development pattern along this section of Beach Drive. Therefore, the proposed project is inconsistent with LUP Policy 5.10.7, which requires that infill structures (typically residences on existing lots of record) be compatible with the pattern of existing development, and is also inconsistent with Zoning Regulation 13.20.130(b)(1), which requires that all new development be visually compatible and integrated with the character of the surrounding neighborhood.

Because of its fundamental conflicts with the Santa Cruz County LCP, the project cannot be found



consistent with the LCP. Also, given the inherently hazardous and steep conditions of the development site, there are no feasible alternatives that are consistent with the LCP. Nonetheless, some development of the site must be allowed to avoid a taking of the property without just compensation, as provided under Coastal Act Section 30010. In light of the constitutional takings issue associated with the proposed development, staff recommends that the Commission **approve** a development on the site subject to special conditions to address landform alteration, natural hazards, and neighborhood compatibility issues in a manner consistent with private property rights.

In order to reduce landform alteration impacts that would result from the approximately 1,250 cubic yards of grading required for the proposed project, and in order to reduce neighborhood impacts due to the size and mass of the residence, the project is conditioned to require submittal of project plans that remove the third story from the proposed development (which is not allowed by the LCP in any case, having been approved by the County through a variance finding). This will decrease the amount of grading necessary to develop the residence, thus reducing the amount of landform alteration required by the project. The remaining development will consist of the ground floor non-habitable garage in the same footprint as proposed and a second floor living area of approximately 1,825 square feet, as proposed. Thus, the total square footage of the proposed residence will be approximately 3,600 square feet, which will also improve the project's compatibility with the neighborhood.

Regarding geological hazards, the Commission's staff geologist notes that hazard avoidance would be preferable to mitigating the hazard by landform alteration and engineering efforts. However, given that the entire parcel is located on an actively eroding steep slope in the FEMA V flood zone, it is not possible to avoid these potential hazards. The proposed project does include extensive mitigations, including the use of a design to both support the slope and bear the impact and weight of a major landslide, earthquake, or flooding without collapse or structural failure. The project is also conditioned to require submittal of project plans that will implement the mitigations recommended in the project's Geotechnical Report and Geological Investigation and will ensure erosion control during construction and appropriate post-construction drainage. The project is also conditioned to provide for an assumption of risk by the applicants.

The Special Conditions do not achieve full consistency with the LCP's policies and zoning regulations regarding landform alteration, neighborhood compatibility, and natural hazards. However, as conditioned, the project's impacts regarding landform alteration, neighborhood compatibility, and natural hazards will be mitigated to the maximum extent feasible, while providing the applicants a reasonable economic use, consistent with Coastal Act Section 30010.



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I. Project Procedural History

The Santa Cruz County Planning Commission first heard the project on April 12, 2006 and continued the project to the May 10, 2006 agenda to allow the applicants to conduct a neighborhood meeting and to ensure that representatives from the Department of Public Works Storm Water Management Section and the applicants' engineer would be present. After hearing the results of the neighborhood meeting and other technical information, the Planning Commission voted to deny the application and directed



staff to prepare findings for denial that were subsequently adopted on June 28, 2006. The Planning Commission based the denial on health and safety concerns due to the location of the residence in an area subject to landslide hazards at the toe of a coastal bluff. On July 11, 2006, the applicants appealed this decision to the Board of Supervisors. On August 22, 2006, the Board of Supervisors voted to take jurisdiction of the project and to schedule the project for a public hearing.

On September 26, 2006 the Santa Cruz County Board of Supervisors overturned the Planning Commission's denial and approved the project based on the recommended findings and conditions presented to the Planning Commission at the April 12, 2006 hearing, with two additional conditions of approval. A full set of the County's findings and conditions of approval are attached to this report as Exhibit #2. Albert and Joel Schreck and Robert and Mitzie Forsland appealed this approval to the Coastal Commission. The applicants provided a 49-day waiver on October 24, 2006. On December 13, 2006 the Coastal Commission found that the appeals raised a Substantial Issue in terms of the project's consistency with the Santa Cruz County LCP. As a result, the Commission took jurisdiction over the coastal development permit (CDP) application, which requires that the Commission conduct a *de novo* review of the project's consistency with the Santa Cruz County LCP and the public access and recreation policies of the Coastal Act. The Commission held a *de novo* hearing on the project on March 14, 2007. The Commissioners continued the hearing to allow Commission staff to analyze the consistency of the project with the landform alteration policies of the Santa Cruz County LCP.

Please see Exhibit #3 for all correspondence received regarding the proposed project.

II. Staff Recommendation

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-SCO-06-059 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 an affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE THE PERMIT: The Commission hereby approves the coastal development permit on the grounds that the development, as conditioned, will conform to the provisions of the Santa Cruz County Local Coastal Program to the maximum extent possible. Approval of the coastal development permit complies with the California Environmental Quality Act because mitigation measures and/or alternatives have, to the maximum extent feasible, been incorporated to substantially lessen any significant adverse environmental impacts of the amended development.



III. Conditions of Approval

A. Standard Conditions

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittees 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 Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

B. Special Conditions

- 1. Revised Plans/Compliance with County's Conditions. Prior to Issuance of the Coastal Development Permit,** the applicants shall submit, for Executive Director review and approval, revised plans for a two-story residence. The first level garage/courtyard/foyer space shall be retained in the same footprint as approved by the County. The second story living space shall not exceed 1,825 square feet. The maximum height of the residence shall not exceed the maximum height of the second story as shown in the plans approved by the County (see Exhibit #5). Additionally, the revised plans shall be consistent with the requirements of the County's Conditions (as shown in Exhibit #2) II.B, II.C(1-10, 12, 18), II.K, II.L, II.M, II.Q. The landscaping plan shall not include any species listed on the *California Invasive Plant Council* List. **Prior to Construction,** the Permittees shall provide written evidence, for Executive Director review and approval, that the Santa Cruz County Planning Department has determined that the Permittees have complied with County Conditions III.A through III.D. The Permittees shall maintain the developed property consistent with the County's Conditions V.A through V.F (Operational Conditions).
- 2. Erosion and Sedimentation Control Plan. Prior to any site disturbance,** the Permittees shall submit, for Executive Director review and approval, an Erosion and Sedimentation Control Plan that incorporates the following provisions: The plan shall indicate that prior to the commencement of



grading, the Permittees shall delineate the approved construction areas with fencing and markers to prevent land-disturbing activities from taking place outside of these areas. The Erosion and Sedimentation Control Plan shall identify the type and location of the measures that will be implemented during construction to prevent erosion, sedimentation, and the discharge of pollutants during construction. These measures shall be selected and designed in accordance with the California Storm Water Best Management Practices Handbook. Among these measures, the plans shall limit the extent of land disturbance to the minimum amount necessary to construct the project; designate areas for the staging of construction equipment and materials, including receptacles and temporary stockpiles of graded materials, which shall be covered on a daily basis; provide for the installation of silt fences, temporary detention basins, and/or other controls to intercept, filter, and remove sediments contained in any runoff from construction, staging, and storage/stockpile areas; and provide for the replanting of disturbed areas immediately upon conclusion of construction activities in that area. The plans shall also incorporate good construction housekeeping measures, including the use of dry cleanup measures whenever possible; collecting and filtering cleanup water when dry cleanup methods are not feasible; cleaning and refueling construction equipment at designated offsite maintenance areas; and the immediate clean up of any leaks or spills.

3. **Post Construction Drainage Plan. Prior to commencement of construction,** the Permittees shall submit to the Executive Director for review and approval, a drainage plan that identifies the specific type, design, and location of all drainage infrastructure and Best Management Practices (BMPs) necessary to ensure that post construction drainage from the project, including runoff from the roof and other impervious surfaces, does not result in erosion, sedimentation, or the degradation of coastal water quality. The Permittees shall be responsible for implementing and maintaining the drainage facilities for the life of the project.
4. **Assumption of Risk, Waiver of Liability, and Indemnity Agreement.** The Permittees acknowledge and agree, on behalf of themselves and all successors and assigns: (i) that the site is subject to hazards from coastal erosion and scour, wave and storm events, geologic instability, and the interaction of same; (ii) to assume the risks to the Permittees and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards; and (v) that any adverse effects to property caused by the permitted project shall be fully the responsibility of the landowners.
5. **Conditions Imposed by Local Government.** All previous conditions of approval imposed on the project by Santa Cruz County pursuant to an authority other than the California Coastal Act remain in effect (see Exhibit #2).



- 6. Deed Restriction. Prior to issuance of the coastal development permit,** the applicants shall submit to the Executive Director for review and approval documentation demonstrating that the applicants have 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 applicants’ entire parcel. 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.

IV. Recommended Findings and Declarations

The Commission finds and declares as follows:

A. Project Location

The project site is located on the landward side of Beach Drive in Aptos (see Exhibit #1 for project location). There are a total of 137 existing homes on Beach Drive, 56 of which are located seaward of Beach Drive and 81 of which are located at the base of a steep coastal bluff on the inland side of Beach Drive. At the end of the public section of Beach Drive is a State Beach parking lot. A private (gated) section of Beach Drive begins after this parking lot. The proposed project site is located on the bluff side of the private section of Beach Drive (see Exhibit #4 for photographs of Beach Drive).

The vast majority of the 137 homes along Beach Drive, i.e. approximately 116 homes, were constructed prior to passage of the Coastal Zone Protection Initiative in 1972. Of the 21 homes constructed along Beach Drive since 1972, 11 of these have been constructed along the private portion of Beach Drive; of these 11 homes, 4 are located on the beach side of Beach Drive and 7 are located on the bluff side of Beach Drive; all 7 of these bluff side homes are three stories. As shown in Table 1 below, the Coastal Commission approved some of these homes prior to LCP certification, and the County since has approved at least 7 homes, including this project on appeal to the Commission.¹

Over the years, this area of the coast has been subjected to landslides, storm surge, and wave run-up that

¹ In the late 1990s, significant residential development and an extension of Beach Drive were proposed onto the sand at Hidden Beach. At that time, the Commission pursued formal prescriptive rights litigation through the courts. Ultimately, the Commission and the property owners entered into a settlement agreement in 2003. Pursuant to the terms of the settlement agreement, a single residential structure was allowed on the inland side at the end of Beach Drive, and all of the other property subject to the agreement (including the Hidden Beach sandy beach area and a portion of the adjacent arroyo) were conveyed to the public in return (about 10 acres of undeveloped beach, bluff, and arroyo).



has damaged or destroyed homes. In response to the hazardous conditions found along Beach Drive, the County has been requiring since 1993 that any new residential development or redevelopment along the inland side of Beach Drive be constructed to withstand landslides, earthquakes, and floods. As of today, eight three-story dwellings using the same reinforced construction as the proposed project have been approved by the County on the inland side of Beach Drive; three of these approved houses have been constructed and three more are currently under construction. In 1996, the County approved a proposed three-story reinforced residence on this parcel. The County granted a two-year extension of that permit in 1998, but the permit was never exercised and the parcel was sold to the current applicants in 2003.

The project site is a 12,888 square foot vacant parcel located in the private section of Beach Drive in Aptos (see page 4 of Exhibit #4 for a photograph of the project site; see Exhibit #6 for parcel map). This bluff-side property is steeply sloped, with the entire site consisting of a slope ranging from 50% to over 70%. A line of mostly one-story homes exists on the ocean side of Beach Drive, between the project site and the beach. There are 16 existing homes (including three under construction) on the bluff side within the private section of Beach Drive, 11 of which are three stories. The project site is also located within FEMA Flood Zone V, a 100-year coastal flood hazard zone designated for areas subject to inundation resulting from wave run-up and storm surges.

B. Project Description

The project includes construction of an approximately 5,800 square-foot, three-story house at 548 Beach Drive in Aptos. The residence will be constructed using reinforced concrete, and has been designed and engineered to withstand the impact of expected landslides. For example, the sides of the proposed structure are designed as retaining walls to prevent damage by landslide flows along the side yards. The proposed project includes approximately 1,250 cubic yards of grading, due to the steeply sloped nature of the project site. The lowest habitable floor of the proposed dwelling is located 21-feet above mean sea level, which is above FEMA's expected 100-year wave impact height. The first floor of the proposed project consists of a non-habitable five-car garage, courtyard, and entry foyer with elevator. The garage doors and non-load bearing walls are designed to function as "breakaway" walls, as required by the FEMA regulations for development in FEMA Flood Zone V. Please see Exhibit #5 for project plans.

C. Coastal Issues Analysis

1. Landform Alteration

Santa Cruz County Land Use Plan Policy 6.3.1 restricts development on slopes in excess of 30 percent and states:

6.3.1: Prohibit structures in discretionary projects on slopes in excess of 30 percent. A single family dwelling on an existing lot of record may be excepted from the prohibition where siting on greater slopes would result in less land disturbance, or siting on lesser slopes is infeasible.



Santa Cruz County Land Use Plan Policy 6.3.9 requires site design to minimize grading and states:

6.3.9: *Require site design in all areas to minimize grading activities and reduce vegetation removal based on the following guidelines: (a) Structures should be clustered; (b) Access roads and driveways shall not cross slopes greater than 30 percent; cuts and fills should not exceed 10 feet, unless they are wholly underneath the footprint and adequately retained; (c) Foundation designs should minimize excavation or fill; (d) Building and access envelopes should be designated on the basis of site inspection to avoid particularly erodable areas; (e) Require all fill and sidecast material to be recompacted to engineered standards, reseeded, and mulched and/or burlap covered.*

Santa Cruz County Land Use Plan Policy 5.10.3, in relevant part, provides for protection of public vistas by, among other things, minimizing landform alteration caused by grading operations, and states:

5.10.3: *Protect significant public vistas as described in policy 5.10.2 from all publicly used roads and vista points by minimizing disruption of landform and aesthetic character caused by grading operations...*

The entire project parcel consists of a slope that ranges in steepness from 50% to over 70%. The proposed project includes approximately 1,250 cubic yards of grading, due to the steeply sloped nature of the project site.

Santa Cruz County Land Use Plan Policy 6.3.1 prohibits the development of structures on 30% or greater slopes, unless siting on greater slopes would result in less land disturbance, or siting on lesser slopes is infeasible. In this case, siting the project on lesser slopes is infeasible because the entire parcel consists of slopes greater than 30%; thus the project is consistent with LUP Policy 6.3.1.

The proposed project, however, is not consistent with LUP Policy 6.3.9(c), which requires that foundation designs minimize excavation or fill. In this case, the proposed project will require approximately 1,250 cubic yards of grading to allow for the development of a single-family dwelling. Put another way, the amount of grading required for the proposed single-family residence would fill a 10-cubic-yard-capacity dump truck 125 times over. In this case, assuming project consistency with other LCP requirements, there are alternatives that would reduce the amount of grading and landform alteration, such as removing the third story or reducing the width of the proposed residence. Additionally, the proposed project is inconsistent with LUP Policy 5.10.3, which requires that grading operations that take place in scenic areas (the project site is located in a scenic mapped area) minimize disruption of landforms. The extent of the excavation required for the project represents a significant alteration of the coastal bluff landform. For these reasons, the proposed project is inconsistent with LUP policies 5.10.3 and 6.3.9(c) regarding landform alteration.

2. Natural Hazards

Santa Cruz County Land Use Plan (LUP) Policy 6.2.10 requires new development to minimize hazards,



and states:

6.2.10: *Require all developments to be sited and designed to avoid or minimize hazards as determined by the geologic hazards assessment or geologic engineering investigations.*

Santa Cruz County LUP Policy 6.2.12 requires specific setbacks from coastal bluffs and states:

6.2.12: *All development activities, including those which are cantilevered, and non-habitable structures for which a building permit is required, shall be set back a minimum of 25 feet from the top edge of a bluff. A setback greater than 25 feet may be required based on conditions on and adjoining the site. The setback shall be sufficient to provide a stable building site over the 100-year lifetime of the structure, as determined through geologic and/or soil engineering reports. The determination of the minimum 100-year setback shall be based on the existing site conditions and shall not take into consideration the effect of any proposed shoreline or coastal bluff protection measures.*

As discussed at the December 13, 2006 hearing on the appeal, the history of landslides in this area, the amount of backcut necessary to construct a residence on a greater than 50% slope, and the fact that Beach Drive is not a “through” road necessitate a careful evaluation of the proposed development’s impact on public safety and its consistency with the hazard policies of the LCP.

One potential hazard to homes and residents along Beach Drive relates to the fact that Beach Drive is not a “through” road, i.e. there is only one way in and out of Beach Drive. In the event that a landslide or flooding impeded a portion of Beach Drive, individuals in cars and homes located past the impeded area would not be able to drive out, and emergency vehicles would have difficulty accessing the area. This potential hazard situation will not change due to construction of this project, i.e. this potential hazard will exist whether or not the proposed project is developed. Furthermore, the County Office of Emergency Services has developed contingency plans with regards to coastal flooding and tsunami to address such situations.

Santa Cruz County LUP policy 6.2.10 requires that new development be sited and designed to avoid or minimize hazards. The proposed project site is located directly on a bluff face with slopes ranging from 50% to over 70%. The bluffs along this stretch of coast are actively eroding. Over the years, this area of coast has been subjected to landslides, storm surge, and wave run-up that has damaged or destroyed homes. As such, the location of the proposed project directly on a steep bluff face has not been sited to avoid or minimize hazards, inconsistent with LUP Policy 6.2.10.

Santa Cruz County LUP policy 6.2.12 requires a minimum 25-foot setback from the edge of a bluff for all development, and also requires that the setback be sufficient to provide a stable building site over the 100-year lifetime of the structure. The intent of this policy is to ensure that development along coastal bluffs is done in a way that reduces safety hazards in areas that are subject to landslides and coastal bluff retreat. The proposed project site, however, is located directly on the bluff face, i.e. directly on the area that is subject to landslides. As such, the proposed project has a zero-foot setback from the bluff because it will be constructed into the bluff. Thus, the proposed project does not comply with the



setback requirements of LUP Policy 6.2.12, nor does it comply with the intent of this policy, which is to minimize safety hazards in areas subject to coastal erosion. In addition, given the inherent constraints of the site, there is no alternative site that would be consistent with LUP Policy 6.2.12.

3. Neighborhood Compatibility and Visual Resources

The LCP includes policies and zoning regulations that require that new development be visually compatible with the character of the surrounding neighborhood, and that require protection of the public viewshed, particularly along the shoreline:

Zoning Regulation 13.20.130(b)(1). Visual Compatibility. All new development shall be sited, designed, and landscaped to be visually compatible and integrated with the character of surrounding neighborhoods or areas.

Objective 5.10.a Protection of Visual Resources. To identify, protect, and restore the aesthetic values of visual resources.

Objective 5.10.b New Development in Visual Resource Areas. To ensure that new development is appropriately designed and constructed to have minimal to no adverse impact upon identified visual resources.

LUP Policy 5.10.2 Development Within Visual Resource Areas. Recognize that visual resources of Santa Cruz County possess diverse characteristics.... Require projects to be evaluated against the context of their unique environment and regulate structure height, setbacks and design to protect these resources consistent with the objectives and policies of this section....

LUP Policy 5.10.3 Protection of Public Vistas. Protect significant public vistas...from all publicly used roads and vistas points by minimizing disruption of landform and aesthetic character caused by grading operations ...[and] inappropriate landscaping and structure design...

LUP Policy 5.10.7 Open Beaches and Blufftops. Prohibit the placement of new permanent structures which would be visible from a public beach, except where allowed on existing parcels of record, or for shoreline protection and for public beach access. Use the following criteria for allowed structures: (a) allow infill structures (typically residences on existing lots of record) where compatible with the pattern of existing development. (b) Require shoreline protection and access structures to use natural materials and finishes to blend with the character of the area and integrate with the landform.



Zoning Regulation 13.10.323: R-1 SINGLE FAMILY RESIDENTIAL ZONE DISTRICTS - SITE AND STRUCTURAL DIMENSIONS CHART: Maximum number of stories = 2; on beach side 1.

a. Neighborhood Compatibility

The project includes construction of an approximately 5,800 square foot, three-story house on a 12,888 square foot parcel on the inland side of the gated section of Beach Drive. The table on the following page includes the square footage of each developed parcel (or parcel under development) located on the inland side of the gated portion of Beach Drive, as well as the square footage of the residence (including the garage) on each parcel.

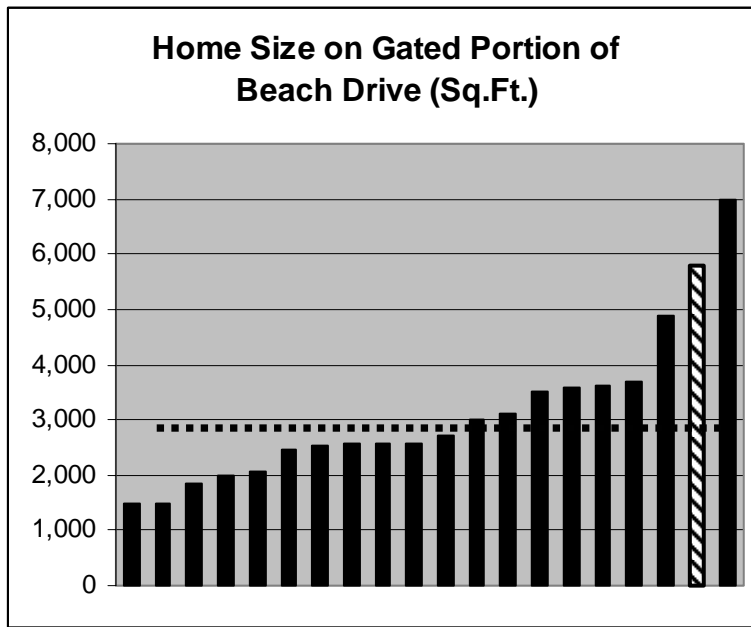


Table 1. Net site area and residential square footage of each inland parcel located along the gated portion of Beach Drive. (Mean square footage = 2,984 sf; Median square footage = 2,568 sf)

ADDRESS (Inland Parcels)	NET SITE AREA (square feet)	RESIDENCE SIZE (including garage) (square feet)	PERMIT#/APPROVAL DATE CCC=Commission SCO=County
525 Beach Drive	6,142	1,974	Pre-Coastal Act
528 Beach Drive	6,577	3,517	Pre-Coastal Act
540 Beach Drive	8,100	3,120	P-79-389 (CCC) August 20, 1979
542 Beach Drive	4,573	2,568	Pre-Coastal Act
544 Beach Drive	4,486	2,568	Pre-Coastal Act
548 Beach Drive (Collins)	12,888	5,800	A-3-SCO-06-059 (CCC) Not yet approved – This Application
615 Beach Drive	4,312	2,448	Pre-Coastal Act
617 Beach Drive	3,880	1,848	Pre-Coastal Act
619 Beach Drive	6,621	2,080	Pre-Coastal Act
621 Beach Drive	5,837	1,500	Pre-Coastal Act
623 Beach Drive	5,096	1,500	Pre-Coastal Act
625 Beach Drive	5,115	2,568	P-02-76-1707 (CCC) March 8, 1976
629 Beach Drive	11,674	6,989	Pre-Coastal Act
633 Beach Drive	6,538	3,582	3-SCO-05-450 October 21, 2005
635 Beach Drive	6,514	3,613	3-SCO-05-449 October 21, 2005
637 Beach Drive	6,000	4,900	3-SCO-05-104 March 8, 2005
639 Beach Drive	7,579	2,706	?
641 Beach Drive	6,882	2,520	3-SCO-93-093
643 Beach Drive	5,075	2,993	3-SCO-04-152 April 28, 2004
APN 043-161-46	8,120	3,704	3-SCO-04-152 April 28, 2004



As shown in the table above and the chart below, the square footage of the proposed residence will be larger than all but one of the homes (which was built prior to passage of the Coastal Act) on the inland side of this section of Beach Drive. Additionally, the square footage of the proposed residence will be twice as great as the square footage of 11 of these homes. Thus, the scale of the proposed residence is incompatible with the existing development pattern along this section of Beach Drive.² Therefore, the proposed project is inconsistent with LUP Policy 5.10.7, which requires that infill structures (typically residences on existing lots of record) be compatible with the pattern of existing development, and is also inconsistent with Zoning Regulation 13.20.130(b)(1), which requires that all new development be visually compatible and integrated with the character of the surrounding neighborhood. The proposed project is also inconsistent with Zoning Regulation 13.10.323, which establishes a two-story maximum for inland-side residential development in the RB (Ocean Beach Residential) zoning district.



b. Visual Resources

The project is within a mapped scenic resource area and therefore must comply with LUP Policies 5.10(b) and 5.10.2 regarding development within visual resource areas. The purpose of these policies is to ensure that new development is appropriately designed and constructed to have minimal to no adverse impacts upon identified visual resources. LUP policies 5.10.2 and 5.10.3 require that development in

² This inconsistency with the size of surrounding neighborhood development is even more dramatic when the proposed square footage is compared to the 28 existing residences located on the beach side of this section of Beach Drive, i.e. the square footage of the proposed project is more than twice as great as 16 of these existing homes, more than 3 times as great as 5 of these existing homes, more than 4 times as great as 2 of these existing homes and more than 5 times as great as 1 of these existing homes.



scenic areas be evaluated against the context of the local environment, utilize natural materials, blend with the area, and protect significant public vistas from inappropriate structural design (the proposed project's inconsistency with the requirement of LUP Policy 5.10.3 to minimize landform alteration was previously discussed in section C1 above). LUP Policy 5.10.7 allows structures to be visible from a public beach if they are infill residential structures and when the structure is compatible with the existing pattern of development.

In this case, the project site is located behind a line of existing mostly one-story homes (a few are two stories) on the seaward side of Beach Drive, and near existing single-family dwellings on the inland side of Beach Drive. The County determined that the upper story of the proposed dwelling will be visible from the open beach at low tides, as are other similarly-designed residences in the area. The design of the structure will be integrated into the Beach Drive neighborhood in terms of architectural style, colors, and materials.

The inland views from the public beach and offshore areas are largely occupied by existing residential development on the seaward and inland side of Beach Drive, and by homes that are located all along the top the bluff, which in many cases are fronted by large retaining structures (see Exhibit #4 for photos of Beach Drive). The homes along Beach Drive are relatively boxy and developed close together. At the project site area, there are multiple two- and three-story residential structures on the inland side of Beach Drive and a series of one- and two-story structures on the seaward side. The design of the proposed development, although much larger, is similar to adjacent development along the inland side of Beach Drive.

The proposed infill development will not block views of the beach or of the ocean. Although the project will incrementally add to the amount of development within the public viewshed, its impact would be less than significant within the scope of the existing view. Thus, the project is consistent with the visual resources policies of the Santa Cruz County LCP that protect scenic coastal views. However, as discussed above, the size of the proposed residence is inconsistent with the LCP's visual resource policies as they pertain to neighborhood compatibility.

4. Public Access

The project location lies between the first public road and the sea. Section 30604(c) of the Coastal Act requires that the Commission make specific findings of consistency of such development with the public access and recreation policies of the Coastal Act. The following Coastal Act policies provide for public access and recreation along the coast:

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.

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.

30212(a). *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in 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.*

30213. *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred...*

30221. *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

The project is located on the inland side of the private portion of Beach Drive. The site is not suitable for public access due to the steep topography of the site. No public access easements exist across this property. Lateral beach public access is available seaward of the beach-side homes that exist along Beach Drive. This beach access connects to Rio del Mar State Beach and Seacliff State Beach to the north and to County beach areas to the south. Thus, as proposed, the project is consistent with the public access policies of the Coastal Act.

5. Project Alternatives

The proposed project is inconsistent with the LCP's provisions regarding landform alteration, natural hazards, and neighborhood compatibility. To address these inconsistencies, Commission staff has evaluated alternative designs to the proposed development. Given that the entire parcel consists of a steep slope ranging from 50% to over 70%, any residential development will require some amount of landform alteration on this hazardous parcel. However, there may be options that would likely substantially reduce the amount of grading and subsequent significant landform alteration. For example, the residence could be elevated on deep piers, as shown in the photograph in Exhibit #11. Or, perhaps the residence could be elevated on a single massive pier or foundation structure. For both of these options, the amount of lateral grading and landform alteration would likely be reduced, although an unknown amount of grading and excavation into the bluff would be required to ensure that the residence would not tower directly over Beach Drive. Access to the residence would be from the bottom of the structure through the stairs or potentially an elevator. In the event of a landslide of the bluff, however, it is possible that this access could be blocked or destroyed, potentially trapping the occupants of the residence within the structure, inconsistent with the safety requirements of the LCP. This type of elevated development probably would not be visually compatible with the character of the surrounding neighborhood and thus would be inconsistent with the neighborhood compatibility policies of the LCP.



Finally, the elevated nature of both alternative residential structures might mean the structure would be highly visible from the beach, inconsistent with the visual resource policies of the LCP. Furthermore, these alternatives would not provide for any onsite parking on the parcel, inconsistent with the requirements of Section 13.10.551 of the certified Zoning Regulations, and this section of Beach Drive does not have adequate width to allow for on-street parking. Finally, as with the proposed project, these alternative structures would be located on a parcel subject to a variety of natural hazards. Appropriate (but at this time unknown) engineering solutions would need to be developed to ensure the safety of these types of structures and their occupants in the event of a landslide and/or wave run-up. For all the above reasons, such alternatives do not appear to be feasible options for development of this parcel.

6. Coastal Issues Conclusion

The proposed project is consistent with the visual resources policies of the certified Santa Cruz County LUP and with the public access and recreation policies of the Coastal Act. The proposed project, however, is inconsistent with the provisions of the LCP that require minimization of landform alteration and grading activities due to the amount of landform alteration and grading (approximately 1,250 cubic yards) that will be required to develop the project. Specifically, the proposed project is not consistent with LUP Policy 6.3.9(c), which requires that foundation designs minimize excavation or fill. The proposed project is also inconsistent with LUP Policy 5.10.3, which requires that grading operations that take place in scenic areas (the project site is located in a scenic mapped area) minimize disruption of landforms.

More fundamentally, the proposed project is inconsistent with the public safety provisions of the LCP as they pertain to natural hazards. The proposed development is located directly on a bluff face with a slope ranging in steepness from 50% to over 70%. As such, the location of the proposed project has not been sited to avoid or minimize hazards, inconsistent with LUP Policy 6.2.10. Furthermore, the proposed project does not meet the minimum 25-foot bluff setback requirement of LUP Policy 6.2.12 and is inconsistent with the intent of this policy, which is to minimize safety hazards in areas subject to coastal erosion.

Finally, the square footage of the proposed project is more than twice that of the majority of homes that are located on the inland side of the gated section of Beach Drive. Therefore, the scale of the proposed residence is incompatible with the existing development pattern along this section of Beach Drive. Thus, the proposed project is inconsistent with LUP Policy 5.10.7, which requires that infill structures be compatible with the pattern of existing development. Furthermore, the proposed project is inconsistent with Zoning Regulation 13.20.130(b)(1), which requires that all new development be integrated with the character of the surrounding neighborhood, and is also inconsistent with Zoning Regulation 13.10.323, which establishes a two-story maximum for inland-side residences located on Beach Drive (the proposed project is three stories).

Given the inconsistencies of the proposed project with the above LCP policies and zoning regulations, Special Conditions have been attached to the permit that allow for the development of a residence with a



reinforced concrete foundation and that implement the LCP's policies and zoning regulations regarding landform alteration, natural hazards, and neighborhood compatibility to the maximum extent feasible. To reduce the landform alteration and neighborhood compatibility impacts of the proposed project, **Special Condition #1** requires the applicants to submit revised plans for a two-story residence. Removal of the third story will reduce the amount of grading necessary to develop the residence, thus reducing the amount of landform alteration required by the project. The remaining development will consist of the ground floor non-habitable garage in the same footprint as proposed and a second floor living area of approximately 1,825 square feet. The height of the two-story residence must be comparable to the maximum height of the second story as shown in the project plans attached as Exhibit #5. Thus, the total square footage of the proposed residence will be approximately 3,600 square feet, instead of the 5,800 square feet proposed. Even so, the square footage of the approved residence will be greater than the mean (2,984 square feet) and median (2,568 square feet) square footages of the inland-side residences along the gated portion of Beach Drive. This condition also incorporates the County's conditions regarding final plans, the finish and color of exterior materials, etc., into this approval. In addition to reducing landform alteration and neighborhood compatibility impacts, the removal of the third story eliminates the need for a variance to Zoning Regulation 13.10.323.

Regarding natural hazards, the Commission's staff geologist and staff engineer acknowledge that development along Beach Drive is subject to an unusually high number of geologic and other hazards and that hazard avoidance, i.e. no development, would be preferable to mitigating hazards through engineering efforts (see Exhibits #7 through #10). However, they note that the proposed project site can be safely developed by extensive mitigation, including the use of a design to both support the slope and bear the impact and weight of the worst conceivable landslide event. Additionally, they note that the level of risk posed by the site is reflected in the 39 recommendations included in the Geotechnical Report for the project, and in the 8 recommendations included in the Geologic Investigation for the project, and that the County permit was conditioned to require that the final plans reference and incorporate these recommendations. Special Condition #1 also incorporates the County's conditions that implement the recommendations of the Geotechnical Report and Geologic Investigation to reduce hazards impacts through engineering efforts to the maximum extent feasible.

Special Conditions #2 & #3 require submission of an erosion and sedimentation control plan and a post-construction drainage plan that will supplement the County's drainage and erosion control requirements. Nevertheless, the risks to development associated with natural hazards cannot be avoided. Development in such a dynamic environment remains susceptible to damage due to long-term and episodic processes. As a result, applicants are regularly required to acknowledge site-specific geological risks and agree to waive any claims of liability on the part of the Commission for allowing the development to proceed. **Special Condition #4** requires that the applicants agree to an assumption of risk. **Special Condition #5** requires that the applicants execute and record a deed restriction that imposes all standard and special conditions of this permit as covenants, conditions, and restrictions on the use and enjoying of the property.

Even with the addition of these Special Conditions, the amended project does not achieve full



consistency with the LCP's policies and zoning regulations regarding landform alteration, neighborhood compatibility, and natural hazards. Specifically, construction of a two-story residence on this steep parcel will still involve substantial alteration of the bluff face and excavation of bluff material. Implementation of the extensive mitigations required by Special Condition #1 and #2 to ensure safe development of the residence cannot completely mitigate for the fact that the parcel is subject to a variety of natural hazards, e.g. flooding and landslides, nor for the fact that the development will not meet the LCP's bluff setback requirements. And although the special conditions require the reduction of building size from approximately 5,800 square feet to approximately 3,600 square feet and removal of the third story, the revised project will still be substantially larger than the average residence along this section of Beach Drive. Given this lack of consistency with the certified LCP, the project should be recommended for denial. However, as discussed in the next section below, denial of an economic use of this property would raise inconsistencies with Coastal Act Section 30010 and with the property rights provisions of the U.S. Constitution.

7. Implementing Coastal Act Section 30010

As discussed above, the project, even as revised by the Special Conditions, is inconsistent with the landform alteration, natural hazards, and neighborhood compatibility policies and zoning regulations of the Santa Cruz County LCP. In total, these LCP inconsistencies could form the basis of a denial recommendation. These LUP policies and zoning regulations, however, must be applied in the context of Coastal Act Section 30010. This section provides that the policies of the Coastal Act "shall not be construed as authorizing the commission . . . to exercise [its] power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation." Thus, if strict construction of the restrictions in the LCP's landform alteration, natural hazards, and neighborhood compatibility policies and zoning regulation requirements would cause a taking of property, these policies and zoning regulations must not be so applied and instead must be implemented in a manner that will avoid this result.

Recent court decisions demonstrate that to answer the question whether implementation of a given regulation to a specific project will cause a taking requires an ad hoc factual inquiry into several factors. Specifically, the courts have consistently indicated that this inquiry must include consideration of the economic impact that application of a regulation would have on the property. A land use regulation or decision may cause a taking if it denies an owner all economically viable use of his or her land. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S. Ct. 2886; also see *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495, citing *Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Another factor that must be considered is the extent to which a regulation or regulatory decision "interferes with reasonable investment backed expectations." (*Keystone Bituminous Coal Assn. v. DeBenedictis*, supra, 480 U.S. 470, 495, citing *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 175.)

In addition, to avoid allegations of a taking, certain types of mitigation measures, such as exactions requiring the dedication of a fee interest in property, must be "roughly proportional" to the impact remediated. (*Dolan v. City of Tigard* (1994) 114 S. Ct. 2309.)



Finally, in still other individual cases it may be necessary to consider whether the property proposed for development by the applicants is subject to existing limitations on the owners' title, such as prescriptive rights, that might preclude the applied for use, or that the proposed use would be a nuisance. The question as to whether any portion of the development is subject to prescriptive rights does not apply in this case. Furthermore, development of the parcel with a residence in the configuration proposed by the applicants would not constitute a nuisance.

In 1996, the County approved a three-story reinforced single-family residence on this property (local project number 96-159; CCC reference number 3-SCO-96-037). In 1998, the County extended this permit for two years (local project number 98-0161; CCC reference number 3-SCO-98-072). The approved project, however, was never constructed. In July 2003, the property was sold to the current applicants (Michael & Deborah Collins) for fair market value. The applicants submitted adequate financial information to demonstrate that they have a sufficient real property interest in the parcel to allow development of the parcel. At the time the applicants purchased the property, this parcel and other parcels along Beach Drive were designated in the LCP and zoned for single-family residential use, although the LCP also includes policies that would severely limit development on this site as well. Prior to purchasing the property, the applicants were aware of the previous County approval for development of a reinforced single-family residence on this parcel. Thus, in the year that the property was purchased (2003), the applicants could have legitimately assumed that limited development of a residence on this property was a reasonable expectation. Therefore, in view of the other residential uses in the vicinity of this parcel and the previous County approval for residential development of the site, the Commission finds that the proposed residential use is a reasonable economic use.

In view of the findings that: (1) the entire parcel is located in a natural hazard area and consists entirely of 50% to greater than 70% slopes, (2) residential use of the property would provide an economic use and (3) the applicants had a reasonable investment backed expectation that a residential use would be allowed on the property, the Commission finds that denial of a residential use, based on the inconsistency of this use with the LCP's landform alteration, natural hazards, and neighborhood compatibility policies and zoning regulations, could constitute a taking. Therefore, consistent with Coastal Act Section 30010 and the Constitutions of California and the United States, the Commission determines that full implementation of these LCP policies and zoning regulations to prevent residential use of the subject property is not appropriate in this case.³

³ Having reached this conclusion, however, the Commission also finds that Section 30010 only instructs the Commission to construe the policies and zoning regulations of the certified LCP in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on permit applications. Moreover, while the applicants may have reasonably anticipated that residential use of the subject property might be allowed, the County LCP provided notice that such residential use would be contingent on the implementation of measures necessary to minimize the impacts of development in this hazardous area. Thus, the Commission must still comply with the requirements of the LCP by protecting against significant landform alteration, assuring safety in a hazardous area, and avoiding impacts to neighborhood compatibility, and avoiding impacts that would degrade these values, to the extent that this can be done consistent with the direction to avoid a taking of property. Mitigations must also be generally proportionate to the adverse impacts caused by development of the residence and associated infrastructure. As discussed in Section 6 above, the Commission has proposed mitigation measures in the form of special conditions that modify the project in order to bring it into conformity to the maximum extent feasible with the development standards of the LCP.



V. California Environmental Quality Act (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment. The County conducted environmental review for the proposed project per the requirements of CEQA and issued a Negative Declaration with Mitigations.

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 constitutional coastal resource issues with the proposal, and has recommended appropriate mitigations to address adverse impacts to said resources. Accordingly, the project is being approved subject to conditions that identify certain mitigating actions required of the applicants by the Commission (see Special Conditions). As discussed in the staff report, the conditions of the Commission's approval modify the project to a degree that does not achieve full consistency with the Santa Cruz county LCP. Thus, the project, as conditioned, will have residual adverse effects on the environment. However, additional alternatives and mitigation measures, by which these adverse effects could be eliminated, are not feasible because they would infringe upon the applicants' right to payment of compensation for a taking of his property for a public use. Accordingly, the Commission's conditions of approval reduce the adverse environmental effects of the project to the maximum extent feasible, and thus satisfy the requirements of the CEQA, because there are no feasible alternatives or mitigation measures available to further reduce such effects.

