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Staff:	Rainey Graeven - SC
Staff Report:	6/22/2018
Hearing Date:	7/12/2018

STAFF REPORT: DE NOVO HEARING

Application Number:	**A-3-SCO-18-0004**
Applicant:	**Opal Cliffs Recreation District**
Project Location:	Opal Cliffs Park and beach accessway on the seaward side of Opal Cliff Drive (at 4520 Opal Cliff Drive) in the Live Oak area of Santa Cruz County.
Project Description:	After-the-fact authorization of the following: 1) a 9-foot tall wrought iron fence and locked gate along Opal Cliff Drive; 2) an access fee program (requiring a $100 keycard to open the gate, with free limited access limited to summertime daytime access only); 3) approximately 30-foot-long and nine-foot-tall chain link fences on the side yards of the Park; 4) a gate attendant program; 5) various previously installed improvements including a concrete paver pathway, stone retaining walls, landscaping and irrigation; and proposed parking improvements (not yet installed), including signs and striping of parking spaces.
Staff Recommendation:	Approval with Conditions

SUMMARY OF STAFF RECOMMENDATION

The Opal Cliffs Recreation District (OCRD)[1], a public agency and special district of Santa Cruz County government, is requesting an after-the-fact (ATF) coastal development permit (CDP) to

[1] The OCRD was established in 1949 and owns and operates Opal Cliffs Park (including its associated beach accessway) and nothing else. The District is made up of some 100 or so properties in the immediate Opal Cliffs

recognize unpermitted development at Opal Cliffs Park, including a 9-foot tall iron fence and locked gate, a park and beach access fee program (including $100 annual user fees for year-round access and a gate attendant to help implement the program), and related park improvements.[2] The application is the end result of a long and protracted enforcement case that was first opened by Commission enforcement staff over a decade ago in 2006 (V-3-06-012), and that ultimately relates to violations extending back to the 1980s. In 2006, staff became aware that the Applicant had installed the above-referenced fence and locking gate apparatus sometime in the mid-2000s without the benefit of a CDP. That violation also applies to the fee and gate attendant program that were apparently instituted sometime in the mid-1980s. Although it is undisputed that the proposed fence, gate, and park improvements have not been previously authorized by a CDP, the Applicant argues that the fee and gate attendant program are simply a continuation of the manner in which OCRD has operated the Park prior to Coastal Act permitting requirements, and that the Commission approved these elements in 1981 by virtue of its approval of CDP P-80-393. In terms of the former, there is only limited information available, and the information that is available suggests that the Applicant may have occasionally employed a gate attendant at times prior to the Coastal Act, but there is no evidence to suggest that access fees were charged for general public access at this location, including to the beach.

With respect to CDP P-80-393, staff has determined that that CDP expired back in 1982, and thus is no longer valid. The Applicant disputes the expiration of CDP P-80-393, and suggests that CDP P-80-393 and its recorded access program are still in effect. The Applicant further suggests that the recorded access program provides for unilateral OCRD fee adjustments. Staff disagrees on all points. First, the Commission never discussed nor approved any access fees or any gate attendant in its approval of CDP P-80-393. Rather, that approval was based on providing a 6-foot-tall chain link fence and gate to help provide some form of access control to address what OCRD had identified at the time as the "unstable, hazardous nature of the bluffs in the area." The suggestion that the Commission approved a beach access fee program (whether $20 or $100) and a gate attendant is simply not supported by the CDP record. Moreover, even if a fee was approved, fee increases would not only require OCRD approval, but also CDP authorization. With respect to the recorded access program, even if the CDP were still valid, the access program terminated by its own terms when the Applicant took out the 6-foot-tall chain link fence and gate and replaced it with the 9-foot-tall wrought iron fence and gate in the mid-2000s without benefit of a CDP.[3] In other words, no matter how one frames this past CDP history in terms of the expiration issue, none of the proposed development at the site, including the gate/fence/attendant and the overall park and beach access fee program, is currently

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area (i.e., all within several hundred feet of the Park) and these property owners are the voting constituency that elects the OCRD Board of Directors, who then make decisions regarding the Park.

[2] The project was originally approved by Santa Cruz County. On March 8, 2018, the Commission found that the County's action raised a substantial issue of conformance with the County's Local Coastal Program (LCP) and with the Coastal Act's public access and recreation policies and took jurisdiction over the CDP application.

[3] As more fully explained in this staff report, the recorded access program included a duration clause that stated (in applicable part) that the access program would only remain in force and effect during the time that the development it authorized was present. Because the development that was authorized by P-80-393 was removed by the Applicant and replaced by the current 9-foot-tall iron fence/gate without the benefit of a CDP, the access program, to the extent it was ever applicable given the CDP expiration issue, terminated of its own terms and is of no force or effect.

authorized by a CDP, and thus the current existing analytic baseline for considering the proposed project is a public beach park with a roughly 6-foot-tall chain link fence and gate without any fees for access – in other words, the same condition as when the Commission considered the Applicant's CDP application (P-80-393) in 1981.[4]

Thus, while there is certainly a complicated and involved permit history, at a very basic level the proposed project replaces free public beach access and use (i.e., the baseline condition) with a significant access fee program, requiring access users to purchase a $100 gate key for yearly access (the proposed ATF project). The proposed project further includes a significant fence/gate structure staffed by a gate attendant whose purpose includes enforcing the program's limited access terms. This construct raises significant and fundamental consistency issues with primary tenets of the Coastal Act and California's coastal management program more broadly in terms of maximizing access to our public beach commons for the broadest of the State's economically and culturally diverse population. At its core, the proposed project imposes a substantial fee to access and use a public park and beach. While fees for parking at public beaches are relatively common, staff is not aware of any other similar fee to access or use a beach at any other publicly-managed beach accessway in California. The Applicant's proposed project therefore reduces public recreational access opportunities when the LCP and the Coastal Act require that they be maximized. In addition, a $100 access fee is a significant cost to many, if not most, potential public access users, particularly when one considers that this is a public park and beach facility. Ultimately, unless members of the public who want to use this public park and beach have the ability to pay a $100 fee, the Applicant is effectively proposing to prohibit year-round public beach access at this location for those who cannot or may not wish to pay such a fee. In other words, because the beach accessway through the park is essentially the only readily available access to the pocket beaches below, and it is the only vertical accessway to the beach and shoreline for a distance of over a mile in this urbanized area of the Santa Cruz County coast, a $100 annual fee serves to prohibit anyone who cannot afford to pay the fee, or may not wish to pay the fee, from accessing the beaches of this stretch of coastline. This fee-based beach access prohibition will fall disproportionately on those who are lower income and more disadvantaged, and on those who do not live near the Opal Cliffs area, and disproportionately benefits those who live in the immediate area and are more likely to be able to make more frequent use of the park and beach.

Further, the proposed 9-foot-tall wrought iron fence and gate system present a rather imposing and exclusionary barrier to public access generally as compared to the baseline 6-foot-tall chain link fence/gate. The 9-foot-tall wrought iron fence and gate system not only serves as a physical barrier to access, but a psychological barrier as well. In other words, potential access users who are not familiar with the setting, particularly visitors from inland locations who do not live in Opal Cliffs, may be intimidated by such an imposing edifice, and thus may not approach the accessway in the first place, whether fees are charged or not. This barrier to general access, especially to visitors from outside the area, is only further enforced by the presence of a gate attendant. Regardless of whether the attendant's role is to help all potential access users understand park rules, etc. (as the Applicant indicates), the gate attendant enforces access fee

[4] When the Commission considers proposed ATF development, it must first establish the baseline permitted condition from which to evaluate the ATF development, in which that baseline is what was legally present before the violations.

requirements, and the presence of a person at the gate and the accessway will only further emphasize the feeling that non-local users are unwelcome, and may intimidate users not familiar with or not accustomed to gate attendants, further dissuading them from using the accessway, and further reducing public recreational access opportunities, inconsistent with the Coastal Act and the LCP. Again, staff is not aware of any other similar "gate attendant" and/or beach access fee programs at any other publicly-managed beach accessway in California. Even if visitors wish to pay the $100 fee and obtain a keycard to enter the park and beach, they must go to Freeline Surf Shop, located almost a half-mile from the Park, to purchase the keycard, and this presents yet another barrier to access.

In short, the Applicant's proposed project is clearly inconsistent with Coastal Act and LCP public access and recreation requirements, including those that require that public recreational access opportunities be maximized. Most notably, the fee program (including the imposing fence, gate, and attendant) inflicts substantial limitations on general public access to the beach, and is not consistent with the requirements of the Coastal Act and the LCP. The proposed project also disproportionately adversely affects those potential beach goers who are of more limited incomes and cannot afford a $100 beach access fee, as well as those who live some distance from the Opal Cliffs area and may not wish to pay a fee for limited, sporadic use of the park. Finally, the overall imposing fence and gate system is inconsistent with the LCP's visual resource protection provisions, especially when one considers that the park provides the only public visual respite towards the ocean along all of Opal Cliff Drive because the public's view is otherwise blocked by a row of about 50 large blufftop private residences and related residential development between the public street and the shoreline along Opal Cliff Drive.

Opal Cliffs Park is a public beach access/park facility that is operated by a public agency, and for all the reasons articulated above, the Coastal Act and LCP do not support allowing public access to be provided for the exclusive benefit of those persons who can afford the $100 per year fee to access the beach and park all year (as opposed to being generally available for free to the beachgoing public in the manner that is the norm for coastal accessways, including all of the other coastal accessways in Santa Cruz County operated by the County Parks Department and State Parks). At its core, the Applicant's proposed project would set up what can best be described as a two-tiered access system, one where those who are able to pay the fee are afforded year-round beach and shoreline access, and those who cannot or do not wish to pay the $100 access fee are limited to access during the summer months only. This two-tiered construct is unacceptable for California's most valuable public resources, and cannot be found consistent with fundamental Coastal Act and LCP requirements to maximize public recreational access opportunities for all. The State's beaches, including the pocket beaches at this location, are there for everyone, regardless of their ability to pay, including those not fortunate enough to live in coastal Opal Cliffs near this accessway, and staff cannot see how any outcome other than opening this beach accessway to free general public use could be found appropriate in this case.

Thus, for the reasons stated above, staff recommends that the Commission approve a conditioned CDP that requires free year-round general public access to the park and the beaches at this location from one hour before sunrise to one hour after sunset, and signage and other related development to reinforce such use parameters. With respect the fence/gate, because the existing fence/gate cannot be found consistent with the Coastal Act or the LCP's public access/recreation

provisions or the LCP's standards related to the protection of visual resources (including allowable fence heights fronting Opal Cliffs Drive), staff recommends removing the existing fence/gate[5] and replacing it with a retractable fence/gate up to six feet in height. A retractable fence/gate design would not impede public views during daylight hours (unlike the current design), and thus would maximize public views of the ocean as seen from Opal Cliff Drive (again, the only such public visual respite between an otherwise unbroken row of some 50 large private residences) as is required by the LCP. It would also allow for the accessway to be closed at night, which is responsive to public safety concerns raised by local law enforcement regarding the potential for nefarious activities to take place on the pocket beaches below.

Related, staff recommends that the gate attendant program not be approved including because despite efforts to re-characterize the gate attendant as a "Park Aide," the presence of a person at the park's entrance is a psychological access deterrent in and of itself, including because gate attendants are highly unusual for public beach accessways. Furthermore, a gate attendant represents a significant unnecessary expenditure, and the Applicant's primary justification for the keycard system is to pay for ongoing operational costs and upkeep, and the gate attendant program is a significant component of these costs ($33,000 annually, which amounts to approximately 64% of the average annual budget). Thus, elimination of the gate attendant component would result in significant cost savings for the Applicant, and would eliminate LCP and Coastal Act inconsistencies related to maximization of public access and recreational opportunities.

Finally, staff recommends approval of the other ATF and new proposed park improvements, including the approximately 30-foot-long and six-foot-tall chain link fencing located along each of the side yards of the park (extending seaward from the existing fence and gate); the ADA-compatible concrete paver pathway; six concrete benches; two approximately three-foot-high retaining walls on either side of the pathway; striped parking (including one handicapped parking space) in the area between Opal Cliff Drive and the fence/gate; access information signage (including ADA parking signage); and the landscaping/irrigation improvements.

In short, the proposed ATF fence, gate, fee and attendant program cannot be found consistent with the Coastal Act and the LCP, and cannot be approved as proposed. At issue is the way in which public access to the public pocket beaches here is provided, but also at issue is the way in which public access to California's public beaches is provided. OCRD is a public agency operating a public beach accessway for the benefit of the public, and is the only such public agency that charges a fee for beach access of which staff is aware in all of California. Such beach access fees are antithetical to the Coastal Act and the coastal management program, and disproportionately fall on those least able to afford it, especially inland visitors looking for a day at the beach who are not fortunate enough to live in the Opal Cliffs area. Staff's recommendation is therefore designed to maximize public beach access for all, including via providing public beach access to the broadest of the State's economically and culturally diverse population. The motion and resolution to affect staff's recommendation is found on page 7.

[5] Staff notes that the fence is currently broken at the upcoast end and only held together with the help of a chain, and thus already requires significant repair to function.

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I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Motion: *I move that the Commission* ***approve*** *Coastal Development Permit Number A-3-SCO-18-0004 pursuant to the staff recommendation, and I recommend a* ***yes*** *vote.*

Resolution to Approve CDP: *The Commission hereby approves Coastal Development Permit Number A-3-SCO-18-0004 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the Santa Cruz County Local Coastal Program policies and Coastal Act access and recreation policies. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

II. STANDARD CONDITIONS

This permit is granted subject to the following 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.

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Approved Project.** This CDP authorizes the following development: replacement of the existing 9-foot-tall wrought iron fence and associated gate with a new retractable fence and gate that are a maximum of six feet in height (see also **Special Condition 2(b)**) along Opal Cliff Drive; the approximately 30-foot-long and 6-foot-tall chain link fencing located along each of the side yards of the park extending seaward from the fence and gate; an ADA-compatible concrete paver pathway; six concrete benches; two approximately 3-foot-high retaining walls on either side of the pathway; striped parking (including one handicapped parking space) in the area between Opal Cliff Drive and the fence and gate; access information signage (including ADA parking signage); and landscaping/irrigation improvements, all as shown on the proposed project plans (dated April 4, 2017 and dated received in the Coastal Commission's Central Coast District Office on January 2, 2018), all as may be modified by **Special Condition 2** below. Any other development than that identified as the Approved Project, including the presence and use of a "Park Aide" or "Gate Attendant" at the Park, is not approved by this CDP.

2. **Public Access Management Plan.** WITHIN 90 DAYS OF CDP APPROVAL, the Permittee shall submit for Executive Director review and written approval two sets of a Public Access Management Plan (Access Plan). The Access Plan shall clearly describe the manner in which general public access associated with the approved project is to be provided and managed, with the objective of maximizing general public access to Opal Cliffs Park facilities on the blufftop, the beach access stairway, the beaches at the base of the stairway, and the offshore surfing and ocean areas. The Access Plan shall at a minimum include the following:

   a. **Clear Depiction of Public Access Areas and Amenities.** All public access areas and amenities, including all of the areas and amenities described **Special Condition 1** above, shall be clearly identified as such on the Access Plan.

   b. **Fence/Gate.** Project plans and visual simulations of the replacement retractable fence/gate (and photos of any existing installed fences/gates of similar design and purpose) shall be provided. The retractable fence/gate shall be sited and designed in such a way as to minimize public view impacts and to be compatible with the overall Park aesthetic, including with respect to any necessary structural supports, and to allow emergency egress from the seaward side. The retractable fence/gate shall be no more than six feet tall and shall be designed such that it can be retracted one hour before sunrise and closed one hour after sunset daily either through an automated system or manually.

   c. **Public Access Signage/Materials.** The Access Plan shall identify all signage, website information, and any other project elements that will be used to facilitate, manage, and provide information to the general public regarding public access to Opal Cliffs Park and all of the areas and amenities described in this condition above. Sign details showing the location, materials, design, and text of all signs shall be provided, and the Park shall include at least one sign providing Park use information (including access hours and information about the use of the overlook and the beaches located at the bottom of the stairway), and such sign shall include the Commission's standard access program "feet"

logo and the California Coastal Trail emblem and be located facing Opal Cliff Drive so as to provide clear public access information without impacting public views and site character to the maximum extent feasible. All signs shall be sited and designed to blend into the site and setting aesthetics as much as possible.

d. No Public Access Disruption. Development and uses within the public access areas that disrupt and/or degrade general public access (including areas set aside for private uses, barriers to public access (furniture, planters, temporary structures, private use signs, ropes, etc.)) shall be prohibited. The public access areas and amenities shall be maintained in a manner that maximizes general public use and enjoyment.

e. Public Access Use Hours. All public access areas and amenities, including all of the areas and amenities described in this condition above, shall be available to the general public free of charge during at least daylight hours (i.e., one hour before sunrise to one hour after sunset) daily.

f. Donation Program. If the Permittee wishes to include a donation program to help fund Park operations, the Access Plan shall provide details on any such program, including any donation stations and related materials, all of which shall be sited and designed to have the least impact on public views.

g. Public Access Areas and Amenities Maintained. The public access components of the project, including signage, landscaping, hardscaping, irrigation, benches, the pathway to the beach stairway, the overlook area, and the beach stairway itself shall be maintained in their approved state for the duration of the this permit, including any future permit amendments.

h. Implementation Timeline. The Access Plan shall include a schedule that identifies expected installation timelines for the improvements and amenities described above, all of which shall be constructed, installed, operational, and available for general public use as soon as possible, but no later than December 31, 2018.

The Permittee shall undertake development in accordance with the approved Public Access Management Plan, which shall govern all general public access to the site pursuant to this CDP.

IV. FINDINGS AND DECLARATIONS

The standard of review for the proposed project is the Santa Cruz County certified LCP and, because the project is located between the first public road and the sea, the public access and recreation policies of the Coastal Act.

A. PROJECT LOCATION

The proposed project is located at Opal Cliffs Park along Opal Cliff Drive, which extends from 41st Avenue in Pleasure Point to Cliff Drive downcoast in the City of Capitola. This area is generally referred to as Opal Cliffs, but it is technically part of the larger Live Oak Beach area of Santa Cruz County between the Cities of Santa Cruz and Capitola.

Santa Cruz County Regional Setting

Santa Cruz County is located on California's central coast, and is bordered to the north and south by San Mateo and Monterey Counties (see **Exhibit 1**). The County's shoreline includes the northern half of the Monterey Bay and the rugged north coast extending to San Mateo County along the Pacific Ocean. The County's coastal zone resources are varied and oftentimes spectacular, including the Santa Cruz Mountains coastal range and its vast forests and streams; an eclectic collection of shoreline environments ranging from craggy outcrops to vast, sandy beaches (in both urban and more rural locations); numerous coastal wetland, lagoon and slough systems; habitats for an amazing variety and number of endangered species; water and shore-oriented recreational and commercial pursuits, including world class skim boarding, bodysurfing, and surfing areas; internationally renowned marine research facilities and programs; special coastal communities; vast State Park lands; and the Monterey Bay itself. The unique grandeur of the region and its national significance was formally recognized in 1992 when the area offshore of the County became part of the Monterey Bay National Marine Sanctuary (MBNMS), the largest of the thirteen federally-protected marine sanctuaries in the nation.

Santa Cruz County's rugged mountain and coastal setting, its generally mild climate, and its well-honed cultural identity combine to make the area a desirable place to both live and visit. As a result, the County has seen extensive development and regional growth over the years since the coastal permitting requirements of Proposition 20 and the Coastal Act were instituted in the early 1970s. In fact, Santa Cruz County's population has more than doubled since 1970 alone with current state estimates indicating that the County is home to over one-quarter of a million persons.[6] This level of growth not only increases the regional need for housing, jobs, roads, urban services, infrastructure, and community services, but also the need for park areas, recreational facilities, and visitor-serving amenities. For coastal counties such as Santa Cruz where the vast majority of residents live within a half-hour of the coast, and most significantly closer than that, coastal zone resources are a critical element in helping to meet these needs. Furthermore, with coastal parks and beaches attracting visitors into the region, an even greater pressure is felt at coastal recreational systems and destinations like Live Oak, including the

[6] Census data from 1970 shows Santa Cruz County with 123,790 persons, and California Department of Finance estimates for 2017 indicate that over 276,603 persons reside in Santa Cruz County (*California Department of Finance Demographic Research Unit, Report E-1: Population Estimates for Cities, Counties, and the State January 1, 2016 and 2017*; Sacramento, California; May 1, 2017).

southern portion of Live Oak where Pleasure Point and Opal Cliffs are located. With the Santa Cruz County shoreline and beaches providing arguably the warmest and most accessible ocean waters in all of Northern California, and with the large population centers of the San Francisco Bay area, San Jose, and the Silicon Valley nearby, this type of resource pressure is particularly evident in coastal Santa Cruz County.

Live Oak is part of a larger area, including the Cities of Santa Cruz and Capitola, that is home to some of the best recreational beaches and shoreline areas in the Monterey Bay area. Not only are north Monterey Bay weather patterns more conducive to beach and shoreline recreation than the rest of the Monterey Bay area, but northern Santa Cruz beaches are generally the first beaches accessed by visitors coming from the north of Santa Cruz. With Highway 17 providing the primary access point from the north (including from the San Francisco Bay Area, San Jose and the Silicon Valley) into the Monterey Bay area, Santa Cruz, Live Oak, and Capitola are the first coastal areas that visitors encounter upon traversing the Santa Cruz Mountains. With an $850 million tourist industry,[7] the Santa Cruz area is also a prime visitor destination for other shoreline pursuits, including the very popular Santa Cruz Beach Boardwalk, the only major amusement park left along the coast of California, and the oldest amusement park in the State. The Boardwalk's some three million annual visitors also look to experience the rest of the area, including its beaches and shoreline. As such, the Live Oak beach area (including Pleasure Point/Opal Cliffs) is an important coastal access asset for not only Santa Cruz County, but also the entire central and northern California region, including inland population centers of the Central Valley.

Live Oak Beach Area

Live Oak is the name for the unincorporated segment of Santa Cruz County located between the City of Santa Cruz on the upcoast end and the City of Capitola on the downcoast end (see **Exhibit 1**). The Live Oak coastal area is well known for excellent public access opportunities for beach area residents, other Live Oak residents, other Santa Cruz County residents, and visitors to the area. Walking, biking, skating, viewing, ocean swimming, skim boarding, bodysurfing, surfing, fishing, sunbathing, and more are all among the range of recreational activities possible along the Live Oak shoreline. In addition, Live Oak also provides a number of different coastal environments including sandy beaches, rocky tidal areas, blufftop terraces, and coastal lagoons. Live Oak includes a number of defined neighborhood and special communities, including the larger Pleasure Point and Opal Cliffs areas where the proposed project is located. These varied coastal characteristics make the Live Oak shoreline unique including because a relatively small area provides different recreational users a diverse range of alternatives for enjoying the coast. By not being limited to one large, long beach, or solely an extended stretch of rocky shoreline, the Live Oak shoreline accommodates recreational users in a manner that is typical of a much larger access system.

Primarily residential with some concentrated commercial and industrial areas, Live Oak is a substantially urbanized area with few major undeveloped parcels remaining. Development pressure has been disproportionately intense for this section of Santa Cruz County. Because Live Oak is projected to absorb the majority of the unincorporated growth in Santa Cruz County,

[7] Visit California 2016 Economic Impact by State, Region, & County.

development pressure will likely continue to tax Live Oak's public infrastructure (e.g., streets, parks, beaches, etc.), including with respect to Live Oak beaches, which make up the majority of identified public park facilities.[8] Given that the beaches are the largest public facility in Live Oak, and called out as such by the LCP, this pressure will be particularly evident in the immediate shoreline and beach area, and maximum access to these areas is thus critical to satisfy both resident and visitor recreational needs.

Pleasure Point/Opal Cliffs

Pleasure Point is the name of the predominantly residential area located roughly between upcoast Moran Lake and downcoast 41st Avenue (at the "Hook" where it transitions to the Opal Cliffs area). Pleasure Point is also the name of the offshore surfing area between Soquel Point (aka "Pleasure Point") and the Hook (see **Exhibit 1**). This area has an informal, beach community aesthetic and ambiance that clearly distinguishes it from inland commercial areas as well as the downcoast Opal Cliffs neighborhood towards Capitola. Housing stock is eclectic and densely crowded together. Though certainly in the midst of a gentrification that has intensified over the last decade or so, the Pleasure Point area retains its informal charm and appeal, much of it rooted in the intrinsic relationship between the built environment, its inhabitants, and the surfing area offshore.

Pleasure Point is an extremely popular recreational surfing destination that is well known around the world. It is not uncommon to see more than 100 surfers in the water, even more when prime surfing conditions are present, and to see small groups of people lining East Cliff Drive both enjoying the shoreline view and watching the surfing below.

The Opal Cliffs area is also part of this prime and popular visitor destination, especially for surfing, but its built environment characteristics are significantly different from adjacent Pleasure Point. Perhaps most striking, whereas Pleasure Point is fronted atop the bluffs by a public linear park (with an almost 20-foot wide recreational trail (part of the California Coastal Trail (CCT)), benches, picnic tables, showers, restrooms, interpretive materials, and other visitor amenities)[9] with only three intervening private residential structures (including the iconic Jack O'Neill residence), Opal Cliffs is almost exclusively described by a row of private mostly two-story residential properties that are perched atop the bluffs located seaward of Opal Cliff Drive. As a result, seaward public views and access to the beach from Opal Cliff Drive have been extremely curtailed. The only respite from the row of approximately 50 large residences blocking off access to and views of the shoreline in all of Opal Cliffs is at Opal Cliffs Park, the site of the proposed project.

[8] The LCP identifies Live Oak at buildout with a population of approximately 29,850 persons; based on the County's recreational formulas, this corresponds to an LCP-identified need for corresponding park acreage of 150-180 acres. Though Live Oak accounts for less than 1% of Santa Cruz County's total acreage, this projected need for park acreage represents nearly 20% of the County's total projected needed park acreage, only heightening the importance of existing park facilities in this regard.

[9] All required as part of the Coastal Commission's approval of the County's Pleasure Point seawall project in 2007 (CDP A-3-SCO-07-015/3-07-019).

Opal Cliffs Park Project Location

The proposed project is located at Opal Cliffs Park at 4520 Opal Cliff Drive, on the seaward side of Opal Cliff Drive, approximately 100 yards downcoast of its intersection with Court Drive. Opal Cliff Drive is approximately two-thirds of a mile long, beginning at its intersection with 41st Avenue and continuing downcoast to its intersection with Cliff Drive in Capitola, and the Park is roughly in the middle of its length. The Park is the only non-residential property along all of Opal Cliff Drive, and it is the only vertical accessway to the beach and shoreline for the stretch of coastline between public stairway beach accessways at 41st Avenue (upcoast) and Hooper Beach in Capitola (downcoast), a distance of over a mile. In addition, it is the only location along Opal Cliff Drive where the public is afforded a through blue-water view because the view from the street is otherwise blocked by approximately 50 private residences and related residential development. Although Pleasure Point has the blufftop linear park with a major CCT recreational trail, the trail development does not continue through to the Opal Cliffs area. In fact, Opal Cliff Drive lacks sidewalks, and the CCT is forced into the area adjacent to the street's travel lane, where it has to compete with parked cars and other obstacles.

The Park itself extends from Opal Cliff Drive to the blufftop edge, and a staircase continues down the bluff to the sandy beaches below. At Opal Cliff Drive, four to five parking spaces, which are perpendicular to the street, face an unpermitted[10] 9-foot-tall wrought iron fence and associated locked gate. The locked gate is opened by use of a keycard that costs $100 per year[11] and is required to access the Park and the pocket beaches below, which are known locally as "Key Beach" or "Privates." The park-like component of the project site located on the blufftop is approximately one-quarter acre in size and consists of a lawn as well as various unpermitted hardscape and landscaping improvements and benches. A path through this blufftop area leads to a wooden stairway that provides access to the beach and ocean below. The staircase itself extends down to a rock shelf at beach level, which in turn provides access to the two small pocket beaches on either side the staircase/rock shelf and the aptly named surf break located immediately offshore known as "Privates." Just upcoast is the "Sharks" surf break, and just downcast is the "Trees" surf break, and the Park provides ready access to these surfing areas as well. Although some lateral beach-level access to the pocket beaches at this location is also available from up- and downcoast, such access is generally limited to extremely low tides, due at least in part to the significant shoreline armoring present along much of Opal Cliffs, including at either end of the pocket beaches, which essentially "closes-off" these beaches from lateral access at most times due to the presence of such armoring, which also itself occupies the very limited beach area along this stretch of coast. In fact, the majority of the bluffs along these pocket beaches are themselves armored at their base by a patchwork mix of riprap, concrete cylinders, stepped concrete retaining walls, wooden walls, and a variety of vertical concrete seawalls. During times of good surf and/or good weather, the Park is staffed by a guard/gate attendant who monitors the accessway, including the keyed gate access.

See **Exhibit 1** for project location maps and **Exhibit 2** for site photos.

[10] See subsequent sections describing Park history, including its CDP history and ongoing CDP violations, and the Violation section.

[11] The key is purchased at Freeline Surf Shop, almost a half-mile away from the Park.

B. PROJECT HISTORY AND BACKGROUND

Opal Cliffs Recreation District

The Applicant, the Opal Cliffs Recreation District (OCRD), was established in 1949 and is a public agency and special district of Santa Cruz County government that owns and operates Opal Cliffs Park (including its associated beach accessway) and nothing else. The District is made up of some 100 or so properties in the immediate Opal Cliffs area (i.e., all within several hundred feet of the Park, see page 9 of **Exhibit 8** for an OCRD boundary map), and these property owners are the voting constituency that elects the OCRD Board of Directors, who then make decisions regarding the Park. Currently, each OCRD property owner is assessed about $50 per year in their property tax bill, and this yearly assessment current nets roughly $5,000 per year.[12] OCRD charges a fee for both OCRD and non-OCRD members to access the Park and the beach access stairway. OCRD members (after providing proof of residency or ownership in the district) can buy a reduced-rate keycard for $50 to gain access through the gate to the beach. In other words, OCRD property owners pay roughly $50 through their property taxes, and this allows them to buy a keycard for about half of what the general public is required to pay (see below), presumably based on the presumption that the OCRD members have already paid $50.[13]

In order for non-OCRD members (i.e., the general public) to access the Park and the beaches down below, the general public has to purchase a keycard to open the locked gate. The keycards are sold at Freeline Surf Shop, which is located on 41st Avenue, almost a half-mile away from the Park on 41st Avenue inland of Portala Drive. A sign posted on the fence adjacent to the locked gate informs the general public of the location and operating hours of the surf shop (see page 11 of **Exhibit 2**). The cost of a keycard for the general public is $100 per year (starting June 1st of each year). There is some historical documentation showing that if a keycard was not purchased until the following January, the cost of the key card dropped to $50; if not purchased until the following April, the key card cost was reduced to $25.[14]

Pre-Coastal Operations of Opal Cliff Park

OCRD has managed the Park in a variety of ways over the years, ranging from allowing general public access to only allowing access via the use of access fees, gates, and guards/gate attendants, as is the case currently. Although there is an intermittent history[15] of use of keys and guards at the Park before Coastal Act permitting requirements applied to new development at the Park, it is worth noting that any claim that access fees and a related fence/gate/guard program constitute a pre-Coastal Act vested right, as the Applicant claims, is untenable. First, there is no clear indication that use of such an access fee and related program was continuously applied at the Park by the time CDP requirements became applicable in order to constitute a vested right,

[12] These assessed fees are not distributed directly to the OCRD, but instead are directed to the County's general Parks and Recreation fund from which OCRD requests periodic disbursements.

[13] It is worth noting that property taxes are paid on a property-by-property basis, and there is typically more than one resident per property. In addition, some such residents may be tenants, and thus, individual $50 keycard purchasers from within the District will not all have also paid $50 through the property tax assessment.

[14] This reduced payment option for only portions of the year does not appear to exist today.

[15] For example, a 1967 Public Notice placed in the local newspaper by OCRD describing use parameters at least at that time.

and no clear indication that such a program was continuously applied after that time until the time the Commission first became involved via OCRD's 1980 CDP application (see below).

Second, the manner in which the fee and related program may have been applied before CDP requirements is not how the fee and related program are proposed to be used today. For example, by the terms of the 1967 Public Notice itself, there were no fees charged for access, rather the only identified "fee" was the cost of a key itself. When persons who did not have a key wanted to use the Park, they were allowed in with no fee when the "guard or caretaker employed by the District is on duty at the gate." In other words, at least in 1967, users who wanted the convenience of their own key could obtain one for the cost of the key, and other users were allowed in without a fee when the gate guard was on duty. This is in contrast to the fact that OCRD now wants to charge the general public a fee to access the Park during about nine months of the year (i.e., other than the daytime hours between the Memorial Day and Labor Day weekends), and the fee is not the "cost of the key" but rather a flat rate of $100. Thus, any pre-Coastal program (at least from 1967) does not establish a pre-Coastal vested right for how OCRD wants to apply the fee requirement and related programmatic elements today, including because the current proposal would constitute an expansion and intensification of any prior program that may have been in effect.

Third, by the terms of the 1967 Public Notice itself, the manner in which the "guard or caretaker" was intended to function was to screen people who did not have keys "who are not known to the caretaker." Furthermore, such people had to be over 21 years of age in order to access the Park. The practice of discriminating against people younger than age 21 from accessing the Park appears prohibited by Government Code Sections 54091 and 54092 to the extent OCRD argues its history of age-based discriminatory access to the Park establishes a pre-Coastal Act vested right to the guard or caretaker program. Similarly, by the terms of the 1967 Public Notice itself, application for keys was limited to persons over 21 years of age, and such age-based discriminatory access to the Park appears prohibited by these Government Code Sections as well to the extent OCRD argues its history of age-based discriminatory access to the Park establishes a pre-Coastal Act vested right to the access fee program.

Finally, the Commission's 1981 CDP (see below) legalized replacement of the then-in-place fence and gate, and required recordation of a public access program prior to issuance of the CDP. Neither the 1981 staff report nor that CDP's special conditions made any reference to an access fee or guard program at all; rather the findings indicate that OCRD represented that the gate/fence "access control" in place at the time was needed to protect against dangers from the "unstable, hazardous nature of the bluffs in the area" and not for the purpose of prohibiting access to all but those who paid a fee for access (see **Exhibit 4**). The Commission noted at that time that providing some confirmation of how to obtain a key or "other means of assuring public access" was required to find consistency with Coastal Act Sections 30210 through 30212. In short, at least when the Applicant came to the Commission in 1980, the program the Applicant represented was *not* a fee program; rather it was represented as a need to have some control over access for safety purposes alone. Thus, at that time, the program was not a fee-for-access program, and there were no guards or related measures pursuant to the Applicant's own representations at that time.

Any claim that the fence, gate, and key access program are "vested rights" pre-dating the Coastal Act are also untenable for a number of other reasons. For example, the Applicant provides no authority for the proposition that a public entity such as OCRD is capable of asserting a "vested right" in the land use context to continue a legal nonconforming use (here, the fence, gate, and key access program) actually instituted notwithstanding an intervening change in the law (the Coastal Act) that would otherwise preclude or regulate it.[16] In addition, even assuming the Applicant, as a public entity, could assert a vested right to a legal nonconforming use as here, the Applicant has lost any such vested right due to expansion or intensification of the use, which is clearly prohibited under vested rights jurisprudence.[17] Here, any 6-foot-tall chain link/wooden fence and gate which pre-dated the Coastal Act have clearly been completely replaced, expanded and intensified to a 9-foot-tall wrought iron fence and gate. OCRD does not have a vested right to maintain any fence of any size and design it so chooses as long as it applies for a CDP.

Furthermore, regarding the access fee program, OCRD provides no authority for the proposition that its "access fee program" (framed otherwise, an access regulatory program) is a "land use" that can properly serve as the basis for a vested rights claim. Even assuming OCRD can make such a vested rights claim for its access fee program, this access fee program has been expanded and intensified well beyond that specified in the 1967 Public Notice, clarifying how OCRD implements the access fee program today. In 1967, the "access fee program" did not in fact charge fees for access. Rather, as discussed above, the only "fee" identified was in terms of the cost of the key itself. When persons who did not have a key wanted to use the Park, they were allowed in with no fee when the "guard or caretaker employed by the District is on duty at the gate." Thus, any such "access fee program" the Applicant might argue based on that evidence that might pre-date the Coastal Act only required a fee for the actual cost of a key but otherwise allowed public access if the guard or caretaker was on duty at the gate. By contrast, OCRD now attempts to assert a vested right to preclude all public access unless a person has first paid $100 for an access key, which cost OCRD itself has acknowledged is not connected to the actual cost of the key, but rather intended to pay for park maintenance. Again, OCRD does not have a "vested right" to charge whatever fee it deems "necessary" and exclude those who do not pay that fee simply because OCRD may have charged for the cost of an access key at one point prior to the Coastal Act. In conclusion, OCRD has no valid claim to a vested right to any portion of the physical development or the fee-for-access program (including gate attendant) that is now the subject of the proposed project.

Coastal Commission Initial Involvement and CDP P-80-393

As alluded to above, the Commission first became involved in permitting with Opal Cliffs Park in 1980[18] when OCRD applied for replacement fencing and a gate at the Park.[19] Per the

[16] See *Whaler's Village Club v. Cal. Coastal Com.* (1985) 173 Cal.App.3d 240, 252 ("The term 'vested' in the sense of 'fundamental vested rights' to determine the scope of judicial review, however, is not synonymous with its use in the 'vested rights' doctrine related to land use and development.")

[17] See *Hansen Bros. Enterprises v. Board of Sup.* (1996) 12 Cal.4th 533, 552 ("Intensification or expansion of the existing nonconforming use … is not permitted"), and *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529 ("Generally, a nonconforming use has no legal right to expand.")

[18] CDPs for new development at this location were required starting on February 1, 1973 under 1972's Proposition 20 ("The Coastal Initiative"), and then again starting on January 1, 1977 under the 1976 Coastal Act.

Applicant, the existing fencing at that time consisted of a 5- to 6-foot-tall chain link fence with a gate on the street frontage with 3- to-5-foot-tall wooden fencing along each of the side yards, and OCRD applied for a uniform 6-foot-tall chain link fence on all three sides with a gate in the fence on the street frontage.[20] On April 13, 1981, the Commission approved CDP P-80-393 (see **Exhibit 4**), allowing for the proposed fencing and gate subject to certain conditions, including the requirement for the Applicant to submit an access program for the Executive Director's review and approval, which needed to be recorded as a deed restriction on OCRD's property title. Notably, the Commission's findings for that approval identify the presence of an existing fence and gate, but did not recognize or approve any fees for access, nor did the Commission recognize or approve any use of a guard/gate attendant for the Park. Rather, that approval noted that "keys are readily available," and further noted that the purpose of the gate was not for collecting fees, but rather "the reason for the access control is the unstable, hazardous nature of the bluffs in the area." In other words, the gate's purpose was to control access for safety purposes, and not revenue purposes. The Commission further noted that "confirmation of key availability and/or some other means of assuring public access (such as a sign directing potential users how to gain access) would be appropriate to ensure consistency with Section[s] 30210-12 of the Coastal Act if the fence is necessary" (emphasis added). Thus, the Commission required OCRD to prepare an access program for the Executive Director's review and approval prior to CDP issuance (see Special Condition 1 in **Exhibit 4**), and also required, prior to commencement of construction, that OCRD provide evidence in writing that the development was acceptable to all local public safety agencies (see Special Condition 3 in **Exhibit 4**). Again, importantly, the Commission did not authorize any access fees or use of a guard/gate attendant in its 1981 action.

The Commission's 1981 fence and gate approval was valid for one year from the date of approval (i.e., until April 13, 1982) as identified in the Notice of Intent (NOI) to issue the CDP that allowed one year to commence development (see **Exhibit 4**).[21] Relatedly, P-80-393 required the access program to be submitted prior-to-issuance of the CDP, which means that the permittee must complete the prior-to-issuance requirement, the CDP must be issued, the permittee must return the signed CDP agreeing to be bound by its terms and conditions, the permittee must complete the pre-construction safety review requirements, and then the approved project must be constructed in substantial reliance upon the CDP consistent with the CDP terms and conditions, all within the one-year timeframe identified by the NOI. In this case, none of the prerequisites to

[19] The County's LCP had not yet been certified (it was certified in 1983), and thus the Commission had CDP jurisdiction over the entire Santa Cruz County coastal zone at that time.

[20] OCRD had hoped to propose an 8-foot-tall fence, but on October 31, 1980, the County Zoning Administrator denied the District's request locally for a variance to allow an 8-foot-tall fence at the Park, citing a lack of special circumstances justifying the increased height (i.e., the maximum height allowed locally was 6 feet).

[21] In addition, Coastal Commission Regulations (CCR) Section 13156(g) states that a permit should include "the time for commencement of the approved development except that where the commission on original hearing or on appeal has not imposed any specific time for commencement of development pursuant to a permit, the time for commencement shall be two years from the date of the commission vote upon the application." In this case, the Commission imposed a one-year time frame, as indicated in the NOI. CCR Section 13156 goes on to state that "an extension of the time of commencement must be applied for prior to the expiration of the permit," and CCR Section 13169 then governs how potential extensions of the expiration date can be pursued. In short, however, CCR Section 13156 provides for a time within which development consistent with the terms and conditions of the CDP must commence, and after that time period has past the CDP is expired, unless extended per CCR Section 13169. No such extension was ever applied for in this case.

allow for the development to commence (and thus to exercise or "vest" the CDP) were achieved within the required one-year period. In fact, the only thing that occurred is that OCRD apparently prematurely installed the subject gate and fence without meeting any of the CDP's terms and conditions, which represents unpermitted development because the CDP was never issued within the required time frame and thus OCRD did not comply with the requirements of the Commission's CDP approval.[22] OCRD never signed the NOI and thus never accepted the terms and conditions of the Commission's approval; and thus, the CDP was not issued within the required timeframe and no development was authorized to commence within one year of issuance of the NOI. Thus, as of April 13, 1982, the CDP had expired[23] and OCRD had apparently installed a new fence and a gate without the benefit of a CDP (see also "Violation" Section below). In addition, sometime in or around 1984-85, OCRD locked the gate and began charging a fee of $20 for keys to the gate, notwithstanding the fact that the Commission's approval, which had expired by this time, did not contemplate nor allow such fees, and thus this fee was also unpermitted.

In the early 1990s, and in recognition of the fact that many CDPs had by then been approved by the Commission (but the Commission's system for verifying compliance with their terms and conditions was limited), the Commission initiated a statewide project that reviewed overall CDP special condition compliance. As part of this effort, CDP P-80-393 was flagged as a CDP approval where special conditions had not been met by the applicant. For some reason, at that time, Commission staff did not realize that the CDP had expired by its own terms in 1982 and thus such condition compliance was mooted.[24] In any case, in late 1991 OCRD was informed

[22] Unpermitted development and/or development inconsistent with the CDP's terms and conditions cannot constitute a valid exercise of a CDP. For example, any work done prior to a CDP being issued, and the permittee signing and agreeing to be bound by the conditions of the CDP, cannot validly exercise a CDP. Similarly, even when a CDP has been issued and signed, if "prior-to-construction" requirements are not met before construction commences, such construction is unpermitted and cannot validly exercise the CDP. In this case, the CDP included both "prior-to-issuance" and "prior-to-construction" requirements that were not met within the requisite one-year NOI time frame (see Special Conditions 1 and 3 in **Exhibit 4**), and thus any work done by OCRD did not validly exercise the CDP, and the CDP expired on April 13, 1982.

[23] Note that OCRD does not agree with this conclusion, and suggests that the 1981 CDP is still valid based on certain staff-level (i.e., not Commission level) actions some ten years after initial CDP approval by the Commission and nine years after CDP expiration per its own terms (see discussion that follows). However, it is worth noting that the NOI provided to the District in 1981 clearly identified that it would expire in one year. Even assuming that a longer expiration period applies here based on the default two-year period for commencement specified in CCR Section 13156(g), for the same reasons discussed above, OCRD cannot show that it signed the NOI, completed all prior-to-issuance and prior-to-construction conditions (specifically, compliance with prior-to-issuance Special Condition 1 of CDP P-80-393), and was validly authorized to commence development by April 13, 1983. Thus, under any best-case scenario for OCRD, CDP P-80-393 expired by April 13, 1982 without OCRD having validly exercised or vested the permit.

[24] There are a number of possible explanations for this error, but it seems the most likely to have been related to the Commission's lack of a thorough CDP management system, including at a time when the Commission's technology was rudimentary at best and exclusively defined by paper-based systems and large file cabinets. CDP expiration information was not collectively maintained in any single location, but rather in individual CDP files, so there was not a systematic way of identifying the range of expired CDPs, particularly as related to a CDP from a decade prior where recollections may have dimmed. Also, the staff working on the statewide special condition compliance effort was working on that issue alone, and probably separate from those who were involved with the CDP P-80-393 action itself nearly a decade earlier, and this may have provided some disconnect as well. In any case, it is not clear whether expired CDPs were first eliminated from the statewide condition compliance project

that it had not complied with the special conditions, and was directed to correct that violation by submitting the outstanding materials related to Special Conditions 1 and 3, including the required safety review and the required public access program. OCRD submitted these materials and they were signed-off by Commission staff, including an access program deed restriction that included allowing OCRD to charge a $20 gate access fee (see **Exhibit 5**). Commission staff at that time then issued the CDP to OCRD on January 9, 1992 (i.e., nearly ten years after the CDP had expired).

However, Commission staff did not (and does not) have the legal authority to resurrect an expired CDP and did not have the authority to issue the CDP in 1992. In other words, staff made a mistake. In addition, staff not only made a mistake in not recognizing that the Commission's approval had expired in 1982, staff also went beyond what the Commission had approved in 1981 and allowed OCRD to implement a fee program when the Commission had not even contemplated nor allowed access fees as part of its approval of CDP P-80-393. In other words, Commission staff – not the Commission – agreed to public access fees when staff cannot legally do so because the CDP as approved by the Commission provided no basis for allowing public access fees, and staff did so anyway based on an expired CDP. Because staff does not have the authority to do either, those staff level actions cannot and do not govern in this case. The Applicant continues to point to the mistakenly issued CDP and the mistakenly-approved access program that allows a fee for access as justification for the gate, fence, and fee program over three decades, and further claims that the Commission is estopped from concluding that the CDP expired and that no such fee program is authorized here.[25]

However, an essential element of estoppel is that the party asserting estoppel must be ignorant of the true state of facts.[26] Even conceding that Commission staff erroneously sent letters to OCRD in the early 1990s providing OCRD an opportunity to receive a CDP and record an access program, which allowed for public access fees, these staff-level errors occurred over 10 years after the CDP was originally approved, thus it would be unreasonable to conclude that OCRD was "ignorant of the true state of facts" that the CDP had expired back in 1982. Specifically, Special Condition 1 of the CDP clearly required that prior to issuance of the CDP the access program had to be recorded. And as previously mentioned, the NOI clearly allowed only one year for OCRD to meet all of the CDP terms and conditions and to develop consistent with them.[27] And paragraph 1 of the NOI clearly stated that the CDP would be effective only after the acknowledgement was signed and sent back to the Commission within 10 working days of issuance, and paragraph 4 of the NOI specified that the development needed to have commenced within one year of issuance. Finally, neither the CDP nor the NOI are complex documents, and

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(which they should have been because in such cases condition compliance would be moot), but in at least this case it was not eliminated.

[25] Bracketing for a moment that the staff-level sign-off was for a 6-foot-tall chain link fence and gate, and not the 9-foot-tall fence, gate, and gate attendant system in place today – see also discussion that follows.

[26] See *Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.

[27] In addition to the plain language of the NOI itself specifying a one-year timeframe for commencement of development, the default regulatory provision regarding expiration of CDPs and time periods for commencement is set forth in CCR Section 13156(g), as discussed above, and was publicly available at the time of issuance of CDP P-80-393.

CCR Section 13156(g) was readily locatable within the Commission's regulations at the time of CDP issuance in 1981; thus, OCRD should be charged with knowledge that the CDP had expired well before 1991. Given the facts above, it can reasonably be presumed that OCRD had actual knowledge of this true set of facts. And, as a practical matter, it is unreasonable for a permittee to assume that it has over 10 years to exercise and vest a CDP, notwithstanding any erroneous actions by staff at that time some 10 years after the Commission's CDP approval.

Furthermore, another essential element of estoppel is that the party asserting estoppel must rely upon the other party's conduct to their injury (again, see *Strong v. County of Santa Cruz* (1975)). Even assuming OCRD relied on the validity of the 1981 CDP for the last some 27 years, taking the position that the CDP is expired does not result in "injury" to OCRD. The Commission here is proposing to allow retention of a fence and gate system (see discussion below). Although this approval does not provide for the proposed access fee program, OCRD cannot point to any "harm" such as an expenditure or other "sunk cost" that it expended in reliance on the erroneously-issued CDP that it would lose with cessation of this program. In addition, the Commission's approval here is not dissimilar to what the Commission approved in 1981 (albeit at a larger scale for the fence and gate), and will allow reasonable use restrictions based on safety/resource considerations. If anything, OCRD has received a "windfall" over the last approximately 27 years by charging for access to the Park when an access fee was not authorized by the Commission through a CDP approval and never has been. Denial of the access fee going forward therefore does not "injure" OCRD's financial position.

Considering the above, it is clear that the CDP was not properly exercised and it expired of its own accord in 1982, well before staff's mistake (and OCRD's mistake) in 1991, and that the fencing and gate that are currently legally authorized to be onsite now are the 5- to 6-foot-tall chain link fence and gate and the approximately 3-foot-tall wooden side yard fencing that were present at the site when the Applicant applied for the 1981 CDP in 1980 (and when CDP requirements began in the early 1970s).

Violations in the 2000s

Subsequently, in approximately the mid-2000's OCRD apparently removed the unpermitted 6-foot-tall chain link fence and gate and replaced it with a new 9-foot-tall wrought iron fence and gate (i.e., the same fence and gate that exist today) topped with razor wire, and apparently increased the annual fee charged to the general public from $20 to $100, and made use of a gate guard/attendant, all without benefit of a CDP. When this ultimately came to the Commission's attention in April of 2006, the Commission opened a violation investigation (V-3-06-012) for the above-described new wrought iron fence/gate and razor wire, as well as the overall fee program (including the gate keycard and the gate attendant elements),[28] and alerted the OCRD that it was in violation of the Coastal Act's CDP requirements. Following initial discussions between enforcement staff and OCRD, OCRD agreed to remove the razor wire,[29] and to submit a CDP application to retain the fencing and gate after the fact (this application also proposed new

[28] While a gate attendant was apparently periodically present at the site prior to 2008, a gate attendant (or equivalent) has never technically been permitted. See discussion above regarding consideration of the gate attendant as a pre-Coastal Act "vested right."

[29] Ultimately, after the razor wire was removed, black grease was applied to the ends of the top of the fence and gate at that time, apparently in an attempt to try to dissuade potential fence jumpers.

hardscaping, landscaping and irrigation development). At that time, Commission staff was under the mistaken impression that the CDP had not expired and that a fee program had been approved by the Commission, and thus that an after-the-fact application could be considered as an amendment to the base CDP, including because OCRD represented that it had a valid CDP and recorded access program at that time (see also above).

Ultimately, OCRD then applied to the Commission for an amendment to CDP P-80-393 for after-the-fact authorization of the unpermitted development,[30] and that application was scheduled for a Commission hearing in January of 2009. Staff explored at that time whether OCRD would be willing to modify the accessway to provide free beach access to all of the general public (i.e., not just those who could afford to pay the fee), but OCRD was not interested in such an outcome, and represented that it continued to want to charge the same fee and to implement the same related access control program as OCRD believed it was permitted to do through the 1981 CDP and the recorded access program. Based on the then-mistaken understanding that the CDP had not expired, and that the Commission had approved a fee program in 1981, Commission staff prepared a staff report and recommendation that these components were the existing baseline development at the site, and recommended a series of changes to that baseline to reduce public access impacts (as compared to the $100 fee to gain gate access), including recommending a $5 day use fee and other measures. Although the Applicant continues to refer to that staff recommendation in an attempt to show that Commission staff supports access fees at this location, and to suggest that that recommendation was adopted by the Commission, neither of these claims are accurate. On the former, the 2009 staff recommendation was based on the mistaken presumption that the existing permitted baseline for considering the amendment was

[30] OCRD initially applied to the County and the County approved a project, but that approval was mooted based on the then-mistaken understanding that the Commission's CDP (i.e. P-80-393) had not expired and was in effect. In other words, based on the mistaken understanding at the time that the Commission's CDP was still in effect, the Commission determined that the County did not have the legal authority to modify the Commission's CDP approval by issuing its own CDP, which would have "superseded" the Commission's CDP, and thus the County's action was deemed improper at that time. OCRD and the County were informed of this, and OCRD subsequently applied to the Commission for an amendment to CDP P-80-393. While acknowledging that the County's approval may not have been moot had Commission staff known at that time that the Commission's 1981 CDP was expired and of no effect, any resulting error is non-prejudicial and harmless for the following reasons: (1) the development that was the subject of the County approval was already undertaken by OCRD without benefit of a required CDP, as evidenced by the fact that Commission staff opened violation case V-3-06-012, so OCRD cannot claim that the Commission's current stance that the Commission's 1981 CDP expired and lack of a County approval for the 2008 improvements resulted in OCRD's current position of having unpermitted development in place at the Park; (2) even assuming that the Commission had recognized the validity of the County's approval, Commission staff would have recommended Commissioner appeal of that decision, and given the significant public access issues raised by this unpermitted development, such an appeal would have been extremely likely, resulting in essentially the same position as OCRD finds itself now with the County's most recent CDP approval on appeal by Commissioners and in front of the Commission; and (3) as explained below, upon determining that the Commission's 1981 CDP had expired, Commission staff directed OCRD to seek a local CDP from the County to authorize ATF the unpermitted development installed by the OCRD in 2008, which ORCD did and which was appealed to the Commission, and the Commission took jurisdiction over the CDP application in March of this year (2018). In other words, any attempt to legalize the 2008 unpermitted development through a locally-issued CDP is expected to have resulted in an appeal to the Commission, as evidenced by the 2018 appeal, and ultimately be in front of the Commission for action, including because of the Commission's oversight role for development in the County's coastal zone under its LCP and the Coastal Act. Thus, there is simply no evidence to demonstrate that OCRD relied upon its submittal of a CDP amendment application in 2008 to its injury.

that the access fee program and related elements had been approved by the Commission and were operating by virtue of a valid CDP, including the $100 gate key. As discussed above, it is now clear that that is not the case. On the latter, it is worth clarifying that the Commission never decided on the 2009 application. Rather, the Commission allowed limited public testimony at the January 2009 hearing (because OCRD had travelled, was present, and requested to speak), but Commission staff recommended that the application be removed from the hearing calendar in early 2009 (and the Commission ultimately voted to continue the item) because of concerns that had surfaced at that time that suggested that the original CDP may have actually expired and that an amendment was not properly before the Commission. After the item was continued, Commission staff subsequently researched its archived files further and determined that the 1981 CDP had expired and was no longer valid, and that thus there was no CDP to amend and the CDP amendment application was moot, and informed OCRD of these facts. At that juncture, the 9-foot-tall wrought iron fence and gate, the fee program, and the gate attendant remained unpermitted.

Ultimately, following OCRD lapses in terms of fulfilling requirements associated with a 2011 Coastal Commission emergency CDP that allowed OCRD to replace a portion of a piling supporting the beach access staircase (ECDP 3-11-018-G),[31] Commission staff again reengaged with OCRD staff in May of 2011. At that time OCRD had done nothing to resolve the outstanding violations at the site, including those related to V-3-06-012. Commission staff explained that the conditions of ECDP 3-11-018-G had not been fulfilled, that violations remained outstanding related to the unpermitted development at the site (i.e., fencing, gate, gate attendant, as well as the landscaping, hardscaping, and irrigation improvements that OCRD installed without a CDP approximately in 2009 or shortly thereafter), and that the 1981 CDP approval had long since expired. Furthermore, because the CDP had expired and could no longer be amended (and thus the Commission had no direct permitting authority for the blufftop portion of the site because the LCP was now certified), OCRD would need to apply to Santa Cruz County under the County's certified LCP for any of the unpermitted improvements it wanted to retain after the fact. OCRD was provided a memo summarizing these procedural issues and identifying the path forward to retain the unpermitted development at a May 18, 2011 meeting (see page 30 of **Exhibit 3).** OCRD was further explicitly informed that Commission staff continued to not support the proposed access fees and related program, and OCRD was encouraged to pursue a different path forward that would allow the accessway to be used by the general public without fees. At that time, OCRD indicated that the members of the OCRD Board would need to think about their options, and would get back to Commission staff regarding their proposed next steps. Following this meeting, OCRD did nothing in terms of resolving the outstanding violations, and did not contact Commission staff for nearly four years.

Ultimately, Commission staff began receiving complaints from the public about how the unpermitted fence, gate, fee, and gate attendant were precluding their ability to access the beach, and complaints about the lack of resolution of these decades' old issues. It became clear to

[31] The ECDP was issued to OCRD on March 18, 2011. Conditions of approval of that ECDP required OCRD to sign and return the ECDP Acceptance Form within 15 days of ECDP issuance, and to apply for a follow-up regular CDP within 60 days of ECDP issuance to authorize the work completed under the ECDP. OCRD completed the emergency repair work on April 29, 2011. By mid-May of 2011, however, OCRD had not returned a signed copy of the ECDP Acceptance Form to Commission staff and had not applied for the required follow-up regular CDP.

Commission staff at that time that OCRD had not done anything in response to the May 18, 2011 meeting and memo. Staff contacted OCRD and in April of 2015, Commission staff again met with OCRD and informed OCRD that it would need to remove the unpermitted gate and fence, and cease from charging fees and using gate attendants to enforce the fee requirement to access the Park and the beaches, absent a CDP that provided for same. In addition, OCRD was notified that it would have to secure the required follow-up regular CDP to authorize the work done under ECDP No. 3-11-018-G, which was now 4 years out of compliance. OCRD indicated an interest in pursuing an after-the-fact CDP for the existing fence/gate and the fee program. Commission staff's response was the same as it had provided to OCRD for many years, namely that such fee-based access is antithetical to the LCP and the Coastal Act at this location, and that staff did not support such a fee access program at this location. Alternatives to fee-based access were discussed, including the possibility of the County Parks Department taking over management and opening the Park as a free Park and accessway comparable to its other publicly-funded parks and beach access stairways. OCRD was also reminded of the existing violation for the unpermitted development (V-3-06-012) on the subject property including the fence, gate, fee, guard, and now the hardscaping, landscaping, and irrigation development that was installed in 2009 or shortly thereafter without the necessary CDP.

Commission enforcement staff repeatedly directed OCRD to remove the unpermitted fence, gate, gate attendant, and to cease charging an unpermitted fee to gain public access to the beach through Opal Cliffs Park, but OCRD repeatedly refused to do so. OCRD continues to be in violation for all of such development, which remains in place in essentially the same form as when the 9-foot-tall wrought iron fence and gate were first installed some ten years ago. Finally, in 2016, after several violation letters sent to and meetings with OCRD and its representatives and the County directing OCRD to resolve the outstanding violations, OCRD submitted a regular application to the Commission to authorize the stair piling replacement done pursuant to ECDP 3-11-018-G,[32] and also applied to the County (County Application Number 161195) to authorize the unpermitted development after-the-fact including the 9-foot-tall wrought iron fence and gate, the fee program, use of a gate attendant, and the landscaping, hardscaping and irrigation improvements installed sometime in 2009 or shortly thereafter.[33] On December 13, 2017, the County approved CDP Number 161195, and then on March 8, 2018, the Commission subsequently found that the County's action approving the project raised a substantial issue of conformance with the County's LCP and the Coastal Act, and took jurisdiction over the CDP application. Thus, the subject ATF application is a culmination of the permitting and appeal process, and brings all of these matters before the Commission for CDP action.

C. BASELINE FOR PROJECT EVALUATION

One of the critical analytic steps in evaluating proposed projects under the Coastal Act and the LCP is establishing the existing baseline in order to compare it against what is being proposed.

[32] CDP Waiver 3-16-0680-W (i.e., the required follow-up regular authorization for ECDP 3-11-018-G) authorized the emergency stair piling replacement work when it was authorized by the Commission in March of 2017.

[33] OCRD applied to Santa Cruz County in an effort to resolve outstanding violations related to unpermitted development at the site, and the County subsequently approved the CDP, expressly stating that its approval was an effort to "clean up" the record given the complex history.

Oftentimes that existing baseline is readily understood, such as a vacant property without any past permitting history or violations. Other times the analytic baseline can be more complicated, especially when violations are involved, as is the case here (including whether one takes the position that the Commission's 1981 CDP expired or not because it is undisputed that OCRD has constructed and implemented development past the 1981 CDP approval without the benefit of a CDP, and has implemented fees well in excess of even the mistakenly staff-approved access program (i.e., $100 versus $20 for gate access)). In fact, the analytic baseline for considering a project on a site with violations is as if the violations do not exist (i.e., the site in its pre-violation state).[34]

In this case, the Applicant believes that the analytic baseline for project evaluation should be as if the 1981 CDP (P-80-393) had not expired, and thus the development authorized by the 1981 CDP represents the "existing" baseline, including the access fee program that was not part of the Commission's CDP deliberations but that was mistakenly signed off by staff after the CDP had already expired (as discussed above). The County also took this analytic tact in its proceedings. In contrast, and as has been communicated to the Applicant and the County on many occasions, Commission staff has determined that the analytic baseline is founded in the fact that the 1981 CDP expired, and thus the actual baseline for permitting considerations are the conditions that existed at the site when CDP's were first required in the early 1970's (because no other CDPs exist that authorize anything at the site). Under either "baseline" scenario, it is clear that OCRD's 1990's era construction (i.e., the 9-foot-tall wrought iron fence and gate) were put in place without the benefit of a CDP, which means that none of these components are included as a part of the analytic baseline. Furthermore, the hardscaping, landscaping, and irrigation improvements that were installed in 2009, or shortly thereafter, were also put in place without a CDP[35] and thus

[34] When unpermitted development has altered the current situation, in order to fairly evaluate the impacts of proposed development, the Commission compares the proposed condition to the condition that would exist now were the unpermitted development not to have occurred (see *LT-WR, LLC v. California Coastal Commission* (2007) 152 Cal.App.4th 770, 797 ("to enable the Commission to protect coastal resources, and to avoid condoning unpermitted development, the Commission properly reviewed the application as though the unpermitted development had not occurred"). Stated differently, unpermitted development does not form the baseline from which impacts are assessed in a CDP application.

[35] The Applicant has asserted (including in additional correspondence received from the Applicant on March 2, 2018) that the landscaping improvements and the 9-foot-tall wrought-iron fence/gate were "previously approved by Santa Cruz County in 2005 and 2008 via exemptions and Santa Cruz County Coastal Permit No. 07-0639." With respect to Permit 07-0639, this permit was rejected by the Commission (which means the appeal period never ran and thus the development was never actually authorized under a permit) because the Commission had already directed OCRD (including on at least two occasions in 2006 as is explained in an earlier footnote and later in this footnote) to apply to the Commission for development at this site. Any error relating to the rejection by Commission staff of Permit 07-0639 is *de minimis* and non-prejudicial for the reasons discussed in the earlier footnote above. The referenced exemption (covering landscaping, pavers, benches and other aesthetic improvements) was mistakenly authorized by Glenda Hill, a Santa Cruz County Planner, without consultation with Commission staff regarding whether exempting said development was appropriate under the LCP (and it is not exemptible under the Coastal Act). Furthermore, OCRD was notified in a letter from the Commission's enforcement staff dated October 4, 2006 (see **Exhibit 3**) that summarizes a meeting between Commission staff and OCRD that took place on June 6, 2006, at which time the Applicant was informed that the unpermitted development that had been installed and was proposed for installation "including the use of a security guard and placement of razor wire on top of the existing gated fence at the Opal Cliffs Park and Beach Accessway, and proposed future development, including but not limited to, reconstruction of an access stairway railing, concrete pathway and seating area, installation of outdoor showers, retaining walls, new irrigation system, drainage system and sod lawn, removal and planting of vegetation, and construction of new fencing along the sides of the

none of these components are part of the analytic baseline either. Although it appears that the Applicant's position might differ significantly from Commission staff's, fortunately the parameters of these two positions for baseline analytic purposes (at least with respect to the extent of physical development for the Park in relation to the fence) are actually almost identical.

First, in terms of Commission staff's position, because CDP P-80-393 expired in 1983, the analytic baseline at the site reverts back to what was present at the site prior to any CDP issued for the development and prior to the CDP requirements associated with 1972's Proposition 20 and 1976's Coastal Act. From the available records it appears that the development at that time consisted of an approximately 5- to 6-foot-tall chain-link fence, and the intermittent presence of a gate attendant who permitted entrance to those with a key, and (free of charge) to those he/she recognized and to anyone from the general public over the age of 21 who provided their name, address, phone number, and license plate number to the attendant.[36] In short, the analytic baseline for considering the proposed project is the presence of a roughly 6-foot-tall chain link fence and gate, where keys could be acquired and/or access gained, but no fees were charged for access.

In terms of the Applicant's position, even assuming that CDP P-80-393 did not expire in 1983, and even assuming that Commission staff had the legal authority to authorize fees when the Commission did not consider or authorize fees as part of the 1981 CDP approval, the access plan authorized by the deed restriction and required by the 1981 CDP approval is no longer in effect in any case because it has terminated by its own terms. This is important because, even using the Applicant's CDP rationale, the deed restriction is actually the only element associated with that CDP that purports to authorize fees, because the Commission itself did not authorize any fees in its 1981 action. The deed restriction mistakenly approved by Commission staff that memorialized the access plan states the following (see also **Exhibit 5** for the full deed restriction):

> *DURATION. Said Deed Restriction shall remain in full force and effect during the period that said permit, or any modification or amendment thereof remains effective, and during the period that **the development authorized by the Permit or any modification of said development**, remains in existence in or upon any part of, and thereby confers benefit upon, the Property described herein, and shall bind Owner and all his/her assigns or successors in interest (emphasis added).*

Thus, based on its own terms, the deed restriction remains in effect only during the period when "the development" specifically authorized by the CDP remains in existence. Because

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accessway" was unpermitted and needed to be authorized by a CDP. The letter further directed OCRD to apply directly to the Commission to authorize all of the unpermitted existing development at that time, as well as the "proposed development" (including the development mistakenly exempted by the County that had not yet been installed). Specifically, the letter directed OCRD to "Please submit a CDP application to the Coastal Commission's Central Coast District Office no later than by November 3, 2006 in order to avoid possible legal enforcement action." Therefore, OCRD was clearly on notice of the need to apply to the Commission (and not the County) for all unpermitted development and any future proposed development, including the development that the County had mistakenly found to be exempt from CDP requirements.

[36] See discussion above explaining why intermittent use of the access fee and guard program prior to Coastal Act permitting requirements does not constitute a "vested right" to those elements for purposes of operation of the Park.

all of the development authorized by P-80-393 (i.e., the 6-foot-tall chain link fence/gate along Opal Cliff Drive and the six-foot-tall chain link fence along the Park's two side yards) was replaced in the 1990s and in the early 2000s, respectively (and without the benefit of a CDP), the entire scope of development approved under CDP P-80-393 no longer exists, and thus the recorded access program was terminated by its own terms at that time. In addition, although the duration clause also states that the deed restriction remains in effect during the period where any modifications to the approved development are in place, such modifications do not extend to unpermitted modifications. In short, by its own terms, the deed restriction is no longer in full force and effect. As a result, and even assuming that CDP P-80-393 did not expire in 1983, and even assuming that Commission staff had the legal authority to authorize fees when the Commission did not consider nor authorize fees in the 1981 CDP approval, only the physical development installed under CDP P-80-393 (i.e., a 6-foot-tall chain-link fence and gate, since removed) would still be authorized at the present time. The Applicant and the County were repeatedly informed of this information, including by enforcement staff in 2016, but have yet to provide any evidence to suggest that the deed restriction should still be valid when it includes a sunset clause that was long ago triggered. Thus, no matter which interpretation is used, the Applicant's/County's or Commission staff's, the analytic existing baseline is the same.

In sum, regardless of whether the CDP is considered expired or not, the baseline physical development at the site is essentially equivalent (either a 5- to 6-foot-tall chain link fence/gate or a 6-foot-tall chain link fence/gate). With respect to the access fee program, because the deed restriction (which authorized the access program) terminated by its own terms, a fee program is therefore not authorized regardless. Therefore, to err on the conservative side, the Commission will consider the analytic baseline to be a 6-foot-tall chain link fence/gate without any access fees.

D. PROJECT DESCRIPTION

The project includes after-the-fact authorization of the following: 1) removal of the existing (i.e., baseline for analytic purposes) 6-foot-tall chain-link fence and gate and replacement with a 9-foot-tall wrought iron fence and gate; 2) an access fee program (which requires a $100 keycard fee for unlimited annual access (including nighttime access) and limits free general public access (with no fee) to between Memorial Day weekend and Labor Day weekend between the hours of 5:00am and 8:00pm daily); 3) a gate attendant to oversee the keycard access program, assist patrons with the gate door, and provide general assistance as needed (e.g., help carry gear/equipment down to the beach); 4) various improvements installed with funding from Proposition 40, including a colored-concrete paver pathway, concrete seating (i.e., six backless benches), approximately 3-foot-high stone retaining walls located at various locations throughout the blufftop portion of the Park and along either side of the pathway that leads to the stairway to the beach, as well as landscaping and irrigation, including sprinklers, drip tape, and a valve box; and 5) associated signage and parking improvements.

See **Exhibit 2** for project photos of all the above-described physical development including the 9-foot-tall wrought iron fence/gate and the improvements funded by Proposition 40.

E. PUBLIC RECREATIONAL ACCESS

Applicable Policies

The project site is located between the sea and the first public road (i.e., Opal Cliff Drive), and thus the Coastal Act's public access and recreation policies are applicable to the project, as well as the public access and recreation provisions of the LCP. The Coastal Act's access and recreation policies provide significant direction regarding not only protecting public recreational access, but also ensuring that access is provided and maximized. Specifically, Coastal Act Section 30210 requires that *maximum* public access and recreational opportunities be provided. This direction to maximize access and recreational opportunities represents a different threshold than to simply provide or protect such access, and is fundamentally different from other like provisions in this respect. In other words, it is not enough to simply *provide* access to and along the coast, and not enough to simply *protect* such access; rather such access must also be *maximized*. This terminology distinguishes the Coastal Act in certain respects, and provides fundamental direction with respect to projects along the California coast that raise public access issues, such as this one.

Beyond that fundamental direction and requirement that public recreational access opportunities be maximized for all in the coastal zone, the Coastal Act provides a series of mechanisms designed to meet that objective and to ensure public access considering appropriate time, manner, and place considerations. For example, Section 30211 prohibits development from interfering with the public's right of access to the sea when acquired by legislative authorization or by use. In approving new development, Section 30212(a) requires new development to provide access from the nearest public roadway to the shoreline and along the coast, except in certain limited exceptions, such as when there is existing adequate access nearby. Section 30212.5 identifies that public facilities are to be appropriately distributed throughout an area to minimize overcrowding and overuse at any single location. This section has been used in the past to ensure an adequate distribution of access points, especially vertical beach access points such as the case in this application, are provided at appropriate intervals. Importantly, Section 30213 requires that lower-cost visitor and recreational access facilities be protected, encouraged and provided, and gives a stated preference to development that provides public recreational access opportunities. And Coastal Act Section 30220 requires that areas that provide water-oriented recreational activities, such as the offshore areas accessed through the accessway in this case, be protected, while Section 30221 states that oceanfront land suitable for recreational use shall be protected for recreational use and development, and Section 30223 protects upland areas such as this one necessary to support coastal recreational uses. Finally, Coastal Act Section 30604(c) requires that every CDP 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," and thus because the proposed project is located seaward of the first public road and the sea, this additional finding must be made to approve a project in this case. Applicable Coastal Act policies include:

> ***Coastal Act Section 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 Section 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 Section 30212(a): *(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects…*

Coastal Act Section 30212.5: *Public facilities; distribution Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.*

Coastal Act Section 30213: *Lower cost visitor and recreational facilities; encouragement and provision; overnight room rental. Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided…*

Coastal Act Section 30220 *Protection of certain water-oriented activities Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

Coastal Act Section 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.*

Coastal Act Section 30223: *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

Coastal Act Section 30604(c): *Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that the development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).*

Similarly, the County's LCP reiterates and amplifies Coastal Act direction, including through requiring that coastal public access and recreational opportunities be maximized for everyone, regardless of one's income group, and further specifying that a full range of access opportunities needs to be provided for all users (including LCP Objectives 7.1a and 7.7a). The LCP also seeks to maximize the availability of parks facilities for general public use (including those owned and operated by recreation districts – see LCP Policy 7.1.8); requires that access be provided to every beach where the public has a right of access, including to provide at least one accessway to every pocket beach, such as the pocket beaches reached through Opal Cliffs Park (LCP Objective 7.7c); requires beach access to be pursued/dedicated at least every 650 feet (LCP Policy 7.7.10); protects coastal blufftop areas and beaches from intrusion by non-recreational structures (LCP Policy 7.7.4); and provides that assisting other public agencies (such as OCRD) in opening and maintaining coastal accessways between the first public road and the shoreline is a stated public policy goal of the County (LCP Policy 7.7.13). The LCP also recognizes County beaches as regional park facilities meant for more than just neighborhood use (LCP Policy 7.5.7) Similarly, the LCP Implementation Plan (IP) highlights the importance of maintaining access coastal

beaches and bluff areas, and protecting existing accessways and trails that have been used by the public. Applicable LCP provisions include:

LCP Objective 7.1a Parks and Recreation Opportunities
To provide a full range of public and private opportunities for the access to, and enjoyment of, park, recreation, and scenic areas, including the use of active recreation areas and passive natural open spaces by all ages, income groups and people with disabilities with the primary emphasis on needed recreation facilities and programs for the citizens of Santa Cruz County.

LCP Objective 7.1b Park Distribution
To establish and maintain, within the economic capabilities of the County, a geographical distribution of neighborhood, community, rural, and regional park and recreational facilities throughout the County based on the standards for acreage and population ratios contained in this plan (see Figure 7-3); and to preserve unique features of the natural landscape for public use and enjoyment. [Note: pursuant to LCP Figure 7-2, Opal Cliffs Park is an LCP-designated Regional Park Facility]

LCP Policy 7.1.8 Sharing Parks and Recreation Facilities
*Recognize the use of existing recreational facilities owned and/or operated by other agencies, including the cities, **recreation districts** and the school districts as serving the recreational needs of the community and partially meeting standards for community park acreage. Cooperate in funding and sharing recreation facilities, and **seek to maximize the availability of all such facilities for general public use** commensurate with the needs and priorities of other agencies through joint powers agreements addressing development, maintenance and operating programs, as allowed by budget constraints. (emphasis added)*

LCP Policy 7.5.7 Beaches as Regional Parks
Recognize the use of beach areas to satisfy regional recreational opportunities for County residents and improve access where appropriate.

LCP Objective 7.7a Coastal Recreation
To maximize public use and enjoyment of coastal recreation resources for all people, including those with disabilities while protecting those resources from the adverse impacts of overuse.

LCP Objective 7.7b Shoreline Access
To provide a system of shoreline access to the coast with adequate improvements to serve the general public and the coastal neighborhoods which is consistent with the California Coastal Act…

LCP Objective 7.7c Beach Access
To maintain or provide access, including visual access, to every beach to which a granted access exists or to which the public has acquired a right of access through use… in order to ensure one access to every pocket beach…

LCP Policy 7.7.1 Coastal Vistas
Encourage pedestrian enjoyment of ocean areas and beaches by the development of vista points and overlooks with benches and railings, and facilities for pedestrian access to the beaches, subject to policy 7.6.2.[37]

LCP Policy 7.7.4 Maintaining Recreation Oriented Uses
Protect the coastal blufftop areas and beaches from intrusion by nonrecreational structures and incompatible uses to the extent legally possible without impairing the constitutional rights of the property owners, subject to policy 7.6.2.

LCP Policy 7.7.10 Protecting Existing Beach Access
Protect existing pedestrian, and, where appropriate, equestrian and bicycle access to all beaches to which the public has a right of access, whether acquired by grant or through use, as established through judicial determination of prescriptive rights, and acquisition through appropriate legal proceedings. Protect such beach access through permit conditions such as easement dedication or continued maintenance as an accessway by a private group, subject to policy 7.6.2.

LCP Policy 7.7.11 Vertical Access
Determine whether new development may decrease or otherwise adversely affect the availability of public access, if any, to beaches and/or increases the recreational demand. If such impact will occur, the County will obtain, as a condition of new development approval, dedication of vertical access easements adequate to accommodate the intended use, as well as existing access patterns, if adverse environmental impacts and use conflicts can be mitigated, under the following conditions: … (a) Within the Urban Services Line: from the first public roadway to the shoreline if there is not dedicated access within 650 feet…

LCP Policy 7.7.13 Access Maintenance Responsibility and Liability
Open accessways only after a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway, including regular garbage collection and recycling at the trailhead, along the trail, and at the beach destination. Notwithstanding the foregoing, it is the policy of Santa Cruz County to accept offers to dedicate coastal access, to complete, open and maintain or assist other public agencies or private non-profit groups to complete, open, and maintain coastal accessways between the first public road and the shoreline as soon as it is feasible.

LCP Program 7.7 Coastal Recreation
a. Improve existing parking areas through the use of fencing, striping, landscaping, bike racks, and safety improvement…

b. Increase parking opportunities to serve visitors to the Live Oak coastline in locations where such facilities are feasible and compatible with the neighborhood and the

[37] LCP Policy 7.6.2 speaks to obtaining easements and dedications to further the LCP's coastal public access objectives.

natural setting. Provide on-and-off-street parking improvements and facilities within walking distance of the beaches and bluffs…

d. Encourage the continued recreational use of Monterey Bay through the development of marine programs and facilities that may serve local residents.

See also **Exhibit 6** for all applicable Coastal Act and LCP provisions cited in this report.

In short, the LCP echoes the Coastal Act with respect to public recreational access requirements, and provides some additional specificity, particularly in terms of beach accessways such as is the case at Opal Cliffs Park (e.g., requiring access to every pocket beach; provisions for ensuring vertical accessways at least every 650 feet; and recognizing County beaches as regional park facilities for more than just neighborhood use).

Consistency Analysis

As discussed in the preceding findings, the analytic existing baseline for considering the proposed project is a public park with a roughly 6-foot-tall fence and gate without any fees for access, and for which there were intermittent periods over the years where the gate was either left unlocked 24 hours a day or left unlocked during daytime hours only. Thus, in place of such free access[38] the Applicant proposes to require users to pay a $100 fee to gain daytime access to the Park and the beach during the majority of the year, and disallows any access between 8pm and 5am all year around. The only time that a fee would not be required to gain access would be between the hours of 5 am and 8 pm from Memorial Day weekend through Labor Day weekend only (roughly three months or only about 25 percent of the year). During the remaining almost nine months (or almost 75 percent of the year), only keycard holders (i.e., those who purchase the $100/year annual keycard) can access the Park and the beach. In other words, in place of the existing free access the Applicant proposes to charge a $100 fee for access, and also proposes a two-tiered access program whereby those who cannot afford or are unwilling to pay a $100/year keycard are only allowed reduced access that is for about 25 percent of the time that access is allowed to keycard holders. Nighttime beach and shoreline access would be prohibited altogether.

Although there are a number of ways of trying to understand Coastal Act Section 30210 and LCP Objectives 7.1a and 7.7a requirements to maximize public recreational access opportunities, at a fundamental level the proposed project actually reduces public recreational access opportunities as related to the existing baseline by requiring a fee for access most of the year (i.e., almost 75 percent of the roughly daytime hours), and limiting access only to daylight hours.[39] This

[38] As explained above, regardless of whether the 1981 CDP is considered still valid or expired, the recorded public access program required by Special Condition 1 of that CDP (which is arguably the only basis for charging an access fee) has terminated by its own terms because "the development" authorized by that CDP is not what is on the ground now, considering the unpermitted increase in height, materials, and design via replacement of the 6-foot-tall chain-link fence with the 9-foot-tall wrought iron fence, as well as the unpermitted replacement of the side fencing. As also explained above, there is no vested right to charge an access fee either. Thus, there is no CDP basis for charging an access fee at Opal Cliffs, and the analytic baseline for evaluating the subject ATF application is as if no fees are currently charged.

[39] And although the free access period is during the heart of the summer season, it does not correspond to the full time during the year when the weather is conducive to beach going in Santa Cruz, which often begins well before

proposed reduction in public recreational access opportunities at this location is inconsistent with maximizing public recreational access opportunities, and cannot be found consistent with either the LCP's or the Coastal Act's requirements to maximize public access and recreational opportunities.

In addition, at $100, the proposed fee itself to gain access during all daytime times of the year is significant, particularly for lower income and/or non-local users. A $100 access fee is a significant cost to many, if not most, potential public access users, particularly when one considers that this is a public park and beach facility. Ultimately, unless members of the public who want to use this public beach have the ability or are willing to pay a $100 fee, the Applicant is effectively proposing to prohibit public beach access at this location during almost 75 percent of the year. This beach access prohibition will fall disproportionally on the lower income and more disadvantaged among the beach-going public, as well as intermittent, sporadic, or far-traveling visitors who do not live in the immediate vicinity of Opal Cliffs. The proposed access fee is not a parking fee, akin to what State Parks might charge for a yearly parking pass at certain State Park units, but rather it is a beach access fee. State Parks does not charge bike-in and walk-in users beach access fees in such circumstances, rather they are allowed in for free. In contrast, there is no other way to readily access the beach and shoreline at this location other than through the Park, and thus the fee is, at its core, a beach access fee, and an expensive one at that. Again, the $100 fee does not maximize public recreational access opportunities, but rather it significantly decreases them, especially for those least able to pay such a fee in the first place and for those who may not use the Park on a regular-enough basis to justify paying such a high fee. At its heart, the proposed fee sets up what can best be described as a two-tiered access system, one where those able to pay the fee get year-round beach and shoreline access, but those who cannot or will not pay a $100 access fee are only allowed a limited amount of access. None of this can be found consistent with the Coastal Act and LCP requirements to maximize opportunities for public recreational access activities.

Similarly, the Applicant proposes to recognize after-the-fact a 9-foot-tall wrought iron fence (i.e., roughly one-inch in diameter iron poles spaced about four inches apart with approximately one-inch in diameter crossbeams at top and bottom, and curved at the top) with an integrated gate to replace the baseline 6-foot-tall chain-link fence and gate along the Park frontage. The proposed ATF recognition of the fence and gate presents a rather imposing and exclusionary barrier to public access generally as compared to a 6-foot-tall chain-link fence and gate, and this has the additional adverse impact of establishing more than a physical barrier to access, but a psychological barrier as well. In other words, potential access users who are not familiar with the setting, particularly visitors from inland locations who do not live in Opal Cliffs, may be intimidated by such an imposing edifice and, as such, may tend to not approach the accessway in the first place, whether fees are charged or not. This barrier to general access, especially to visitors from outside the area, is only further enforced by the presence of a proposed gate attendant.[40] Regardless of whether the attendant's nominal role is to help all potential access

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May and often extends well into October and further. In addition, as discussed above, this accessway also provides shoreline access to at least three popular surf breaks, and these are a visitor draws at all times of the year.

[40] Again, as explained above, regardless of whether the 1981 CDP is considered still valid or expired, use of a gate attendant does not constitute part of the baseline conditions for Opal Cliffs Park as part of the consideration of the CDP at issue. The 1981 CDP says nothing about use of a gate attendant and, as explained earlier in this report, the

users understand Park rules, etc., as the Applicant indicates, the presence of a person guarding the gate and the accessway will tend to only serve to further emphasize the perception that non-local users are not welcome as a general rule, and will most likely intimidate users not familiar with or accustomed to the proposed setup for Opal Cliffs Park, further pushing them away from using the accessway and further reducing public recreational access opportunities, inconsistent with the Coastal Act and the LCP. The Commission is not aware of any other similar "gate attendant" programs at any other public beach accessway in California.

For the same reasons as articulated above, the proposed project interferes with the public's right to access the beach and the sea, inconsistent with Coastal Act Section 30211; it provides only limited public access as opposed to general public access from the nearest public roadway to the shoreline, inconsistent with Coastal Act Section 30212; it does not protect existing free access, let alone lower-cost access, and it does not encourage or provide lower-cost public access, inconsistent with Section Coastal Act 30213; it only protects water-oriented recreational areas and oceanfront land, and only reserves upland areas necessary for coastal recreational uses, for only a limited period of time and only for a limited number of users who can afford a $100 fee, inconsistent with Coastal Act Sections 30220, 30221, and 30223. In addition, and again for the same reasons, the proposed project does not improve beach access, inconsistent with LCP Policy 7.5.7; it reduces the utility of the overall shoreline access system, inconsistent with LCP Objective 7.7b; it does not maintain but instead only provides limited access to these pocket beaches, inconsistent with LCP Objective 7.7c; it discourages pedestrian enjoyment of the beach and the ocean, inconsistent with LCP Policy 7.7.1; it allows barriers to recreational use, inconsistent with LCP Policy 7.7.4; it interferes with the public's right to access the beach and the sea, inconsistent with LCP Policy 7.7.10; it limits vertical accessways to roughly a mile apart, inconsistent with LCP Policy 7.7.11; it does not recognize this beach area as a regional destination and not just a neighborhood facility, inconsistent with LCP Figure 7-2 and Policy 7.5.7; it does not meet the County's stated policy goal of assisting other public agencies (such as OCRD) in maintaining existing public access, inconsistent with LCP Policy 7.7.13; and it does not encourage continued recreational use of Monterey Bay, inconsistent with LCP Program 7.7.

In short, the proposed project is antithetical to Coastal Act and LCP public access requirements that apply here, including fundamentally those that require that public recreational access opportunities be maximized. Most notably, the fee program (including the imposing fence, gate, and attendant) inflicts substantial limitations on general public access to the beach, and is not consistent with the requirements of the Coastal Act and the LCP. The proposed project also disproportionately adversely affects those potential beachgoers of more limited incomes who cannot afford a $100 beach access fee, as well as visitors from inland locations who do not live near the Park. Given that this is the only accessway to the beach and shoreline, including for surfing access between the public stairway at the Hook at 41st Avenue and the public stairway near the Capitola Wharf at Hooper's Beach (a distance of roughly a mile), this impact on the general beach-going public is particularly acute. The proposed project in not consistent with the Coastal Act or the LCP, and cannot be approved in its proposed form. As a public park providing the only readily available beach access for a mile of urban Santa Cruz shoreline, an access

gate attendant cannot be construed as a vested right. Thus, there is no basis for construing the gate attendant as part of the baseline condition.

program can only be found consistent with the Coastal Act and LCP's requirements if it maximizes public access and recreational opportunities for all people regardless of ability to pay and if access is provided to the general public year-round (as opposed to only during select months of the year) and free of charge, consistent with other public parks and beach accessways found throughout the County and the Coastal Zone.

The Applicant maintains that the $100 fee is the only way that OCRD can continue to operate the Park at all, and that OCRD will not be able to provide any access otherwise. However, there are a number of issues with this assertion. First and foremost, this is public property that provides the only readily available public access to popular public beaches, and it is not clear why it needs to be operated any differently than any other public beach accessway in the County, all of which are currently operated free of any charge. State Parks and the County Parks Department operate these other such accessways for the benefit of the public without fees. In fact, the Commission is unaware of any public agency charging a beach access fee (as distinct from parking access fees that apply in certain circumstances) anywhere else in California. Moreover, Commission staff has had recent discussions regarding various means that could result in increasing revenues for County Parks (including encroachment fees for development that encroaches into public rights-of-way and mitigation fees for shoreline armoring devices, the latter of which is already being implemented in Santa Cruz County and the former of which is near implementation) to better operate County coastal accessways Countywide that might have a bearing on the Park (e.g., through use of coastal armoring mitigation fees, coastal public property encroachment fees, coastal parking fees, etc.).

In addition, the record indicates that almost none of the capital improvements undertaken at the Park in recent years have been paid for by keycard fees collected by OCRD. Rather, Federal and State public grants and other funds have been used to pay for capital improvements at the Park over the years. These publicly funded capital improvements include: the repair of the beach access staircase following the 1989 Loma Prieta earthquake; the 2011 emergency stairway repairs; and the upland Park improvements constructed in 2009 (or shortly thereafter) and which are proposed to be authorized ATF under this CDP application (including the concrete paver pathway, the stone retaining walls, benches, landscaping, and irrigation).[41] Beyond these most recent improvements, other public grant funds have been used for construction of OCRD's capital improvements over the years, including distributions from California Bond Acts in 1974, 1986, and 1988.[42] In short, although OCRD argues that the funds generated from access fees are critical to support capital improvements at the Park, it appears that the major improvements over the last three decades have been paid for through other public funds. This is not atypical of other County and Statewide coastal accessways for which these types of public monies are used to make improvements to public parks. What is unusual in this case is that those public dollars,

[41] Specifically, certain repairs to the stairway in 1989 were funded by the Federal Emergency Management Agency and its State counterpart (the State Natural Disaster Assistance Act Program); the 2011 stairway repairs were funded by a 2002 Resources Bond Act administered through California State Parks, and totaled $95,621; and the 2009 improvements (proposed to be authorized ATF by this application) were funded via a separate grant from the 2002 Resources Bond Act, and totaled $124,601.

[42] There is evidence in the record that OCRD received money from California Bond Acts in 1974, 1986, and 1988. Commission staff has requested that OCRD provide the amounts distributed to OCRD from these California Bond Acts and information on how these funds were used; however, OCRD had not provided this information to date.

including from California taxpayers, are used for improvements at a Park that is currently only available for the exclusive benefit of those persons who can afford or are willing to pay the $100 per year fee to access the Park, as opposed to being generally available to the beach-going public in the manner that is the norm for coastal accessways.[43]

Furthermore, a transition away from the proposed $100 fee program and toward a free public Park and public beach accessway is further supported by the fact that the bulk of OCRD's annual expenditures appear to be related to administration of the keycard and gate attendant program, and not basic Park or beach access needs. Indeed, even a cursory review of OCRD's finances demonstrates that OCRD's budget largely consists of expenditures that are unnecessary for providing basic Park and beach access at the site. For example, based on a 2017 budget review by the County over the preceding five-year period (see **Exhibit 7**), OCRD spent roughly $52,000 annually. For the 2015-2016 year, OCRD spent approximately $56,500, and of this $56,500, approximately $2,000 went to maintenance, $1,000 for utilities, $1,500 for insurance, and another $500 for other undisclosed items (or a total of $5,000). An additional roughly $52,000 was used for the production of keycards/passes, security, and other professional services.[44] Thus, the cost for the basic operation of the accessway (i.e., maintenance, utilities and insurance) comes out to about $5,000 per year (which is the same as OCRD already takes in through property taxes). The bulk of OCRD's annual expenditures during the budget analysis (over $52,000) are unrelated to these basic public accessway operational needs, but rather are to pay for the fee program apparatus itself and the gate attendants.

In addition, concerns have been raised in the past regarding OCRD's budgeting and expenditures,[45] including in a 2016 report by the Santa Cruz Local Agency Formation Commission (or LAFCO) that recommends that OCRD consider transitioning operation of the accessway to another entity, such as the Santa Cruz County Parks Department,[46] and in a more recent 2018 LAFCO report (see **Exhibit 8**) that reiterates that conclusion and states that it would make sense for County Parks to assume management of the Park given its proximity and similarity to other County-operated parks. Specifically, the report recommends that, "CSA 11

[43] For example, the Coastal Conservancy, using State bond and grant funds, has funded the development of beach access stairways in other areas of coastal Live Oak at the ends of 12th, 13th, 20th, and 26th Avenues as well as along East Cliff Drive at 38th and 41st Avenues. In addition, the nearby Pleasure Point Parkway project includes three beach and surfing accessways that were all publicly funded and developed in the early 2000s. All of these beach and shoreline accessways are operated free of charge for the benefit of the general public by the Santa Cruz County Parks Department.

[44] Or roughly $8,000 for the keycards/passes, $26,000 to pay for the salaries of the gate attendants, and $13,000 for other undisclosed professional services.

[45] Including Santa Cruz County 2009 Grand Jury investigations, which found that the larger non-County-operated recreation and park districts generally functioned well, but the small districts such as OCRD are more likely to fall into "gray areas of minimal compliance with guidelines and statutes in the operation of their districts." In addition, and audit of OCRD's budget from 2011 found that over approximately $11,000 of OCRD's budget was unaccounted for, and that the budget was partially used to pay for bar tabs and food bills (totaling over $1,000) for a "June 9th Freeline Party" (Freeline is the surf shop that is responsible for selling OCRD's $100/year keycards to the public).

[46] The 2016 LAFCO report identifies a series of OCRD operational issues, including substantially in relation to its financial accounting and responsibilities, and ultimately recommends that OCRD consider transitioning operation of the accessway to another entity, such as the Santa Cruz County Parks Department.

[County Service Area 11] would be a logical and efficient operating option for the Opal Cliffs Park if the Opal Cliffs Park and Recreation District were unable to continue to operate Opal Cliffs Park."

In short, although OCRD argues that it needs the beach access fee revenues to be able to operate the Park at all, it appears clear that capital improvements (including stairway repairs and aesthetic improvements such as pathways, landscaping, seating, etc.) have been paid for in the past by State and Federal bonds and grants, much like other public accessways that provide free general public access without fees, and that the overwhelming bulk of OCRD's annual expenditure is used to pay for the overall gate and gate attendant program, including the gate and the locks themselves. In addition, it is not clear why this accessway needs to function differently than others Countywide to which all members of the general public are provided free public beach and shoreline access, regardless of their ability to pay. OCRD is a special district, but it is still a part of Santa Cruz County government formed for the purpose of providing public park and beach access services, and thus it is not clear why OCRD (or Santa Cruz County Parks Department in a transfer scenario as recommended by LAFCO) cannot maintain and operate this public beach accessway at a comparable level to other beach accessways throughout the County without the "need" for keycard revenue.[47] It is worth noting that there are ongoing discussions with the County to facilitate alternate funding mechanisms that would eliminate the $100/year keycard program.

Thus, the access fee program cannot be found consistent with the Coastal Act and LCP provisions described above, and cannot be approved as proposed. Consistent with Coastal Act and LCP requirements to maximize public recreational access opportunities, this approval is structured to require the submission of a Public Access Management Plan (**Special Condition 2**) that clearly depicts all public access areas and amenities at the Park (**Special Condition 2(a)**), that prohibits development and uses within the public access areas of the Park that disrupt or degrade public access (**Special Condition 2(d)**), that requires all public access amenities at the Park to be maintained in their approved state (**Special Condition 2(g)**), and provides for free year-round general public access (**Special Condition 2(c))**.

With respect to hours of use, the Applicant proposes that the Park would be open from 5am to 8pm daily (with no access between 8pm though 5am each night for anyone, whether they have purchased the $100 key or not).[48] In past cases, the Coastal Commission has typically interpreted that maximized public recreational access opportunities means unlimited access 24 hours per day and 365 days a year, unless there is a clearly demonstrated need for some kind of reduced access. Access restrictions are often proposed because of some perceived problem with access users later at night and/or overnight in terms of noise, public nuisance, inappropriate camping, public safety, and other related issues. In such cases, it is important that the problem be clearly identified and substantiated, and that the response be as focused as possible to address the

[47] And it is not even clear if Government Code Sections 54090-54092 even allow for imposition of such beach access fees. Section 54092 states: "Any city, county, or other local agency that allows any property owned, operated, or controlled by it to be used as a means of access to any public beach shall allow free access over that property to all persons regardless of ancestry, residence, or any characteristic listed or defined in Section 11135."

[48] In all cases, the locked gate would still allow exit from the Park for users leaving the beach later than 8pm; it just would not allow entry between 8pm and 5am.

problem but avoid public access impacts to the maximum extent feasible. In order to approve nighttime closures there must be legitimate justifications because nighttime closures inevitably reduce public access use after dark (including for nighttime beach and surfing access, nighttime coastal viewing across the bay waters and the Pacific Ocean, nighttime star gazing, etc.). The important question is: at what point does legitimate and appropriate use of the public access resource need to be restricted so as to address the potential concerns related to unrestricted nighttime access? As a general rule, the demand for the former decreases as the night goes on, and the potential for the latter increases as the night goes on. The key is to ensure that the least number of legitimate users are impacted while still abating the potential access issues to the fullest extent possible.

In this case, OCRD has historically identified (including as the primary impetus for the fence and locked gate proposed under the 1981 CDP) that the bluff and beach accessway can be dangerous at night, including because there is no lighting along the accessway and the stairway leading to the beach, and the fact that there is little or no beach during times of high tides and large swells. In addition, the Commission has received comments from the Santa Cruz County Sheriff Jim Hart indicating that the Sheriff's office believes that nighttime use of the Park results in the potential for unlawful activities and potential public safety concerns, including because the beach cannot readily be seen even from the blufftop above the Park, especially at night. Although limited objective data has been presented to justify the need for a nighttime closure at this location, there is little doubt that the beaches at the base of the stairway are relatively secluded pocket beaches that are difficult to patrol from the Park above to ensure public safety. Thus, it seems that a nighttime closure is supportable provided it applies to all users of the Park. Importantly, though, nighttime varies throughout the year, and a static hourly "nighttime" closure does not necessarily reflect nighttime at all times of the year, (e.g., sunset at the summer solstice in June is 8:30pm), including because there is still daylight before sunrise and after sunset. To address this issue, the Commission has typically required that public access amenities be open to general public use from one hour prior to sunrise to one hour after sunset year round. This timing makes the Park available during all daylight hours, including the early morning and early evening hours when there is some light in the sky but the sun is not technically above the horizon, and does not unduly penalize early morning and sunset users making use of such facilities. Therefore, **Special Condition 2(e)** requires the Park to be open from one hour before sunrise to one hour after sunset daily, consistent with the Commission's past actions in this regard.[49]

Regarding the 9-foot-tall wrought iron fence and gate,[50] as articulated earlier, this fence and gate present a significant barrier, both physically and psychologically, to public access (as well as presenting public view concerns; see also "Visual Resources" finding below). In addition, IP Section 13.10.525 limits such fences and gates to six feet in height absent additional findings

[49] Given that the earliest sunrise is 5:47am for the bulk of June, and the latest sunset is 8:35pm in the latter part of June and in early July, that would mean *maximum* daylight hours applied to those static data points would be approximately 4:50am to 9:30pm in the summer months.

[50] Again, as explained above, regardless of whether the 1981 CDP is considered still valid or expired, the 9-foot-tall wrought iron fence and gate are clearly beyond the scope of development authorized by the 1981 CDP (which authorized a 6-foot-tall chain-link fence), and is wholly unpermitted. Thus, there is no basis for considering the 9-foot-tall wrought iron fence and gate as a baseline condition for purposes of consideration of the CDP.

related to safety, community character/aesthetic, and that the project meets the LCP's requirements related to the protection of visual resources. Any fence/gate inherently creates both physical and psychological barriers to access, and thus it would be difficult to make the finding that any gate or fence is consistent with LCP's and Coastal Act's requirements for maximized public access/recreation. That being said, this particular fence/gate design with its 9-foot height and wrought iron design raises particularly significant public access/recreational issues including because the fence design generally, and in context of the neighborhood character location setting, suggests that visitors are not welcome; and relatedly, the fact that the gate door remains closed (even though unlocked) during the Park's open hours during the summer months. In addition, it is worth noting that the angled bars at the top of the fence were designed to serve as an anti-climb feature, similar albeit less intimidating compared to the previously existing and unpermitted razor wire. Moreover, although the razor wire is no longer present, it is likely that its former installation has had lingering adverse impacts to public access/recreation (e.g., someone who may have tried to visit while the razor wire was installed may not consider returning).

Therefore, only a completely open gate entrance would adequately address the long-term issues associated with maximized access at this particular site. However, because the Applicant has expressed safety concerns, including related to a lack of nighttime lighting, in order to balance public safety with the public access/recreation requirements of the LCP and Coastal Act (which is allowed, for example, by Coastal Act section 30214 and LUP Objective 7.7b), the project is conditioned to allow a fence/gate that is no more than six feet tall and can be retracted (i.e., pulled back to allow for a completely open Park entryway) during daytime hours. More specifically, **Special Conditions 1 and 2(b)** require the removal of the existing fence/gate and replacement with a retractable gate/fence that is to be retracted from one hour before sunrise to one hour after sunset daily (**Special Condition 2(d))**. This will address the Applicant's stated need for nighttime closures for safety reasons while maximizing public access to the Park and the beaches below. It is also worth noting that the existing fence is damaged; the upcoast segment of the fence/gate is no longer directly attached the rest of the fence/gate, and is being supported by rusted chains (see **Exhibit 2**). Therefore, it would appear that the existing fence/gate has deteriorated significantly since its installation in the mid-2000's and needs replacement, further supporting replacement under the current permit with an LCP/Coastal Act consistent design.

As for the Park's signage, it is critical that the Park be appropriately signed to ensure that all public access users know they are welcome to use the Park for free during daylight hours. This is particularly important given the historical presence of the imposing fence/gate and gate attendant, and because it will likely take some time and education for these perceptions of the accessway to be changed. It is also particularly important given that this accessway has been subject to exclusive use of keycard holders for many years without CDP authorization, and the general beach-going public will need to be made aware that the conditions for use of the accessway have changed so that they know they are welcome and can use it, particularly with respect to visitors from out of town. Thus, all signage needs to be updated to reflect the new access parameters and hours of use, and the same applies to all other OCRD information and materials (e.g., website, handouts, etc.) (see **Special Condition 2(c)).**

Regarding the gate attendant program, the Commission does not find that such a program is necessary for basic Park and beach access purposes. In addition, the gate attendant presents an additional barrier to public access, especially for visitors from out of town not familiar with such a program. Although the Applicant has taken steps to re-characterize the gate attendant as a "Park Aide" including via defining his/her purpose and attire, the presence of a person guarding the gate and the accessway creates the perception that non-local users are unwelcome. Thus, this permit, including as codified in **Special Condition 1,** does not authorize the use of a gate attendant "Park Aide," or any person staffing the entryway to the Park.

Finally, as indicated above, the Applicant also requests after-the-fact approval of a series of previously completed improvements (including landscaping, hardscaping, and irrigation improvements) and newly proposed parking improvements (parking space striping and ADA parking signage). These Park improvements provide an enhanced park experience and can be found consistent with the Coastal Act and the LCP's public access and recreation policies as proposed.

Therefore, the approved project as conditioned can be found consistent with the above-cited Coastal Act and LCP provisions, including those that require that public recreational access opportunities be maximized for all, including nearby residents but also visitors from other parts of the County and elsewhere and of all economic groups.

F. VISUAL RESOURCES

Applicable LCP Provisions

The Santa Cruz County LCP is highly protective of coastal zone visual resources, particularly in regards to views from public roads, such as Opal Cliff Drive. LCP Objective 5.10a seeks to identify, protect and restore the aesthetic values of visual resources, meanwhile LCP Objective 5.10b seeks to ensure that new development does not adversely impact visual resources. In addition, LCP Policies 5.10.2, 5.10.3 and 5.10.6 recognize the importance of coastal zone visual resources, and require maximized protection and preservation of ocean vistas. LCP Policy 5.10.7 prohibits the placement of new permanent structures that would be visible from the beach, and LCP Policy 5.10.9 requires onsite restoration of any visually blighted conditions at a site as a condition of approval of any new development. LCP Policy 7.7.1 encourages the development of vista points and facilities for pedestrian access to beaches, and LUP Objective 7.7c requires the provision of visual access to every beach to which the public has acquired a right of access through use. Lastly, IP Section 13.20.130(b)(1) broadly requires that all development within the coastal zone be sited, designed and landscaped to be visually compatible and integrated with the character of surrounding neighborhoods or areas, and to embody a community aesthetic, and IP Section 13.20.130(b)(7) identifies that new development shall not block views of the ocean, and requires mitigation of any visually blighted conditions. With respect to fences, IP Section 13.10.525 states that the purpose of the fence regulations is to preserve a harmonious and compatible street front appearance, and limits fences in the area fronting a street, such as this, to a maximum of 6 feet in height. Applicable LCP policies and standards include:

LCP Policy 7.7.1 Coastal Vistas
Encourage pedestrian enjoyment of ocean areas and beaches by the development of vista points and overlooks with benches and railings, and facilities for pedestrian access to the beaches, subject to policy 7.6.2.

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

LCP Objective 5.10b 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.

LCP Policy 5.10.2 Development within Visual Resource Areas
Recognize that visual resources of Santa Cruz County possess diverse characteristics and that the resources worthy of protection may include, but are not limited to, ocean views … 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. …

LCP Policy 5.10.3 Protection of Public Vistas
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, timber harvests, utility wires and poles, signs, inappropriate landscaping and structure design. …

LCP Policy 5.10.6 Preserving Ocean Vistas
Where public ocean vistas exist, require that these vistas be retained to the maximum extent possible as a condition of approval for any new development.

LCP 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. …

LCP Policy 5.10.9 Restoration of Scenic Areas
Require on-site restoration of visually blighted conditions as a mitigating condition of permit approval for new development. … Provide technical assistance for restoration of blighted areas.

IP Section 13.20.130(B)(1): Design Criteria for Coastal Zone Developments
… Visual Compatibility. All development shall be sited, designed and landscaped to be visually compatible and integrated with the character of surrounding neighborhoods or areas. Structure design should emphasize a compatible community aesthetic…

> ***IP Section 13.20.130(B)(7): Design Criteria for Coastal Zone Developments***
> *Development shall be sited and designed so that it does not block or significantly adversely impact significant public views and scenic character, including by situating lots, access roads, driveways, buildings, and other development (including fences, walls, hedges and other landscaping) to avoid view degradation and to maximize the effectiveness of topography and landscaping as a means to eliminate, if possible, and/or soften, if not possible, public view impacts.*

See also **Exhibit 6** for all applicable Coastal Act and LCP provisions cited in this report.

Consistency Analysis

As detailed above, the Applicant's proposed project seeks after-the-fact approval of a 9-foot-tall wrought iron fence (roughly one-inch-in-diameter iron poles spaced approximately four inches apart with one-inch-in-diameter crossbeams at top and bottom, and curved at the top) with an integral gate to replace the baseline 6-foot-tall chain-link fence and gate along the Park's frontage. As discussed in the public access findings above, the proposed ATF fence and gate present a rather imposing and exclusionary barrier to public access, but they also present visual concerns with respect to LCP consistency. This is especially the case because the Park provides the only public visual respite towards the ocean along all of Opal Cliff Drive, given that the public's view is otherwise blocked by an otherwise unbroken row of approximately 50 large private residences and related residential development located between the public street and the shoreline.

At the Park, the only public respite for ocean views from Opal Cliff Drive are impaired by the relatively thick and numerous wrought-iron bars, and the fence's 9-foot height makes it such that one cannot see over the fence (i.e., the fence impedes the entire ocean view from any viewpoint along Opal Cliff Drive – see photos in **Exhibit 2**). In addition, the area surrounding the gate (i.e., roughly in the middle of the view) is further blocked by the presence of a roughly 8-feet-in-diameter metal mesh screen that surrounds the gate's locking mechanism, with a roughly 3-feet-in-diameter piece of solid material in the middle (both ostensibly to prevent users from reaching through and opening the gate from the inland side without a key), This additional fencing and signage further impedes and blocks the public's ocean view from Opal Cliff Drive .

Moreover, the proposed 9-foot-tall fence exceeds the LCP's allowable maximum fence height of six feet by a full 50%. The proposed 9-foot height is therefore significantly out of conformance with this LCP standard, which is designed in part to avoid impacting public street views. The only way exceptions to the LCP's 6-foot height maximum are allowed is through required special findings, including that the fence will not adversely impact public views and scenic character; that the additional height will not be detrimental to the health safety, or welfare of persons residing or working in the neighborhood or the general public; and that the fence will complement and harmonize with the existing and proposed land uses in the vicinity and will be compatible with the physical design aspects, land use intensities, and dwelling unit densities of the neighborhood (see **Exhibit 6**; and also IP Sections 18.10.230(A) and 13.10.535). The proposed 9-foot-tall fence is not considered detrimental to the health or safety of the public, neighbors, or those working in the neighborhood; however, the fence certainly impairs the public's view of the ocean as seen from Opal Cliff Drive, and it cannot meet the required special

findings to be able to allow a 9-foot-tall fence here. Moreover, there has been no evaluation of alternate fencing designs and configurations that would adequately mitigate safety concerns and better protect public views (such as retractable fencing). The proposed fence and gate also do not meet the threshold identified by LUP Policy 5.10.6, which requires that ocean vistas be retained to the *maximum* extent feasible; nor LUP Policy 5.10.9, which requires on-site restoration of visually blighted conditions as a mitigating condition of permit approval for new development; nor LUP Policy 5.10.3, which requires the protection of public vistas from publicly used roads including by minimizing any disruptions to aesthetic character including those caused by the placement of structures (in this case a fence), and explicitly requires the protection of ocean views. Further, the proposed fence and gate are inconsistent with IP Section 13.20.130(b)(7), which does not allow development to either block or significantly impact public views and scenic character. The proposed fence and gate therefore meet none of these LCP requirements. In order to maximize the ocean vista at this location, as is required by LUP Policies 5.10.6 and 5.10.3, and to meet LCP objectives (such as Objective 5.10b that requires minimal to no adverse impacts on visual resources), there would need to be no impediments to the ocean view, which is possible during daytime hours with an alternate fence/gate design such as a retractable fence/gate that is rolled/folded back to the property's side yards during daytime hours, but that can be erected at night for safety purposes. Further, in terms of consistency with LUP Policy 5.10.9, the proposed fence (that was installed without a permit approximately nine years ago) has caused visual impacts at this location for an extended timeframe. Therefore, it is entirely appropriate to require replacement of said fence/gate with a design that maximizes views of the ocean as mitigation for years of visual impacts.

In light of the above analysis, including LCP requirements that public ocean views be maximized and protected; that development is not allowed to block or adversely impact significant public views such as this; and that visually blighted conditions be corrected with any new development approval, **Special Conditions 1 and 2(b)** require replacement of the existing unpermitted 9-foot-tall wrought iron fence/gate with a new retractable fence/gate that can be rolled back during daytime hours (i.e., from one hour before sunrise to one hour after sunset daily) either through an automated system or manually. Although the exact fence/gate design has not been identified, **Special Condition 2(b)** requires that the new fence/gate be no more than six feet tall and that the design be reviewed and approved by the Executive Director prior to final authorization. The retractable fence/gate shall be sited and designed in such a way as to minimize public view impacts and to be compatible with the overall Park aesthetic, including with respect to any necessary structural supports, and to allow emergency egress from the seaward side. The retractable fence/gate as required by **Special Conditions 1 and 2(b)** would allow for unimpeded views of the ocean during daylight hours, consistent with the LCP's visual resource protection provisions.

In short, the LCP (including LCP Policy 7.7.1, Objectives 5.10a and 5.10b, Policies 5.10.2, 5.10.3, and 5.10.6, and IP Section 13.20.130 et seq.) requires that ocean and coastal vistas be protected as a matter of public importance. The public view at Opal Cliff Park is particularly important because it allows the only public view respite of the ocean along an otherwise unbroken stretch of approximately 50 large private residences and related development. The 9-foot-tall fence/gate is not protective of public views and is not consistent with the aforementioned LCP provisions. **Special Conditions 1 and 2(b)** therefore require removal of the

existing 9-foot-tall wrought iron fence/gate and replacement with a retractable fence/gate that would be opened during daytime hours, thus providing unimpeded views of the ocean from Opal Cliff Drive during the day, consistent with the aforementioned policies protecting ocean and coastal vistas and with the explicit requirements of LUP Policy 5.10.9, which requires mitigation of visually blighted areas as a condition of the development's approval. Finally, the project as conditioned is consistent with IP Section 13.20.130(B)(1) because it includes recognition of the existing installed aesthetic improvements including an ADA-compliant pathway, benches, and various landscaping improvements, which help create an inviting and visually pleasing park/overlook area for public/community enjoyment, and the revised fence design allows consistency with IP Section IP Section 13.20.130(b)(7), which does not allow development to either block or significantly impact public views and scenic character. **Special Condition 2f** further allows the Applicant to implement a donation program to help fund Park operations, including landscaping, provided the program materials (signage and/or donation station) are designed to minimize impacts to public views. Thus, as conditioned, the fence and gate and other physical improvements are consistent with the LCP's visual resource protection policies.

G. VIOLATION

As described in this report, there is an extensive history of Coastal Act violations, including significant violations of the public access and recreation policies of the Coastal Act, at Opal Cliffs Park. Violations of the Coastal Act and the Santa Cruz County LCP exist on the subject property including the following: placement of an unpermitted 9-foot-tall wrought iron fence with locked gate and restrictive signage that blocks public park and beach access; implementation of an unpermitted fee program that includes a $100 annual fee and the presence of a gate attendant to prevent members of the public from accessing the beach unless they have paid the fee; and unpermitted park-related improvements on the blufftop of the Park (as described in this report). Some of the above-described development (fence, gate, gate attendants, fee program, and signage) have limited and in some cases completely precluded the public's ability to access a public beach over a long period of time, including people from inland communities with diverse social and economic backgrounds. As stated previously, this is the only publicly-managed beach in California, that staff is aware of, that charges a beach access fee. Said fee has limited beach access to those who can afford to pay such a fee and favored Opal Cliffs residents over those who live far from the coast.

Commission Enforcement staff has spent over 12 years attempting to resolve these issues. During this time, public access was significantly limited and impacted by the unpermitted development described herein. There is no way to mitigate for the impacts caused by actions that have happened in the past. See **Exhibit 3** for Commission enforcement staff's letters to OCRD regarding these violations.

Approval of this application pursuant to the staff recommendation and the Applicant's ongoing compliance with all of the terms and conditions of this permit will result in resolution of the aforementioned violations on the subject property going forward. But, as stated above, there is no way to return the public access that was taken away from the public as a result of unpermitted development activities that occurred in the past.

Although unpermitted development has taken place prior to Commission consideration of this CDP application, consideration of this application by the Commission has been based solely upon the public access policies of the Coastal Act and applicable provisions of the Santa Cruz County LCP. Commission review and action on this CDP application does not constitute a waiver of any legal action with regard to the alleged violations, nor does it constitute an implied statement of the Commission's position regarding the legality of development, other than the development addressed herein, undertaken on the subject site without a CDP. In fact, approval of this CDP is possible only because of the conditions included herein and failure to comply with these conditions would also constitute a violation of this CDP, the Coastal Act, and the LCP – including the public access policies of the Coastal Act. Accordingly, the Applicant remains subject to enforcement action, just as it was prior to this permit approval for engaging in unpermitted development, unless and until the conditions of approval included in this CDP are satisfied, with the exception that this action does not resolve liabilities that attach to the violations that occurred prior to the issuance of, and compliance with, the CDP.

In order to ensure that the unpermitted development component of this application is resolved in a timely manner, the subject permit will issue upon Commission approval and **Special Condition 2 (Public Access Management Plan)** is required to be submitted to the Executive Director (for review and written approval) within 90 days of Commission action, with full implementation of the approved Public Access Management Plan's improvements and amenities no later than December 31, 2018 (**Special Condition 2(h)**). Failure to comply with the terms and conditions of this permit may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act, including, but not limited to, Section 30821 of the Coastal Act. Only as conditioned is the proposed development consistent with the Coastal Act and the Santa Cruz County LCP.

H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with CDP 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 that the activity may have on the environment.

Santa Cruz County, acting as lead agency, found that the project was exempt from CEQA requirements and issued a Categorical Exemption for the project under Sections 15601(b)(3) and 15302.[51] The Coastal Commission's CDP program has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of environmental review under CEQA (pursuant to Section 15251(c)).The preceding CDP determination findings discuss the relevant coastal resource issues associated with the project, including with respect to the protection public access and recreation and public views. The CDP conditions identify

[51] Section 15601(b)(3) applies to projects where there is no possibility that the activity in question will have significant effect on the environment, while Section 15302 applies to replacement or reconstruction of existing structures or facilities where the new structures will be located on the same site as the structure replaced and are substantially similar to the previous structures.

appropriate modifications and mitigation measures to avoid and/or lessen any potential for adverse impacts to said resources as those terms are understood under CEQA.

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

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- CDP P-80-393
- CDP Amendment Application P-80-393-A1
- LAFCO Report: "Review of Recreation and Park Districts' Services and Spheres of Influence," March 2016
- LAFCO Report: "2018 Service and Sphere of influence Review for County Service Area 11 Parks, Open Space, and Cultural Services," May 2018

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS[52]

- Opal Cliffs Recreation District
- Santa Cruz County Administrative Officer
- Santa Cruz County Planning Department
- Santa Cruz County Parks Department
- Surfrider Foundation
- Azul
- Save the Waves

[52] Staff also reached out to The Wahine Project, Center for Race, Poverty, and the Environment, Environmental Justice Coalition for Water, Community Bridges, Mi Casa at Hartnell College, Unitarian Universalist Fellowship of Santa Cruz County, Center for Community Action and Environmental Justice, Homeless Garden Project, UC Santa Cruz Center for Justice, Tolerance, and Community, NAACP Santa Cruz Branch, Santa Cruz Barrios Unidos, CAUSE, Fort Ord Environmental Justice Network, Greenaction, Sierra Club, Brown Girl Surf, and City Surf Project.