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F11b

Prepared December 16, 2021 for December 17, 2021 Hearing

To: Commissioners and Interested Persons

From: Dan Carl, Central Coast District Director
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Subject: STAFF REPORT ADDENDUM for F11b
Appeal Number A-3-PSB-21-0073 (Gentilcore Seawall)

In the time since the staff report was distributed for the above-referenced appeal item (on December 3, 2021), the Commission has received correspondence on it from the Applicant's geotechnical representatives (TerraCosta, dated December 9, 2021), the City of Pismo Beach (dated December 9, 2021), the Surfrider Foundation (dated December 8, 2021), the Beach Cities Preservation Alliance (dated December 14, 2021), and from a next door neighbor to the project, all of which can be found in the correspondence package for this item. The Surfrider Foundation supports and agrees with staff's recommendation that the Commission find that the City's approval of a CDP for the project in question raises substantial LCP and Coastal Act issues. The Applicant's representatives, the City, the Beach Cities Preservation Alliance, and the neighbor all take exception to staff's recommendation, suggesting that the staff report mischaracterized when an 'existing structure' is allowed armoring. The Applicant's representatives also suggest that the degree of danger is acute and such danger also justifies the use of armoring. The City reiterated the former point and also claimed that the staff report mischaracterizes portions of the City's action. The City, the Applicant's representatives, and the neighbor all ask the Commission to instead find no substantial issue.

The purpose of this addendum is to respond to the various assertions, and to provide some additional clarity for the staff recommendation on these points. Such clarification does not modify the staff recommendation, which is still that the Commission determine that the City's approval of a CDP for the project raises a substantial LCP and Coastal Act conformance issue in light of the appeal contentions.

Existing Structures
The City, the Applicant's representatives, and the Beach Cities Preservation Alliance all take issue with the use of January 1, 1977 as the date at which a structure is deemed existing for purposes of considering shoreline armoring. Conversely, the Surfrider Foundation supports the use of this date, and explains, similar to the staff report, the genesis for its application. The Applicant's representatives suggest that the Commission

here is applying a non-LCP certified interpretation (from the Commission's Sea Level Rise Policy Guidance document) as the standard of review to establish the use of the 1977 date, and that such an interpretation is inconsistent with "a well-established 44-year record of interpreting and applying the Coastal Act." Staff disagrees on both points. Similarly, the City states that the residence was approved in 2000 consistent with the LCP, and the City considers the residence to be a legal conforming principal structure eligible for shoreline armoring under the LCP. And the City indicates that the Commission has approved armoring for structures built as late as 1998, and remodeled as late as 2005, nearby.

As indicated in the staff report, the LCP only allows armoring to be considered for "existing principal structures," but does not define the term.[1] Thus, staff looked to the Coastal Act and its implementing regulations to help understand how the Commission should apply that term in relation to this project's review under the LCP and its applicable provisions.[2,3] And, as explained in detail starting on page 11 of the staff report, the requirements of Coastal Act Sections 30235 and 30253 can best be reconciled by understanding the use of "existing" in 30235 to allow for the subset of structures that were physically existing at the time of the Coastal Act's effectiveness (i.e., January 1, 1977) to be allowed armoring under certain circumstances, but to not allow for armoring for projects permitted after that date since such projects would be reviewed under Section 30253's (and relevant LCP sections implementing same (e.g., here LUP Policy S-3)) requirements that expressly prohibit such armoring for new structures.[4,5]

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[1] The LCP explicitly requires conformance to Coastal Act Section 30235 requirements in that regard as well (see staff report page 10), thus Section 30235 is also applicable here.

[2] Despite the City's assertion that doing so somehow disregards the LCP, LCPs are required to be understood and implemented consistent with the Coastal Act provisions from which they derive their statutory authority, as was held by the court in *McAllister* (see staff report page 14). In addition, as indicated, the LCP explicitly requires conformance with Section 30235 in its provisions.

[3] The City also suggests that the Commission should avoid making a 1977 determination here because it would not be consistent with the principles being developed by Commission staff working with the League of Cities Coastal Cities Group, where the issue is "identified as a point of conflict that is too contentious to address in these documents." However, while staff agrees that the date for considering when a structure is existing for the purposes of armoring is a contentious issue statewide, and agrees with the principles referenced that it be resolved separately when that is possible, staff does not agree that the Commission can simply avoid making such determinations, particularly in CDP and appeal cases such as this. It is clearly within the Commission's authority to interpret these provisions so that they can be properly applied to CDP applications, and it cannot avoid such a determination in a case like this where it is a primary issue.

[4] On this point, and to the assertion that the staff report relies on the Commission's adopted Sea Level Rise Policy Guidance document as the standard of review, that is inaccurate. The staff report simply refers to the document to offer perspective on these issues after providing the Coastal Act/LCP analysis because it is a recent example of the Commission's guidance to all parties, including the City of Pismo Beach, on how to implement the Coastal Act and LCPs in relation to these very topics.

[5] To the assertion that such an interpretation is inconsistent with 44 years of Coastal Act implementation, staff acknowledges that the Commission has at times allowed armoring for post-1977 structures (including at 125 Indio Drive, but not at 121 Indio Drive as identified by the City, as the house at that location was deemed to be pre-1977 at the time the armoring was approved). At the same time, these

The City's assertion that a home approved in 2000 (and built in 2003) should be considered eligible for armoring because it was legally established at that time misses these critical points, and it also misses the fact that in order to be approved in 2000 the residence had to be able to be sited and designed to avoid armoring, including prospectively moving forward from 2000. The City suggests that because the residence was sited based on the "best available data" at the time, and because it has proven to be a much more dangerous site in the intervening years,[6] that that is enough to qualify the structure for armoring. However, the City's position does not take into consideration a critical point regarding authorizing development in potentially hazardous locations: simply because a new residential development like this is required to be safe for a specified period of time under the LCP (here, 100 years), that does not entitle the development to shoreline protection over this time period. On the contrary, the LCP creates no such assurances and property owners are required to internalize any risks to development in hazardous areas such as this, including if their initial analysis regarding proper siting to account for potential hazards risk is proven insufficient over time.[7] Section 30253/LUP Policy S-3 do not entitle these applicants to shoreline armoring to maintain their structure and address their hazardous situation simply because this residence was approved as consistent with the LCP in the year 2000.[8] And this is for good reason. Shoreline armoring has a number of well-known coastal resource impacts,

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issues have come into sharper focus in recent years and the Commission has also consistently used the 1977 date as the cutoff for armoring consideration (while not an exhaustive list, see, for example, Morro Bay LUP Update (LCP-3-MRB-21-0047-1, certified August 2021), City of Long Beach SEASIP (LCP-5-LOB-19-0008-1, approved October 2020), CDP Applications 5-19-0288 (Niguel Shores revetment, denied February 2020), 6-19-1291 (DeSimone, Schrager, and Oene armoring, denied September 2019), and 2-17-0438 (AMJT Capital/BCPUD armoring, approved July 2020).

[6] The Applicant's representatives assert that the home is "in imminent danger." To that point, staff notes that the question of the degree of threat is not reached in a case like this where the home is not eligible for armoring. To the extent that there is an emergency (i.e., defined in Section 13009 of the Commission's implementing regulations as "a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health, property or essential public services"), then the Applicant could pursue an emergency CDP to temporarily abate the emergency. Since an armoring project here would appear unapprovable through a regular follow-up CDP (as is required to maintain temporary ECDP installations), any such ECDP would probably better be understood as an interim solution to allow for proper planning for non-armoring alternatives.

[7] Here the residence was approved with a 28.3-foot setback from the bluff edge in 2000 that was estimated at that time to be sufficient to allow for safety and stability for 100 years. Today, the setback now is estimated at 17-19 feet. In other words, the bluff has receded about 10 feet, or about 6 inches per year when annualized, over the past 20 some years (on this point it is noted that the Applicant's representatives now estimate an 18 inch per year average annualized erosion rate, despite the above data that appears to suggest a value that is significantly lower than that based on observed erosion at the site). And to be clear, it is not uncommon along the California coast for initial siting analyses to be perhaps overly optimistic when a project is initially being sited, and for more severe dangers to be identified shortly thereafter when armoring is proposed, such as in this case.

[8] And this Applicant for the armoring now is the same Applicant who developed the house in 2000. At that time in 2000, at least, it appears that the Applicant understood the concept of internalizing such risks and these facts, including as evidenced by the letter the Applicant sent to the Commission at the time (on December 5, 2000) to help alleviate Commission staff's concerns about future armoring where he stated "We have no desire or plans to contract for construction of alteration of the property that will affect the coastline. We will not build a protective seawall. It has always been our intent and desire to preserve the natural beauty of the coastline bluff."

including prominently the loss of shoreline and beach recreational areas. Here, the Applicant is suggesting that the consequence of the risk they took should instead be borne by the public in the form of shoreline armoring impacts. Section 30253/LUP Policy S-3 exist to avoid exactly this scenario, and to ensure that the public is not forced to bear the burden of such private risks. In staff's view, the residence at this location is not eligible for shoreline armoring consideration under the LCP. All of this is detailed in the staff report starting on page 8.

City Evaluation

Bracketing that the residence at this site is not eligible for armoring consideration under the LCP, as described above, the LCP only allows armoring for existing principal structures when such armoring is conclusively shown to be the least environmentally damaging feasible alternative (see discussion starting on staff report page 16). The City asserts that it only evaluated the 'no project alternative,' and that "other alternatives such as "managed retreat" or living shoreline alternatives were not considered as this is not a current provision of the City's certified LCP," suggesting that the evaluation of the no project alternative on its own is sufficient to meet the requirements of the LCP. However, as detailed starting on page 10 of the staff report, LUP Policy S-6 states that "Shoreline protective devices…shall be permitted only when necessary to protect existing principal structures, coastal dependent uses, and public beaches in danger of erosion. **If no feasible alternative is available**, shoreline protection structures shall be designed and constructed in conformance with Section 30235…" (emphasis added). Similarly, IP Section 17.078.060 (D) states "seawalls shall not be permitted, **unless the City determines that there are no other less environmentally damaging alternatives**…". In other words, such an alternatives analysis is indeed required by the LCP. And the City's assertion in its letter that "based on the estimated 18 inch per year retreat rate estimated by the [Applicant's geotechnical report], these would not be considered viable options" does not satisfy or substitute for LCP required alternatives analysis.

The City also takes issue with the staff report noting that the City imposed a condition requiring a sand supply fee, but indicating that no information was provided regarding how the displaced materials are to be calculated, or how the fee is to be developed (see staff report pages 16-17). To support its record, the City provided documents prepared by the Applicant's representatives to show that the City took this issue seriously, and that it did indeed have supporting information for the sand supply fee condition. Three things are noted on the City's observations. First, the sand supply fee documents provided with the City's December 9, 2021 letter were <u>not</u> submitted as supporting documents when the City reported their CDP action to the Commission, and were thus not part of the record considered by staff in making its substantial issue recommendation. In fact, staff first became aware of these materials upon receiving the City's letter.

Second, although staff has not had an opportunity to fully evaluate the provided sand supply materials (which represent some 27 pages of calculations and assertions), staff notes that a preliminary review raises some concerns that would need to be better understood (including that the majority of these documents are actually supporting documents for a nearby proposed armoring structure, and not this one; that the sand

content of the bluffs here was estimated at a fairly paltry less than 8%, etc.). Furthermore, the sand supply calculations submitted by the City are intended to cover 20 years of sand supply impacts, but the City's approval does not include any provisions to provide for impact mitigation past the initial 20 year period, meaning that any impacts continuing past that date would be unmitigated.

And finally, the City in its letter focuses on sand supply, but the LCP requires a whole series of coastal resource impacts to be addressed as part of any armoring approval (see staff report discussion starting on page 16). In fact, issues remain with the City's lack of evaluation of the project's full impact (including cumulatively) on other LCP and Coastal Act protected resources, including importantly shoreline/beach and public view protection and mitigation. The City does not respond to these issues in its letter.

CDP jurisdiction

The staff report indicates that the project that is the subject of this appeal may not have been properly before the City, as it is not clear whether it is located entirely in the City's CDP jurisdiction (see staff report discussion starting on page 17). Both the City and the Applicant's representative indicate that the mean high tide elevation was properly mapped and displayed on project plans (both referring to a +4.54-foot (NAVD 88) elevation for the mean high tide), and that that elevation defines a line that is seaward of the project, including all construction associated with it. Four things are noted.

First, the Commission's CDP jurisdiction is based on the existence of tidelands (including former tidelands), submerged lands, and public trust lands, and thus there are additional bases for the Commission's jurisdiction that need to be considered beside the mean high tide elevation alone.

Second, although the process used here by the Applicant's consultants is not unlike that undertaken by applicants statewide, it is not an official determination of the location of the mean high tide line. That official determination would be a formal determination by the California State Lands Commission, and there is no such State Lands determination here. Rather, the mapping done in this case represents the application of an elevation survey conducted on a particular day or days (here, according to the Applicant's representatives, a survey undertaken on March 23-24, 2020). The problem with such a methodology is that while the mean high tide elevation can be specified with some certainty on a particular day, the point at which that elevation intersects the shoreline (i.e., the mean high tide line) is ambulatory, depending on the composition of the shoreline and beach at the moment of survey. Beach geometry in particular can vary considerably over the year, the months, and even on individual days, and differing geometries map to different mean high tide lines, sometimes with considerable differences (e.g., a scoured winter beach profile can be much different than a summer beach profile, leading to a mean high tide line that is substantially further inland in a winter condition as compared to a summer condition using these methodologies). This is an issue on which Commission staff is coordinating statewide with State Lands Commission staff with an eye towards better accuracy. In any case, it is not clear to staff that the mean high tide line identified by the Applicant's consultants represents the actual location of the mean high tide line, but is instead a snapshot in time, and, as such, their finding is not dispositive.

Third, the proposed seawall would extend to a depth of +2.5 feet NAVD88 or lower (where it is not clear to what ultimate depth it might extend) as shown on the City's approved plans (see staff report Exhibit 4 page 22), which is below the mean high tide elevation estimated by the Applicant's consultants (i.e., +4.54 feet NAVD88), and this alone may be determinative that the seawall is actually located in the Commission's CDP jurisdiction. In addition, the plans show a bench footing of some sort that appears would be constructed exactly at the estimated +4.54 feet NAVD88 elevation, and they show a portion of the seawall and a sea cave fill at the downcoast end of the project that would be located seaward of even the mean high tide line estimated by the Applicant's consultants. Both of which indicate that, at a minimum, a portion of the approved project is located in the Commission's jurisdiction even under the Applicant's estimates.

Fourth, it is not clear from the project materials provided in the City record to what extent construction activities would extend seaward of the mean high tide line, even as it was estimated by the Applicant's consultants. As a general rule, shoreline armoring construction includes a fairly wide construction area footprint seaward of the actual footprint and profile of the completed structure (including for construction workers, staging, equipment, and operations), even when substantial work can be completed from above. Here, the footprint of the proposed structure appears to be located just inland of the Applicant's estimated mean high tide line, as close as about a foot in one location, about an average of five feet for half the wall, and up to about 15 feet at most. It would appear extremely likely that the project would include development activities in the Commission's retained CDP jurisdiction on this basis alone.

Thus, staff stands by its assertion that the project may well be located in the Commission's retained CDP jurisdiction, and potentially completely within that jurisdiction.