

CALIFORNIA COASTAL COMMISSION

CENTRAL COAST DISTRICT
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877
WEB: WWW.COASTAL.CA.GOV



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CDP Approved: 4/10/2019
Staff: Ryan Moroney - SF
Staff Report: 10/23/2020
Hearing Date: 11/6/2020

STAFF REPORT REMANDED CDP ACTION

Application Number: 3-18-0650

Applicant: Darla Harbaugh

Project Location: Atop the coastal bluff fronting Yankee Point Beach at 172 Spindrift Road within the unincorporated Carmel Highlands area of Monterey County, approximately 4.5 miles south of the City of Carmel-by-the-Sea.

Project Description: Redevelopment of an existing three-story single-family dwelling; renovations to and conversion of a detached carport/workshop into a gym/workout room with an attached garage; grading and construction of two new inland retaining walls; new septic system; improved drainage and landscaping; and related residential development.

Commission Action: Approved with Conditions on April 10, 2019; Revised Findings Adopted on June 13, 2019.

Staff Recommendation: Revise OTD and CDP expiration conditions

STAFF NOTE

On April 10, 2019, the Coastal Commission approved a coastal development permit (CDP) by a vote of 9-0 for the proposed project, including adding a condition to the staff recommendation at the hearing (i.e., Special Condition No. 12) requiring the Applicant to record an Offer-to-Dedicate (OTD) for a public access easement over a portion of an existing privately used beach access trail located on her property. At the approval hearing, the Applicant agreed to the imposition of the condition, but ultimately did not agree to the language that the Commission adopted for it later through revised findings. The Applicant subsequently sued the Commission over its action, claiming, among other things, that the Commission lacked a public access nexus to require the OTD.

Subsequently, staff and the Applicant engaged in negotiations to determine whether they could come to agreement on alternative language for Special Condition No. 12 that would be acceptable to both parties, and ultimately did so. Shortly thereafter the Commission agreed to a settlement in which the litigation would be stayed pending the Commission's consideration of the modified condition language, and would be dropped completely if the Commission were to adopt that language through a remand hearing.

On October 21, 2020 the court issued an order, pursuant to the parties' stipulation, remanding this matter to the Commission and directing the Commission to hold a new hearing "for the sole purposes of considering the inclusion of a revised Special Condition No. 12...and adjusting the CDP expiration date."¹ The order goes on to specify that the Commission retains its discretion to "accept, amend or reject the revised Special Condition No. 12, associated revised findings and resetting the CDP's two year term."² Staff recommends that the Commission approved the changes to Special Condition 12 and the revised expiration date (see, also Exhibit , as well as conforming changes to findings, all of which are shown herein in ~~cross-through~~ and underline format (for text to be deleted and text to be added, respectively).³ The motion to do so is found below on staff report page 7.

SUMMARY OF ORIGINAL COMMISSION ACTION

The Commission approved development to partially demolish and redevelop an existing three-story, 2,334-square-foot main residence and a detached 524-square-foot guest house into a single two-story 4,938-square-foot single-family dwelling (SFD) on an approximately 1½-acre blufftop parcel. The project also involves renovation and conversion of an existing garage and workshop into a garage with a gym, a new septic system, improved drainage and landscaping, grading, and construction of two new inland retaining walls. The project is located at 172 Spindrift Road in the Carmel Highlands area of unincorporated Monterey County. The property and existing home sit atop a coastal bluff overlooking Yankee Point Beach on the south side of Yankee Point proper, and is vegetated with numerous mature Monterey cypress trees along with a variety of landscape plantings, as well as some invasive iceplant around the existing residence and accessory structures. Although Monterey County has a certified local coastal program (LCP), the project is located in an area of deferred LCP certification (because of public access disputes involving four properties, including this one, at the

¹ The Applicant requested that the CDP expiration date, which currently is two years from the date of the Commission's original action to approve the application (or April 20, 2021) be extended to run two years from the date the Commission acts on this remand (on November 6, 2020, which would make the new expiration date November 6, 2022). Staff does not object to this extension in this case.

² Although the court issued a limited remand only authorizing the Commission to consider Special Condition No. 12, associated findings, and the expiration date, if the Commission were to consider adding or changing any other conditions (or were to deny the CDP), and it were to do so over the objection of the Applicant, the terms of the settlement are such that the Applicant would no longer be obligated to dismiss the litigation. Thus, should the Commission decide to make any other changes without the applicant's agreement, staff would recommend that the Commission not adopt the proposed revisions to Special Condition No. 12.

³ Such changes are limited to pages 2, 4-5, 15-18, and 36-38.

time of LCP certification in 1981), and thus the Commission retains CDP authority over this site, where any such CDP application is subject to the Coastal Act as the standard of review (rather than the LCP).

There are two main issues raised by the project. The first relates to the effects that coastal hazards may have on the site and the project due to its location atop a coastal bluff fronting the open Pacific Ocean. Because the project includes substantial SFD and garage changes to over 50% of the structures' major structural components, the project constitutes redevelopment whereby all such redeveloped structures need to conform to standards for new development under the Coastal Act, including with respect to siting and design for safety and stability without the need for shoreline armoring. The Applicant's geotechnical analyses found no evidence of measurable bluff retreat at the site over the past nearly 60 years, estimated continued low potential for erosion at this location, and ultimately concluded that the proposed SFD was adequately set back from such erosion and other coastal hazard threat. The Commission's Senior Coastal Engineer, Dr. Lesley Ewing, and its Geologist, Dr. Joseph Street, evaluated the relevant project materials and concur that the site is basically stable, that threats from slope instability and erosion are minimal, and that the existing roughly 10-foot blufftop setback is sufficient to satisfy Coastal Act stability and structural integrity tests.

At the same time, in order to ensure that the redeveloped SFD, garage and related development comply with the Coastal Act Section 30253 requirement that such development not result in shoreline altering development in the future (e.g., base of bluff and/or upper bluff armoring/retention), and to prevent the significant adverse impacts to coastal resources that such shoreline altering development is known to cause, the project is conditioned to ensure that the redeveloped structures are not allowed such shoreline armoring and/or bluff retention now or in the future, thus ensuring that natural processes will be allowed to continue here. The approval is also conditioned to require the Applicant to assume all risks for developing in an area of coastal hazards, and to monitor bluff retreat and erosion to remove development that becomes threatened by such hazards. In short, the redeveloped SFD, garage, and related development would be removed over time as determined by specific triggers to allow natural shoreline processes to continue as they would otherwise, as much as possible, and to avoid the loss of beach and other attendant impacts associated with shoreline structures and development at the shoreline interface more broadly.

The second main issue raised by the project relates to public access to Yankee Point Beach, a small beach fronting this part of the Carmel Highlands. Specifically, the project site is located atop a coastal terrace overlooking Yankee Point Beach on the south side of Yankee Point proper, and that beach is currently inaccessible to the general public from the public street due to fences and locked gates at the streets that block such general access, and instead limit it to neighborhood residents per a private easement arrangement. Historically, the beach area was basically open to and used by the general public, including as the surrounding area had not been subdivided. However, following subdivision and residential development, such unhindered general public access to Yankee Point Beach was blocked off, and only residents in the Carmel Highlands area and their guests are allowed to access the beach today (via keys issued

by the Carmel Highlands Association). Specifically, access to Yankee Point Beach is via two trails that begin on Yankee Beach Way and Spindrift Road respectively, both of which are public streets, but each of these trails are presently blocked for general public access by a fence, and locked gate,⁴ again where only Carmel Highland residents are issued keys and allowed to use the accessway via a private easement arrangement. Although the fences and locked gates at the public streets are not situated on the Applicant's property, the trails that extend from the two locked gates converge into a single trail (within a 10-foot-wide easement area) that ultimately leads across the Applicant's property to a stairway down to Yankee Point Beach.⁵ The lack of public access from the public street to Yankee Point Beach at this location, and the lack of a proposed plan or policies/provisions to pursue such public access through the LCP, is the reason that the LCP was never certified in 1981 for the parcels on which the trails and the beach stairway are located (including the Applicant's property), and why these parcels are currently an area of deferred LCP certification subject to the Commission's direct CDP authority.

In order to resolve the identified and heretofore unsettled public access issues and concerns in a manner that provides certainty for both the Applicant and the Commission, the Applicant has agreed to record an Offer-to-Dedicate (OTD) for general public access over the portion of the currently privately controlled accessway located on her property, and the project conditions are updated to memorialize this intent. In this way, over time, as the other parcels that contain portions of the private accessway redevelop, similar OTDs or other arrangements that lead to public access along the privately controlled accessway can be pursued and potentially applied to/recorded on those properties so that the currently private beach access system may ultimately become available for public access. On that point, it is worth noting that the even upon proper acceptance of the OTD, as will be set forth in the terms of the OTD itself, the property dedicated by the Applicant will not be required to actually become open to the public unless and until remaining contiguous segments of the accessway that provide connection from ~~either~~ both Spindrift Road ~~or~~ and Yankee Point Drive (or conceivably another public road) to the beach are made available for public access.

It is the Commission's strong preference that potential violations (in this case, the potential violations associated with unpermitted fencing and gate improvements) be remedied either prior to or in conjunction with a CDP action. However, given the complicated nature of this particular set of potential violations, their long history, and the various different property owners and other interested parties involved, these potential

⁴ The Spindrift Road fence and gate was originally first installed in 1962 and first equipped with a locked gate in 1965, prior to the coastal permitting requirements of both 1972's Proposition 20 (The Coastal Initiative) and 1976's Coastal Act. The Yankee Beach Way fence and locked gate was originally first installed in June 1974 without benefit of a coastal permit (required in this location by Proposition 20 at that time). In addition, it appears that both fences and gates have been modified since then without benefit of any CDPs.

⁵ Note also that the first part of the trails nearest the street-fronting fences/gates are not located on the Applicant's property, but after the two trails converge, the last 100 feet or so of the then-single trail leading to the beach and at least a portion of the beach stairway are on the Applicant's property.

violations are not resolved here prior to or concurrent with the Commission's action. Rather, in this case, and because of the particular set of facts here, including the age of the potential violations and the need for more global resolution than could be offered by this one property owner acting alone, the Commission here acted on the CDP without remedying potential violations, but rather further directing Commission Enforcement staff to begin the work necessary to resolve the potential identified violations. As a result, the Commission's enforcement staff are now taking a fresh look at the 45-year-old permitting violation (i.e., for the unpermitted 1974 locked fence/gate on Yankee Beach Way that blocks the ability of the general public to make their way to the beach, including any potential public rights to use of the trail and stairway sections that are located on the Applicant's property, as well as any unpermitted improvements to the private accessway system, since that time), and may pursue overall public access resolution through Coastal Act enforcement processes, including potential Section 30821 administrative penalty provisions, if justified.

As to other coastal resources issues raised by the project, these include its potential effect on water quality, coastal/marine resources, and cultural resources. With respect to water quality and offshore resources, the project includes an improved drainage system, including measures designed to collect, filter, and treat all runoff/drainage on site and provide for it to infiltrate (with none of it allowed seaward of the blufftop edge); is conditioned to require the removal of invasive plant species on the site and the planting of appropriate native plant species; and is conditioned to require appropriate best management practices to protect water quality (including offshore marine habitats) during construction. With respect to cultural resources, and after consultation and outreach with local tribes including the chairperson of the Ohlone/Costanoan-Esselen Nation (or OCEN), the project has also been conditioned to require that a qualified archeologist be present during any ground disturbance, and that, in the event that any article of historical or cultural significance is encountered, all activity that could damage or destroy these resources must cease and a mitigation plan be developed in consultation with the Executive Director, the Native American Heritage Commission, and OCEN and other tribal representatives as appropriate.

Thus, the Commission approved the project as modified to settle unresolved public access concerns and otherwise mitigate project impacts to coastal resources to a less than significant level. ~~The motion to adopt the revised findings is found on page 6 below.~~

TABLE OF CONTENTS

1. MOTION AND RESOLUTION 7

2. STANDARD CONDITIONS 7

3. SPECIAL CONDITIONS 8

4. FINDINGS AND DECLARATIONS..... 17

 A. PROJECT LOCATION AND DESCRIPTION..... 17

 1. Project Location and Background 17

 2. Project Description 18

 B. STANDARD OF REVIEW 19

 C. COASTAL HAZARDS 19

 D. BIOLOGICAL RESOURCES..... 27

 E. MARINE RESOURCES..... 29

 F. CULTURAL RESOURCES..... 30

 G. PUBLIC ACCESS AND RECREATION 33

 H. LOCAL COASTAL PROGRAMS 37

 I. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)..... 38

5. APPENDICES..... 39

 A. SUBSTANTIVE FILE DOCUMENTS..... 39

 B. STAFF CONTACT WITH AGENCIES AND GROUPS..... 39

EXHIBITS

- Exhibit 1 – Project Vicinity Maps
- Exhibit 2 – Photos of the Site and the Surrounding Area
- Exhibit 3 – Photos of Yankee Point Beach
- Exhibit 4 – Photos and Aerial of Spindrift and Yankee Way Accessways
- Exhibit 5 – Project Plans and Visual Simulations
- Exhibit 6 – Landscaping Plans
- Exhibit 7 – Applicant’s Tree Report
- Exhibit 8 – Cultural Resources Correspondence
- Exhibit 9 – Special Condition 12 in ~~cross-through~~/underline

CORRESPONDENCE

EX PARTE COMMUNICATION

1. 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** the modifications to Special Condition No. 12, the addition of Special Condition 13, and related modified findings associated with Coastal Development Permit Number 3-18-0650 pursuant to the staff recommendation, and I recommend a **yes** vote.*

Resolution to Approve CDP: *The Commission hereby modifies Coastal Development Permit Number 3-18-0650 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit modifications 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.*

2. 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 Permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.

3. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Approved Project.** As modified by these special conditions, the approved project consists of redevelopment of an existing three-story, 2,334-square-foot main residence and a detached 524-square-foot guest house into a single two-story 4,938-square-foot single-family dwelling on an approximately 1½-acre parcel. The project also involves renovation and conversion of an existing garage and workshop into a garage with a gym, a new septic system, improved drainage and landscaping, grading, removal of one Monterey cypress limb, construction of two new inland retaining walls, removal of an existing blufftop retaining wall seaward of the existing deck, and related development, all as further shown on the project plans (titled Harbaugh Residence and dated November 14, 2018, and dated received in the Coastal Commission's Central Coast District Office on January 15, 2019; see Exhibit 5). Revised Final Plans.
2. **Construction Plan. PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit two copies of a Construction Plan to the Executive Director for review and written approval. The Construction Plan shall, at a minimum, include the following:**
 - (a) **Construction Areas.** The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors in site plan view. All such areas within which construction activities and/or staging are to take place shall minimize impacts coastal resources, including by using developed inland portions of the Permittee's property for construction staging, storage, and activities.
 - (b) **Construction Methods.** The Construction Plan shall specify the construction methods to be used, including all methods to be used to keep construction areas separated from other public use areas, and to be used to protect coastal resources, including verification that equipment operation, equipment and material storage, and other construction activities will not significantly degrade public views during construction. The Plan shall limit construction activities to avoid coastal resource impacts as much as possible.
 - (c) **Construction Timing.** All work shall take place during daylight hours (i.e., from one hour before sunrise to one hour after sunset), except for interior work. Nighttime work (other than interior work) and lighting of the exterior work area are prohibited.
 - (d) **Construction Best Management Practices (BMPs).** The Construction Plan shall identify the type and location of all erosion control/water quality/tree protection best management practices that will be implemented during

construction to protect coastal resources, including coastal water quality as well as the existing Monterey cypress trees on the site, including at a minimum all of the following:

- (1) Runoff Protection.** Silt fences, straw wattles, and equivalent apparatus shall be installed at the perimeter of the construction site to prevent construction-related runoff and/or sediment from discharging from the construction area, and/or entering into storm drains, drainages or otherwise offsite, and/or to the Pacific Ocean. Special attention shall be given to appropriate filtering and treating of all runoff, and all drainage points, including storm drains, shall be equipped with appropriate construction-related containment equipment and filtration/treatment materials.
- (2) Equipment BMPs.** Equipment washing, refueling, and/or servicing shall take place at an appropriate inland location to prevent leaks and spills of hazardous materials near the bluff at the project site, where such location shall be at least 50 feet inland from the bluff edge, and preferably on an existing hard surface area (e.g., a road or driveway) or an area where appropriate collection of potentially problematic washing, refueling, and/or servicing materials is facilitated. All construction equipment shall also be inspected and maintained at a similar inland location to prevent leaks and spills of hazardous materials near the bluff at the project site.
- (3) Good Housekeeping.** The construction site shall maintain good construction housekeeping controls and procedures (e.g., clean up all leaks, drips, and other spills immediately; keep materials covered and out of the rain, including covering exposed piles of soil and wastes; dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather; remove all construction debris from the project site; etc.).
- (4) Erosion and Sediment Controls.** All erosion and sediment controls shall be in place prior to the commencement of construction as well as at the end of each workday.
- (e) Construction Site Documents.** The Construction Plan shall provide that copies of the signed CDP and the approved Construction Plan be maintained in a conspicuous location at the construction job site at all times, and that such copies be available for public review on request. All persons involved with project construction shall be briefed on the content and meaning of the CDP (including explicitly its terms and conditions) and the approved Construction Plan, and the public review requirements applicable to them, prior to commencement of construction.
- (f) Construction Coordinator.** The Construction Plan shall provide that a construction coordinator be designated to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies), and that his/her contact information (i.e., address,

phone numbers, email address, etc.) including, at a minimum, a telephone number and an email that will be made available 24 hours a day for the duration of construction, is conspicuously posted at the job site where such contact information is readily visible from public viewing areas while still minimizing impacts to public views, along with indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the contact information (e.g., address, email, phone number, etc.) and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry. All complaints and all actions taken in response shall be summarized and provided to the Executive Director on at least a weekly basis.

(g) Construction Specifications. All construction specifications and materials shall include appropriate provisions that require remediation for any work done inconsistent with the terms and conditions of the CDP.

(h) Notification. The Permittee shall notify planning staff of the Coastal Commission's Central Coast District Office at least three working days in advance of commencement of construction, and immediately upon completion of construction.

Minor adjustments to the above Construction Plan requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources. All requirements above and all requirements of the approved Construction Plan shall be enforceable components of this CDP. The Permittee shall undertake development in conformance with this condition and the approved Construction Plan, unless the Commission amends this CDP or the Executive Director provides a written determination that no amendment is legally required for any proposed minor deviations.

3. Coastal Hazards Risk. By acceptance of this CDP, the Permittee acknowledges and agrees, on behalf of herself and all successors and assigns, to all of the following:

(a) Coastal Hazards. That the site is subject to coastal hazards including but not limited to episodic and long-term shoreline retreat and coastal erosion, high seas, ocean waves, tsunamis, tidal scour, coastal flooding, landslides, bluff and geologic instability, bluff retreat, liquefaction and the interaction of same, many of which may worsen with future sea level rise.

(b) Assume Risks. To assume the risks to the Permittee and the property that is the subject of this CDP of injury and damage from such coastal hazards in connection with this permitted development.

(c) Waive Liability. To unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such coastal hazards.

(d) Indemnification. To indemnify and hold harmless the Coastal Commission, its officers, agents, and employees with respect to the Commission's approval of the development against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such coastal hazards.

(e) Property Owner Responsible. That any adverse effects to property caused by the permitted development shall be fully the responsibility of the property owner.

4. Coastal Hazards Response. By acceptance of this CDP, the Permittee acknowledges and agrees, on behalf of herself and all successors and assigns, to all of the following:

(a) CDP Intent. The intent of this CDP is to allow for the redeveloped SFD and the garage on the site and related development to be redeveloped and used consistent with the terms and conditions of this CDP for only as long the redeveloped SFD, garage and other approved project development remains safe for occupancy and use without additional measures (beyond ordinary repair and/or maintenance, as articulated in this condition below) to protect such development from coastal hazards (as these hazards are defined by Special Condition 3(a) above). The intent is also to ensure that the redeveloped SFD, garage and other approved project development or portions of same on the property are removed and the affected area restored under certain circumstances (as further described in this condition) consistent with the Removal and Restoration Plan required in subsection (d) of this special condition.

(b) Shoreline Armoring Prohibited. Shoreline armoring (including but not limited to seawalls, revetments, retaining walls/structures, gabion baskets, tie backs, piers, groins, caissons/grade beam systems, etc.) shall be prohibited.

(c) Section 30235 Waiver. Any rights that the Permittee may have to construct and/or maintain shoreline armoring to protect the SFD and related development, including rights that may exist under Coastal Act Section 30235, the Monterey County Local Coastal Program, or any other applicable laws, are waived.

(d) Removal and Restoration Plan. The Permittee shall submit two copies of a Removal and Restoration Plan (RRP) to the Executive Director for review and written approval that accounts for the following when any of the following criteria are met:

(1) Unsafe Conditions. If any portion of the approved project (including but not limited to the redeveloped/modified SFD, garage, driveway, outdoor patio areas, utility infrastructure, subsurface elements, etc.) are threatened and/or damaged by coastal hazards (as defined by Special Condition 3(a)), and if a government agency has ordered that the threatened and/or damaged portion

of the approved development is not to be occupied and/or used, and if such government agency concerns cannot be abated by ordinary repair and/or maintenance (see below), the RRP shall provide that all development meeting the “do not occupy and/or use” criteria is removed to the degree necessary to allow for such government agency to allow occupancy to and/or use of the remainder of the development after implementation of the approved RRP, including full removal if occupancy and use is not possible for a reduced-scale development. For purposes of this special condition, “ordinary repair and/or maintenance” shall include sealing and waterproofing and improvements that do not involve alteration of 50% or more to any of the SFD or garage major structural components, including exterior walls, floor and roof structures, and/or foundation.

- (2) Major Structural Components.** If any portion of the approved project’s major structural components (including exterior walls, floor and roof structures, and/or foundation) are subject to threat and/or damage due to coastal hazards (as defined by Special Condition 3(a)) requiring more than 50% alteration (including renovation and/or replacement) to abate those coastal hazards, beyond ordinary repair and maintenance (as further described in subsection (d)(1) above), then the RRP shall provide that such structural components be removed. For purposes of this special condition, “exterior wall major structural components” shall include exterior cladding and/or framing, beams, sheer walls, and studs; “floor and roof structure major structural components” shall include trusses, joists, and rafters; and “foundation major structural components” shall include any portion of the foundation.
- (3) Setback Triggers.** In the event that the edge of the blufftop recedes to within five feet of the redeveloped SFD, garage, and/or other related approved project development, and/or if the deck cantilevers over the blufftop edge, but no government agency has ordered that the SFD, garage, other related approved project development, and/or deck not be occupied, then the RRP shall address whether any portions of the redeveloped SFD, garage, other related approved project development, and/or deck are threatened by coastal hazards (as defined by Special Condition 3(a)). The RRP shall require removal of any portion of the deck that cantilevers over the blufftop edge, and shall identify all those immediate or potential future measures that could stabilize the redeveloped SFD, garage, and/or other related approved project development considering those coastal hazards threats without going beyond ordinary repair and maintenance (as further described in subsection (d)(1) above) and without reliance upon shoreline armoring, including, but not limited to, removal or relocation of portions or all of the deck and/or the redeveloped SFD, garage, and/or other related approved project development.
- (4) Daylighting.** If any portion of the approved subsurface components of the foundation and/or other subsurface elements of the approved project become exposed due to bluff erosion or other coastal hazards, then the RRP shall

provide that all development supported by these exposed elements, as well as the elements themselves, be immediately removed.

The RRP shall be submitted as soon as possible, but in no case later than 30 days after any of the above criteria are met. In cases where one or more of the above criteria is met, the RRP shall be required to meet all requirements for all triggered criteria. In all cases, the RRP shall also ensure that: (a) all non-building development necessary for the functioning of the redeveloped SFD, garage, and/or other related approved project development (including but not limited to access and utilities) is relocated out of harm's way as part of the removal episode; (b) all removal areas are restored as natural areas of a quality consistent with adjacent natural areas; and (c) all project modifications necessary to maintain compliance with the terms and conditions of this CDP, including the objectives and performance standards of these conditions, are implemented as part of the RRP.

If the Executive Director determines that an amendment to this CDP or a separate CDP is legally required to implement the approved RRP, then the Permittee shall submit and complete the required application within 30 days of such determination. The RRP shall be implemented immediately upon Executive Director or Commission approval of the RRP, as the case may be. The Permittee shall undertake development only in accordance with the approved RRP.

- 5. Native Landscaping Requirements.** The landscaping for the project shall be consistent with the Landscaping Plan dated August 1, 2017 and received in the Coastal Commission's Central Coast District Office on June 14, 2018 (see Exhibit 6), as modified by this special condition as follows. All plant species that are not native to this portion of coastal California shall be removed from the site and shall not be allowed to persist at any time. Only native plant species from the Carmel Highlands area shall be planted. All landscaped areas shall be maintained in a litter-free, weed-free, and healthy growing condition, and plants shall be replaced as necessary to maintain the approved vegetation over the life of the project. The irrigation system shall limit water use to the maximum extent feasible, including using irrigation measures designed to facilitate reduced water use (e.g., micro-spray and drip irrigation). No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be so identified from time to time by the State of California, and no plant species listed as a "noxious weed" by the State of California or the U.S. Federal Government shall be planted or allowed to naturalize or persist on the site.
- 6. Tree and Bird Protection.** The project shall incorporate and comply with the recommendations of the "172 Spindrift Road Tree Resource Assessment Forest Management Plan" prepared by Frank Ono and dated November 4, 2014 (see Exhibit 7, pages 8-11), including with respect to tree protection during construction, grading, and excavation activities, and pruning of trees, but not with respect to Best Management Practice B on page 11 regarding nesting birds. With respect to nesting birds, PRIOR TO COMMENCEMENT OF CONSTRUCTION for any construction activities taking place between February 1st and August 31st that have the potential

for significant noise impacts, the Permittee shall ensure that a qualified biologist shall conduct a preconstruction survey for the presence of nesting birds at the project site. If an active nest of a Federal or State-listed threatened or endangered bird species, bird species of special concern, or any species of raptor is identified during such preconstruction surveys, or is otherwise identified during construction, the Permittee shall notify all appropriate State and Federal agencies within 24 hours, and shall develop an appropriate action plan specific to each incident that shall be consistent with the recommendations of those agencies. The Permittee shall notify the Executive Director in writing within 24 hours and consult with the Executive Director regarding the determinations of the State and Federal agencies. At a minimum, if an active nest is located within 250 feet of construction activities (within 500 feet for raptors), the Permittee shall submit a report, for Executive Director review and approval, that demonstrates how construction activities shall be modified to ensure that nesting birds are not disturbed by construction-related noise.

- 7. Archaeological Protection.** An archaeological monitor qualified by the Native American Heritage Commission shall be present at the site during all ground disturbance (including grading activities), and shall be consulted to provide recommendations for subsequent measures for the protection and disposition of artifacts of historical or cultural significance in the event such artifacts are discovered. In the event that any article of historical or cultural significance is encountered, all activity that could damage or destroy these resources must cease and the Executive Director, the Native American Heritage Commission, and all appropriate local tribal representative(s) (as identified in the project's tribal consultation report) must be notified so that the articles may be suitably protected or flagged for future research. Mitigation measures shall be developed in accordance with Native American Heritage Commission and local tribal representative recommendations, and submitted to the Executive Director for review and approval, and such measures shall be required to address and proportionately offset the impacts of the project on such archaeological resources prior to recommencement of construction activity.
- 8. Real Estate Disclosure.** Disclosure documents related to any future marketing and/or sale of the subject property, including, but not limited to, specific marketing materials, sales contracts and similar documents, shall notify potential buyers of the terms and conditions of this CDP including, but not limited to, explicitly identifying all requirements associated with Special Conditions 3 and 4. A copy of this CDP shall be provided in all real estate disclosures.
- 9. Deed Restriction.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall submit to the Executive Director for review and approval documentation demonstrating that the Permittee has executed and recorded against the properties governed by this CDP a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this CDP, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the terms and conditions of this CDP as covenants, conditions and restrictions on the use and

enjoyment of the property. The deed restriction shall include a legal description and site plan of the entire parcel or parcels governed by this CDP. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this CDP shall continue to restrict the use and enjoyment of the subject property so long as either this CDP or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

10. Public Rights. By acceptance of this CDP, the Permittee acknowledges and agrees, on behalf of herself and all successors and assigns, that the Coastal Commission has identified the potential for public access rights on the subject property and nearby, and that the Coastal Commission's approval of this CDP shall not constitute a waiver of any public rights that may exist on the properties involved, including explicitly the portion of the Permittee's property containing the trail to the beach and the beach stairway. The Permittee shall not use this CDP as evidence of a waiver of any public rights that may exist on the properties now or in the future.

11. Future Permitting. Any and all future proposed development at and/or directly related to this project, this project area, and/or this CDP shall require a new CDP or a CDP amendment that is processed through the Coastal Commission, unless the Executive Director determines a CDP or CDP amendment is not legally required.

~~12. Offer to Dedicate (OTD).~~

~~(a) PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, and in order to implement the Permittee's agreement to record an OTD under the terms and conditions set forth herein, the Permittee shall execute and record a document(s) in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private entity (which entity shall assume liability, maintenance, repair, and security for use of the easement) approved by the Executive Director, a public access easement for public access and recreational uses in perpetuity as set forth herein. The easement shall be coterminous with the existing portion of the beach access easement that is located on the eastern perimeter of the Permittee's property that is currently for use exclusively by the Carmel Highlands Association recorded in Monterey County on September 1, 1921 in Book 183 of Deeds, Page 358 (the "Association Easement"). Nothing in this dedication shall require Permittee to remove the existing fence running parallel to the Association Easement. No development, as defined in Section 30106 of the Coastal Act, shall occur within the easement area except for grading and construction necessary to maintain public access amenities.~~

~~The recorded document(s) shall include a legal description and corresponding graphic depiction of the legal parcel(s) subject to this permit and a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the perimeter of the easement area prepared by a licensed surveyor based on an on-site inspection of the easement area. Public use of the easement area~~

~~shall be limited to one hour before sunrise to one hour after sunset daily.~~

~~The easement area that is the subject of the OTD shall not be required to be open and available for public access unless and until remaining contiguous segments of the accessway which connect the Association Easement to either Spindrift Road or Yankee Point Drive, or comparable areas (i.e., connect the Association Easement to a public road), are made available for public access.~~

- ~~(b) The irrevocable offer to dedicate shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed. The document shall provide that the offer of dedication shall not be used or construed to allow anyone to interfere with any rights of public access acquired through use which may exist on the property.~~
- ~~(c) The offer to dedicate shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner in perpetuity, and shall be irrevocable for a period of 21 years, such period running from the date of recording, and indicate that the restrictions on the use of the land shall be in effect upon recording and remain as covenants, conditions and restrictions running with the land in perpetuity, unless the landowner affirmatively revokes the offer.~~

12. Offer to Dedicate (OTD).

- (a) PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, and in order to implement the Permittee's agreement to record an offer to dedicate under the terms and conditions set forth herein, the Permittee shall execute and record a document(s) in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private entity (which agency or entity shall assume all liability, other than that specified in Civil Code section 846(d), maintenance, repair, and security for public use of the easement) approved by the Executive Director, a public access easement for public access and recreational uses in perpetuity as set forth herein. Such offer shall be irrevocable for a period of 21 years. The easement shall be coterminous with the existing portion of the beach access easement that is located along the southeastern perimeter of the Permittee's property, as shown in the Record of Survey map, recorded in Monterey County on December 22, 1958, in Volume X-1 of Official Records, Page 231 (the "Easement"). Nothing in this dedication shall require Permittee to remove the existing fence running parallel to the Easement. Any proposed repair and/or replacement of any portion of Permittee's existing fence is not part of this CDP and will therefore be considered independently at the time of the proposal. No development, as defined in Section 30106 of the Coastal Act, shall occur within the Easement area except for grading and construction necessary to maintain public access amenities.**

The recorded document(s) shall include a legal description and corresponding graphic depiction of the legal parcel(s) subject to this permit and a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the perimeter of the Easement area prepared by a licensed surveyor based on an on-site inspection of the Easement area. Public use of the Easement area shall be limited to one hour before sunrise to one hour after sunset daily. Any restrictions on public use adopted for the trail system or as part of a Local Coastal Program Policy, whichever is more protective of resources and privacy rights, in the future would apply to the segment over the Permittee's property as well.

The Easement area that is the subject of the offer to dedicate shall not be required to be open and available for public access or recreational uses unless and until:

Public access rights from Spindrift Road and Yankee Beach Way to the Easement area are established or confirmed by a final court judgment, with such judgment no longer subject to judicial review. Consistent with the offer to dedicate, Permittee shall not voluntarily, in her individual capacity, interfere with or oppose any efforts to establish or confirm public access rights along the portion of the access trail over Permittee's property. Nothing in this condition, however, shall limit Permittee's rights as a member of the Carmel Highlands Association or in support of the Mal Paso Creek Association or a subsidiary group of landowners of one or both associations, to oppose the above-referenced court action, or to defend any legal or regulatory action in which Permittee, or her successor or assignee, is a named party.

(b) The irrevocable offer to dedicate shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed, except for the easement and access rights held by the Carmel Highlands Association and its members, the Mal Paso Creek Association and its members, and the adjacent property owners over which the trail runs commonly referenced as Assessor Parcel Numbers 241-301-014; 241-301-018; 243-141-017; 241-141-016 and 243-141-005. The document shall provide that the offer of dedication shall not be used or construed to allow anyone to interfere with any rights of public access acquired through use which may exist on the property.

(c) The offer to dedicate shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner, and shall be irrevocable for a period of 21 years, such period running from the date of recording, and it shall indicate that once the restrictions on the use of land have become enforceable, they shall remain as enforceable covenants, conditions and restrictions running with the land in perpetuity (unless the parties agree to remove the restrictions). The restrictions set forth in the offer to dedicate shall become enforceable on the date that both of the following have occurred: (1) the acceptance of the offer by an entity approved by the Executive Director in writing,

and (2) public access rights have been established as indicated in the final paragraph of subdivision (a). Until such time that public access rights have been established as indicated in the final paragraph of subdivision (a), acceptance of the offer to dedicate by a third party shall not imply that said third party or any other entity has any access rights or any other rights to the Easement area.

(d) If, by December 31, 2060, public access rights have not been established as indicated in the final paragraph of subdivision (a), or if, at any time, there is a final judicial determination that no public rights exist along any portion of the trail, the offer and any acceptance thereof will be extinguished. The recorded offer to dedicate shall provide that: (1) if either of the conditions set forth in the prior sentence occurs, the offer and any acceptance thereof both expire; and (2) if the offer and acceptance expire as set forth in part (1) of this sentence, the party who accepted the offer shall execute and record a release of its acceptance and an acknowledgement that the offer and acceptance have expired within 30 days of December 31, 2060 or within 30 days of a final judicial determination that no public rights exist, whichever is earlier.

13. Expiration. This Special Condition 13 replaces Standard Condition 2 above. If development has not commenced, the permit will expire on November 6, 2022. 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.

4. FINDINGS AND DECLARATIONS

A. Project Location and Description

1. Project Location and Background

The project site is located at 172 Spindrift Road in the Carmel Highlands area of unincorporated Monterey County just south of the City of Carmel-by-the-Sea (see **Exhibit 1** for a project location map). The property sits atop a coastal terrace overlooking Yankee Point Beach on the south side of Yankee Point proper and is vegetated with numerous mature Monterey cypress trees along with a variety of landscape plantings, as well as some invasive iceplant around the existing residence and accessory structures. The LCP's Carmel Area Land Use Plan (LUP) describes the area as follows:⁶

In contrast to the north section of the Carmel area shoreline, the south section is privately owned, supports very few accessways, and receives minimal public use. The terrain, characterized by steep cliffs and rocky shoreline, generally precludes the potential for much public access. The two notable shoreline destinations within this section -- Malpaso and Yankee Point Beaches -- are

⁶ See Carmel Area LUP page 100.

served by improved and maintained accessways.

See **Exhibit 2** for photos of the site and surrounding area.

Yankee Point Beach is directly seaward and below the site, and it occupies approximately an acre stretching along the shoreline, with its 1,500-foot-long sandy cove nearest the site (see **Exhibit 3**). The beach is generally fairly narrow, depending on the tides, and topographical constraints preclude lateral sandy beach access to the beach from up or down coast. The beach is also currently inaccessible to the public from the street due to fences and locked gates which limit beach access to neighborhood residents per a recorded easement arrangement. Historically, the beach area was basically open to and used by the general public, including as the surrounding area had not been subdivided. However, following subdivision and residential development, such unhindered public access to Yankee Point Beach was blocked off, and currently only residents in the Carmel Highlands area and their guests are allowed to access the beach today (via keys issued by the Carmel Highlands Association). Specifically, access to Yankee Point Beach is via two trails that begin on Yankee Beach Way and Spindrift Road (see **Exhibit 4**), both of which are public streets, but each of these trails are presently limited by an easement, fence, and locked gate,⁷ again where only Carmel Highland residents are issued keys. Although the gates and fences in question are not on the Applicant's property, the trails that extend from the two locked gates converge into a single trail within a 10-foot wide easement area that ultimately leads across the Applicant's property to a stairway down to Yankee Point Beach.⁸

Because of the lack of public access from the public street to Yankee Point Beach at this location, and the lack of a proposed plan or policies/provisions to pursue such public access through the LCP when it was originally proposed by Monterey County in 1981, the Commission deferred certification of the LCP for the parcels on which the trails and the beach stairway are located (including the Applicant's property). As a result, these parcels are currently an area of deferred LCP certification that is not subject to the County's LCP, and rather is subject to the Commission's direct CDP authority. Because this project is on one of the parcels in the area of deferred certification, the CDP application here is being processed by the Commission, and the standard of review is the Coastal Act.

2. Project Description

The proposed project includes partial demolition and redevelopment of the existing three-story, 2,334-square-foot main residence and the detached 524-square-foot guest

⁷ The Spindrift Road fence and gate was originally first installed in 1962 and first equipped with a locked gate in 1965, prior to the coastal permitting requirements of both 1972's Proposition 20 (The Coastal Initiative) and 1976's Coastal Act. The Yankee Beach Way fence and locked gate was originally first installed in June 1974 without benefit of a coastal permit (required in this location by Proposition 20 at that time). In addition, it appears that both fences and gates have been modified since then without benefit of any CDPs.

⁸ Note that the first part of the trails nearest the street-fronting gates are not located on the Applicant's property, but after the two trails converge, the last 100 feet or so of the then single trail leading to the beach is on the Applicant's property (see **Exhibit 5**).

house into a single two-story 4,938-square-foot single-family dwelling (SFD) on an approximately 1½-acre parcel. The project also includes renovation and conversion of an existing single-story, 782-square-foot two-car detached carport/workshop into a 663-square-foot gym/workout room with an attached 501-square-foot garage; construction of two inland retaining walls, one adjacent to the proposed redeveloped SFD (5 feet high by 60 feet long) and one adjacent to the proposed redeveloped gym/garage (5 feet high by 85 feet long); replacement of an existing septic system; approximately 500 cubic yards of grading; driveway repaving; landscaping with native plants; removal of an existing blufftop retaining wall seaward of the existing deck; improved drainage, including measures designed to collect, filter, treat, and infiltrate all runoff and drainage on site (with none allowed seaward of the blufftop edge); and a new fire pit. See **Exhibit 5** for the project plans and visual simulations.

B. Standard of Review

Although Monterey County has a certified LCP, as described above the proposed project is located in an area of deferred LCP certification and thus the standard of review is the Coastal Act with the certified LCP providing non-binding guidance.

C. Coastal Hazards

Applicable Provisions

The project site is located on the blufftop, in an area subject to coastal hazards, including from storm, waves, and coastal flooding, as well as episodic and longer-term coastal erosion. Coastal Act Section 30253 addresses the need to ensure long-term structural integrity, minimize future risk, and to avoid landform altering protective measures in the future. Specifically, Section 30253 provides, in relevant part:

Section 30253. *New development shall do all of the following:*

- (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

Although not the standard of review, the LCP implements Section 30253 through the Carmel Area LUP as well as its implementing measures and countywide implementing measures, including:

2.7.2 Key Policy

Land uses and development in areas of high geologic, flood, and fire hazard shall be carefully regulated through the best available planning practices in order to minimize risks to life and property and damage to the natural environment.

2.7.3 General Policies

- 1. All development shall be - sited and designed to minimize risk from geologic, flood, or fire hazards. Areas of a parcel which are subject to high hazard(s) shall*

generally be considered unsuitable for development. For any development proposed in high hazard areas, an environmental or geotechnical report shall be required prior to County review of the project. These reports must include a demonstration that all the criteria in the applicable following policies are complied with and recommendations for mitigation measures (if mitigation is possible) consistent with the following policies. All recommended mitigation measures contained in the reports are to be County requirements (i.e., conditions of Coastal permits).

2.7.4 Specific Policies ...

6. Where geotechnical evaluation determines that the hazard is unlikely to lead to property damage or injury, construction is permissible if certified by a registered geologist/soils engineer that the proposed development will not result in an unacceptable risk of injury or structural damage and the County building official and Environmental Review Section concurs. Such certification will be recorded with a copy of the deed at the County Recorder's Office. ...

10. Revetments, groins, seawalls, or retaining walls, and other such construction that alters natural shoreline processes shall be permitted only where required for the protection of existing development. These structures shall not impede lateral beach access and shall respect, to the greatest degree possible, natural landform and visual appearance. Such facilities shall be designed to eliminate or mitigate adverse impacts on local shoreline supply (e.g. incorporate sand by-pass; import replacement sand) and shall be subject to certification of a coastal engineer or engineering geologist with expertise in coastal processes.

Thus, although not binding and rather for guidance only in this case, the LCP requires that new development assure stability and structural integrity much like the Coastal Act, and, unusually for LCPs, does *not* include a minimum numerical setback distance from the coastal bluff, rather a finding that *“the proposed development will not result in an unacceptable risk of injury or structural damage.”*

As to the standard of review, Coastal Act Section 30253 requires new development to minimize risks to life and property in areas of high geologic and flood hazard. The clearest approach for minimizing coastal hazards is to avoid siting new development within areas vulnerable to such hazards (including flooding, inundation, and erosion). Section 30253 also requires that new development minimize coastal hazard risks without the use of bluff retaining or shoreline protection devices that would substantially alter natural landforms.⁹ Thus, Section 30253 requires that new development include provisions to ensure that coastal hazard risks are minimized for the life of the development without requiring landform-altering shoreline protection along bluffs and cliffs. The Commission has applied Section 30253 by implementing hazard risk minimization measures for new development, including redevelopment, through a

⁹ The proposed project includes two new retaining walls, one adjacent to the proposed redeveloped SFD and one adjacent to the proposed redeveloped gym/garage. However, both of the retaining walls would be located on the inland side of the proposed structures and will not function as shoreline protective devices.

variety of means, but has focused on siting such development out of harm's way as much as possible (through appropriate blufftop setbacks, for example), and by requiring that such development be modified, relocated, and/or removed when/if the development becomes threatened by coastal hazards, including sea level rise, as opposed to allowing a reliance of shoreline armoring.

Thus, under Section 30253, new development must be sited, designed, built, and in the future modified as necessary to allow natural shoreline processes to occur without creating a need for a shoreline protective device, and coastal development permittees for new shorefront development must make a commitment to the public (through the approved action of the Commission or local government counterparts for jurisdictions with certified LCPs) that, as a condition of building their project, the public will not suffer the impacts which would occur by permitting said development to be protected by such shoreline protective devices (e.g., losing public beach access, offshore recreational access, sand supply, visual resources, natural landforms, etc.), and that the public will not be held responsible for any future stability problems.

Redevelopment

The threshold question that often arises in the context of the provisions cited above when an existing residence and related residential development is modified, such as is proposed here, is whether the proposed project constitutes "redevelopment" such that the entire redeveloped structures must meet all of the above provisions explicitly, versus more ordinary repair and maintenance to an existing structure, but the repaired/maintained portion of the (existing) structure may not necessarily be required to be modified (e.g., to meet setback requirements where it currently doesn't), depending on the nature of the project. The Commission relies on the applicable provisions of the Coastal Act and its implementing regulations in informing its determinations as to what qualifies as "redeveloped."¹⁰ 14 CCR Section 13252(b) specifically states that replacement of 50% or more of a structure, including a single-family residence, is not repair and maintenance under Coastal Act Section 30610(d) but instead constitutes a replacement (redeveloped) structure. In applying 14 CCR Section 13252(b), the Commission has in the past found a structure to be redeveloped if at least one of the following circumstances applies: 1) 50% or more of the major structural components are altered;¹¹ 2) there is a 50% increase in gross floor area; 3) alteration of less than 50% of a major structural component results in cumulative alterations exceeding 50% or more of that major structural component (taking into account previous work undertaken in the time since coastal permits were required); 4) a less than a 50% increase in floor area where the alteration would result in a cumulative addition of 50% or more of the floor area, taking into account previous additions to the structure in the time since coastal permits were required. In certain cases, the Commission has also relied upon the FEMA 50% threshold, where a structure would be considered redeveloped where the alterations to it exceed 50% of the value of the

¹⁰ Specifically, Coastal Act Section 30610(d), and Title 14 of California Code of Regulations (CCR) Section 13252(b).

¹¹ Major structural components include exterior walls, floor, roof structure, or foundation, where, in past cases at least, alterations are not additive between individual structural components.

structure.

In this case, the proposed changes to the SFD include partial demolition and redevelopment of the existing three-story, 2,334-square-foot residence and the detached 524-square-foot guest house into a single two-story 4,938-square-foot SFD. Specifically, this will include an addition of 2,604 square feet (a nearly 112% increase in floor area of the existing SFD), and more than 50% of the roofing and foundation elements will be modified, meaning that the house will be considered a redeveloped structure, as described above. In addition, the project also includes partial demolition and redevelopment of an existing single-story, 782-square-foot two-car detached carport/workshop into a 663-square-foot gym/workout room with an attached 501-square-foot garage (a nearly 149% increase in floor area of the existing carport/workshop). Thus, both the proposed SFD and garage both constitute “redevelopment” as described above, and Section 30253 requires these redeveloped structures to meet all of its requirements, including that the redeveloped structures would need to be sited and designed to assure stability and structural integrity, and to not rely on shoreline armoring, which alters landforms along bluffs and cliffs, by operation of Coastal Act Section 30253.

Consistency Analysis

The Applicant’s geologist and geotechnical engineers have studied the project location and found the site to be suitable for new development based on the existing geological conditions (Harwood, 2014; Earth Systems Pacific 2015 – see **Appendix A**).¹² Specifically, the Applicant’s 2014 geological evaluation found no evidence of measurable bluff retreat at the site over the period of 1956 through 2014. This Applicant evaluation determined that the bluff at the site consists of highly resistant granitic bedrock, and that surf action at the bluff’s base is somewhat subdued as it occurs generally within a southwest facing cove that shields it from the prevailing onshore wave action. Ultimately, the geologic evaluation concluded that “as a result of our site geologic evaluation, we established a coastal bluff setback that is equal to 10 feet from the current bluff crest.” The Commission’s Senior Coastal Engineer, Dr. Lesley Ewing, and its Geologist, Dr. Joseph Street, evaluated the relevant project materials and are in general agreement with the conclusion that the site is generally stable and at low risk from erosion. At the same time, the absence of measureable erosion over the past 60 plus years is not a guarantee that such a condition will persist into the future. On the contrary, including with rising sea levels, it is likely that the site will experience increased erosion in the future. In addition, while the site appears to exhibit fairly gross stability within the granitic bedrock, it is also likely that some surficial losses of the weaker soils and decomposed granite comprising the upper bluff will also occur moving forward. Dr. Ewing and Dr. Street concluded that the proposed 10-foot setback would provide protection from foreseeable, minor erosion of the upper bluff at the site, and that

¹² The LCP does not include an numeric minimum setback distance for blufftop development, but instead requires the preparation of a geologic report for any proposed development located within 50 feet of a bluff edge (see Carmel Area LUP Policy 3.7.3.A.9 and Coastal Implementation Plan (CIP) Section 20.145.080.A.1.b.2), where these reports are to be used by the decision-making body to establish appropriate setbacks.

there is little technical basis for requiring a larger setback at this time. In short, the project as proposed to be sited can be found consistent with the portion of Section 30253 requiring that coastal hazard risks be minimized.¹³

However, as described above, the site is not without coastal hazards risk. The proposed project is located in an area that is subject to coastal hazards due to the inherent nature of its blufftop and shoreline location. Moreover, the proposed 10-foot bluff setback line is within a few feet of the proposed redeveloped SFD in some locations (see **Exhibit 5**), which raises issues with respect to whether the location of the redeveloped SFD meets the intent of the Section 30253 requirement that new development be sited and designed to assure stability and structural integrity without the use of shoreline altering development to make it so over its lifetime.¹⁴ In other words, given how close the proposed bluff setback line is to the proposed redeveloped SFD, a larger setback could arguably be appropriate. Taking into account that the proposed project is located in an area that is subject to coastal hazards due to the inherent nature of its blufftop and shoreline location notwithstanding the Applicant's identified 10-foot coastal bluff setback, in order to ensure that the redeveloped residence fully complies with Coastal Act Section 30253, the approval is conditioned to require the Applicant to assume all of the risk for developing in an area of coastal hazards, to prohibit future shoreline armoring, to require the Applicant to monitor bluff retreat and to remove development that becomes threatened by such hazards, based on actual circumstances and triggers over time (see **Special Conditions 3 and 4**). In this way, the project meets the requirements of Section 30253, and will not be allowed shoreline armoring in the future. See further discussion of each of these issues and associated conditions below.

In addition, and more broadly in terms of hazards risk at the site, and in terms of recognizing and assuming the hazard risks for shoreline development, the Commission's experience in evaluating proposed developments in areas subject to coastal hazards has been that development has continued to occur despite periodic episodes of heavy storm damage and other such occurrences. Development in such dynamic environments is susceptible to damage due to such long-term and episodic processes. Past occurrences statewide have resulted in public costs (through low-interest loans, grants, subsidies, direct assistance, etc.) in the tens and hundreds of millions of dollars. As a means of allowing continued development in areas subject to these hazards while avoiding placing the economic burden for damages onto the people

¹³ The project plans also include retention of decking within the 10-foot setback area, essentially to the blufftop edge in places. Because it is part of the redeveloped structure, this decking also needs to meet all Section 30253 requirements, including in terms of setback. In this case, there is little to be gained in removing all decking to the 10-foot setback, including as it is easily removed in the future if need arises, and the conditions are structured to require its removal should it cantilever over the blufftop edge. While in other cases decking to the blufftop edge is not supportable (e.g., when it results in other coastal resource issues, such as marring public views), the decking does not raise significant concerns of this type at this time, and the removal requirements associated with it are sufficient for Section 30253 purposes as well as to protect coastal resources.

¹⁴ The proposed redeveloped gym/garage, however, will be located in a more inland location on the 1½-acre parcel, approximately 150 feet from the blufftop edge, and thus is not expected to be subject to the same coastal hazard issues in the short term.

of the State of California, applicants are regularly required to acknowledge site hazards and agree to waive any claims of liability on the part of the Commission for allowing the development to proceed. Accordingly, this approval is conditioned for the Applicant to assume all risks for developing at this location (see **Special Conditions 3 and 4**).

With respect to the requirements of Section 30253(b) prohibiting new development from relying upon shoreline protective devices, both now and in the future,¹⁵ although redevelopment of the proposed redeveloped SFD, garage, and other related development is considered safe in the opinion of the Applicant's geologist and geotechnical engineer, the project is not sited in such a manner that the Commission can find with confidence that it would definitively never need shoreline armoring to protect it in place at some point in the future, especially considering the uncertainties associated with erosion and sea level rise. The Commission must still find, however, that the project is consistent with two requirements: it must not rely upon shoreline armoring which would alter natural landforms along bluffs and cliffs in its approved design and configuration, and it must include appropriate restrictions that prohibit such armoring in the future, taking into consideration the significant adverse impacts to coastal resources caused by such shoreline protection (including adverse effects on sand supply, public access, coastal views, natural landforms, and overall shoreline beach dynamics on and off site, which ultimately result in the loss of beach)¹⁶ and the

¹⁵ The Carmel Area LCP requires all development to be sited to minimize risks from geologic, flood, and fire hazards and requires areas of a parcel that are subject to high hazards to generally be considered unsuitable for development (see LUP Policy 2.7.3.1 and CIP Section 20.146.080.D.1.a.). As identified above, the LCP does not identify a specific numerical setback distance, nor does it identify a specific length of time considered the "economic life" of a development. In the Commission's 2015 Sea Level Rise Guidance, the Commission found 75-100 years to be an appropriate time frame for which to analyze appropriate siting, design, and other related coastal hazard concerns for a single-family residence. In past permit actions, when implementing Coastal Act Section 30253, the Commission has similarly used this 75 to 100 year range as an appropriate estimate for the applicable analysis associated with the potential time that a residence might be expected to be present (see, for example, CDP 1-10-010 (Maier)). The Commission certified the Solana Beach LUP with an assumption that the appropriate coastal hazard analytic timeframe for residences was 75 years and certified the City of Malibu LCP with a 100-year analytic timeframe. Thus, although the LCP does not define the term, is the Commission determines in this case that it is appropriate to analyze the development for applicable policy consistency based on 75-100 years.

¹⁶ See, for example, Griggs, Gary, *The Impacts of Coastal Armoring*, Shore & Beach Vol. 73, No. 1, Winter 2005, pp. 13-22. See also Herzog, Megan & Hecht, Sean, *Combating Sea-level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*, 19 Hastings West Northwest J. Environmental Law & Policy 463 (2013): "Although hard armoring can be effective at preventing flooding from damaging critical infrastructure and densely developed areas, hard structures have high economic, environmental, and social costs. By preventing the natural landward migration of beaches and deflecting wave energy, hard armoring contributes to beach and wetland erosion. Erosion negatively impacts both ecosystem functions and the public's ability to access the coast. Over time, the inundation and erosion related to sea-level rise could cause dune, beach, and wetland ecosystems backed by hard armoring to disappear. Hard armoring also interferes with the ability of coastal ecosystems to filter water, buffer coastal communities from storms, support fisheries, and provide other valuable ecosystem services that would be costly for coastal communities to replace. In addition to the environmental impacts, the visual impacts of a concrete coast are stark and may be offensive to local residents and beachgoers. As successive property owners armor the coast, hard armoring may lower property values in the larger community. Consequently, many governments are moving away from hard

uncertainty of geologic site stability in light of coastal erosion and sea level rise. With respect to whether the approved project includes appropriate restrictions against future armoring, the project must be conditioned to define specific trigger points for deeming the residential development to be threatened by coastal hazards to a degree that requires relocation/removal, and to identify allowable ordinary repair and maintenance actions short of more extraordinary actions, such as armoring, to address any potential damage from coastal hazards. Clear and unambiguous language defining these trigger points is particularly important for determining when a structure is at risk, particularly when it implicates the removal of portions or even all of the single-family residence and/or other related development on site.

In order to ensure that the proposed development does not result in shoreline armoring, **Special Condition 4(b)** prohibits shoreline protective structures, including but not limited to seawalls, revetments, retaining walls/structures, gabion baskets, tie backs, piers, groins, and caisson/grade beam systems, in the event the development at this site is threatened, and **Special Condition 4(c)** waives any potential rights that may exist to construct such shoreline protective devices for the approved development. **Special Condition 4(a)** articulates that the intent of the CDP is to ensure that the approved development does not use armoring as a mechanism to cope with any potential coastal hazards problems, and that, in lieu of armoring, the response to abate such hazards is through removal and restoration over time. **Special Condition 4(d)** ensures that the redeveloped residence and related site development will only be allowed to remain onsite if it is safe for occupancy and use without additional measures beyond ordinary repair and maintenance and without shoreline protection. This condition is meant to define when the redeveloped residence and related development (or portions of same) may be impermissibly situated within a hazardous location and/or subject to a hazardous situation otherwise necessitating shoreline armoring. When this situation arises, the project will then be inconsistent with the Coastal Act and the LCP by posing a risk to life and property in an area of high geologic and flood hazard because it is not allowed armoring, and thus special conditions are required that do not rely on armoring to abate these coastal hazards. Specifically, the condition requires the Applicant to submit a plan for removal and/or relocation of the potentially threatened development on the site if any of four triggers is met: (1) if a government agency has ordered that any portion of such development is not to be occupied or used due to one or more coastal hazards, and such government agency concerns cannot be abated by ordinary repair and/or maintenance; (2) if any portions of such development's major structural components, including exterior walls, floor and roof structures, and foundation, must be significantly altered (i.e., 50% or more) (including renovation and/or replacement) to abate coastal hazards; (3) if the bluff edge recedes to within five feet of any portion of such development (or if the deck cantilevers over the blufftop edge); or (4) if any portion of such development's subsurface foundation or other subsurface elements become exposed due to bluff erosion.

armoring as a primary sea-level rise adaptation strategy. Shoreline armoring is banned or severely restricted in Maine, Massachusetts, North Carolina, Oregon, Rhode Island, South Carolina, and Texas. Instead, innovative governments are increasingly turning to soft armoring to protect development.”

Furthermore, **Special Conditions 4(d)(1)** and **(2)** define when the approved project is subject to hazards at which the development would be deemed hazardous and therefore when it would require partial or complete relocation due to the fact that the special conditions prohibit shoreline protection to protect the approved development from coastal hazards. These conditions define the points at which this determination would be made by the extent of damage, and the resultant type of necessary repair work, caused by coastal hazards. These conditions specify that ordinary repair work,¹⁷ including waterproofing and alterations to non-structural components, does not constitute a coastal hazard response triggering certain relocation/removal. Thus, if high seas and waves from a large storm caused some minor damage to the structure, but that damage was relatively minimal and could be addressed by simple repair work, as specified in **Special Condition 4**, then such a situation does not rise to the threshold for deeming the development hazardous and unsafe for continued use without requiring work beyond ordinary repair and maintenance or shoreline armoring (which is prohibited by **Special Condition 4**). However, when the hazard causes enough damage that significant alteration (including replacement of more than 50% of the development's major structural components) is necessary, for example, then the development is subject to hazards at a level unsafe for continued human use and occupancy that cannot be remediated by work other than that beyond ordinary repair and maintenance or shoreline protection.

Essentially, the amount/level of repair work defines the point at which the development is deemed at risk under this CDP. When hazards are infrequent and/or weak enough to where ordinary repair and maintenance work is sufficient, such work is allowed without triggering the required coastal hazard response of removal and/or relocation. Conversely, if such hazards are strong and/or frequent enough that major repair work to fix damaged structural elements is necessary, the trigger point for determining that the development is located in an impermissible hazardous site and/or subject to an impermissible hazardous situation has been reached, and therefore removal/relocation of the affected portion of the development must take place (since site development may not subsequently be protected under these circumstances by shoreline armoring, per the special conditions). **Special Condition 4(d)(3)** specifies another trigger point for preparation of a Removal and Restoration Plan (RRP) – that is, in the event that the edge of the blufftop recedes to within five feet of the redeveloped residence. In that case, the RRP must address the threat and identify measures that could stabilize the development without shoreline armoring, including potential removal of the entire structure. And it further requires deck removal of any component of the deck that might cantilever over the blufftop edge. Finally, **Special Condition 4(d)(4)** specifies the final trigger point for preparation of an RRP, being exposure of any of the foundation and/or subsurface elements of site development.

¹⁷ With respect to what defines and differentiates ordinary repair and/or maintenance versus major structural alteration, **Special Condition 4** is modelled after language approved in relatively recent Commission-approved LCP updates (e.g., Solana Beach) and CDP actions (e.g., A-3-STC-16-0016, Honjo), which provide examples for how these calculations can be made consistent with the Coastal Act. This language differentiates between these two types of work, including by specifying the types of building components that would be considered structural.

The terms and conditions of this approval are meant to be perpetual. **Special Condition 8** therefore requires the Permittee to notify any prospective purchasers of the property about these permit requirements, thus ensuring that future owners are made aware of these conditions. This approval is also conditioned for a deed restriction to be recorded against the property involved in the application (see **Special Condition 9**). This deed restriction will record the terms and conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property.

With these conditions, the redeveloped residence, garage and related development has been sited to assure safety and stability without the use of shoreline armoring now or in future and will instead abate potential future hazards through removal/relocation and site restoration when defined trigger points are reached. Therefore, with respect to shoreline erosion and related coastal hazards, the proposed project, as conditioned, can be found consistent with the Coastal Act.

D. Biological Resources

Applicable Provisions

Coastal Act Section 30250 provides for general protection of coastal resources, stating as follows:

Section 30250. *(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources...*

Although not the standard of review, the LCP implements the Coastal Act in this respect through the Carmel Area LUP as well as its implementing measures and countywide implementing measures, including:

2.4.2 Key Policy

The water quality of the Carmel area's coastal streams and of the Point Lobos and Carmel Bay Areas of Special Biological Significance shall be protected and maintained...

2.4.3 General Policies

1. The effects of all new development proposals or intensification of land use activities or water uses on the natural character and values of the Carmel coasts streams will be specifically considered in all land use decisions. Subjects to be addressed in such evaluations include protection of water quantity and quality, wildlife and fish habitat, and recreational and scenic values...

2. New development including access roads shall be sited, designed and constructed to minimize runoff, erosion, and resulting sedimentation. Land divisions shall be designed to minimize the need to clear erodable slopes during

subsequent development. Runoff volumes and rates should be maintained at pre-development levels, unless provisions to implement this result in greater environmental damage.

Analysis

The project site is located along the Carmel Highlands area just south and east of Yankee Point proper. The 1.47-acre parcel is located at approximately 30 feet of elevation, on a coastal terrace fronting a fairly steep and rocky cliff. The project site contains 34 Monterey cypress trees with an understory of mixed ornamental plants, some native plant species, and large areas of invasive iceplant. The Applicant prepared a Biological Assessment (Ballerini, 2015) and a Tree Resource Assessment (Ono, 2014) for the proposed project. These assessments included general biological field surveys and botanical surveys for sensitive plants, concluding that “[n]o occurrence of plants or wildlife protected under Federal or State listed Rare or Endangered Species were observed in the project parcel.” Rather, the proposed redevelopment would take place in areas that are currently occupied by existing structures, landscape, and hardscape elements or in areas that are covered with iceplant. The site is not considered ESHA under the Coastal Act. As a result, it is subject to the more general resource protective standards of Section 30250, and not those of Section 30240.

The project plans include a landscaping plan that consists of appropriate native plant species (see **Exhibit 6**). No trees are proposed for removal. One 14-inch-diameter cypress branch would be pruned to allow for the proposed development. The Biological Assessment recommended following the protocols of the Tree Resource Assessment when pruning the Monterey cypress, removing iceplant, and restoring the site with appropriate native coastal bluff species. **Special Condition 5** requires implementation of the proposed native planting plan and removal of all exotic plant species that are not native to this part of California.

The Tree Resource Assessment (see **Exhibit 7**) found that no significant long-term impacts to the ecosystems on the site are anticipated due to the project. However, this Assessment included numerous recommendations to protect Monterey cypress trees on the site, including best management practices during construction, grading, and excavation activities, as well as recommendations for pruning of the trees to, among other things, maintain their health and structural integrity. **Special Condition 6** ensures that these recommendations (except for Best Management Practice B. on page 11 of the Assessment regarding nesting birds) will be implemented as part of the project. With respect to nesting birds, **Special Condition 6** requires a pre-construction survey performed by a qualified biologist if any construction activities will occur between February 1st and August 31st, and protection measures for any nesting birds during construction.

As conditioned, the project will adequately protect and also enhance the habitat values of the site and thus can be found consistent with the above referenced Coastal Act policy.

E. Marine Resources **Applicable Provisions**

The Coastal Act protects the marine resources and habitat offshore of this site. Coastal Act Sections 30230 and 30231 provide:

Section 30230. *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231. *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Although not the standard of review, the LCP implements the Coastal Act through the Carmel Area LUP as well as its implementing measures and countywide implementing measures, including:

2.4.2 Key Policy

The water quality of the Carmel area's coastal streams and of the Point Lobos and Carmel Bay Areas of Special Biological Significance shall be protected and maintained...

2.4.3 General Policies

1. The effects of all new development proposals or intensification of land use activities or water uses on the natural character and values of the Carmel coasts streams will be specifically considered in all land use decisions. Subjects to be addressed in such evaluations include protection of water quantity and quality, wildlife and fish habitat, and recreational and scenic values...

2. New development including access roads shall be sited, designed and constructed to minimize runoff, erosion, and resulting sedimentation. Land divisions shall be designed to minimize the need to clear erodible slopes during subsequent development. Runoff volumes and rates should be maintained at pre-development levels, unless provisions to implement this result in greater environmental damage.

Analysis

As discussed above, the project is located on an ocean-fronting blufftop parcel that also overlooks the Monterey Bay National Marine Sanctuary, which is recognized for its unique and abundant marine life. The Sanctuary is home to some 26 Federal and State

Endangered and Threatened species and a vast diversity of other marine organisms. As such, the Commission recognizes the marine resources offshore of the proposed project site as sensitive coastal resources that are of high state and federal importance. The proposed project has the potential to negatively impact marine resources, both during construction and after, due to runoff from inclement weather as well as from normal residential activities, such as landscape watering or driveway washing, that could direct typical residential pollutants into the ocean.

In terms of long-term drainage improvements, the project is designed to ensure that all runoff will be maintained onsite through the use of improved pervious surfaces, rain gutters, area drains, and improvements to existing perforated drain fields located inland of the SFD in the approximate center of the 1.47-acre site. Drainage would not be directed seaward at any time.

Construction of the project may also negatively impact water quality due to the potential for foreign materials to enter marine waters during construction. To address these concerns, **Special Condition 2** requires that these impacts be contained through construction parameters that limit construction and staging activities to areas that will minimize impacts to coastal resources, require good construction housekeeping practices, and require erosion and sediment controls and other best management practices. As conditioned, the project is consistent with the above referenced policies regarding protection of marine resources and offshore habitat.

F. Cultural Resources

Applicable Provisions

Section 30244 of the Coastal Act states:

Section 30244. *Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.*

Although not the standard of review, the LCP implements the Coastal Act through the Carmel Area LUP as well as its implementing measures and countywide implementing measures, including:

2.8.2 Key Policy

Carmel is [sic] archaeological resources, including those areas considered to be archaeologically sensitive but not yet surveyed and mapped, shall be maintained and protected for their scientific and cultural heritage values. New land uses, both public and private, should be considered compatible with this objective only where they incorporate all site planning and design features necessary to minimize or avoid impacts to archaeological resources.

2.8.3 General Policies

1. Monterey County shall encourage the timely identification and evaluation of archaeological, historical and paleontological resources in order that these resources be given consideration during the conceptual design phase of land-use planning or project development.

2. Whenever development is to occur in the coastal zone, the Archaeological Site Survey Office or other appropriate authority shall be contacted to determine whether the property has received an archaeological survey. If not and the parcel are [sic] in an area of high archaeological sensitivity, such a survey shall be conducted to determine if an archaeological site exists. The Archaeological Survey should describe the sensitivity of the site and recommend appropriate levels of development and mitigation consistent with the site's need for protection.

The Coastal Act requires development to implement reasonable mitigation measures to protect identified archaeological or paleontological resources.

Analysis

This part of the Monterey Bay region includes representation by the Ohlone/Costanoan-Esselen Nation (OCEN), which is comprised of over 600 enrolled tribal members of Esselen, Carmeleno, Monterey Band, Rumsen, Chalon, Soledad Mission, San Carlos Mission (Carmel) and/or Costanoan Mission Indian descent.

The site is located within an archaeologically sensitive area where potentially significant archaeological resources and artifacts have been discovered in the past, and thus an archaeological survey and report (Report) was prepared by the Applicant (Breschini, 2015). The Report identifies previous archeological studies prepared for the site and properties adjacent to it. Specifically, the first archeological study, prepared by Breschini and Haversat (1979), located a previously unrecorded archeological site adjacent to Yankee Beach Way, south of the subject parcel. That site was recorded and given the trinomial designation CA-MNT-95 and the map included with that site record showed the site extending north onto the subject parcel as well as the parcel to the east (APN 243-301-14). That map, however, was based on an estimate from the adjacent parcel to the south, and not a separate field investigation.

As part of a development proposal before the County in 1991 for a single-family addition on a parcel adjacent to the subject property, a surface archeological survey was conducted (Runnings and Breschini, 1991) and included both the subject parcel and the parcel immediately to the east. That report noted, in part:

*Around the bases of the cypress trees near the bluff edge of APN 241-301-14 and partially onto 241-301-15, flakes of *Haliotis*, *Mytilus*, and chiton were observed in dark soil. This corresponds to the recorded location of CA-MNT-953. The material in this area was sparse, and appeared to have been removed or work away in places between the trees.*

As a result, the 1991 report recommended placing a portion of the subject site in an archeological easement in order to avoid further impacts to this area. Based on that recommendation, the County authorization required recordation of a scenic easement for archeological resources (1991 Monterey County Planning Commission Resolution 91-247.) However, no such easement was ever recorded. In any case, archeological investigation of the proposed project site since then, based on the research and

opinions of both Morley and Breschini, conclude that an archeological easement on the project site is unwarranted because “based on Morley’s results in the southern portion of the current project area, the area thought to contain a portion of archeological site CA-MNT-953, we conclude that our original estimate that the archeological site extended on to the current project parcel was in error. Morley’s more intensive studies have shown that there was no cultural resource in that portion of the property.”¹⁸ The Monterey County Resource Management Agency confirms that the County was in agreement that no archeological easement was required (see **Exhibit 8**).

That said, and out of an abundance of caution, the Applicant also conducted a tribal consultation effort to ensure local Native American tribes were aware of the project and provided with an opportunity to comment on it (Morley, January 2019). Morley conducted outreach to the Native American tribes as recommended by the Native American Heritage Commission (NAHC), including sending the local tribes a letter via certified mail that provided the address of the project, a project description, and a map of the project location. Morley received one letter in return and one email, which are included in the Morley report. On January 3, 2019 and January 7, 2019, Ms. Morley telephoned all those tribal representatives that had not responded via mail. All their responses are provided in the Morley Report. Subsequent to that report, Commission staff received additional correspondence from OCEN requesting consultation regarding the project (see **Exhibit 8**) and indicating that OCEN's Tribal leadership desires to be provided with: archaeological reports/surveys, including subsurface testing, and presence/absence testing. OCEN requested to be included in mitigation and recovery programs, that cultural and tribal mitigation measures reflect request for OCEN Tribal Monitor, reburial of any ancestral remains, burial artifacts, placement/return of all cultural items to OCEN, and that a Native American monitor of Ohlone/Costanoan-Esselen Nation, approved by the OCEN Tribal Council is used within their aboriginal territory.

More broadly, the main issue identified by the tribal consultation was a request that a qualified archeologist and a Native American Monitor be present on the site during any ground disturbance activities and that in the event any article of historical or cultural significance is uncovered, that the tribes be consulted and involved in any mitigation. The project has therefore been conditioned to require that a qualified archeologist to be present during any ground disturbance, and that, in the event that any article of historical or cultural significance is encountered, all activity that could damage or destroy these resources must cease and a mitigation plan be developed in consultation with the Executive Director, the Native American Heritage Commission, and all appropriate tribal representatives as identified in the Tribal Consultation Report (see **Special Condition 7**). Thus, as conditioned, the project is consistent with the Coastal Act Section 30244 regarding the protection of archaeological resources.

¹⁸ Cultural Resource Auger Testing, Morley May 2013; Archeological Monitoring, Morley July 2013; Revised Preliminary Cultural Resources, Morley September 2014; and Archeologic Report, Breschini 2015.

G. Public Access and Recreation

Applicable Provisions

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.” The proposed project is located seaward of the first through public road (Highway 1). The following cited Coastal Act public recreational access sections are applicable to the proposed project:

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.*

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.*

Section 30212(a). *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or, (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway. ...*

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

Section 30214. *(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following: (1) Topographic and geologic site characteristics. (2) The capacity of the site to sustain use and at what level of intensity. (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses. (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter. (b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. ...*

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

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.*

Section 30222. *The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.*

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

Although not the standard of review, the LCP implements the Coastal Act through the Carmel Area LUP as well as its implementing measures and countywide implementing measures, including:

5.3.1 Key Policy

Public access shall be protected and provided where consistent with public safety needs and the need to protect the rights of private property owners and natural resource areas from overuse.

i. General Policies ...

2. Other coastal areas suitable for public access shall also be protected for such use. When new access is provided, or existing access is formalized or expanded, an appropriate public agency must assume management responsibility for public use or agreements concerning such responsibility must be reached with landowners.

Where it is needed to implement the access plan, access easements, deed restrictions or offers of dedication shall be required as conditions of any coastal permits (except for developments listed in Section 30212b of the Coastal Act) issued for the site containing the potential access. ...

5. Bluff-top access and lateral access along or near the shoreline is appropriate along the coast. These types of access shall be protected for long-term public use, subject to adequate management programs.

Section 30210 of the Coastal Act requires the Commission to provide the general public maximum access and recreational opportunities, while respecting the rights of private property owners. Section 30211 prohibits development from interfering with the public's right of access to the sea. 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, save certain limited exceptions, including existing adequate nearby access. Section 30213 protects lower cost forms of access, such as the free access. Section 30220 protects coastal areas suited for ocean-oriented activities, such as the ocean offshore here, for such purposes. Sections 30221 and 30223 protect oceanfront and upland areas for public recreational uses, and Section 30222 prioritizes visitor-serving amenities providing for public recreational use.

Finally, the Coastal Act Section 30210 direction to maximize access represents a different threshold than to simply provide or protect such access – it is not enough to simply provide access to and along the coast, and not enough to simply protect access; rather such access must also be maximized. This terminology provides fundamental direction with respect to projects along the California coast that raise public access issues, like this one.

Consistency Analysis

Yankee Point Beach is directly seaward and below the site, and it occupies approximately an acre stretching along the shoreline, with its 1,500 foot long sandy cove nearest the site (see **Exhibit 3**). The beach is generally fairly narrow, depending on the tides, and topographical constraints preclude lateral sandy beach access to the beach from up or down coast. The beach is also currently inaccessible to the public from the street due to fences and locked gates that limit beach access to neighborhood residents per a recorded easement arrangement. Historically, the beach area was basically open to and used by the general public, including as the surrounding area had not been subdivided. However, following subdivision and residential development, such general public access to Yankee Point Beach was blocked off, and only residents in the Carmel Highlands area and their guests are allowed to access the beach today (via keys issued by the Carmel Highlands Association). Specifically, access to Yankee Point Beach is via two trails that begin on Yankee Beach Way and Spindrift Road (see **Exhibit 4**), both of which are public streets, but access to each of these trails is are presently limited by a private easement arrangement, fence, and locked gate,¹⁹ again where only Carmel Highland residents are issued keys. Although none of the fences or locked gates is are situated on the Applicant's property, the trails that extend from the two locked gates converge into a single trail within a 10-foot wide easement area that ultimately leads across the Applicant's property to a stairway down to Yankee Point Beach.²⁰

Because of the lack of public access from the public street to Yankee Point Beach at

¹⁹ The Spindrift Road fence and gate was originally first installed in 1962 and first equipped with a locked gate in 1965, prior to the coastal permitting requirements of both 1972's Proposition 20 (The Coastal Initiative) and 1976's Coastal Act. The Yankee Beach Way fence and locked gate was originally first installed in June 1974 without benefit of a coastal permit (required in this location by Proposition 20 at that time). In addition, it appears that both fences and gates have been modified since then without benefit of any CDPs.

²⁰ Note that the first part of the trails nearest the street-fronting gates are *not* located on the Applicant's property, but after the two trails converge, the last 100 feet or so of the then single trail leading to the beach *is* on the Applicant's property (see **Exhibit 5**).

this location, and the lack of a proposed plan or policies/provisions to pursue such public access through the LCP when it was originally proposed by Monterey County in 1981, the Commission deferred certification of the LCP for the parcels on which the trails and the beach stairway are located (including the Applicant's property). At the time, the Commission found that "the lack of public access provisions to Yankee Beach in the Land Use Plan is inconsistent with Sections 30210 and 30212," and further found that that while the lots containing the accessways are developed, "a situation could occur in the future where developments not exempted by Section 30212(b) could be proposed on these lots."

In order to resolve the identified and heretofore unsettled public access issues and concerns in a manner that provides certainty for both the Applicant and the Commission, the Applicant has agreed to record an Offer-to-Dedicate, for general public access over the portion of the currently privately controlled accessway located on her property, and the project conditions are updated to memorialize this intent. In this way, over time, as the other parcels that contain portions of the privately controlled accessway redevelop, similar OTDs or other arrangements that lead to public access along the private accessway can be pursued and potentially applied to/recorded on those properties so that the currently private beach access system may ultimately become available for public access. On that point, it is worth noting that even upon proper acceptance of the OTD, as will be set forth in the terms of the OTD itself, the property dedicated by the Applicant will not be required to actually become open to the public unless and until all remaining contiguous segments of the accessway that provide connection from either both Spindrift Road or Yankee Point Drive (or conceivably another public road) to the beach are made available for public access. (See **Special Condition 12, see, also Exhibit 9 for redline changes to Special Condition 12.**)

Although the Commission believes that the version of Special Condition 12 adopted at the revised findings hearing in June of 2019 accurately represented the condition that the Commission had approved two months earlier, the Commission acknowledges that there are other ways in which the condition could be structured that would still achieve its intended purpose, even if they involve substantive alterations to how the condition would function. In addition, because the specific terms were not before the Commission at the original hearing, other formulations could also accurately reflect the Commission's original intent without resulting in any material change. The changes presented to the Commission at the November 6, 2020 hearing include both types of changes. The latter type need no discussion.

As for the changes that do alter how the condition would function, the Commission notes that the revisions effect four main types of changes. First, as noted above, the triggering event will require that all remaining contiguous segments of the accessway that provide connection from *both* roads where entrances to the trail system exist be made available for public use. Although the Commission believes this is not logically necessary to establish a connection, it is an acceptable compromise, given the limited number of additional properties that requires be involved, and the fact that the trail system does function as an integrated whole.

Second, the condition now requires that the rights of public access over those additional segments be confirmed by a final court judgment. Although the Commission indicated, at the prior hearing, that this should not be necessary, the requirement to obtain such confirmation should not involve any legal risk or present a substantial enough practical burden to refuse to agree to such a requirement.

Third, the Applicant is agreeing to new language that would preclude her from acting in her voluntary, individual capacity, to interfere with efforts to establish or confirm public access rights over her property. This was a request made by the Commission at the original hearing, but it was not explicitly reflected in the prior version of the condition language.

Finally, to avoid the possibility that the easement would remain in place, but without the triggering event occurring, in perpetuity, which could result in a perpetual ambiguity as to the public's rights to this area, the new language allows the easement to be removed if public rights have not been established over the other segments in the next 40 years. Conversely, if, at any time, the Applicant is able to establish that no public rights of any kind exist over any portion of either trail, the easement can also be extinguished.

The Commission finds these changes to constitute a reasonable compromise to avoid the costs and uncertainties of continued litigation and to continue to ensure that the fundamental terms requested by the Commission and agreed upon by the Applicant at the original hearing remain in place.

It is the Commission's strong preference that potential violations (in this case, the potential violations associated with unpermitted fencing and gate improvements) be remedied either prior to or in conjunction with a CDP action. However, given the complicated nature of this particular set of potential violations, their long history, and the various different property owners and other interested parties involved, these potential violations are not resolved here prior to or concurrent with the Commission's action. Rather, in this case, and because of the particular set of facts here, including the age of the potential violations and the need for more global resolution than could be offered by this one property owner acting alone, the Commission here acted on the CDP without remedying potential violations, but rather further directing Commission Enforcement staff to begin the work necessary to resolve the potential identified violations. As a result, the Commission's enforcement staff are now taking a fresh look at the 45-year old permitting violation (i.e., for the unpermitted 1974 locked fence/gate on Yankee Beach Way that blocks the ability of the general public to make their way to the beach , including any potential public rights to use of the trail and stairway sections that are located on the Applicant's property, as well as any unpermitted improvements to the private accessway system, since that time), and may pursue overall public access resolution through Coastal Act enforcement processes, including potential Section 30821 administrative penalty provisions, if justified.

In any case, it is clear that there are public access issues and concerns here, and the Commission does not intend to allow this CDP action to affect any such potential public access rights that may exist. To this point, the Commission here does not intend its

action waive any public rights that may exist on the affected properties. Thus, this approval is also conditioned to make that clear, and to require the Applicant to agree and acknowledge same, including that the Applicant is required to acknowledge the Commission's belief that these potential public access rights may exist on the Applicant's property as well as nearby properties, and that the Applicant shall not use this CDP as evidence of a waiver of any public rights that may exist on these properties now or in the future, including explicitly the portion of the Applicant's property containing the portion of the trail to the beach and the beach stairway (see **Special Condition 10**).

Thus, the project can be found consistent with the above-cited Coastal Act public access and recreation policies.

H. Local Coastal Programs

Before LCPs are certified, the Coastal Act requires the Commission to take great care in its CDP actions not to permit development in such a way that could prejudice the ability of the local government to complete their LCP. Coastal Act Section 30604(a) states:

Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with Chapter 3 (commencing with Section 30200) and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3 (commencing with Section 30200). A denial of a coastal development permit on grounds it would prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for that conclusion.

As indicated above, the proposed project is located in an area of deferred LCP certification, and any Commission CDP action here must be evaluated in terms of its potential to prejudice certification of LCP components that would apply to this area. As also indicated above, the reason LCP provisions for this area were not certified back in 1981 is because of the lack of public access from the public street to Yankee Point Beach, and the lack of a plan at the time the LCP was proposed to address that issue at that time. These circumstances have not changed.

As discussed above, in order to resolve the identified and heretofore unsettled public access issues and concerns in a manner that provides certainty for both the Applicant and the Commission, the Applicant has agreed to record an Offer-to-Dedicate, for general public access over the portion of the currently private accessway on her property. Special Condition 12 memorializes this intent. In this way, over time, as the other parcels that contain portions of the private accessway redevelop, similar OTDs or other arrangements that lead to public access along the private accessway can be pursued and potentially applied to/recorded on those properties so that the currently private beach access system may ultimately become available for public access. Further, the Commission has taken care to approve this project only based on the facts and circumstances that affect the Applicant's property in light of the approved

development, and has required the Applicant to acknowledge these potential public access rights, and to acknowledge that this CDP decision cannot be used as evidence of a waiver of any public rights that may exist on these properties now or in the future, including explicitly the portion of the Applicant's property containing the trail to the beach and the beach stairway (see Special Condition 10). As such, the Commission's action here will not prejudice the ability of the Monterey County to prepare and implement LCP provisions applicable to this area of deferred certification.

I. California Environmental Quality Act (CEQA)

Section 13096 of Title 14 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.

On January 10, 2019, Monterey County, acting as the CEQA lead agency, determined the project was categorically exempt from CEQA requirements (citing to Section 15302 for replacement or reconstruction of existing facilities). The Coastal Commission's review and approval of land use proposals via coastal development permit has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of environmental review under CEQA. (14 CCR § 15251(c).) The preceding CDP findings discuss the relevant coastal resource issues with the proposal, and the CDP conditions identify appropriate modifications to avoid and/or lessen any potential for adverse impacts to said resources. The Commission incorporates these findings as set forth here in full. Further, all public comments received to date have been addressed in the findings, which are incorporated herein in their entirety by reference.

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 project, as conditioned, would have on the environment within the meaning of CEQA. Thus, as conditioned, the approved 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).

5. APPENDICES

A. Substantive File Documents²¹

- *Geological Evaluation Harbaugh Residence Additions/Renovation*. Craig Harwood, October 2014.
- *Harbaugh Residence Additions and Secondary Unit*. Earth Systems Pacific, February 5, 2015.
- *Tree Resource Assessment Forest Management Plan*. Frank Ono, November 4, 2014.
- *Biological Assessment*. Fred Ballerini, May 6, 2015.
- *Preliminary Cultural Resource Reconnaissance*. Runnings and Breschini, May 25, 1991.
- *Archeological Monitoring Report*. Morley, July 2013.
- *Revised Preliminary Cultural Resources Reconnaissance*. Morley, September 2014.
- *Archeological Report*. Breschini, September 11, 2015.
- *Native American Consultation*. Morley, January 2019.

B. Staff Contact with Agencies and Groups

- Monterey County Resource Management Agency
- Ohlone/Costanoan-Esselen Nation (OCEN)

²¹ These documents are available for review in the Commission's Central Coast District office.