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Appeal Filed: 11/12/2021
Action Deadline: 1/24/2022
Staff: Katie Butler - SC
Staff Report: 12/3/2021
Hearing Date: 12/17/2021

STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION

Appeal Number: A-3-PSB-21-0073
Applicant: James Gentilcore
Appellant: Commissioners Escalante and Hart
Local Government: City of Pismo Beach
Local Decision: City coastal development permit number P20-000059 approved by the City of Pismo Beach Planning Commission on September 28, 2021
Project Location: On the bluffs and beach fronting 117 Indio Drive in the Sunset Palisades area of the City of Pismo Beach (APN 010-205-003)
Project Description: Construction of a new 120-foot-long and 40-foot-high textured and colored shotcrete seawall with 23 drilled tiebacks located on the bluff face, bluff toe, and beach and intended to protect a single-family residence constructed in 2003.
Staff Recommendation: Substantial Issue Exists

IMPORTANT HEARING PROCEDURE NOTE

Please note that at the hearing for this item the Commission will not take testimony on staff's substantial issue recommendation unless at least three Commissioners request it. Commissioners may ask questions of the Applicant, aggrieved persons (i.e., generally persons who participated in some way in the local permitting process), the Attorney General, the Executive Director, and their proxies/representatives prior to determining whether or not to take such testimony. If the Commission does decide to

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take such testimony, then it is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify these time limits). Only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing. Other interested parties (as well as testimony-qualifying parties) may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP) application and will then review that application at a future Commission meeting, at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

SUMMARY OF STAFF RECOMMENDATION

The City of Pismo Beach approved a CDP that authorized the construction of a new 120-foot-long and 40-foot-high textured and colored shotcrete seawall with 23 drilled tiebacks that would cover the entirety of the bluff face (as well as the toe of the bluff at the beach) fronting 117 Indio Drive in Pismo Beach. The seawall is intended to protect a single-family residence that was originally constructed in 2003. The appeal contends that the City-approved seawall would protect a structure that is not allowed such protection under the LCP and that, even if it were allowable, does not appear to have been appropriately evaluated in terms of alternatives, impacts, and mitigations, all of which could lead to adverse, unmitigated, and not allowable coastal resource impacts.

Like the Coastal Act, the LCP only allows for shoreline armoring to protect existing principal structures or coastal-dependent uses in danger from erosion. And although neither the Coastal Act nor the LCP explicitly identifies what qualifies as an "existing principal structure" for such armoring provisions, the Commission's interpretation and application in terms of armoring (including as articulated in the Commission's Sea Level Rise Policy Guidance) is that such term means a principal structure that was in existence on January 1, 1977 (the effective date of the Coastal Act) and that has not subsequently been redeveloped. Here, the residence that the armoring is intended to protect was originally approved by the City in 2000 and constructed in 2003, subject to CDP terms and conditions at the time that found that it would not require protective armoring in the future. Thus, not only is the residence not an "existing principal structure" as the Commission understands that term, but the residence was also approved on the basis that it was adequately set back to be safe for at least 100 years, as required by the LCP, without the need for armoring. It has been just over 20 years since that CDP decision.

In addition, the LCP only allows armoring for existing principal structures when such armoring is conclusively shown to be the least environmentally damaging feasible alternative to protect qualifying structures, and where all impacts are appropriately mitigated. Even if the project were to properly qualify for shoreline armoring, which it does not, it does not appear that the City's action has appropriately evaluated alternatives, impacts, and mitigations as required by the LCP and by the Coastal Act's access and recreation provisions (which are also applicable here to a City decision).

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And finally, there is some question as to whether the approved project may be wholly or partly located in the Coastal Commission's retained CDP jurisdiction, including whether the project should have come before the Commission instead of the City in the first place, and whether the City had the legal authority to process a CDP application in this case.

The City's approval of a CDP for this project raises fundamental issues with respect to the way in which the LCP and the Coastal Act are to be understood on such critical issues as coastal hazards and shoreline armoring, including the ways in which armoring decisions affect the shoreline and the beach. These issues are exacerbated in light of sea level rise and the ways in which such rising seas will affect shorelines and shoreline development, not only as it relates to the Pismo Beach shoreline in this case, but also the California coast as a whole. Therefore, staff recommends that the Commission find that the appeal raises substantial LCP and Coastal Act conformance issues and that the Commission take jurisdiction over the CDP application for the proposed project. If the Commission does so, then the de novo hearing on the merits of the CDP application would be scheduled for a future Commission meeting. The motion and resolution to effect this recommendation are found on page 5.

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Exhibit 4 – City’s Final Local CDP Action Notice and Approved Project Plans

Exhibit 5 – Appeal of City’s CDP Decision

1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeals were filed. A finding of substantial issue would bring the CDP application for the proposed project under the jurisdiction of the Commission for de novo hearing and action. To implement this recommendation, staff recommends a **no** vote on the following motion. Failure of this motion will result in a future de novo hearing on the CDP application, and adoption of the following resolution 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 affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission determine that Appeal Number A-3-PSB-21-0073 raises no substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act, and I recommend a **no** vote.*

***Resolution to Find Substantial Issue:** The Commission hereby finds that Appeal Number A-3-PSB-21-0073 presents a substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

2. FINDINGS AND DECLARATIONS

A. Project Location and Description

The City-approved project is located on the bluff, at the toe of the bluff, and on the beach seaward of 117 Indio Drive in the Sunset Palisades area of the City of Pismo Beach, which is the upcoast part of the City's shoreline. The blufftop portion of the site contains a single-family residence that was originally constructed in 2003 and is one of eight blufftop residences located on the southernmost block of Indio Drive between the road and the ocean. The blufftop is at an elevation of approximately 40 feet above mean sea level and the existing residence on the site is set back some 17 to 19 feet from the blufftop edge. The bluff along this block, from the Florin Road cul-de-sac overlook south to South Palisades Park, is mostly reinforced with a mix of shoreline armoring of varying ages and types, but the bluff at this site is unarmored. It fronts on a narrow beach area that is most accessible at low tides, where access is provided to the public from a stairway about 1,000 feet away at nearby South Palisades Park.

The parcel is zoned in the LCP as Single-Family Residential (R-1) with a Hazards Overlay Zone. The objective of the Hazards Overlay Zone is, among other things, to prevent unsafe development in hazardous areas. The City-approved project involves the construction of a new 120-foot-long and 40-foot-high, textured and colored shotcrete seawall with 23 drilled 40-foot tiebacks into the bluff that would cover the entirety of the bluff face at the site, and is intended to protect the residence. The seawall is also

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intended to connect to upcoast and downcoast armoring.¹

See **Exhibit 1** for location map, **Exhibit 2** for photos of the site, **Exhibit 3** for California Coastal Records Project photos of the applicable shoreline from 1972 to 2019, and **Exhibit 4** for the City-approved project plans.

B. City of Pismo Beach Approval

On September 28, 2021 the City of Pismo Beach Planning Commission approved a CDP for the above-described project. The City's Final Local CDP Action Notice on that CDP decision was received in the Coastal Commission's Central Coast District Office on October 29, 2021 (see **Exhibit 4**). The Coastal Commission's ten-working-day appeal period for this action began on November 1, 2021 and concluded at 5pm on November 15, 2021. One valid appeal was received during the appeal period (see **Exhibit 5**).

C. Appeal Procedures

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or 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 the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. This City CDP decision is appealable to the Commission because the project site is located between the first public road and the sea and is within 300 feet of the inland extent of the beach and the seaward face of the coastal bluff.

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP and/or to Coastal Act public access provisions. For appeals of a CDP denial, where allowed (i.e., such appeals are only allowed in extremely limited circumstances – see description of appealable actions, above), the grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions.

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission

¹ The upcoast armoring is currently being augmented via a series of emergency CDPs (ECDPs) (ECDPs G-3-20-0025, G-3-21-0023, and G-3-21-0035; Grossman), while the downcoast site includes a concrete seawall covering the lower 12 to 15 feet of the bluff (City CDP 96-135, CCC record 3-PSB-96-135; Conroy).

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taking jurisdiction over the CDP application. This step is often referred to as the “substantial issue” phase of an appeal. The Commission is required to begin its hearing on an appeal, addressing at least the substantial issue question, within 49-working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline.

The Coastal Act and the Commission’s implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.² At this stage, the Commission may only consider issues brought up by the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the former recommendation, the Commission will not take testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it, and, if no such hearing is requested, a substantial issue is automatically found. In both cases, when the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

If, following testimony and a public hearing, the Commission determines that the appeal does not raise a substantial issue, then the first step is the only step, and the local government’s CDP decision stands. However, if the Commission finds a substantial issue, the Commission takes jurisdiction over the underlying CDP application for the proposed project, and the appeal heads to the second phase of the hearing on the appeal.

In the second phase of the appeal, the Commission must determine whether the proposed development is consistent with the applicable LCP (and in certain circumstances the Coastal Act’s public access and recreation provisions). This step is often referred to as the “de novo” review phase of an appeal, and it entails reviewing the proposed project in total. There is no legal deadline for the Commission to act on the de novo phase of an appeal. Staff will make a CDP decision recommendation to the Commission, and the Commission will conduct a public hearing to decide whether to

² The term substantial issue is not defined in the Coastal Act. The Commission’s regulations simply indicate that the Commission will hear an appeal unless it “finds that the appeal raises no substantial issue” (California Code of Regulations, Title 14, (CCR) Section 13115(b)). CCR Section 13115(c) provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a significant issue: (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 the Coastal Act’s public access provisions; (2) the extent and scope of the development; (3) the significance of the 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, and may make a substantial issue determination for other reasons as well.

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approve, approve with conditions, or deny the subject CDP. Any person may testify during the de novo phase of an appeal hearing (if applicable).

D. Summary of Appeal Contentions

The appeal contends that the City-approved seawall appears to protect a structure that is not allowed such protection under the LCP and that, even if it were allowable, does not appear to have been appropriately evaluated in terms of alternatives, impacts, and mitigations, all of which could lead to adverse, unmitigated, and not allowable coastal resource impacts. The appeal also contends that there is some question as to whether the approved project may be wholly or partly located in the Coastal Commission's retained CDP jurisdiction, including whether the project should have come before the Commission instead of the City in the first place, and whether the City had the legal authority to process a CDP application in this case. See **Exhibit 5** for the full appeal document.

E. Substantial Issue Determination

2. Shoreline Hazards and Armoring

Applicable LCP and Coastal Act Provisions

The standard of review for appeals is consistency with the LCP, and for development between the sea and the first public road (as is the case here), the Coastal Act's public access provisions. The LCP includes a Safety Element that speaks to issues of minimizing risks due to hazards, including shoreline hazards, and the need to ensure that private development not impose risks on the public at large. The LCP's Safety Element states:

The intent of the Safety Element is to establish policies that will minimize the potential of human injury and property damage by reducing the exposure of persons and property to natural hazards. ... Exposure to the hazards addressed in this element may or may not be voluntarily undertaken by individuals. Voluntarily taken risks, however, are not necessarily acceptable from a public point view (sic). This is because property owners and residents frequently have expectations that public actions, such as building and zoning regulations ... will provide a significant risk-reduction. For the various hazards, thresholds of unacceptable exposure to risks have been determined. These determinations are expressed in policies, which limit the intensity of development in high risk areas, impose development standards, which will provide a measure of protection, or prohibit construction in areas with unacceptable risks. In imposing any restrictions ... 1) individuals should not be permitted to develop land in a manner that would impose risks on their neighbors or the community at large ... and 3) a financial burden should not be imposed on the general taxpayer by allowing developments in hazard-prone areas which are likely to have unusually high costs for public services. ...

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These concepts are then embodied in a series of LCP principles and policies, including LCP Land Use Plan (LUP) Principle P-23 (which essentially reflects Coastal Act Section 30253 requirements),³ stating:

LUP Principle P-23 Protection of Life & Safety. *Pismo Beach shall develop policies to minimize injury and loss of life, to minimize damage to public and private property ... and to minimize social and economic dislocations resulting from injuries, loss of life, and property damage.*

The LCP also requires identification of high-risk hazard areas, including explicitly in terms of blufftop/shoreline hazards, and utilizes a Hazards Overlay Zone concept for this purpose, with an LUP Hazards Overlay Zone and an Implementation Plan (IP) Hazards and Protection Overlay (H) Zone. Importantly, the H overlay also explicitly identifies that a primary objective of the zone is “to also protect and enhance the shoreline bluffs and beaches of the city from visual as well as physical deterioration or erosion.” The subject property is mapped with an LUP Hazards Overlay and is designated with the “H” hazards and protection zone in the IP. The LCP states:

LUP Policy S-7 Hazards Overlay Zone. *Areas where bluff-top hazards exist shall be included within and subject to the requirements of the Hazards Overlay Zone.*

IP Section 17.078.010 Hazards and Protection (H) Overlay Zone – Purpose of zone. *The hazards and protection (H) overlay zone is intended to prevent unsafe development of hazardous areas; to minimize damages to public and private property; and to minimize social and economic dislocations resulting from injuries, loss of life, and property damage. This overlay zone includes those areas unsafe for development which are ... (3) located in areas of high liquefaction potential, unstable slopes, retreating ocean bluffs or easily erodible areas. ... This overlay zone is intended to also protect and enhance the shoreline bluffs and beaches of the city from visual as well as physical deterioration or erosion. ...*

In terms of blufftop development provisions specifically, the LCP requires that development be sited and designed for at least 100 years of stability and safety without a reliance on shoreline armoring. These are the same provisions that were in place when the residence that is proposed to be protected by this proposed seawall project was originally permitted by the City in 2000. The LCP states:

LUP Policy S-3 Bluff Set-Backs. *All structures shall be set back a safe distance from the top of the bluff in order to retain the structures for a minimum of 100 years, and to neither create nor contribute significantly to erosion, geologic*

³ Coastal Act Section 30253 states, in applicable part: “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.”

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instability or destruction of the site or require construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. The City shall determine the required setback based on the following criteria: (a) For development on single-family residential lots subdivided prior to January 23, 1981, the minimum bluff setback shall be 25 feet from the top of the bluff (blufftop is defined as the point in which the slope begins to change from near horizontal to more vertical). ...

IP Section 17.078.050 Bluff hazard, erosion and bluff retreat criteria and standards. (A) *New structures shall be set back a sufficient distance from the bluff edge to be safe from the threat of bluff erosion for a minimum of one hundred years. The city shall determine the required setback based on the following criteria: 1. For development on single family residential lots subdivided prior to January 23, 1981, the minimum bluff setback shall be twenty-five feet from the top of the bluff (blufftop is defined as the point at which the slope begins to change from near horizontal to more vertical). ...*

With respect to shoreline armoring, the LCP also includes provisions that mirror Coastal Act Section 30235⁴ (and indeed the policies directly reference Section 30235 requirements) and that limit the construction of shoreline protective devices to those required to protect existing principal structures, coastal-dependent uses, or public beaches in danger from erosion; require that such devices shall only be permitted if there are no other less environmentally damaging feasible alternatives for protection of existing development, and require that such devices eliminate or mitigate adverse impacts on sand supply, and enhance public recreational access and opportunities. All of these provisions are directly applicable to the proposed seawall in this case. The LCP states as follows:

LUP Policy S-6 Shoreline Protective Devices. *Shoreline protective devices, such as seawalls, revetments, groins, breakwaters, and riprap 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 of the Coastal Act and all other policies and standards of the City's Local Coastal Program. Devices must be designed to eliminate or mitigate adverse impacts on local shoreline sand supply, and to maintain public access to and along the shoreline. Design and construction of protective devices shall minimize alteration of natural landforms, and shall be constructed to minimize visual impacts. The city shall develop detailed standards for the construction of new and repair of existing shoreline protective structures and devices. As funding is available, the city will inventory*

⁴ Coastal Act Section 30235 states: "Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. ..."

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all existing shoreline protective structures within its boundaries. (emphasis added)

IP Section 17.078.060(D). *Seawalls shall not be permitted, unless the city has determined that there are no other less environmentally damaging alternatives for protection of existing development or coastal dependent uses. If permitted, seawall design must (a) respect natural landforms; (b) provide for lateral beach access; and (c) use visually compatible colors and materials and will eliminate or mitigate any adverse impacts on local shoreline sand supply. (emphasis added)*

IP Section 17.078.060(F). *Shoreline structures, including groins, piers, breakwaters, pipelines, outfalls or similar structures which serve to protect existing structures, or serve coastal dependent uses and that may alter natural shoreline processes shall not be permitted unless the city has determined that when designed and sited, the project will: 1. Eliminate or mitigate impacts on local shoreline sand supply; 2. Provide lateral beach access; 3. Avoid significant rocky points and intertidal or subtidal areas; and 4. Enhance public recreational opportunities. (emphasis added)*

And finally, as indicated above, the Coastal Act's public access provisions are also standard of review for appeals. These provisions are embodied in a number of different Coastal Act sections, including as follows:

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. *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects...*

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

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*

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demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

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

Section 30240(b). *Development in areas adjacent to ... parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those ... recreation areas.*

In sum, the City's LCP mirrors Coastal Act policies for new blufftop development that require minimization of risks to life and property and assurance of stability and structural integrity without any reliance on shoreline armoring that would substantially alter natural landforms along bluffs and cliffs. The LCP includes a 100-year setback requirement for blufftop development that acts to implement these policy directives. The LCP also mirrors Coastal Act policies related to shoreline armoring, and in some ways is slightly stronger in that respect as the LCP limits allowable armoring to existing "principal" structures and not just existing structures, and it states that such armoring shall "only" be permitted where it is to protect such structures in danger from erosion. In other words, absent that situation, an armoring project cannot be approved consistent with the LCP. The LCP also further limits armoring by stating that it can only be approved if it meets certain criteria, including that it is required to be the least environmentally damaging feasible alternative for protecting qualifying structures, and it is also required to "1. Eliminate or mitigate impacts on local shoreline sand supply; 2. Provide lateral beach access; 3. Avoid significant rocky points and intertidal or subtidal areas; and 4. Enhance public recreational opportunities." In other words, the LCP provides additional and explicit criteria that must be met to approve such armoring. If the criteria are not met, then the LCP explicitly states that the armoring 'shall not be approved.'

Analysis

The City-approved project includes a 120-foot-long and 40-foot-high, textured-and-colored seawall (with 23 40-foot tiebacks drilled into the bluff itself) located on the bluff face, bluff toe, and beach seaward of 117 Indio Drive. The seawall is intended to protect a single-family residence originally approved via City CDP in 2000 and constructed in 2003. The City found that the project is necessary to protect the residence from accelerated bluff failure and found it consistent with the LCP's allowances for shoreline protection because the City determined that the residence is both an existing structure and in danger of erosion. According to the Applicant's geotechnical assessment, 20 to 30 feet of bluff loss has occurred in this area over the last 20 years, and at this site specifically, in the time since the residence was approved in 2000, approximately 10 feet of bluff loss has occurred. The site appears to be continuing to experience accelerated erosion as a result of a combination of existing subsurface springs, unique geologic conditions, inadequate drainage in the rear yard, and focused wave energy. The Applicant's current geotechnical assessment also suggests that growing sea caves and continuing instability could lead to imminent and catastrophic bluff failure. Based on

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this assessment, the City found the proposed seawall consistent with LCP allowances for shoreline armoring.

There are multiple issues with the City's conclusion, related primarily to the types of structures that are allowed shoreline armoring at all, and the analysis that must support approval of an armoring structure for qualifying structures, including the very specific LCP criteria that must be satisfied, as identified above. In this case, the City erred in its assessment on the former, and did not evaluate the specific criteria that are required to be met to allow approval otherwise.

With respect to structures that qualify for armoring under the LCP, the residential development inland of the proposed armoring is not a coastal-dependent use,⁵ and although the public beaches here are in danger of erosion, such danger is exacerbated by armoring such as is proposed here as opposed to protected by it.⁶ Thus, the only other potential development type that might qualify for armoring in this case under the LCP is an "existing principal structure." The LCP, like the Coastal Act, does not include a definition for "existing structure" or "existing principal structure." With respect to the word "principal," that word typically refers to the main structure on a site, here, the residence. However, the word "existing" in an armoring framework does not mean extant today, rather it means a structure that existed in that form and has not been redeveloped since the time the Coastal Act became operable (i.e., January 1, 1977). The reason for this is that development that preceded the Coastal Act was not subject to Section 30253's requirement (and similar LCP provisions, here LUP Policy S-3 and IP Section 17.078.050) that it be sited and designed in such a way as to avoid the need for armoring over its lifetime. And thus Section 30235 (and similar LCP provisions, here LUP Policy S-6 and IP Sections 17.078.060(D) and (F)) provide that such pre-Coastal Act structures may be able to avail themselves to armoring if in danger from erosion (and if other tests and requirements are met). Conversely, development approved since January 1, 1977 was only allowed provided it would not require armoring to protect it.

The Commission's adopted Sea Level Rise Policy Guidance⁷ (Guidance) provides the following explanation for how these Section 30253 and 30235 directives are meant to be understood and synthesized:

⁵ LCP IP Section 17.006.0275 defines coastal dependent development or use as "any development or use which requires a site on, or adjacent to, the sea to be able to function at all." (This definition mirrors that of Coastal Act Section 30101.) Residential development such as is present here does not require such siting to be able to function at all, including as evidenced by the fact that most residential development exists well inland of the sea.

⁶ Armoring not only occupies beach and shoreline space that would otherwise be available to public recreational uses, such as would be the case at this site with the proposed seawall, but it also blocks the normal transmittal of beach-generating materials from bluffs, and it also leads to loss of beaches over time as an eroding shoreline bumps up against such armoring (also referred to as the 'coastal squeeze' or passive erosion). Thus, such armoring is the opposite of what is necessary to protect a public beach in danger from erosion in this case.

⁷ Available at <https://coastal.ca.gov/climate/slr/>.

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Read together, the most reasonable and straightforward interpretation of Coastal Act Sections 30235 and 30253 is that they evince a broad legislative intent to allow shoreline protection for development that was in existence when the Coastal Act was passed, but avoid such protective structures for new development now subject to the Act. In this way, the Coastal Act's broad purpose to protect natural shoreline processes and public access and recreation would be implemented to the maximum extent when new, yet-to-be entitled development was being considered, while shoreline development that was already entitled in 1976 would be "grandfathered" and allowed to protect itself from shoreline hazards if it otherwise met Coastal Act tests even if this resulted in adverse resource impacts. Such grandfathering of existing conditions is common when new land use and resource protection policies are put in place, and the existing development becomes "non-conforming."

In other words, the Commission understands "existing structure" in Section 30235 (and equivalent LCP provisions) to mean structures lawfully in existence prior to the effective date of the Coastal Act (January 1, 1977) that have not been redeveloped since, and this interpretation was formally adopted by the Commission when it adopted the Guidance (originally in 2015 and updated in 2018). The Guidance states that "...going forward, the Commission recommends the rebuttable presumption that structures built after 1976 pursuant to a coastal development permit are not "existing" as that term was originally intended relative to applications for shoreline protective devices..." It is important to note that this Guidance was intended not only for the Commission itself, but to facilitate implementation of the Coastal Act by coastal managers at all levels, and local governments are encouraged to rely upon it in LCP implementation. Further, should there be any question of appropriate LCP interpretation, courts have also previously found that LCP provisions must be understood in relation to the relevant Coastal Act section or sections from which a specific LCP provision derives its authority (see *McAllister v. Coastal Commission* (2008) 169 Cal.App.4th 912). Thus here, LUP Policies S-3 and S-6 and IP Sections 17.078.050, 17.078.060(D) and 17.078.060 (F) are required to be understood in terms of Coastal Act Sections 30253 and 30235.

In this case, the subject residence was approved via City CDP in 2000 and construction was completed in 2003. The City's 2000 action found the then proposed residence consistent with the LCP, including LUP Policy S-3 and IP Section 17.078.050 requirements that it be sited and designed in such a way as to avoid the need for armoring over its lifetime, where a setback of 28.3 feet was established as the means to appropriately set back such development from the blufftop edge to ensure that it would not require armoring over its lifetime. And although the LCP's analytic framework is to establish such setbacks based on ensuring at least 100 years of such lifetime, including as a means of ensuring that such development can be utilized for a reasonable period of time, the lifetime of a structure in terms of coastal erosion and hazards is as long as it remains stable and safe to occupy, and there is not some sort of inherent entitlement to 100 years of useful life. On the contrary, this property owner and Applicant decided to pursue residential development at this location, a location mapped as a Coastal Hazards Overlay and "H" hazards and protection zone in the LCP, with the knowledge that the development was required to avoid shoreline armoring, as is required by LUP

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Policy S-3 and IP Section 17.078.050 with which the project was deemed consistent based on the property owner and Applicant's representations regarding bluff safety and stability at this location at that time. In other words, the Applicant was thus on notice of the risk that bluff stability might be less than estimated when they undertook the development.

As indicated above, shoreline armoring of the type proposed leads to a variety of negative coastal resource impacts, including with respect to covering beach and shoreline access areas, blocking sand and sand generating materials from making their way into shoreline sand supply systems, and leading to a loss of such beaches and shoreline access areas when the bluffs are no longer allowed to retreat naturally and beaches and shoreline access areas are lost over time (also known as passive erosion or the 'coastal squeeze'), all of which is exacerbated by rising seas. The City's LCP recognizes such issues, including through the use of the Hazards Overlay Zone that applies to this site, and that "is intended to also protect and enhance the shoreline bluffs and beaches of the city from visual as well as physical deterioration or erosion." In other words, the LCP recognizes that these coastal resource values need to be respected in development cases in the zone, like this one, and does not excuse projects from meeting relevant tests.

Here, as discussed above, not only is the 2000s-era residence not considered an existing principal structure in coastal armoring terms (which alone would require denial of the proposed project due to inconsistencies with LUP Policy S-6), but even if it were, the City's analysis did not include an evaluation of relevant alternatives, did not include an analysis of (and adequate mitigation for) relevant coastal resource impacts, and did not include an analysis of consistency with explicit LCP requirements. The failure to analyze these subjects independently also raises a substantial issue. For example, in order to approve such a project in the City, the project must eliminate or mitigate impacts on local shoreline sand supply (this issue was not evaluated nor adequate mitigations identified); must provide lateral beach access (no such access was required here); must avoid significant rocky points and intertidal/subtidal areas and respect natural landforms (where here the entire bluff landform would be covered, and an area that at the least appears intertidal would be covered by the project, and lead to its eventual loss due to passive erosion over time); and must both maintain public access along the shoreline and also enhance public recreational opportunities) neither of which would be the case here) (see LUP Policy S-6 and IP Sections 17.078.060(D) and (F)). Furthermore, the Coastal Act's public access provisions are also applicable, and the project would violate these provisions as well for similar reasons (it would not maximize access and recreational opportunities, rather it would reduce them; it would not protect access to the beach and shoreline area fronting the site (including as a lower cost visitor and recreational facility, an area suited for water-oriented recreational activities, oceanfront land suitable for recreational use, and a recreation area), rather it would cover it and eventually cause it to disappear and is not approvable on that basis as well. It would also lead to a loss of public trust areas, both initially and over time.

So, although the LCP allows for shoreline armoring to protect existing principal structures or coastal-dependent uses in danger from erosion (see LUP Policy S-6, and

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IP Sections 17.078.060 (D) and (F)), the residence (built in 2003, post-dating the Coastal Act by more than a quarter century) does not qualify for such armoring as it is not an existing principal structure as the Commission understands that term. Absent any contrary LCP definition of “existing principal structure,” the City made findings and based its approval on its own interpretation of that term as a structure that is extant today. However, the City’s interpretation is not consistent with the Commission’s adopted Guidance or recent decisions,⁸ and the residence at this location does not qualify for armoring. This issue alone raises a substantial LCP issue regarding LCP allowances for shoreline armoring.

In addition, the City-approved seawall would protect a structure that was not only built after January 1, 1977 but that the City stated (at the time of its CDP approval of it in 2000) was sited and designed to avoid the need for armoring in its lifetime, and for at least an estimated 100 years. The City’s previous CDP for the residence was approved on the basis that the development was adequately set back for 100 years, as required by the LCP, without the need for armoring. The City’s approval thus raises a substantial issue of LCP conformance regarding requirements that such new development not require shoreline armoring but instead rely on adequate setbacks from the blufftop edge to ensure stability and safety, and where applicants are required to internalize the risks of developing along an eroding shoreline (and an LCP-designated Hazards Overlay Zone and “H” Hazards and Protection zone), including as a means of protecting beaches and other shoreline access areas for the public. It appears that the 100-year setback as it was determined in 2000 was not accurate and/or that then unforeseen forces have hastened bluff retreat at this site, and it is possible that the structure may be in danger. However, the LCP still does not allow armoring for the residence because it is not an existing principal structure under the LCP or Coastal Act. This issue too raises a substantial LCP issue regarding LCP allowances for shoreline armoring.

Furthermore, LUP Policy S-6 and IP Sections 17.078.060 (D) and (F) only allow armoring for existing principal structures when such armoring is conclusively shown to be the least environmentally damaging feasible alternative to protect qualifying structures, and where all impacts are appropriately mitigated. In terms of the former, the City only evaluated alternative forms of armoring, but did not evaluate other more coastal resource protective alternatives (such as removal and/or relocation of the residence inland). In terms of the latter, the project does not appear to have been adequately mitigated to address adverse impacts on local shoreline sand supply and other coastal resources, as required by the LCP. The City’s approval includes a condition that states only that “soil materials to be displaced by the project” are to be mitigated with a fee, but it does not state how the displaced materials are to be calculated, or how the fee is to be developed. And there is no evaluation of the effect of the armoring structure otherwise on coastal resources, including sandy beach access here and cumulatively in the City, as required by Coastal Act public access and

⁸ 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, Schragger, and Oene armoring, denied September 2019), and 2-17-0438 (AMJT Capital/BCPUD armoring, approved July 2020).

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recreation policies, let alone mitigation for such identified impacts (or other impacts, such as to coastal views and natural landform protection). In fact, even a cursory review of historical aerial photos of the shoreline here suggests that the hard armoring up- and downcoast has contributed over time to lost beach and recreational beach area (see **Exhibit 3**) and is further evidence that the type of expected coastal resource impacts here are borne out by past evidence associated with armoring nearby. Even if the project were to properly qualify for shoreline armoring consideration, which it does not, the City's action has not appropriately evaluated alternatives, impacts, and mitigation measures as required by the LCP and by the Coastal Act's access and recreation provisions, thus raising additional substantial LCP conformance issues.

And finally, as observed in the appeal document, there is some question as to whether the City had the legal authority to approve a CDP for the proposed project because the proposed seawall may lie wholly or partly within the Coastal Commission's retained CDP jurisdiction.⁹ In fact, the City-approved plans indicate that at least a portion of the proposed seawall would be embedded or keyed a minimum of two feet into the bedrock formation at the toe of the bluff, below the mean high tide elevation at this location. This also raises a substantial issue of LCP conformance as it appears that the seawall may lie totally or partially within the Commission's CDP jurisdiction, necessitating separate or consolidated CDP review by the Commission.

In sum, the City's approval of a CDP for this project raises fundamental issues with respect to the way in which the LCP and the Coastal Act are to be understood on such critical issues as coastal hazards and shoreline armoring, including the ways in which armoring decisions affect the shoreline and the beach. These issues are exacerbated in light of sea level rise and the ways in which such rising seas will affect shorelines and shoreline development, not only as it relates to the Pismo Beach shoreline, but also the California coast as a whole. Therefore, the City's CDP approval raises a substantial LCP conformance issue regarding coastal hazards and shoreline armoring.

3. The "Five Substantial Issue" Factors

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over a de novo CDP for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP conformance. Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue: 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; 2) the extent and scope of the development as approved or denied by the local government; 3) the significance of the coastal resources affected by the decision; 4) the precedential value of the local government's

⁹ The Coastal Commission's CDP jurisdiction is based on the existence of tidelands (including former tidelands), submerged lands and public trust lands. The information available indicates that the area in question appears to be located, in part, on tidelands, submerged land and/or land that may be subject to the public trust.

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decision for future interpretations 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, and may find substantial issues for other reasons. In this case, these five factors, considered together, support a conclusion that the County's approval of CDP for this project does raise substantial LCP conformance issues.

Regarding the first factor, the City determined that the residence here qualified for consideration of shoreline armoring based upon it being extant today. However, such a finding contradicts the City's original approval of said residence in 2000 where it was determined that it was set back adequately for its lifetime and would not need or be allowed armoring in the future. And the LCP must be interpreted as consistent with the Coastal Act, from which it derives its authority, and the Commission understands an existing structure for armoring purposes under the analogous Coastal Act provisions to be one that existed prior to the Coastal Act and has not been redeveloped since. The City provided no evidence to suggest that this understanding is incorrect, let alone evidence to suggest that this residence could be considered for armoring protection notwithstanding its 2000 CDP. Further, even if the residence were to qualify for armoring, the City failed to conclusively show, or even analyze, whether the approved shoreline protective device was the least environmentally damaging feasible alternative to protect a qualifying structure, did not thoroughly evaluate nor mitigate potential coastal resource impacts from the seawall, and did not show how the explicit LCP tests were met by the project, where it appears they are not met. It also appears that the project may lie within the Commission's retained CDP jurisdiction and that the City may not have had the authority to issue this permit. In short, the degree of factual and legal support for the City's decision strongly supports a determination that the appeal raises a substantial issue.

As to the second factor (the extent and scope of the development as approved by the City), it might be argued that a single seawall is a fairly limited scope of project. However, such a seawall can lead to significant negative resource impacts, both by itself as well as cumulatively with other seawalls. In fact, air photo evidence suggests that such seawalls are leading to a pronounced loss of beach and shoreline access at this location. The second factor thus also suggests a substantial issue.

Regarding the third factor, the primary coastal resource that would be impacted by the proposed seawall (were it to somehow be allowed) would be public recreational access. This resource, while almost always significant in any context, is particularly important in this case given existing conditions related to shoreline processes and the beach at this location. As mentioned above, a brief review of historical aerial photos of the shoreline in the immediate vicinity appears to suggest that the hard armoring at this pocket beach has contributed over time to lost beach and recreational beach area (see **Exhibit 3**). The available public beach area appears to be narrower and less accessible than it once was. Any additional hard armoring would very likely contribute to this same phenomenon, further adversely impacting public recreational beach access and the public trust. The remaining available public beach at this location, and everywhere in California for that matter, is significant in the eyes of the LCP and

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Coastal Act, particularly in light of these localized as well as bigger picture (e.g. sea level rise) effects. Therefore, the third factor supports a finding of substantial issue as well.

Regarding the fourth factor, allowing the LCP to be interpreted to allow for new seawalls to protect structures that were built after passage of the Coastal Act, and without a thorough evaluation of alternatives, coastal resource impacts (and mitigations), and LCP-specific requirements (which do not appear to be met here) would create adverse precedent for future interpretation of the LCP. Such a precedent could lead to a potentially significant amount of new armoring on the Pismo Beach shoreline, given the abundance of blufftop homes and increasing concerns regarding sea level rise and related erosion. Therefore, the fourth factor also supports a finding of substantial issue.

Finally, the fifth factor weighs most heavily in favor of finding substantial issue. The project raises issues of regional and statewide significance, given that climate change and sea level rise-related effects (such as coastal erosion) impact the entire coastline, and the issue of how to address them has become a top regulatory and policy priority for the State of California. These sorts of determinations related to coastal hazards and public access and recreation are important not only here in Pismo Beach but are indicative of regional and statewide trends and issues that raise significant coastal resource concerns. To allow for the City's LCP to be interpreted the way it has here would affect how similar provisions are interpreted statewide and elsewhere in the region. Thus, the fifth factor strongly supports a finding of substantial issue.

In short, the City-approved project does not adequately address LCP shoreline armoring requirements, and the five factors on the whole support a finding of substantial issue.

For the reasons stated herein, the Commission finds that Appeal Number A-3-PSB-21-0073 raises substantial LCP conformance issues in terms of coastal hazards and shoreline armoring requirements. Therefore, the Commission finds that **a substantial issue** exists with respect to the City-approved project's conformance with the certified City of Pismo Beach LCP and takes jurisdiction over the CDP application for the proposed project.

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3. APPENDICES

A. Substantive File Documents¹⁰

- File for Coastal Development Permit Appeal Number A-3-PSB-21-0073
- Final Local Action Notice for City of Pismo Beach Coastal Development Permit Number P20-000059

B. Staff Contact with Agencies and Groups

- City of Pismo Beach Planning Division

¹⁰ These documents are available for review in the Commission's Central Coast District office.