

CALIFORNIA COASTAL COMMISSION

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Appeal Filed: 12/6/19
 49th Day: 2/19/20
 Staff: D. Venegas - V
 Staff Report: 1/23/20
 Hearing Date: 2/13/20

STAFF REPORT: APPEAL - SUBSTANTIAL ISSUE

APPEAL NO.: A-4-MAL-19-0213

APPLICANT: City of Malibu

APPELLANTS: Commissioner Brownsey and Commissioner Aminzadeh; Sara Wan; and Madelyn Glickfeld

LOCAL GOVERNMENT: City of Malibu

LOCAL DECISION: Coastal Development Permit No. 18-033 approved by the Malibu Planning Commission on November 4, 2019

PROJECT LOCATION: 29300.5 Cliffside Drive, City of Malibu, Los Angeles County (Nearest APN: 4468-001-900)

PROJECT DESCRIPTION: Installation of a new vehicular gate at the entry and alligator teeth (traffic spikes) at the exit of an existing public parking area within the Cliffside Drive public right-of-way, adjacent to Point Dume State Beach and Nature Preserve.

STAFF RECOMMENDATION: Substantial Issue Exists

MOTION & RESOLUTION: Pages 6-7

NOTE: The Commission will not take testimony on this “substantial issue” recommendation unless at least three commissioners request it. The Commission may ask questions of the applicant, any aggrieved person, the Attorney General, or the Executive Director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally and at the discretion of the Chair limited to 3 minutes total per side. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the

hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo hearing will occur at a future Commission meeting, during which time the Commission will take public testimony.

SUMMARY OF STAFF RECOMMENDATION: SUBSTANTIAL ISSUE EXISTS

The Commission’s role at the “substantial issue” phase of an appeal is to decide whether the appeal of the local government action raises a substantial issue with respect to the grounds on which the appeal was filed, which can include a claim that the approved development is not in conformity with the applicable provisions of the certified Local Coastal Program (LCP) or with the public access policies of the Coastal Act (Pub. Res. Code §§ 30210-14). Here, the appellants contend that the approved project is not consistent with the policies of Malibu’s certified LCP and the Coastal Act regarding the provision of public access and recreation. Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal has been filed. The **motion** and **resolution** for “no substantial issue” findings (for which a “no” vote is recommended) are found on **pages 6-7**.

On November 4, 2019, the City of Malibu Planning Commission approved a coastal development permit (CDP) for installation of a new vehicular gate at the entry, and alligator teeth (traffic spikes) at the exit, of an existing public parking area containing ten spaces on the Cliffside Drive public road right-of-way, adjacent to Point Dume State Beach and Natural Preserve (Exhibit 1). The subject parking spaces are restricted by existing signage which indicates time restrictions of no more than 2 hours for each parking space and no parking sunset to sunrise. The stated purpose of the project is to further enforce the existing “no parking sunset to sunrise” parking restriction within this 10-space public parking area. The closure of the gate is designed to prevent new cars from entering the public right-of-way area after hours and allow existing parked cars to exit the right-of-way area over the traffic spikes.

The subject parking spaces were created as a result of a Settlement Agreement between the Coastal Commission and the City in 2000 to resolve litigation involving unpermitted public parking restrictions in this area. The litigation involved the Commission’s issuance of Cease and Desist Order No. CCC-97-CD-01 to the City in 1997, which directed the City to apply for a permit to either retain or remove an unpermitted large boulder barrier and signs that prevented public parking in the road easement of Cliffside Drive and other nearby public streets. To comply with the Settlement Agreement and Cease and Desist Order, the City and the California Department of Parks and Recreation, as co-applicants, applied for, and were granted, a CDP from the Commission (CDP No. 4-00-126) to construct the required ten public parking spaces along Cliffside Drive, install associated public access signage, construct a walking path and curbing, remove boulders, and operate and maintain a shuttle service to transport Preserve visitors between the Westward Beach parking lot and the Preserve. The CDP also required that, if the City terminated the shuttle service prior to the certification of the City’s LCP or prior to an agreement between the Commission and the City to replace the shuttle program, the City must promptly submit a CDP application for construction of an additional 22 parking spaces. As described in Commission staff’s letter to the City regarding this project dated October 31, 2019, in 2011, the City unilaterally ceased the shuttle service without consulting with the Commission, to staff’s knowledge, or providing alternative parking, in violation of CDP No. 4-00-126.

The mandate to protect and maximize public recreational access opportunities to and along the coast is among the most important requirements of the Coastal Act and Malibu LCP. In particular, LUP Policy 2.27 generally prohibits restrictions on public parking that would impede or restrict public access to beaches, trails or parklands, except where such restrictions are needed to protect public safety. The LCP (Land Use Plan Policy 2.79) also calls for improving public access to Point Dume State Preserve by improving the availability of parking at the blufftop in a manner consistent with the terms of the Settlement Agreement between the City and the Coastal Commission. Here, the City did not make findings that the proposed gate and traffic spikes were needed to protect public safety. However, the City asserts that the new barriers are consistent with the Settlement Agreement, which allows the City to prohibit parking in these spaces between sunset and sunrise, and with current signage, which implements those restrictions.

The appellants contend that the City is in noncompliance with the Settlement Agreement because the City terminated the required shuttle service in 2011 without providing alternative, additional parking. They also claim that, while the Settlement Agreement may allow the City to use signage to restrict parking here between sunset and sunup, it does not permit the City to install a gate. Accordingly, they assert that, because the project would further restrict coastal access parking in a manner inconsistent with the Settlement Agreement and related CDP No. 4-00-126, it is inconsistent with the LCP and Coastal Act access policies.

Public access opportunities to the Preserve are currently inadequate, as demonstrated by the fact that members of the public are apparently using these 10 parking spaces during the nighttime, when such use is restricted. If there was adequate parking nearby, the public would not be forced to use these spots at night. It also appears that the City unilaterally terminated the shuttle service without providing an additional 22 parking spaces, in apparent violation of CDP No. 4-00-126, which stemmed from the Settlement Agreement. Although the Settlement Agreement permits the City to prohibit nighttime parking in these 10 spaces, it is not clear that it permits the City to gate the spaces. The issue of the City's compliance with CDP No. 4-00-126 and Settlement Agreement is therefore integrally related to this project because 1) the project might not be necessary if the City constructed 22 additional parking spaces in the immediate vicinity, 2) the project will further restrict coastal access parking in an area that already has inadequate parking and that is subject to a Settlement Agreement and CDP related to such inadequate parking, and 3) the project's access impacts cannot be accurately measured without understanding the access issue in light of the Settlement and past violation and permitting history.

The City's approval of the subject permit fails to analyze the project and its impacts within the larger context of prior permitting and the Settlement, and it fails to resolve these issues of noncompliance. Resolution of those issues would clarify the existing public access situation at the site, which in turn would affect the baseline conditions that the City should use to review the project's effects. Public access opportunities to the Preserve are currently inadequate and fail to maximize access to the coast, as required by the Malibu LCP and Coastal Act. The appeals therefore raise a substantial issue regarding conformance with the public access policies of the Coastal Act and Malibu LCP (specifically LUP policies 2.27, 2.79 and 2.86(g)(3)) because the City failed to fully analyze, much less resolve, the issues regarding public access related to the Settlement Agreement and associated CDP.

Therefore, for these reasons, staff recommends that the Commission determine that a substantial issue exists with respect to the grounds raised by Commissioners Brownsey and Aminzadeh, Sara Wan, and Madelyn Glickfeld in the subject appeals, because there are questions as to whether the permit approved by the City of Malibu is consistent with the public access and recreational policies and provisions of the City's certified LCP and the public access policies of the Coastal Act.

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Exhibit 6.	Appeal by Commissioner Brownsey & Aminzadeh
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Exhibit 8.	Appeal by Madelyn Glickfeld
Exhibit 9.	Settlement Agreement
Exhibit 10.	Joint Project Agreement
Exhibit 11.	CDP Permit No. 4-00-126

I. APPEAL JURISDICTION AND PROCEDURES

A. APPEAL PROCEDURES

The Coastal Act provides that after certification of a local government's Local Coastal Program (LCP), the local government's actions on Coastal Development Permit applications for development in certain areas and for certain types of development may be appealed to the Coastal Commission. Local governments must provide notice to the Commission of their coastal development permit actions. During a period of ten working days following Commission receipt of a notice of local permit action for an appealable development, an appeal of the action may be filed with the Commission.

1. Appeal Areas

Approvals of CDPs by cities or counties may be appealed if the development authorized will be located within the appealable areas, which include the areas between the sea and the first public road paralleling the sea; within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is greater; on state tidelands; or along or within 100 feet of natural watercourses and lands within 300 feet of the top of the seaward face of a coastal bluff. (Coastal Act Section 30603(a)). Any action on an application for development that constitutes a major public works project or major energy facility may also be appealed to the Commission (Coastal Act Section 30603(a)(5)).

In this case, the project site is located on Cliffside Drive, in the City of Malibu (Exhibits 1-3). The Post LCP Certification Permit and Appeal Jurisdiction map certified for the City of Malibu (Adopted September 13, 2002) indicates that the appeal jurisdiction for the area extends between the first public road and the sea, which includes the subject property. As such, the City's coastal development permit for the subject project is appealable to the Commission.

2. Grounds for Appeal

The grounds for appeal of a local government approval of development shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in the Coastal Act (See Public Resources Code § 30603(b)(1)).

3. Substantial Issue Determination

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. When Commission staff recommends that a substantial issue exists with respect to the grounds of the appeal, a substantial issue is deemed to exist unless three or more Commissioners wish to hear arguments and vote on substantial issue. If the Commission decides to hear arguments and vote on the substantial issue questions, proponents and opponents will have three minutes per side, at the Chair's discretion, to address whether the appeal raises a substantial issue. Pursuant to Section 13117 of the Commission's regulations, the only persons qualified to testify before the Commission at the substantial issue stage of the appeal process are the applicant, persons who opposed the application before the local government (or their

representatives), and the local government. Testimony from other persons must be submitted in writing. A majority vote of the Commissioners present is required to determine that an appeal raises no substantial issues and that the Commission will therefore not review the merits of the appeal *de novo*. If the Commission determines that no substantial issue exists, then the local government's coastal development permit action will be considered final.

4. De Novo Permit Hearing

Should the Commission determine that a substantial issue exists, the Commission will consider the CDP application *de novo*. The applicable test for the Commission to consider in a *de novo* review of the project is whether the proposed development is in conformity with the certified LCP and, if the development is between the sea and the first public road paralleling the sea, the public access policies of the Coastal Act. If a *de novo* hearing is held, testimony may be taken from all interested persons.

B. LOCAL GOVERNMENT ACTION AND FILING OF APPEAL

The project that is the subject of this appeal was approved by the City of Malibu Planning Commission on November 4, 2019. The City's Notice of Final Action for the project was received by Commission staff on December 5, 2019 (Exhibit 5). Commission staff provided notice of the ten working day appeal period, which began on December 5, 2019 and ended on December 19, 2019. Appeals were received from Sara Wan, Madelyn Glickfeld, Coastal Commissioner Donne Brownsey and Coastal Commissioner Sara Aminzadeh between December 6, 2019 and December 16, 2019. Commission staff notified the City, the applicant, and all interested parties that were listed on the appeal and requested that the City provide its administrative record for the permit. The administrative record was received on December 16, 2019. Pursuant to Section 30621(a) of the Coastal Act, a hearing on an appeal must be set no later than 49 working days after the date on which the appeal was filed with the Commission, which would be February 19, 2020; however, according to Section 30625(a), the applicant can waive that time limit.

II. STAFF RECOMMENDATION FOR SUBSTANTIAL ISSUE

MOTION: *I move that the Commission determine that Appeal No. A-4-MAL-19-0213 raises NO substantial issue with respect to the grounds on which the appeal has been filed under §30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a *de novo* hearing on the application, and adoption of the following resolutions and findings. Passage of this motion will result in a finding of NO Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the appointed Commissioners present (i.e., a tied vote results in a finding that a "substantial issue" is raised).

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-4-MAL-19-0213 raises a **Substantial Issue** with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and the public access and recreation policies of the Coastal Act.

III. FINDINGS AND DECLARATIONS FOR SUBSTANTIAL ISSUE

The Commission hereby finds and declares:

A. PROJECT DESCRIPTION AND ENVIRONMENTAL SETTING

The Malibu Planning Commission approved the subject CDP for installation of a new vehicular gate (approximately 3 ft. high and 30 ft. wide) at the entry, and alligator teeth (traffic spikes) at the exit, of an existing public parking area within the Cliffside Drive public right-of-way, adjacent to Point Dume State Beach and Natural Preserve, located at 29300.5 Cliffside Drive in the City of Malibu (Exhibits 1-3). The stated purpose of the project is to further enforce the existing “no parking sunset to sunrise” parking restrictions within the public right-of-way area of Cliffside Drive. The closure of the gate is designed to prevent new cars from entering the public right-of-way area after hours and allow existing parked cars to exit the right-of-way area over the traffic spikes. The City also stated that enforcement will still be necessary for cars that do not exit the parking area after the closure time of sunset.

The project site is located on Cliffside Drive and adjacent to the Point Dume Natural Preserve (the Preserve). The Preserve is approximately 34 acres of undeveloped coastal terrace and bluffs located at the headlands of Point Dume in the City of Malibu. The Preserve is a sub-unit of Point Dume State Beach and is operated and managed by the California Department of Parks and Recreation (State Parks). The Preserve is located on a south-facing promontory and is surrounded by residential development to the northwest and northeast and is bound by Cliffside Drive, a public street separating the Preserve and residential development, to the north. Point Dume State Beach and the ocean exist below the coastal bluff of the Preserve to the south. Point Dume State Beach is presently operated by Los Angeles County. There are two marine protected areas (MPAs) in the waters adjacent to the Park: Point Dume State Marine Conservation Area (SMCA) and Point Dume State Marine Reserve (SMR). Additionally, there is an existing steel stairway that provides public access down to the beach from the Park; however, this stairway is severely deteriorated and is currently closed due to public safety concerns. On January 14, 2019 the City approved Coastal Development Permit No. 17-036 to replace the deteriorated stairway, and State Parks anticipates beginning work on that project in March 2020.

The Preserve is a host to several sensitive plant species, including giant coreopsis (*Coreopsis gigantean*). The area contains a network of trails, including many unsanctioned trails, with the Park-developed Coreopsis Trail and Poppy Trail both approaching the project area from Cliffside Drive. Point Dume is a well-known and popular point break for experienced surfers. Due to the Preserve’s open space values and natural landscape with significant native habitat the Preserve also offers vast educational opportunities for the public. Point Dume is also a popular place to watch for California gray whales during the December to mid-April migration period. The Preserve is designated as Environmentally Sensitive Habitat Area (ESHA) on the Malibu LCP ESHA and Marine Resource Map; however, the subject project site is located entirely within the

public right-of-way area of Cliffside Drive and therefore is not located within an area mapped as ESHA.

The subject ten-space public parking area consists of two Americans with Disabilities Act (ADA) compliant spaces and eight general parking spaces located entirely within the City's right-of-way on the seaward side of Cliffside Drive. Currently, the subject parking spaces are restricted by existing signage which indicates time restrictions of no more than 2 hours for each parking space and no parking sunset to sunrise. These ten parking spaces are the only publicly available parking spaces within a half mile radius of the Point Dume State Beach and Natural Preserve. In other words, when these ten parking spaces are either taken or closed during sunset to sunrise, Point Dume State Beach and Natural Preserve visitors would have to walk approximately half a mile to reach the Beach/Preserve.

B. BACKGROUND AND PERMIT HISTORY

The subject Cliffside Drive public right-of-way parking spaces were created as a result of a Settlement Agreement the Coastal Commission reached with the City of Malibu on March 15, 2000 (Exhibit 9) to resolve a Coastal Act violation dispute regarding unpermitted public parking restrictions in this area. Specifically, the Settlement Agreement resolved litigation between the Coastal Commission and the City of Malibu. The litigation involved the Commission's issuance of Cease and Desist Order CCC-97-CD-01 to the City. The order directed the City to apply for a permit to either retain or remove an unpermitted large boulder barrier and signs that prevented public parking in the road easement of Cliffside Drive and other nearby public streets. In order to resolve the issues giving rise to the Cease and Desist Order and the litigation, the Coastal Commission and the City of Malibu reached a Settlement Agreement in which the City agreed to remove the boulder barrier and install specific public access improvements. The City and California Department of Parks and Recreation (State Parks) also executed a Joint Project Agreement (Exhibit 10) detailing the proposed site improvements and a timeline for their implementation. The Joint Project Agreement also specifies that a Management Plan and Access Study for the Preserve shall be completed. Information derived from the Management Plan and Access Study was to be provided to the Commission for consideration in the course of the Commission's action on the City's proposed Local Coastal Program.

The Settlement Agreement between the Commission and the City specifically required that the City apply for a CDP to remove existing boulders from the road easement; construct a total of ten parking spaces and a loading zone on Cliffside Drive, a walking path, fencing, and curbing; restore disturbed areas with native vegetation; and install signs addressing the public access improvements. Additionally, to further enhance public access opportunities to the Preserve, the Settlement Agreement required the City, pursuant to the terms of a CDP, to implement a shuttle bus service to transport Preserve visitors between the Westward Beach parking lot, located just west of the Point Dume Headlands, and the Preserve (Exhibit 1). The agreement specified that the shuttle bus would operate 7 days a week during the summer season (Memorial Day weekend through Labor Day) and on weekends and holidays during the rest of the year. Furthermore, the agreement required Commission staff and the City to meet on a quarterly basis to investigate the effectiveness of the shuttle program for meeting visitor use demands. The agreement also stated that, should it be determined that the shuttle program was not cost effective or was not sufficiently meeting its intended use, the Commission and the City would cooperate in exploring

other means of enhancing public access opportunities to the Preserve. Additionally, the City was required to install appropriate signage to inform the public of shuttle availability. Lastly, the agreement states that, should the City terminate the shuttle service prior to the certification of the City's Local Coastal Program and prior to an agreement between that Commission and the City to terminate and replace the shuttle program with another acceptable means for providing public access to the Preserve, the City is required to promptly submit a coastal development permit application for construction of an additional 22 parking spaces in a location in close proximity to the Preserve.

In order to comply with both the Settlement Agreement and the Commission's Cease and Desist Order CCC-97-CD-01, the City and State Parks, as co-applicants, applied for a coastal development permit (CDP No. 4-00-126) to obtain approval for the construction of the required ten parking spaces along the Cliffside Drive public right-of-way. On October 13, 2000, the Commission approved Coastal Development Permit No. 4-00-126 for the development of public access improvements for Point Dume Natural Preserve. Specifically, CDP No. 4-00-126 approved the removal of boulders from the road easement and construction of ten roadside parking spaces and a drop off zone on the seaward side of Cliffside Drive, replacement and relocation of boundary fencing, construction of a walking path, curbing, installation of appropriate signage, vegetation restoration, and 650 cu. yds. of cut grading to be exported offsite. The permit also required implementation of a shuttle bus program to operate between Westward Beach parking lot and the Natural Preserve and after-the-fact approval of previously installed No Parking/Tow Away signage in the public road easements of Cliffside Drive. The Commission found in that action that in the absence of the previously installed large boulder barrier and No Parking/Tow Away signs, the road easement of Cliffside Drive would easily provide room for approximately 30-40 parked vehicles near the Preserve. The after-the-fact approval of the prohibition of public parking along Cliffside Drive (through the placement of no parking signs) therefore resulted in the loss of approximately 30-40 public parking spaces. The construction of the proposed ten public parking spaces alone would result in a significant loss of public access parking in the area. The Commission found that the ten parking spaces would only provide adequate public access to the Preserve (and substitute for the loss of public parking on Cliffside Drive) in combination with the implementation of the shuttle service. The Commission conditioned the permit to require the City to operate the shuttle, or if the shuttle service was terminated, to provide 22 additional parking spaces instead.

Coastal Act Violation

Commission enforcement staff opened a violation case in 1997 against the City of Malibu for the unpermitted placement of parking restrictions near Point Dume Natural Preserve ("preserve"). As described above, this violation led to a Consent Order, subsequent litigation, Settlement Agreement, and CDP No. 4-00-126. Both the Settlement Agreement and CDP required that the City take certain actions, including to construct the 10 parking spaces and operate a shuttle service.

As described in staff's letter to the City dated October 31, 2019, Commission staff has learned that the City unilaterally terminated the shuttle service on January 10, 2011 at a City Council meeting, in violation of CDP No. 4-00-126. The City staff has indicated that the City was not required, pursuant to the Settlement Agreement, to continue the shuttle service after the City's LCP was certified. The City's LCP was certified by the Commission in 2002, and the City

continued operating the shuttle until 2011. Commission enforcement staff has reviewed the Settlement Agreement and CDP and disagrees that the City was authorized to unilaterally terminate the shuttle service without first communicating with Commission staff and without providing alternate additional parking. Pursuant to Special Condition 4 of the CDP:

Should the City terminate the shuttle service prior to the certification of the City's Local Coastal Plan or without obtaining an agreement to terminate the shuttle service from the Commission, the City shall submit an application to construct an additional 22 parking spaces.

The Commission staff report for that CDP describes the rationale for this requirement:

The Commission further notes that the proposed project will formally install 10 public parking spaces and that implementation of the shuttle service is intended to mitigate the loss of additional public parking on Cliffside Drive. Therefore, should the City terminate the shuttle service prior to Commission approval and implementation of additional public access improvements allowed pursuant to an amendment of this coastal permit, public access opportunities to the Preserve would be inadequate, which would be inconsistent with the public access policies of the Coastal Act. Therefore, the Commission finds that should the shuttle service be terminated prior to certification of the City's Local Coastal Plan or prior to an agreement between the Commission and the City to terminate and replace the shuttle service with another acceptable means of providing for public access to the Preserve, the City shall be required to promptly submit a coastal development permit application for construction of an additional 22 parking spaces in a location in close proximity to the Preserve.

In addition, pursuant to the Settlement Agreement, the City must consult with the Commission on alternative access before ceasing operation of the shuttle, which the City did not do, to staff's knowledge. Because the City did not communicate with Commission staff regarding cancellation of the shuttle and did not provide additional access to replace the access that was lost by termination of the shuttle, the City is in violation of the CDP and may also be in breach of the Settlement Agreement.

The City asserts that the shuttle was only required to operate for a period of ten years because its Joint Project Agreement with California Department of Parks and Recreation to carry out the shuttle service had an initial term of ten years. However, although this Joint Project Agreement was referenced in, and required by, the Settlement Agreement, neither the Settlement Agreement nor the CDP provide a termination date of ten years. In fact, both the CDP and the Settlement Agreement require coordination between both parties to determine whether adjustments to the shuttle service should be made. To the knowledge of Commission staff, the City did not obtain an agreement by Commission staff to terminate the shuttle, and no alternative measures to provide public access to Point Dume Natural Preserve were implemented by the City upon the unilateral termination of the shuttle by the City in 2011. Special Condition No. 4 of the CDP also states that if either agency believes the shuttle service is not cost effective, the agencies may evaluate other means of access that would meet visitor demand. This language bars cancellation of a shuttle without provision of alternative means of public access. Further, the CDP states that should the Commission and City concurrently agree that an adjustment to the shuttle service is

needed, then the City shall obtain a CDP amendment. To the knowledge of Commission staff, no CDP amendment was sought for the adjustment (cancellation) of the shuttle service. For these reasons, the City is in violation of Commission-issued CDP 4-00-126.

Additionally, Commission Cease and Desist Order CCC-97-CD-01, as modified on April 14, 2000, requires full compliance with (1) the terms of the settlement and (2) the terms and conditions of the CDP. Noncompliance with the CDP constitutes noncompliance with the Cease and Desist Order as well.

In addition to the termination of the shuttle service, and consequent decrease in available public access to Point Dume, other public access violations exist in the area. There are also several unpermitted parking restrictions on various streets within the Point Dume neighborhood including: signs that prohibit parking that have been installed since 1973 without a CDP; road shoulder striping which eliminated available parking on Grasswood and Fernhill Streets; boulders installed at 29317 Cliffside Drive in the road shoulder right-of-way; and other landscaping throughout the Point Dume neighborhood that encroaches into the public parking right-of-way. These issues were, in part, previously raised in a comment letter that Commission staff sent to the City regarding the subject permit on October 31, 2019.

Early Coordination

Prior to the City's action on the subject project, Commission staff provided City staff with comment letters on September 27, 2018 and October 31, 2019 regarding the subject project and potential LCP and Coastal Act inconsistencies that were raised by the City's staff report findings.

C. SUMMARY OF APPEAL CONTENTIONS

The appeals filed by Commissioners Brownsey, Commissioner Aminzadeh, Sara Wan, and Madelyn Glickfeld ("appellants") are attached as Exhibit 6, 7, and 8, respectively. The appeals contend that the approved project is not consistent with the policies and provisions of the City of Malibu certified LCP and the Coastal Act regarding the provision of public access and recreational opportunities, including Land Use Plan (LUP) Policies 2.27, 2.79 and 2.86(g). Specifically, the contentions in the appeal received by Sara Wan relate to public parking restrictions. The contentions of Madelyn Glickfeld's appeal relate to the City's noncompliance with the Settlement Agreement executed in March 2000 between the Commission and the City. Thirdly, the contentions of the Commissioners appeal also relate to public parking restrictions and the City's noncompliance with the above mentioned Settlement Agreement and CDP No. 4-00-126. Since the contentions of the three appeals raise similar issues, they will be addressed together.

D. ANALYSIS OF SUBSTANTIAL ISSUE

Pursuant to Sections 30603 and 30625 of the Coastal Act, the appropriate standard of review for an appeal is whether a substantial issue exists with respect to the grounds raised by the appellant relative to the locally-approved project's conformity to the policies contained in the certified Local Coastal Program (LCP) or the public access policies of the Coastal Act. In this case, the appellants cited the LCP policies related to the protection and preservation of public recreational access opportunities to and along the coast and the public access policies of the Coastal Act.

The Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603 (§ 30625(b)(2)). Section 13115(c) of the Commission's regulations provides that the Commission may consider various factors when determining if a local action raises a significant issue, including but not limited to the following five factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretation of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

The Commission may, but need not, assign a particular weight to a factor.

In this case, for the reasons discussed below, the Commission determines that the appeal raises a substantial issue with regards to the grounds on which the appeal has been filed.

1. Public Access and Recreation

The appellants assert that the project, as approved by the City, fails to conform with the following LCP policies and provisions relating to the protection and preservation of public access and recreational opportunities to and along the coast:

Coastal Act Section 30210, as incorporated into the certified LCP, states:

In carrying out the requirements 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 for overuse.

Coastal Act Section 30211, as incorporated into the certified LCP, states:

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

Coastal Act Section 30212.5, as incorporated into the certified LCP, states:

Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.

Land Use Plan Policy 2.27 states:

The implementation of restrictions on public parking, which would impede or restrict public access to beaches, trails or parklands, (including, but not limited to, the posting of “no parking” signs, red curbing, physical barriers, imposition of maximum parking time periods, and preferential parking programs) shall be prohibited except where such restrictions are needed to protect public safety and where no other feasible alternative exists to provide public safety. Where feasible, an equivalent number of public parking spaces shall be provided nearby as mitigation for impacts to coastal access and recreation.

Land Use Plan Policy 2.79 states:

The City should continue to support and coordinate with the California Department of Parks and Recreation in improving access to Point Dume State Preserve by ensuring that adequate public parking is provided consistent with the terms of the settlement agreement between the City, State Department of Parks and Recreation and the Coastal Commission. Where applicable, the City should support and coordinate with the Department of Parks and Recreation in designing and constructing trails consistent with ongoing efforts to restore, enhance and protect sensitive resources.

Land Use Plan Policy 2.86(g)

The following standards shall apply in carrying out the access policies of the LCP relative to requiring and locating vertical accessways to the shoreline. The standards shall not be used as limitations on any access requirements pursuant to the above policies.

g. Dume Cove/Point Dume State Reserve

- 1. Vertical access to the beach from the blufftop headlands parking lot.*
- 2. Vertical access to and lateral access along the blufftop at the Point Dume headlands for coastal view purposes and passive recreation, with a minimum of two established viewpoints at least 500 feet apart.*
- 3. The provision and protection of public parking pursuant to the terms of the settlement agreement between the City, the State Department of Parks and Recreation and the Coastal Commission shall be required.*

Local Implementation Plan Section 3.14.1 (D) states:

Restrictions on public parking, which would impede or restrict public access to beaches, trails, or parklands (including, but not limited to, the posting of “no parking” signs, red curbing, physical barriers, imposition of maximum parking time periods, and preferential parking programs), shall be prohibited except where such restrictions are needed to protect public safety and where no other feasible alternative exists to provide safety. Where feasible, an equivalent number of public parking spaces shall be provided nearby as mitigation for impacts to coastal access and recreation.

A fundamental goal of the Coastal Act is to “maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone” (Coastal Act § 30001.5, subd. (c)). To achieve this goal, both the Coastal Act and the City’s certified LCP set forth specific policies governing the provision of public access and recreational opportunities, and development along the coast. The public access policies of the Coastal Act (Sections 30210, 30211, 30212.5), which are incorporated into the LCP (and which are one standard of review for appeals of development between the first public road and the sea such as this in any event), mandate that development shall not interfere with the public’s right to access the coast, that wherever appropriate and feasible, public facilities shall be distributed through an area so as to mitigate against the impacts of overcrowding or overuse by the public of any single area, in consideration of public safety needs, private property rights, and the protection of natural resources.

Specifically, the City’s LCP contains policies and provisions, including Land Use Plan Policy 2.27 and Local Implementation Section 3.14.1(D), which prohibit the implementation of restrictions on public parking, which would impede or restrict public access to beaches, trails or parklands, (including, but not limited to, the posting of “no parking” signs, red curbing, physical barriers, imposition of maximum parking time periods, and preferential parking programs) except where such restrictions are needed to protect public safety.

In this case, the proposed parking area gate and traffic spikes constitute physical barriers that may deter the public from using recreational trails and public beach access on the adjacent Point Dume State Beach and Natural Preserve, and may create a perception that this parking area is private property. Although the City argues the proposed parking gate will be under the control of the City, and will be opened and closed consistent with the existing parking hours, the proposed gate could still have the potential to restrict public parking in the future due to security concerns or a desire at some future date to keep the public from accessing Point Dume State Beach. In addition, despite current signage, the public apparently uses the spots at nighttime due to the lack of other, available, legal parking in the area. Thus, as a practical matter, the City’s failure to provide other, adequate, nearby parking has forced the public to use these spots at nighttime, and the gate will reduce the public’s ability to access this area of the coast. Moreover, the City did not make findings based on substantial evidence that the proposed gate and traffic spikes were needed to protect public safety. Furthermore, the City’s action raises issue regarding consistency with Coastal Act Sections 30210 and 30211 for similar reasons. The installation of a parking area gate and traffic spikes would constitute development that would interfere with the public’s ability to access the sea, and would not maximize access for all the people. Therefore, the City’s approval of the project raises a substantial issue regarding consistency with LUP Policy 2.27 and Coastal Act Sections 30210 and 30211 because the project constitutes physical barriers that may deter the public from accessing the coast and are prohibited under the LCP.

The appellants also contend that the City is in noncompliance with the Settlement Agreement between the Coastal Commission and the City of Malibu when the City terminated the required shuttle service in 2011 and failed to provide alternative additional parking. Specifically, LUP Policy 2.79 calls for improving public access to Point Dume State Preserve by improving the availability of parking at the blufftop consistent with the terms of the Settlement Agreement between the City, State Parks and the Coastal Commission. Furthermore, LUP Policy 2.86(g)(3)

states that to carry out the access policies of the LCP within the Dume Cove/Point Dume State Reserve, the protection of public parking pursuant to the terms of the settlement agreement between the City, State Parks and the Coastal Commission shall be required.

As previously mentioned, the subject ten parking spaces along Cliffside Drive were created as a result of the Settlement Agreement between the Coastal Commission and the City of Malibu to settle a dispute regarding public parking in this area. The ten parking spaces are required to be open to the public daily from sunrise to sunset and allows signs stating that parking is not allowed sunset to sunrise. The Settlement Agreement also requires that the City implement a shuttle bus service to transport Preserve visitors between the Westward Beach parking lot and the Preserve. However, the City's findings indicate that "the shuttle service was terminated in 2011" and "the City's agreement with State Parks to run the "nature shuttle" was for a term of 10 years, starting on March 30, 2000 (see State Parks Agreement, page 8, paragraph 14)" and that "the City has satisfied its obligation under this agreement and it is no longer in effect." However, Commission staff disagrees with the City's position that the shuttle service was only required for a term of ten years. Specifically, Section 9 Mutual Commitment of the Joint Project Agreement Between California Department of Parks and Recreation and City of Malibu (Exhibit 10), (found on page 8, paragraph 14) states that "the term of this Agreement shall be ten years from the effective date except upon earlier termination by mutual written agreement of the parties". The Joint Project Agreement does not specifically state that the City was only obligated to run the shuttle service for a period of ten years; rather, the agreement states that the agreement between the City and California Department of Parks and Recreation was only for ten years. The fact that the Joint Project Agreement was only valid for a period of ten years has no bearing on the requirements of the Settlement Agreement between the City and the Commission, which did not include a term limit for the required shuttle service.

Furthermore, Commission enforcement staff has determined that the City is out of compliance with previously issued Commission CDP No. 4-00-126, which the City was required to seek and obtain pursuant to both the Settlement Agreement and the Commission Cease and Desist Order CCC-97-CD-01. Specifically, Special Condition Four of CDP No. 4-00-126 requires that the City operate and maintain a shuttle bus service, and states that should the City terminate the shuttle service prior to the certification of the City's LCP or without obtaining an agreement to terminate the shuttle service from the Commission, the City shall submit an application to construct an additional 22 parking spaces. However, no CDP application for additional parking spaces was submitted and no alternative measures to provide public access to Point Dume Nature Preserve were implemented by the City upon the unilateral termination of the shuttle by the City in 2011. This noncompliance needs to be resolved to facilitate full public access to Point Dume State Beach and Nature Preserve. Additionally, Commission Cease and Desist Order CCC-97-CD-01, as modified on April 14, 2000, requires full compliance with (1) terms of the Settlement Agreement and (2) the terms and conditions of any CDP for activities to improve access to Point Dume State Beach and Nature Preserve. Noncompliance with the CDP constitutes noncompliance with the Cease and Desist Order as well. Because the City is in noncompliance with the CDP, which was required pursuant to the Settlement Agreement, and therefore not providing adequate public parking for access to Point Dume Preserve pursuant to the terms of the Settlement Agreement, the approved project to further restrict the limited parking that does exist is not consistent with the LUP requirements to provide and protect adequate public parking.

Therefore, the City's approval of the project raises substantial issue regarding consistency with LUP Policy 2.79 and 2.86(g)(3).

Lastly, the City's approval of the subject permit to install a new vehicular gate and traffic spikes at the existing Cliffside Drive public right-of-way parking spaces fails to resolve these issues of noncompliance. Rather, it may exacerbate public access issues related to the settlement and prior CDP, as the approved gate constitutes a physical barrier that may deter the public from using the only public parking spaces near the adjacent Point Dume State Beach and Nature Preserve. Public access opportunities to the Preserve are currently inadequate and inconsistent with the public access policies and provisions of the Malibu LCP, in part due to the City's noncompliance with conditions in CDP No. 4-00-126. The approved project to add further restrictions to the limited parking that does exist will have significant adverse impacts on public access and recreation. These impacts were not identified or addressed by the City in the subject CDP action. Without resolution of these issues and provision of the public access required by CDP No. 4-00-126 and Commission Cease and Desist Order CCC-97-CD-01, which would clarify the existing public access situation at the site that should be used by the City as the baseline for review of the project, the City's action on the subject permit fails to adequately analyze the impacts of the project and fails to demonstrate conformance with the public access policies of the Coastal Act and Malibu LCP (specifically LUP policies 2.27, 2.79 and 2.86(g)(3)).

Therefore, for these reasons, substantial issue is raised regarding the approved development's consistency with the above cited public access policies and provisions of the City's LCP and the Coastal Act.

2. Factors Considered in Substantial Issue Analysis

The standard of review for the subject appeal is whether a substantial issue exists with respect to the grounds raised by the appellants relative to the appealable development's conformity to the policies contained in the certified LCP and the public access policies of the Coastal Act. In this case, the appeals cite policies and provisions of the Malibu LCP and Coastal Act regarding public access and recreational opportunities. The Commission's regulations indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (Cal. Code Regs., Title 14, Section 13115(b).) Section 13115(c) of the Commission's regulations provides that the Commission may consider various factors when determining if a local action raises a significant issue, including but not limited to the five factors that are addressed below.

The first factor in evaluating the issue of whether the appeal raises a substantial issue is the degree of factual and legal support for the local government's decision that the development is consistent with the subject provisions of the certified LCP. In this case, the City findings do not provide an adequate analysis or evidence that the proposed physical barriers on public parking are needed for public safety. The proposed physical barriers on public parking are prohibited under the LCP unless they are needed to protect public safety. Additionally, the City did not provide adequate evidence that it is providing adequate parking and access opportunities at Point Dume in compliance with CDP No. 4-00-126 and the Settlement Agreement, as required by LCP policies. The approved project to add further restrictions to the limited parking that does exist will have significant adverse impacts on public access and recreation. Rather than consider these impacts in the larger context of the Settlement Agreement, Cease and Desist Order, and CDP No.

4-0-126, including the various requirements to provide better public access at Point Dume, the City assumed that this project would not have access impacts because it would simply make enforcement of existing parking restrictions easier. However, these further restrictions on access cannot be properly analyzed without understanding the larger context, and the project's full impacts were not identified or addressed by the City in the subject CDP action. Therefore, the City has not provided an adequate degree of factual and legal support for its decision that the proposed development is consistent with the certified LCP related to public access and recreational opportunities protection policies, as explained in detail above.

The second factor in evaluating the issue of whether the appeal raises a substantial issue is the extent and scope of the development as approved. As described above, the approved project involves the installation of a vehicular gate at the entry and traffic spikes at the exit of existing ten-space public parking area on Cliffside Drive public right-of-way adjacent to Point Dume State Beach and Nature Preserve. The physical extent and scope of the development approved (gate and traffic spikes) is not particularly large in this instance, although the effects on access will be significant. Taken alone, this factor does not warrant finding substantial issue.

The third factor in evaluating the issue of whether the appeal raises a substantial issue is the significance of coastal resources affected by the decision. In this case, the project site is located on a public street within a beachfront residential community, immediately adjacent to a regionally-significant public access destination, the Point Dume State Beach and Nature Preserve. These ten parking spaces are the only publicly available parking spaces within a half mile radius of the Point Dume State Beach and Nature Preserve. In other words, when these ten parking spaces are either taken or closed during sunset to sunrise, Point Dume State Beach and Nature Preserve visitors would have to walk approximately half a mile to reach the Beach/Preserve. Public access to the coastline represents a significant coastal resource, as evidenced by the specified priority and protections it is given in both the City's LCP and the Coastal Act. One of the most important goals and requirements of the Coastal Act and Malibu LCP is to protect and maximize public access opportunities to and along the coast. In this location, there is also a long history of inadequate access and attempts by the Commission to increase access, as evidenced by the Settlement Agreement and Cease and Desist Order. Public access—particularly in shorefront areas subject to sea level rise—is also a very important issue, and one that supports finding substantial issue.

The fourth factor in evaluating the issue of whether the appeal raises a substantial issue is the precedential value of the local government's decision for the future interpretation of its LCP. In this case, the precedential value of the City's decision for future interpretation of its LCP is significant because there are several other beachfront public streets where the placement of gates or similar restrictions could raise similar resource issues. As described above, under the certified LCP, restrictions on public parking, which would impede or restrict public access to beaches, trails or parklands, (including physical barriers) are prohibited except where needed to protect public safety and where no other feasible alternative exists to provide public safety. If the installation of other public parking restrictions (such as the subject project) are not required to be consistent with these LCP policies, cumulative impacts of parking restrictions along the Malibu coastline could result in overburdening other parking areas or facilities and a significant loss of public access and recreation. In addition, if the City's interpretation that it was permitted to end the shuttle service without providing additional parking is left to stand, it would allow the City to

severely restrict public access opportunities at Point Dume, which is a regionally significant park. This is an issue of important precedent not just for the City, but also statewide.

The final factor in evaluating the issue of whether the appeal raises a substantial issue is whether the appeal raises only local issues, or those of regional or statewide significance. In this case, the appeal not only raises local issues, but also has implications for resources of regional or statewide significance. The subject development raises issues associated with public parking restrictions and public access and recreation. These are important issues common to jurisdictions throughout the Coastal Zone, and could inspire other local governments to restrict public access in a similar manner. Point Dume is also an important regional park where the public can recreate, whale-watch, and engage in other recreational opportunities. Restricting access so severely affects not just local residents, but visitors from around the state and world that travel to Malibu. Therefore, this appeal does have regional and statewide significance.

In conclusion, the City-approved project raises substantial issue with respect to its conformance with applicable LCP provisions related to public access, and the public access policies of the Coastal Act. Therefore, the Commission finds that substantial issue exists with respect to the approved project's conformance with the certified Malibu LCP and the Coastal Act's access policies. As such, the Commission will evaluate the project under a de novo permit review.

APPENDIX 1

Substantive File Documents

Certified City of Malibu Local Coastal Plan; Malibu Planning Commission Agenda Report for CDP No. 18-033 dated September 20, 2018; Malibu Comment Letter 29300.5 Cliffside Drive October 3, 2018 Planning Commission, dated September 27, 2018; Malibu Planning Commission Agenda Report for CDP No. 18-033 dated October 24, 2019; Malibu Comment Letter 29300.5 Cliffside Drive November 4, 2019 Planning Commission, dated October 31, 2019; Coastal Development Permit No. 4-00-126 (City of Malibu, California Department of Parks and Recreation); Settlement Agreement between Coastal Commission and City of Malibu, dated March 15, 2000; Joint Project Agreement Between California Department of Parks and Recreation and City of Malibu, March 30, 2000; Initial Study dated June 7, 2000 and Proposed Negative Declaration for Point Dume Natural Preserve Site Improvements Project.