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# F13a

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## STAFF REPORT CDP APPLICATION

**Application Number:** 2-19-0026

**Applicant:** Shawn Rhodes

**Project Location:** Undeveloped property located west of the Pedro Point Shopping Center and northeast of San Pedro Avenue (505 San Pedro, APN 023-072-010) in the City of Pacifica.

**Project Description:** Construction of a mixed-use commercial and residential development including: (1) a 6,475-square foot two-story building with a surf shop on the first floor, office and storage space on the second floor, and a 3,500-square foot basement for storage; (2) a 3,010-square foot two-story building for storage and surf board shaping; and (3) a 3,346-square foot two-story building with retail on the first floor and two residential units on the second floor; (4) a 4,730-square foot skate park; (5) a 24-car parking lot; and (6) related development.

**Staff Recommendation:** Denial

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### SUMMARY OF STAFF RECOMMENDATION

The Applicant proposes to construct a mixed-use commercial and residential development on a 37,538 square-foot parcel on San Pedro Avenue, west of Highway 1 and south of Pacifica State Beach. Specifically, the proposed development would include a 6,475 square-foot two-story surf shop with office, storage space and basement (building #1); a 3,010 square-foot two-story building for storage and surf board shaping (building #2); a 3,346 square-foot two-story mixed-use building with retail on the first floor and two residential units on the second floor (building #3); a skate park;

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and a 24-car parking lot. The project site is a split coastal development permit (CDP) jurisdiction, long and narrow parcel that is approximately 60 feet in width, with the portion of the parcel in the Coastal Commission's jurisdiction located nearest the shoreline and the portion in the City of Pacifica's jurisdiction located inland of that. The Applicant did not agree to a consolidated CDP process, and thus went through the City's permitting process before submitting the subject CDP application to the Coastal Commission. As such, the City authorized a CDP for the portion of the proposed development that is within its CDP permitting jurisdiction, which includes building #3 and a portion of the parking area. The rest of the project is the subject of this CDP application to the Commission. In addition to the subject CDP, there is one open violation case related to this parcel, corresponding to an existing unpermitted wooden skate ramp.

The project site is subject to significant development constraints, including the presence of environmentally sensitive habitat areas (ESHAs) and wetlands immediately adjacent to and running along the western perimeter of the property, as well as the potential for coastal hazard impacts over time. With respect to habitat issues, the site is located immediately adjacent to an unnamed watercourse that constitutes both federal and state delineated wetlands, that serves as habitat for California red-legged frog, and that constitutes ESHA for these reasons. The Commission's staff ecologists have evaluated the ESHA area, which extends over the entirety of the site, and thus all of the proposed development is located within ESHA. The proposed development is not an allowed use in ESHA, and would lead to significant disruption and degradation of ESHA resources, and thus is not approvable under the Coastal Act.

With respect to coastal hazards, the site would be subject to potential future impacts from the combination of shoreline retreat, sea level rise, wave runoff, and inundation. As proposed, the structures are not sufficiently sited and designed to avoid such problems, and the northernmost building includes a basement structure, all of which would be subject to flooding over the expected life of the development. Finally, the proposed project does not include any open view corridors, employs large massing with limited articulation, and does not provide for adequate parking facilities (which could impact on-street public shoreline parking in the area).

As a result, the project cannot be found consistent with the ESHA, wetlands, hazards, viewshed, or public access policies of the Coastal Act. Further, the fundamental ESHA inconsistencies mean that there aren't conditions available that could modify the development to be consistent. Thus, the project requires denial. In such a case, the Coastal Act requires the Commission to evaluate whether such a denial might lead to taking of private property without compensation. Staff does not believe that a taking would be engendered in this case. Specifically, as indicated above, the City has already authorized building #3 (i.e., the 3,346-square foot two-story mixed-use building with retail on the first floor and two residential units on the second floor) within the City's CDP permitting jurisdiction, and thus the Applicant has an allowed economic use of the site that is sufficient to address investment backed expectations for the site, including accommodating the only residential development proposed. Thus, the Commission can deny the CDP application without danger of a takings in staff's view, and thus protect

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the ESHA and wetland habitat area as required by the Coastal Act. The motion to implement staff’s recommendation is found on **page 4** below.

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**EXHIBITS**

- Exhibit 1 – Location Map
- Exhibit 2 – Site Photos
- Exhibit 3 – City-Approved Project Plans
- Exhibit 4 – City of Pacifica Final Local Action Notice
- Exhibit 5 – Wetland Delineation
- Exhibit 6 – Coastal Commission comment letters to City
- Exhibit 7 – Peter Baye Biology Memo dated May 4, 2005
- Exhibit 8 – Peter Baye Biology Memo dated July 7, 2014
- Exhibit 9 – Photographic Documentation of CRLF
- Exhibit 10 – CNDDDB Field Survey Report
- Exhibit 11 – Commission Staff Ecologist memo

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### 1. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit (CDP) for the proposed development. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in denial of the CDP and adoption of the following resolution and findings. The motion passes only by an affirmative vote of the majority of the Commissioners present.

***Motion:*** *I move that the Commission **approve** Coastal Development Permit Application Number 2-19-0026 as proposed by the applicant, and I recommend a **no** vote.*

***Resolution to Deny CDP:*** *The Commission hereby denies Coastal Development Permit Number 2-19-0026 and adopts the findings set forth below on the grounds that the development will not be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

### 2. FINDINGS AND DECLARATIONS

#### A. Project Location

The proposed project is located at 505 San Pedro Avenue, west of the Pedro Point Shopping Center and northeast of San Pedro Avenue in the Pedro Point neighborhood, which is just south of Pacifica State Beach, in the City of Pacifica in San Mateo County (see location map in Exhibit 1). The undeveloped property is a narrow and long parcel (600 feet long by almost 60 feet wide) that is approximately 0.86 acres (37,538 square feet) and relatively flat with the exception of a downslope at the northern end of the property. Immediately to the west of the property lies an unnamed watercourse, and on the northern end of the site there is a stand of arroyo willows. An abandoned railroad berm lies to the north of the property on the seaward side of the stand of willows, and this berm provides a topographic separation between the subject site and Pacifica State Beach and the ocean.

The City of Pacifica Local Coastal Program (LCP) Land Use Plan (LUP) designates the site as Commercial, which allows for a variety of potential commercial uses, including visitor-serving commercial, retail commercial, office, heavy commercial, and light industrial. The LCP then zones the site Community Commercial/Coastal Zone (C-2/CZ), which allows for a range of commercial and visitor-serving uses, and also allows one or more residential units in the same building as a commercial use when located entirely above the ground floor.

The Pedro Point neighborhood is described in the LCP as providing a mix of visitor and neighborhood commercial uses, with a strong residential base. Existing development in

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the area consists of the adjacent Pedro Point Shopping Center immediately to the east; a mix of commercial and residential to the south across San Pedro Avenue; Pacifica State Beach to the north; and a large, 1.48-acre vacant parcel to the west directly across from the adjacent watercourse.

### **B. Project Background**

Prior to submission of this CDP application, Commission staff provided comment letters<sup>1</sup> to the City and Applicant describing the split CDP jurisdiction that applied to the site and concerns about the watercourse and thus the potential for sensitive coastal resources to be on or proximate to the site. In addition, Commission staff provided comments on the Mitigated Negative Declaration for the project,<sup>2</sup> again raising habitat concerns, specifically with regard to identification of wetlands, required development buffers, and the potential for the presence of sensitive species, including explicitly requesting that the Applicant complete a one-parameter wetland delineation at that earlier stage in the permitting process.

As noted above, the property spans both Coastal Commission and City of Pacifica CDP jurisdictions. Both Commission and City staff recommended a consolidated CDP process, whereby the Commission would process a CDP for the entire site. However, the Applicant did not agree to the consolidated process. As such, on November 5, 2018, the City approved a CDP for the portion of the proposed project within its jurisdiction, along with various other discretionary permits required by the City.<sup>3</sup> City staff has indicated that all of these permit approvals may need to be amended if the Commission's action does not align with that of the City.

### **C. Project Description**

#### ***City-Approved CDP***

The City's approved CDP only authorizes the southernmost portion of the proposed project that is within the City's CDP permitting jurisdiction: namely Building #3 and a portion of the proposed parking lot (see **Exhibit 3**).<sup>4</sup> Building #3 is a proposed 3,346-square foot two-story mixed-use building with retail space on the first floor and two residential units on the second floor.

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<sup>1</sup> Dated May 13, 2010, October 30, 2014, and May 8, 2015 (see Exhibit 6).

<sup>2</sup> Dated May 1, 2018 (see Exhibit 6).

<sup>3</sup> These City permits were originally authorized through November 5, 2020. On November 4, 2020, the City authorized a one-year extension (to November 5, 2021) pursuant to provisions in the local conditions of approval. Although Commission staff informed the City that there were significant habitat concerns related to the site, and that staff was tentatively intending to recommend denial of the CDP application applicable to the Commission's jurisdiction, the City concluded that there was no material change in the circumstances regarding the City's original approval, and extended the authorization through November 5, 2021.

<sup>4</sup> The City's approval also included other local but non-CDP discretionary approvals, including a Site Development Permit, Use Permit (to allow residential on the second floor of the mixed-use building), Parking Exception (to allow reduced parking capacity of 24 parking spaces), Sign Exception, and a Heritage Tree Removal Authorization.

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Two of the proposed buildings (Buildings #1 and #2) and the skate park are located within the Commission's jurisdiction. As referenced on the project plans, Building #1, the northernmost building, would be set back approximately 15 feet from the western property line and ranging between approximately 60-100 feet from the northern property line, with the proposed building footprint extending into the arroyo willow thicket. Building #1 is a proposed 6,475 square-foot two-story building with a surf shop on the first floor, office and storage space on the second floor, and a 3,500 square-foot basement for additional storage space. The proposed 4,730 square-foot skate park would be immediately adjacent to the southern end of Building #1 and would be both fenced and roofed. It is proposed to be set back approximately 10 feet from the western property line. Building #2, at the southern end of the skate park, is a proposed 3,010 square-foot two-story building intended to be used for additional storage and surf board shaping, set back approximately 10 feet from the western property line and adjacent to the 24-car parking lot. The Applicant also proposes a paved pedestrian pathway fronted by a retaining wall immediately adjacent to and along the full extent of the western property line, spanning both the City and Coastal Commission jurisdictions, which would connect San Pedro Avenue to an existing coastal access pathway from the northern end of the Pedro Point Shopping Center to Pacifica State Beach. See **Exhibit 3** for the proposed project plans.

### **D. Standard of Review**

As noted above, this proposed project spans both Coastal Commission and City of Pacifica CDP jurisdictions. The standard of review for the portion of the proposed development within the Coastal Commission's permitting jurisdiction (i.e., the subject of this CDP application) is the Chapter 3 policies of the Coastal Act, although the Commission may also consider the policies of the City of Pacifica's certified LCP as non-binding guidance.

### **E. Biological Resources**

#### ***Applicable Coastal Act Provisions***

The Coastal Act provides protection for sensitive habitat areas, including those that are considered to be on and offshore marine resources, wetlands, and environmentally sensitive habitat areas (ESHAs), including as follows:

**30107.5.** *“Environmentally sensitive area” means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

**30231.** *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface*

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*waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

### **30233.**

*(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*

- (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- (3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- (4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- (6) Restoration purposes.*
- (7) Nature study, aquaculture, or similar resource dependent activities.*

*(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for these purposes to appropriate beaches or into suitable longshore current systems.*

*(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. (...)*

*(...)*

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**30240.** (a) *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.* (b) *Development in areas adjacent to environmentally sensitive habitat areas and 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 habitat and recreation areas.*

### **LCP Policy Guidance**

The City of Pacifica LCP emphasizes the Coastal Act's protections for wetlands and environmentally sensitive habitat areas and provides additional guidance on the creation of buffers from such sensitive habitat areas, and allowable uses within buffer areas, including as follows:

**LUP Page C-99.** *A wetland is defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes. In certain types of wetlands, vegetation is lacking and soils are poorly developed or absent. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep water habitats.*

**LUP Policy 18.** *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas. Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.*

**IP 9-4.4302 Definitions.** ... (f) *"Buffer" shall mean an area of land adjacent to primary habitat, which may include secondary habitat as defined by a qualified biologist or botanist, and which is intended to separate primary habitat areas from new development in order to ensure that new development will not adversely affect the San Francisco garter snake and wetlands habitat areas.*

**IP Section 9-4.4403 Habitat Preservation.** (a) *Intent. The provisions of this section shall apply to all new development requiring a coastal development permit in the CZ District and shall be subject to the regulations found in Article 43, Coastal Zone Combining District. The intent of these provisions is to protect, maintain, enhance and restore the following types of environmentally sensitive habitat as identified in the LCP Land Use Plan...*

(c) *Survey Contents. All habitat surveys shall include, at a minimum, the following information: ...*

(4) *Delineation of all wetlands, streams, and water bodies;*



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*(5) Direct and indirect threats to habitat resulting from new development;*

*(6) Delineation of the secondary habitat buffer area to be provided along the periphery of the primary habitat; and*

*(7) Mitigation measures to reduce impacts and to allow for the long-term maintenance of environmentally sensitive habitats.*

*(e) Development Standards for Wetlands and Wetland Buffer Areas. The following minimum standards shall apply to a wetlands and wetlands habitat area.*

*(1) No new development shall be permitted within a recognized wetlands habitat area;*

*(2) Limited new development may be permitted within a recognized wetlands habitat buffer area subject to the following standards: ...*

*(iv) Public access through wetlands shall be limited to low-intensity recreational, scientific, or educational uses. Where public access is permitted, it shall be strictly managed, controlled, and confined to designated trails and paths as a condition of project approval;*

*(v) Alteration of the natural topography shall be minimized;*

*(vi) Runoff and sedimentation shall not adversely affect habitat areas;*

*(vii) Alteration of landscaping shall be minimized unless the alteration is associated with restoration and enhancement of wetlands; ...*

*(ix) New development adjacent to the buffer shall not reduce the biological productivity or water quality of the wetlands due to runoff, noise, thermal pollution, or other disturbances;*

*(x) All portions of the buffer shall be protected pursuant to Section 9-4.4308, Permanent Environmental Protection;*

*(xi) Potential impacts identified in the habitat survey shall be mitigated to a level of insignificance where feasible; and*

*(xii) Mitigation measures identified in the habitat survey shall be considered and made conditions of project approval where necessary to mitigate impacts*

*(3) In the event that new development is not possible because the size of the buffer has rendered the site undevelopable, the buffer may be reduced in width if it can be demonstrated that a narrower buffer is sufficient to protect*

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*the habitat and new development may be permitted subject to standards established in (e)(2) above.*

*IP Section 9-4.4308 Permanent Environmental Protection. (b) Findings. The Director, the **Planning Commission, or the City Council may determine that the proposed development is required to include** a continuous and binding land use restriction through either a deed restriction, easement, offer of dedication, or other conveyance, as a condition of project approval based on any of the following findings: ... (2) Such a restriction is necessary to protect sensitive coastal resources, including environmentally sensitive habitat, open space, and view corridors...*

### **Analysis**

Both the Coastal Act and the LCP, as guidance, emphasize the need to protect sensitive habitats within the coastal zone, including wetlands and environmentally sensitive habitat areas (ESHAs). In communication with the City of Pacifica, Coastal Commission staff expressed concerns going back over a decade with regard to potential impacts of development on the habitats located on and adjacent to the subject site, indicating that any proposed development should consider measures to avoid or reduce potential impacts on the adjacent unnamed watercourse, which most likely would meet the one-parameter definition of wetlands under the Coastal Act, and stating that a one-parameter wetland delineation should be conducted (see comments in **Exhibit 6**).

Despite the recommendation to conduct a one-parameter wetland delineation at an earlier stage in the process, a delineation of the site and adjacent drainage channel was not prepared for this project until November 2019, after the City of Pacifica had already approved a local CDP for the portion of the project located in their CDP jurisdiction.<sup>5</sup> This delineation showed that the adjacent watercourse that runs along the western edge of the subject property constitutes areas of both federal and state wetlands, with the state wetlands spanning the full length of the watercourse, thus comprising the entire length of the subject property's western boundary. On the northern end of the property, the federal and state wetlands encompass an approximately 0.096-acre arroyo willow thicket that partially extends onto the subject property and takes up approximately 0.048-acres at the northern border of the subject property (see delineation of these features in **Exhibit 5**). The federal and state wetlands present onsite include arroyo willow thicket, perennial rye grass fields, small-fruited bulrush marsh, smartweed patch, the flow channel, and the wetted watercourse channel.

During an initial assessment of the project-related biological information, Commission staff ecologist Dr. Lauren Garske-Garcia identified for the Applicant that the Commission typically applies a minimum wetland buffer of 100 feet. Examining the site-specific circumstances associated with the property known at that time, Dr. Garske indicated that the minimum possible justifiable wetland buffer, if appropriately mitigated,

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<sup>5</sup> The delineation was prepared for the Applicant by Coast Ridge Ecology, LLC as part of the CDP application to the Coastal Commission.

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would be 50 feet from the edge of the arroyo willow thicket and 25-feet from the remainder of the state wetlands that comprise the entire length of the drainage channel along the property's western edge. The Applicant submitted revised plans in response to this feedback, however, the revised plans did not adhere to these buffer minimums and continued to propose development within this already reduced buffer area. After further research in response to the Applicant's updated submittals and, while Commission staff and the Applicant were in further discussions regarding the ESHA and wetland buffers, interested parties provided information documenting the presence of California red-legged frog in the watercourse area.

California red-legged frog (*Rana draytonii*; "CRLF") is a California special-status species and a federally-listed threatened species due to loss and degradation of habitat, predation, and human disturbance. CRLF are known to occur in San Pedro Creek, which is connected to the subject watercourse by a culvert on the northern end of the parcel, near the arroyo willows. As such, Dr. Garske-Garcia, along with consulting reports that she reviewed, considered the site in question to have moderate potential for CRLF upland habitat and watercourse use, which extends the full length of the property along the western edge (see **Exhibit 5**). However, Dr. Garske-Garcia also recognized the degraded state of the subject parcel and adjacent watercourse as relatively unfavorable when compared to nearby habitats, and no published record had appeared documenting CRLF at this location. Subsequently, Commission staff received documentation from multiple Pacifica residents, including from a San Francisco State University ecologist, in April 2020 demonstrating positive observation of more than one CRLF, including time-stamped photographs from various dates in April showing as many as five CRLF at the same location at one time (see **Exhibit 9**). In addition, Commission staff received letters written by local biologist Peter Baye (dated May 4, 2005 and July 7, 2014) that report ongoing observations of CRLF at the location over a sustained period of time (see **Exhibits 7 and 8**).

Altogether, this evidence points to the watercourse area as being used by CRLF more than just a single frog passing through, and the information provided and reviewed indicates that the area is used as CRLF aquatic and/or dispersal habitat. While the Applicant's consultant argues that the location is unlikely to provide "consistent, stable long-term habitat for [CRLF] over time," CRLF does not have to carry out its full life cycle in the watercourse area itself for the area to have ecological value for this sensitive species. Dr. Garske-Garcia consulted with California Department of Fish and Wildlife (CDFW) and U.S. Department of Fish and Wildlife (USFWS) on this matter, and CDFW confirmed that the information received by the Commission in April was valid, including the species identification. USFWS did not have the 2005 Peter Baye record available digitally but indicated it was likely available in their hard files; however, USFWS staff was not surprised by the recent observations and provided information on recent CRLF observations from nearby San Pedro Creek.

In short, the watercourse running adjacent to the subject parcel constitutes part of a larger habitat corridor for CRLF. In addition, the watercourse likely also supports several other species as a habitat corridor, as it remains green throughout the seasons and compared to adjacent parcels, and connects to San Pedro Creek, the shore, the Pacific

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Ocean, a large open space to the west, and a major forested area. Although there have been recent development encroachments, the watercourse provides a connection across the landscape capable of supporting species including birds and small mammals. The Coastal Commission consistently finds this type of important and vulnerable habitat to be an ESHA due to the rarity of the physical habitat and its important ecosystem functions, including that of support for sensitive species, as found in this case by Dr. Garske-Garcia. Thus, the drainage channel adjacent to this site is considered ESHA under the Coastal Act. In addition, per Dr. Garske-Garcia's advice (see **Exhibit 11**, page 11), Commission staff also concludes that the arroyo willow thicket, as well as the small-fruited bulrush marsh both constitute ESHA, and would recommend a buffer of 50 feet at these locations as well<sup>6</sup>.

Coastal Act Section 30240 and LUP Policy 18 prohibit non-resource dependent development within ESHA, prohibit any development in ESHA that would significantly disrupt habitat values, and prohibit any development in areas adjacent to ESHA that would significantly degrade those ESHA areas. In addition, Coastal Act Section 30231 protects the biological productivity of coastal streams and wetlands. According to Lief Gould, the USFWS biologist for this region, the USFWS would typically recommend a 300-foot dispersal corridor around similar occupied CRLF habitat. Considering all this and applying a 300-foot corridor (i.e., where the area within the corridor constitutes ESHA due to its CRLF habitat functions), Dr. Garske-Garcia determined that the subject property is all ESHA, and that no level of precaution could avoid the loss of habitat with the proposed project. Even if the 300-foot corridor were centered on the watercourse, it would extend across and beyond the subject parcel. In addition, Dr. Garske-Garcia believes that the 300-foot corridor is the minimum that is acceptable for protecting this ESHA as required by the Coastal Act and that a reduced corridor width is not appropriate. The proposed development in ESHA is not a resource-dependent use and it would significantly disrupt habitat values. As a result, the proposed project is inconsistent with Coastal Act Section 30240. In addition, and for similar reasons, the proposed project is also inconsistent with Coastal Act Section 30231 and 30233.

In short, the portion of the site within the Commission's permitting jurisdiction is all ESHA and undevelopable for the proposed range of uses and structures. Although some provisions in the LCP allow for reductions to habitat buffers in the event that the buffer renders the site undevelopable, in this case it is the actual ESHA area that is affected by development (and not the buffer from it), and the City has approved development in the portion of the property that is within its jurisdiction and subject to the LCP. The Commission finds that there is no location on the site that is outside of ESHA and sufficient to protect the habitat, as required by the Coastal Act. And, as such, there aren't siting and design conditions available to the Commission to correct this Coastal Act inconsistency. Therefore, the Commission finds the proposed project inconsistent with the Coastal Act's sensitive habitat protection requirements cited above, requiring project denial.

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<sup>6</sup> At this point however, these buffer recommendations are moot since the entirety of the site constitutes ESHA and are constrained regarding allowable development because of that determination.

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### F. Coastal Hazards

#### **Applicable Coastal Act Provisions**

The Coastal Act requires that new development minimize risks to life and property, assure stability and structural integrity, not contribute to instability, and not rely on shoreline protection in order to be safe from hazards. Section 30253 states:

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

*(a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*

*(b) 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. ...*

#### **LCP Policy Guidance**

The City of Pacifica LCP establishes several requirements for new development to address coastal hazards, including that new development shall minimize risks to life and property, assure stability and structural integrity, and maintain safety and stability over time, including in relation to 100-year storm events and over the anticipated design life of the development, defined by the LCP as generally a 100-year analytical time frame, including:

**LUP Policy 26 (Coastal Act Section 30253).** *New development shall:*

*(a) Minimize risks to life and property in areas of high geologic, flood and fire hazard.*

*(b) 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.*

**LUP Definition of Net Developable Area.** *The portion of a site determined by a geologist to remain usable throughout the design life of the project and determined to be adequate to withstand a 100-year hazard event.*

**LUP Definition of Design Life.** *The time span during which the designer expects the development to safely exist, generally 100 years.*

**IP Section 9-4.4404(a) Geotechnical Suitability. Intent.** *The provisions of this Section shall apply to all new development requiring a coastal development permit in the CZ District and shall be subject to the regulations found in Article 43, Coastal Zone Combining District. The intent of these provisions is to minimize risks to life, property, and the natural environment by ensuring geotechnical suitability for all development.*

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**IP Section 9-4.4404(c)(6) Geotechnical Suitability.** *All geotechnical surveys shall, at a minimum, include the following information: Mitigation measures demonstrating that potential risks could be reduced to acceptable levels.*

**IP Section 9-4.4404(d)(3) Geotechnical Suitability.** *The density of new development shall be based on the net developable area, as established in the required geotechnical survey.*

Further, the LCP requires that new development be designed to avoid coastal resource impacts, including to prevent impacts from armoring on natural shoreline processes such as sand supply, and prohibits armoring to protect new development, including:

**IP Section 9-4.4406(c) Development Standards.** *The following standards apply to all new development along the shoreline and on coastal bluffs.*

(2) *Shoreline Protection: Consistent with the City's Seismic Safety and Safety Element, new development which requires seawalls as a mitigation measure or projects which would eventually require seawalls for the safety of the structures shall be prohibited, unless without such seawall the property will be rendered undevelopable for any economically viable use.*

**LUP Policy 23 (Coastal Act 30250(a)).** *New development, except as otherwise provided in this policy, shall be located within, contiguous within, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources...*

### **Analysis**

Taken together the Coastal Act and the certified LCP, as guidance, require new development to minimize risks to life and property while ensuring stability and structural integrity without contributing significantly to erosion, geologic instability, or destruction of the site or surrounding area (Coastal Act Section 30253, LUP Policy 26). Coastal Act Section 30253, IP Section 9-4.4406(c), and LUP Policies 23 and 26 also provide that new development that would rely on shoreline armoring is prohibited and that adverse impacts of shoreline armoring to coastal resources be avoided, lessened, and mitigated for where unavoidable. In sum, the Coastal Act and LCP require that new development minimize risks to life and property in areas of high coastal hazards, that new development be set back adequately to accommodate a 100-year storm event and ensure stability for the design life of the development, which per the LCP is generally a 100-year period,<sup>7</sup> and prohibit development that would require a seawall to ensure stability during its anticipated lifetime.

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<sup>7</sup> Where the policy requires such stability for the expected life of the structure, which the LCP states is the time frame in which the designer expects the development to safely exist, generally 100 years.

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The subject site is located approximately 375-feet from the shoreline, outside of the present-day designated FEMA flood zone. Per the Applicant's topographic survey and project plans, ground elevations at the seaward end of the site range from +16 to +21 feet NAVD88,<sup>8</sup> and the finished floor elevation of the most seaward building (proposed Building #1) would be at +20.5 feet NAVD88 with the associated basement at +10.7 feet NAVD88. In other words, the project would include components that are just 7.52 feet above mean sea level. The highest proximate elevation seaward of the subject property is an abandoned railroad berm at about +25 feet NAVD88, which could provide some flood protection for the site. However, this berm is not continuous, and is breached at its eastern end by an access road (Halling Way, at an elevation of approximately +16 feet NAVD88) for the beachfront homes north of the project site. Additionally, the stream bank along San Pedro Creek east of the project site is at an elevation of approximately +17 feet NAVD88. Thus, there is the potential for flood waters to flow from the ocean or San Pedro Creek, through the break in the berm and onto the subject property at some times.

The March 12, 2019 coastal hazards analysis prepared by the Applicant's consultant (GeoSoils) included a wave runup analysis indicating that wave runup could exceed the highest elevation level at the seaward end of the site (+21 feet NAVD88) under a future scenario with 6.3 feet of sea level rise. This elevation is higher than the finished floor elevation of the most seaward building, but the GeoSoils report assumes that the railroad berm would not be overtopped and would protect the project site from flooding. However, the analysis did not consider whether wave runup along the lower elevation access road could affect the project site. The GeoSoils analysis (and a supplemental analysis dated August 20, 2019) also examined future flooding, wave runup, and shoreline retreat projections from the USGS CoSMoS models, with up to 175 cm (5.7 feet) of sea level rise. These analyses found that inundation and wave runup would not affect the site, and that inland migration of the beach would not impinge on the site based on shoreline retreat projections. However, in interpreting the CoSMoS results the analyses did not recognize that the flooding projection tool does not allow for future shoreline retreat and erosion beyond the line of existing development and/or shoreline protection,<sup>9</sup> which in this case is the row of existing structures along Shoreside Drive seaward of the railroad berm (see **Exhibit 2**). Thus, these flooding projections may underestimate future flooding and wave runup at the project site and do not represent a scenario in which the railroad berm is absent and is not being relied on for the protection of new development, inconsistent with Coastal Act and LCP requirements. Commission staff used a separate CoSMoS shoreline retreat tool that takes into account future shoreline retreat and erosion. This tool indicates that the shoreline (the mean high tide line (MHTL)) could retreat to a position inland of the railroad berm and to within about 40 feet of the site under scenarios of 3.3 feet (1 meter) of sea level rise or

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<sup>8</sup> NAVD stands for North American Vertical Datum, and generally corresponds to mean lower low water (MLLW) for the current tidal epoch (NAVD88 corresponds to the 1983-2001 tidal epoch). Thus, the seaward portion of the site is roughly 16.82 feet above mean sea level.

<sup>9</sup> Erikson, L.H., Barnard, P.L., O'Neill, A.C., Vitousek, S., Limber, P., Foxgrover, A.C., Herdman, L.H., and Warrick, J., 2017. [CoSMoS 3.0 Phase 2 Southern California Bight: Summary of data and methods](http://dx.doi.org/10.5066/F7T151Q4). U.S. Geological Survey. <http://dx.doi.org/10.5066/F7T151Q4>.

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greater.<sup>10</sup> Under such conditions, the subject property could potentially be subject to wave uprush and flooding.

As a rough approximation to account for the potential combined impacts of inundation, wave runup, and shoreline retreat, GeoSoils (August 2019) added 60 feet of horizontal wave runup distance to the projected CoSMoS shoreline position (with 5.7 feet of sea level rise), and concluded that the project site would still not be at risk. However, this estimate of horizontal runup distance was based on CoSMoS-projected runup onto the steep slope of the railroad berm, not across the gentler slope of the beach or the flatter ground surrounding the project site. Using a similar approach, Commission staff geologist Dr. Joseph Street estimates that with 6.6 feet of sea level rise, wave runup with the 100-year storm could extend about 170 feet inland of the shoreline (i.e., of MHTL) across the beach and flatter ground near San Pedro Creek, northeast of the project site. This provides a more conservative estimate of potential storm wave runup beyond the future shoreline position. If 170 feet of horizontal wave runup distance is added to the projected future shoreline position (with 5.7 or 6.6 feet of sea level rise), the seaward portion of the project site (where Building 1 is proposed which includes the two-story surf shop on the first floor, office and storage space on the second floor, and a 3,500 square-foot basement subgrade) would be affected by wave runup within the 100-year analytic period referenced by the LCP.

Another option to approximate the future wave runup hazard risk to the site is to add projected sea level rise to the current FEMA 100-year flood elevation. Adding the medium-high risk scenario sea level rise projection (+5.6 to +6.9 feet by 2090-2100) to the current FEMA 100-year flood elevation of the VE zone (representing areas within the 1% annual chance coastal floodplain which have additional hazards associated with storm waves) where the proposed project is located (i.e., at +17 feet elevation) yields a rough estimate of the future 100-year flood elevation in the range of +22.5 to +24 feet NAVD88. Given the existing elevations at the project site (+16 to +21 feet) and the elevations of the topographic lows adjacent to the project site (+16 to +17 feet NAVD88), it is thus possible that future flood elevations in this range affect at least a portion of the project site toward the end of the project life. At the very least, additional, more detailed analysis would be needed to rule out this possibility.

In summary, the analysis by GeoSoils found that the project site would be safe from flooding and wave runup; however, the GeoSoils analysis was not based on conservative assumptions for erosion of the railroad berm. Under more conservative assumptions, coastal hazards could impact the subject property within the anticipated life of the proposed development, and therefore the project has not minimized risk as required by the Coastal Act. Thus, modifications to the project would be needed in order to be consistent with the Coastal Act. First, the development would need to be designed to protect from flooding to +23 to +24 feet NAVD88 (e.g., through elevation, floodproofing, or a combination of the two), in order to ensure that the project would be

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<sup>10</sup> With 5.7 feet (175 cm) of sea level rise, the shoreline position could retreat to within 65 feet of the project site; with 6.6 feet (200 cm) of sea level rise, the shoreline could retreat to about 40 feet from the project site.



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safe from hazards for the full extent of its anticipated life without relying on existing or future shoreline protection. If sufficient elevation or floodproofing is not integrated into the design, adaptation options are needed to ensure that the building can be modified or adapted in the future to minimize flood risk.

Second, as currently proposed, the northernmost and thus most seaward building (Building #1) contains a 3,500-square foot basement for additional storage space. As there is shallow groundwater present, sea level rise could impact the groundwater elevation, which could result in flooding of the structure even sooner. As such, the basement component would need to be eliminated from the proposed development to achieve consistency with the Coastal Act. And third, the Environmental Impact Report prepared for this project for CEQA purposes called for specific structural recommendations that consider the tsunami risks to the site, which would need to be incorporated into the proposed development to achieve Coastal Act consistency.

In short, there are a range of project modifications and adaptation options that could be applied here to minimize risks from geologic or flood hazards. However, the project must be denied because it cannot be found consistent with the Coastal Act's habitat requirements, and thus the Commission does not here require these project changes. Thus, although corrections would be possible absent the habitat inconsistencies, the Commission finds the proposed project has not minimized risks from geologic or flood hazards, and, as a result, it is not consistent with the Coastal Act's coastal hazards avoidance requirements as cited above.

### G. Visual Resources

#### ***Applicable Coastal Act Provisions***

The Coastal Act provides that the scenic and visual qualities of coastal areas are resources of public importance that must be protected, and that new development is required to protect public views and be designed to be visually compatible with the surrounding area. Section 30251 states:

*30251. The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

#### ***LCP Policy Guidance***

The LCP reiterates the Coastal Act's protection of the scenic and visual qualities of coastal areas and emphasizes the need for commercial development in the Pedro Point – Shelter Cove neighborhood (i.e., where the project is located) to be oriented to its

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coastal setting and compatible with the surrounding character, including through small scale and rustic design, including:

**LUP Policy 24 (Coastal Act 30251).** *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

**LUP Pg. C-54 (“Pedro Point – Shelter Cove”).** *Although located very near the shoreline, neither the buildings nor the uses orient to their coastal setting... There are several coastal planning issues to be dealt with in the preparation of a land use plan for this neighborhood: ... 3. The problems of orientation and appearance of the commercial areas...*

**LUP Pg. C-56 (“Pedro Point – Shelter Cove”).** *Small scale, rustic design and ample landscaping throughout the commercial development would complement the existing attractive design elements in the Pedro Point area.*

### **Analysis**

Together, the Coastal Act and the LCP, as guidance, provide that new development must be sited and designed to protect public coastal views as well as to be visually compatible with the character of surrounding areas. Due to geographic specificity, LCP language is particularly relevant guidance with regard to setting and character, and the LCP specifically indicates that commercial development in the Pedro Point – Shelter Cove neighborhood should be small scale and rustic, and better oriented to the coastal setting. The proposed development includes three two-story buildings, each of which is proposed to be stucco siding with only limited building articulation (see simulations in **Exhibit 3**). The proposed buildings include multiple windows but overall are fairly boxy in appearance and lack architectural details that would reduce the perception of visual massing from the street and neighborhood. While the development is adjacent to existing commercial buildings to the east, it abuts a vacant field to the west and is otherwise surrounded by residential structures that are smaller in scale.

The project as proposed would also maximize site coverage, provide limited open view corridors not oriented to the coast, and is not small-scale or rustic as stipulated by the LCP. As a narrow parcel that separates commercial from residential development, and that is adjacent to the old railroad berm and shoreline, proposed development should be designed to visually bridge this transition between the different uses, including in terms of its effect on the shoreline viewshed associated with the adjacent beach. As such, in order to be consistent with the Coastal Act, the buildings would need to be sited and designed to limit the amount of development on-site, include open view corridors to the coast and ocean, reduce massing, and incorporate more rustic architectural details and

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articulation that would enable it to appropriately protect public views and to be visually compatible with the surrounding shoreline area and neighborhood.

In short, there are a range of project modifications that could be applied to help limit such range of public view impacts. However, the project must be denied because it cannot be found consistent with the Coastal Act's habitat requirements, and thus the Commission does not here require these project changes. Thus, although corrections would be possible absent the habitat inconsistencies, the Commission finds the proposed project has not been sited and designed in a manner that adequately protects public views and character, and, as a result, it is not consistent with the Coastal Act's public view requirements as cited above.

### H. Public Access

#### ***Applicable Coastal Act Provisions***

The Coastal Act provides that maximum opportunities for public recreational access shall be provided, including in new development projects, taking into account considerations including the location of existing public accessways and parties responsible for maintenance of new public accessways, including:

**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.*

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

**30252.** *The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.*

#### **LCP Policy Guidance**

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The LCP further highlights that public recreational access to the coast must be maximized:

**LUP Policy 25 (Coastal Act 30252).** *The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.*

**IP Section 9-4.4300 (c) Purpose.** *Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resource conservation principles and constitutionally protected rights of private property owners.*

**IP Section 9-4.4400 (g) Purpose.** *Maximize public access to and along the shoreline, while protecting the established rights of private property owners...*

### **Analysis**

The project includes a proposed public recreational access pedestrian pathway spanning the length of the site from south to north, abutting the western property line, along and adjacent to the unnamed watercourse. The walkway would lead from San Pedro Avenue and connect to an existing coastal access pathway at the northern end of the site, near the Pedro Point Shopping Center, leading to Pacifica State Beach. The pathway is proposed to be paved with concrete and covered in artificial sod. As it is located along the western property line, where there is a downslope and significant grade change down to the adjacent watercourse, a concrete retaining wall and wood railing is proposed along the western property line. As such, the pedestrian walkway would not be set back from the property line and is located in ESHA, as previously described.

The only way that access pathways are allowed in ESHA is if they are low-key recreational features that require a location within the resource in order to function at all as an interpretive facility. The pathway in this case does not meet those criteria, including as it proposes hardscape that would significantly disrupt the habitat resources (e.g., as opposed to a pervious pathway absent hardscape that minimizes alteration of natural topography). Therefore, while the intent of the pedestrian walkway would be aligned with Coastal Act public access provisions, its proposed implementation would not be consistent with Coastal Act habitat requirements, and, as such, the proposed walkway cannot be approved in its current form.

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In addition, the proposed development is required by the LCP to have 50 parking spaces (47 spaces for the commercial area and 3 spaces for the residential units). However, the City approved a parking exception for the subject development to reduce the required parking to 26 spaces (24 spaces for the commercial area and 2 spaces for the residential units). The Pedro Point neighborhood already experiences highly constrained parking, and there are ongoing conflicts between nearby businesses and public access parking for the beach. Public access parking issues in this neighborhood were recently discussed by the Commission for CDP 2-19-0586 with regard to parking fees at the nearby Pacifica State Beach parking lot, and a CDP application was recently submitted to the Commission to allow for proposed pay parking machines in the parking lot adjacent to the subject site. In short, there are already public access parking deficits in the project area, and at a minimum, the project site needs to account for and accommodate all of its parking needs onsite to avoid exacerbating those issues, including the potential for site users to occupy scarce on-street public parking spaces. As such, a reduction in required parking at this location is inappropriate given existing constraints, and thus the proposed development does not provide adequate parking facilities and would be inconsistent with the public recreational access policies of the Coastal Act.

Again, it would likely be possible to apply project modifications to help address such parking impacts. However, the project must be denied because it cannot be found consistent with the Coastal Act's habitat requirements, and thus the Commission does not here require these project changes. Thus, although corrections would be possible absent the habitat inconsistencies, the Commission finds the proposed project has not been sited and designed in a manner that adequately protects public recreational access, and, as a result, it is not consistent with the Coastal Act's public recreational access requirements as cited above.

### **I. Violation**

A violation of the Coastal Act exists on the subject property including, but not limited to, a wooden skate ramp that was constructed and is operating on the subject property without benefit of a CDP (V-2-21-0002). The CDP application proposes to remove the unpermitted skate ramp and redevelop the subject parcel. If the skate ramp were to be removed, that would resolve this Coastal Act violation. However, Commission staff is recommending denial of the proposed project; if the project is denied, the unpermitted skate ramp will remain. In that case, Commission enforcement staff will address this violation accordingly.

Although development has taken place prior to submission of a CDP application, consideration of the development of the proposed CDP was made by the Commission solely based upon the policies of Chapter 3 of the Coastal Act. Commission review and action on this CDP does not constitute a waiver of any legal action with regard to the alleged violation, nor does it constitute an implied statement of the Commission's position regarding the legality of any development undertaken on the subject site without a CDP, or that all aspects of the violation have been fully resolved. Accordingly,

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the Applicant remains subject to enforcement action for engaging in unpermitted development.

### J. CEQA

Section 13096(a) of the Commission's administrative regulations requires that Commission approval of a Coastal Development Permit application be supported by a finding showing that the application, as conditioned by any conditions of approval, is consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment. In addition, CEQA Guidelines Section 15042 states that "[a] Responsible Agency may refuse to approve a project in order to avoid direct or indirect environmental effects of that part of the project which the Responsible Agency would be called on to carry out or approve."

The City of Pacifica, as lead agency under the California Environmental Quality Act (CEQA), prepared and certified an Initial Study/Mitigated Negative Declaration for the project in 2018. The Coastal Commission, acting as a responsible agency pursuant to CEQA, has reviewed and considered the information contained in the Initial Study/Mitigated Negative Declaration on the project. The findings in the staff report also address and respond to all issues pertaining to significant adverse environmental effects that were raised in public comments received prior to preparation of the staff report.

The Commission incorporates its findings on inconsistency with the Coastal Act at this point as set forth in full. As discussed above, the proposed development is inconsistent with various, applicable policies of the Coastal Act, and is denied on that basis. Section 21080(b)(5) of CEQA, as implemented by Section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects that a public agency rejects or disapproves. Accordingly, the Commission's denial of this project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, does not apply.

### K. Takings

As discussed above, the proposed project is fundamentally inconsistent with the sensitive resources, coastal hazards, visual resources, and public access policies of the Coastal Act and certified LCP. In other words, applying Coastal Act policies to the proposed project requires denial of the CDP application. If and when the Commission denies a project, however, a question may arise as to whether the denial results in an unconstitutional "taking" of the applicant's property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

*The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant*

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*or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Commission must assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the assurance that its actions are consistent with Section 30010.

In addition, the Commission has the authority, under Section 30010, to approve some level of development otherwise inconsistent with Coastal Act policies in order to avoid a “taking”.<sup>11</sup> In this situation, the Commission finds that the Applicant’s proposed project is inconsistent with the Coastal Act and that a denial would not constitute a taking, as the City approved a building and associated parking in the portion of the property within the City’s CDP permitting jurisdiction. Therefore, the Applicant has a right to develop the City-approved project (Building #3), and, as such, the Commission’s denial does not constitute a taking.

### **General Takings Principles**

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”<sup>12</sup> Article 1, section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.”

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee, supra*, 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass’n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). The Commission’s actions here would be evaluated under the standards for a regulatory taking.

In takings cases, the United States Supreme Court (“Court”) has identified two circumstances in which a regulatory taking might occur. The first is the “categorical”

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<sup>11</sup> See, for example, *Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 272; and *Surfrider Found. v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 257–58.

<sup>12</sup> The Fifth Amendment was made applicable to the states by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

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formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a “case specific” inquiry into the public interest involved (*Id.*). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when no productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless” (*Id.* at pp. 1016-1017 [emphasis in original]) (see *Riverside Bayview Homes, supra*, 474 U.S. at p. 126 [regulatory takings occur only under “extreme circumstances”]).<sup>13</sup>

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. (Penn Central) v. New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the regulation’s economic impact, its interference with reasonable, investment-backed expectations, and the character of the government action. (*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur.<sup>14</sup>

### **Final Government Determination**

Before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, however, it must demonstrate that the takings claim is “ripe” for review. This means that the takings claimant must show that government has made a “final and authoritative” decision about the use of the property.<sup>15</sup> Premature adjudication of a takings claim is highly disfavored, and the Supreme Court’s cases “uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it” (*Id.* at p. 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (e.g., *McDonald, supra*).

In this case, although the Commission denies the project proposed by the Applicant, the City-approved development within the City’s CDP permitting jurisdiction, Building #3, a two-story mixed-use building, is already authorized to be constructed on this site. Alternatively, the Applicant could withdraw the City CDP and resubmit a CDP to the Commission for consolidated permit processing, with a revised, reduced scope project

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<sup>13</sup> Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036).

<sup>14</sup> See *id.* (rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*).

<sup>15</sup> See, for example, *Williamson County Regional Planning Com. V. Hamilton Bank* (1985) 473 U.S. 172; and *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348.



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that better considers the coastal resource constraints on the parcel. Therefore, this denial is not a final adjudication of potential development within the Commission's jurisdiction, and the Applicant is unlikely to be successful in arguing that the Commission's denial is a taking because the takings claim is not "ripe."

### ***Development Allowed to Avoid a Taking***

The Commission interprets Section 30010, together with the *Lucas* decision, to mean that if Commission denial of the project would deprive an applicant's property of all reasonable economic use, the Commission may be required to allow some development even if a Coastal Act or LCP policy would otherwise prohibit it, unless the proposed project would violate background principles of state property and nuisance law (e.g. if it constitutes a nuisance under state law). In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property of some economically viable use.

As described above, the subject parcel is designated commercial, which allows for visitor-serving, commercial uses. The parcel is currently vacant, with the exception of a wooden skateboard ramp. As the parcel is within split CDP permitting jurisdiction, the City of Pacifica approved a CDP for the southernmost proposed building within the City's CDP permitting jurisdiction, referred to as Building #3 on the project plans. This building is a 3,346-square foot two-story, mixed-use building containing retail space on the first floor and two residential units on the second floor. Because residential development at this location is a conditional and discretionary use under the LCP, the City also approved a Use Permit to conditionally allow for the residential use to be located on the second floor, above a commercial, visitor-serving use. Thus, as the Applicant has the required City approvals to construct the building within the City's CDP jurisdiction on this subject parcel, under the *Lucas* takings analysis, the Commission's denial of the project would not be found to constitute a taking.

### ***Taking under Penn Central***

Although the Commission has already determined that the City's approval of the building within the portion of the parcel that is in the City's CDP permitting jurisdiction constitutes an economic use on this property and thus avoids a categorical taking under *Lucas*, a court may also consider whether the permit decision would constitute a taking under the *ad hoc* inquiry stated in *Penn Central*. This *ad hoc* inquiry generally considers the extent of the applicant's property interest, the regulation's economic impact, the regulation's interference with reasonable, investment-backed expectations, and the character of the government action.

### ***Property Interest***

In the subject case, the Applicant purchased the property (APN 023-072-010) for \$353,508 on April 26, 2011. On October 12, 2011, a Grant Deed was recorded as document number 2011-127592 in the Official Records of the County of San Mateo's Recorder's Office, effectively transferring and vesting fee simple ownership to the Applicant.

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### ***Reasonable Investment-Backed Expectations***

In this case, the Applicant's expectation that he could develop some type of structure on the property was both a reasonable and investment-backed expectation. The Applicant purchased the 37,538 square-foot (or 0.86-acre) property for \$353,508 in 2011. It was zoned then as it is now for visitor-serving commercial uses, not as open space. At the same time, the Applicant should also have been aware that the parcel was adjacent to a watercourse, and that such watercourses also include additional development constraints via the Coastal Act and the LCP. And, in fact, the Applicant was aware of these issues inasmuch as he had had conversations with Commission and City staff prior to acquisition regarding such development constraints as it affected his property (see also below). Thus, the Applicant did have an investment-backed expectation that he had purchased developable property, albeit one that was encumbered by a coastal resource likely to require project modifications, and his investment reflected that future development could likely be accommodated on some portion of the subject parcel, but that such development would need to address potential coastal resource constraints, primarily associated with the unnamed watercourse bordering the site.

The question remains whether the Applicant had an investment-backed expectation to construct three two-story buildings, a skate park, a graded pathway with retaining wall, and a parking lot. In order to analyze this question, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the Applicant's proposed use, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

When the Applicant purchased the property in 2011, there was no existing development on the site. The property was zoned for visitor-serving commercial uses, as is the adjacent property to the east. The adjacent property on the inland side of the subject lot was developed with commercial buildings. The adjacent property on the seaward side of the subject lot was vacant. Farther seaward, as well as to the south of the subject lot, were residential buildings. Thus, the property was zoned for visitor-serving uses and was located near both visitor-serving commercial and residential uses.

In communication with the City of Pacifica and Applicant,<sup>16</sup> including communications *prior* to the Applicant's purchase of the property, Coastal Commission staff expressed documented concerns in 2010, 2014, 2015, and 2018 with regards to potential impacts of development on the habitat resources located on and adjacent to the subject site, indicating that any proposed development should consider measures to avoid or reduce potential impacts on the adjacent watercourse area, which most likely would meet the one-parameter definition of wetlands under the Coastal Act, and stating that a one-parameter wetland delineation should be conducted. See **Exhibit 6** for prior communications from Coastal Commission staff related to the subject site and site constraints.

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<sup>16</sup> Personal telephone communications between Commission staff and Applicant between May 2010 and May 2018.

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At the time, Commission staff was not aware of the degree of wetlands and/or habitat resources present at the site because there had been no analysis and no wetland delineation, but the Applicant could have availed himself through the due diligence purchasing process to Commission reports to help understand the site constraints more clearly, including in consultation with City and Commission staff, but he did not. In fact, it was not until November 2019 that the Applicant finally provided the wetland delineation that was long advised, which delineation precipitated discovery more precisely of the constraints that affect this site, as described now in this report.

Consequently, while the Applicant may have had a reasonable investment-backed expectation that he had purchased a lot that could be developed, it was not reasonable to assume that the site could be developed to the extent the Applicant proposes, which in effect would develop the entirety of the site, encroach into required sensitive habitat, and develop all the way up to the bank of a watercourse that he was on notice could contain protected wetlands and sensitive species. In short, while investment-backed, the Applicant's expectation in this regard was not reasonable.

### ***Economic Impact***

The *Penn Central* analysis also requires an assessment of the economic impact of the regulatory action on an applicant's property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished.<sup>17</sup> If the Commission were to deny the Applicant the right to all development on the property as a whole, consistent with the requirements of the LCP and the Coastal Act, then the Applicant could argue that the economic impact of the Commission's action was significant enough to constitute a taking. However, in this instance, due to the City's prior authorization for one of the three proposed buildings that is located within the City's CDP permitting jurisdiction, the Applicant has the right to develop the proposed building within the City's CDP permitting jurisdiction, granting him ability to gain some economic benefit from his property. As such, while this decision does not allow for further development on the subject property and is not precisely the development proposed by the Applicant, the right to develop one two-story, mixed-use building provides for an economic use of the property.

### ***Character of the Government Action***

This final prong of the *Penn Central* test, namely the character of the government's action, has been downplayed in recent years.<sup>18</sup> Nevertheless, it is still part of the *Penn*

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<sup>17</sup> See, for example, *Tahoe Sierra Pres. Council, Inc., supra*, (citing *William C. Haas v. City and County of San Francisco* (9<sup>th</sup> Cir. 1979) 605 F. 2d 1117 (diminution of property's value by 95% not a taking)); and *Rith Energy v. United States* (Fed. Cir. 2001) 270 F. 3d 1347 (applying *Penn Central*, court finds that diminution of property's value by 91% not a taking).

<sup>18</sup> See, for example, *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 529 (governmental action that substantially advances a public purpose alone does not insulate the government from a takings claim). See also Lewyn, Michael, Character Counts: The "Character of the Government Action" In Regulatory Takings Actions, 40 Seton Hall L. Rev 597, 599 (2010) stating that *Lingle* holds that the existence of a

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*Central* analysis, and the Coastal Commission advances a legitimate public interest when it regulates various uses according to the Chapter 3 policies of the Coastal Act, specifically protection of coastal resources. With the Coastal Act, the Legislature sought to protect natural resources and the ecological balance of the coastal zone while allowing for future development consistent with the Act's policies (see, for example, Coastal Act Sections 30001(b), (c), and (d)).

### **Conclusion**

The Commission finds that the project as proposed is inconsistent with the Coastal Act and the certified Pacifica LCP and must therefore be denied. The Commission also finds, however, that the City's CDP authorization for the portion of the proposed project that is within the City's CDP jurisdiction provides for an economic use of the site. Further, given the significant impacts to coastal resources that would result from approval of the project, the inconsistencies with the Coastal Act described above, as well as legitimate questions as to whether there are alternatives to the proposed project currently before the Commission that would minimize impacts to coastal resources, the Commission finds that it is premature to approve any development located in the Commission's retained CDP jurisdiction area in order to avoid an unconstitutional taking of private property at this time. Specifically, this denial is not a final determination by the Commission of the potential for development overall on this site, as it does not preclude the Applicant from withdrawing the City-approved project and resubmitting a new CDP to the Commission for consolidated permit processing as originally recommended and applying for some other development or use of the overall site, such as a smaller-scale development that more carefully addresses the applicable Coastal Act and LCP policies, in particular as they relate to ESHA, wetlands, coastal hazards, public views, and public recreational access. The Commission, therefore, denies the proposed project because it is inconsistent with Chapter 3 of the Coastal Act, and denial of this project will not result in an unconstitutional taking of private property.

## 3. APPENDICES

### **A. Substantive File Documents<sup>19</sup>**

- GeoSoils Sea Level Rise & Coastal Hazard Analysis, dated March 12, 2019
- GeoSoils Supplemental Memo, dated August 20, 2019

### **B. Staff Contact with Agencies and Groups**

- City of Pacifica
- USFWS

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valid public purpose *standing alone* may not justify an otherwise problematic regulation (emphasis in original).

<sup>19</sup> These documents are available for review from the Commission's North Central Coast District office.