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# F11a

Appeal Filed: 7/5/2022  
Action Deadline: 9/12/2022  
Staff: Rainey Graeven - SC  
Staff Report: 8/19/2022  
Hearing Date: 9/9/2022

## STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION

**Appeal Number:** A-3-SCO-22-0033

**Applicants:** Sara and David Hoyle

**Appellants:** Commissioners Escalante and Hart

**Local Decision:** Approved by the Santa Cruz County Zoning Administrator on June 3, 2022 (County Coastal Development Permit Number 211298).

**Project Location:** Blufftop property at 4630 Opal Cliff Drive in the unincorporated Opal Cliffs area of Santa Cruz County (APNs 033-132-02).

**Project Description:** Demolition of an existing approximately 2,700 square-foot two-story residence and garage, construction of a new two-story approximately 3,000 square-foot residence and garage with an approximately 400 square-foot accessory dwelling unit (i.e., a total of approximately 3,400 square feet of residential development), and removal of an unpermitted blufftop deck, all fronted by a seawall at the base of the bluff and on the beach.

**Staff Recommendation:** A Substantial Issue Exists

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### IMPORTANT HEARING PROCEDURE NOTE

The Commission will not take testimony on this “substantial issue” recommendation unless at least three Commissioners request it. The Commission may ask questions of the Applicant, any aggrieved person, the Attorney General, or the Executive Director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the

appeal raises a substantial issue, testimony is generally (and at the discretion of the Chair) limited to three minutes total per side. Only the Applicant, persons who opposed the application before the local government (or their representatives), and the local government are qualified to testify during this phase of the hearing. Others may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which the Commission will take public testimony.

#### SUMMARY OF STAFF RECOMMENDATION

The Santa Cruz County-approved CDP would allow for demolition of an existing blufftop two-story house and the construction of a new blufftop two-story house and related residential development at 4630 Opal Cliff Drive in Santa Cruz County, all of which is reliant on a seawall fronting the site for site and structural stability. The property is located in the Live Oak beach area of Santa Cruz County (between the cities of Santa Cruz and Capitola), which is arguably the most popular coastal visitor destination in the County, and heavily used for coastal recreational access pursuits. The appeal contends that the County's approval of the project raises questions of consistency with the County certified Local Coastal Program (LCP) and the public access policies of the Coastal Act because: (1) the approved new residence relies on shoreline armoring to establish project and site stability, which is not allowed by the LCP; (2) the existing development that the armoring was authorized to protect is being demolished, and thus the armoring would protect new development, which is not allowed by the LCP; and (3) the armoring in question adversely affects public beach access, and its retention perpetuates such impacts, inconsistent with LCP and Coastal Act public access provisions.

In terms of coastal hazards, the LCP requires that new development proposed within areas subject to such hazards be sited and designed for stability and structural integrity without reliance on shoreline armoring as measured against at least a 100-year period. Here, the County identified a 100-year setback line that would actually be located seaward of the existing to-be-demolished residence, and it was derived based on the continued existence and maintenance of the armoring fronting the site. In other words, the new development proposed requires shoreline armoring to meet its LCP setback requirements, which is not allowed by the LCP. As such, the County's approval raises substantial issues regarding whether such outcomes are appropriate under the LCP. Further, the project also raises significant statewide issues related to the extent to which new development such as this is allowed to rely on shoreline armoring in areas subject to coastal hazards.

With respect to public access, the Coastal Act and LCP require public access to be protected, including requiring public recreational access opportunities to be maximized. The County-approved project allows armoring fronting the site to be used to protect the proposed new residential development, which, as indicated, is not allowed by the LCP. As the Commission is aware, armoring on the shoreline generally has considerable and significant adverse impacts to coastal resources, including contributing to the loss of beach area, which appears to be the case here. In fact, the armoring in question adversely affects lateral public beach access and general public beach use, including blocking all such access except at the lowest tides, and retention of this armoring would

perpetuate such impacts. As a result, the County's approval thus also raises substantial issues related to requirements to protect and maximize public beach and related access under the Coastal Act and the LCP.

In short, the County's approval allows a new residence and related development to rely on shoreline armoring when that is not allowed by the LCP.<sup>1</sup> In addition, the armoring in question negatively impacts public recreational access, particularly in terms of sandy beach access. For these reasons, staff believes that the County's approval raises substantial Coastal Act and LCP conformance issues related to coastal resource protection requirements, and recommends that the Commission find that a substantial issue exists and take jurisdiction over the CDP application for this project. If the Commission does so, then the de novo review of the merits of the CDP application would be scheduled for a future Commission meeting. The motion and resolution are found on page 5.

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<sup>1</sup> It should also be noted that at least one violation of the Coastal Act and LCP exists on the subject property, and the matter has been referred to the Commission's Enforcement division for investigation and consideration of future action to address it. See further discussion in the Violation section below.

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**EXHIBITS**

- Exhibit 1 – Location Map
- Exhibit 2 – Project Site Photo
- Exhibit 3 – County’s Final Local CDP Action Notice
- Exhibit 4 – Appeal of County’s CDP Action
- Exhibit 5 – Applicable Coastal Act and LCP Provisions

**CORRESPONDENCE**

## 1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that **a substantial issue exists** with respect to the grounds on which the appeal was filed. A finding of substantial issue would bring the CDP application for the proposed project under the jurisdiction of the Commission for de novo review 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 review of 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-SCO-22-0033 raises no substantial issue with respect to the grounds on which the appeal has 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-SCO-22-0033 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

## 2. FINDINGS AND DECLARATIONS

### **A. Project Description**

The County-approved project provides for: 1) demolition of an existing approximately 2,700 square-foot two-story residence and garage; 2) construction of a new two-story approximately 3,000 square-foot two-story residence and garage with an additional approximately 400 square-foot accessory dwelling unit (ADU) (for a total of about 3,400 square feet of residential development), located closer to the blufftop edge than the existing to-be-demolished residence; and 3) removal of an unpermitted blufftop deck,<sup>2</sup> all of which is fronted by armoring at the base of the bluff and on the beach. See pages 19-31 of **Exhibit 3** for the County-approved project plans.

### **B. Project Location and Background**

The County-approved project is located on an oceanfront blufftop property at 4630 Opal Cliff Drive in Santa Cruz County. This area is generally referred to as Opal Cliffs, but it is technically part of the larger unincorporated Live Oak beach area of Santa Cruz County, which is located between the cities of Santa Cruz and Capitola. The Live Oak beach area is arguably the most popular coastal visitor destination in the unincorporated County, and it is heavily used for coastal recreational access pursuits. Opal Cliff Drive is about two-thirds of a mile long with the project site located along the more downcoast portion of Opal Cliffs nearer to Capitola. Opal Cliff Drive is also lined with an almost

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<sup>2</sup>The deck is the subject of an open Commission enforcement case, and is further described in the Violation section of this report.

unbroken string of private residential developments between the road and the blufftop edge, which limits the public's ability to even see the ocean or shoreline, let alone access it. In fact, the only place where the public can access the shoreline from Opal Cliff Drive is at Opal Cliffs Park just upcoast of the subject site, where free beach access and a beach stairway is provided by Santa Cruz County.<sup>3</sup> The next closest vertical accessways are located about a half-mile up and downcoast from the park (at 41st Avenue upcoast<sup>4</sup> and Hooper Beach downcoast in Capitola).<sup>5</sup> There is a series of well-used surf breaks all along Opal Cliffs, including the surf break known as "Trees" that is just seaward of the subject property, and which is named for the trees that historically lined the bluff just downcoast from the subject site, some of which still stand today.

The main portion of the beaches accessed via Opal Cliffs Park (known locally as "Privates Beach" or "Key Beach") are just upcoast from the project site, and these beach areas are connected to the beach area fronting the site, albeit beach access there is more transitory due to armoring. Privates/Key Beach provides the only true sandy beach experience along Opal Cliffs during most tides. There is also a sandy pocket beach, sometimes referred to as Trees Beach, that is located just downcoast of the subject property, but it is mostly inaccessible to the public due to an armored promontory just downcoast of this site at its upcoast end and a bedrock promontory at the base of Cliff Drive near Hooper Beach at its downcoast end.<sup>6</sup> Other beaches along Opal Cliffs are either mostly inaccessible, like Trees Beach, or are submerged, sandwiched between the ocean and inland armoring except during the lowest of tides. The beach context in this area, with limited access and limited windows of availability, emphasizes the importance of the beaches fronting this site, and the importance of weighted consideration when residential development reliant on shoreline armoring, such as is the case here, is considered. In any event, and notwithstanding the limited area, the beaches and shoreline below the homes seaward of Opal Cliff Drive are heavily used by the public for tide-pooling, beach walks, fishing, and access to the ocean for surfing, paddle-boarding, etc., and Privates/Key Beach fronting this site provides for general sandy beach use in a larger sandy beach area.

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<sup>3</sup> The Santa Cruz County Parks Department recently took over management of Opal Cliffs Park from the Opal Cliffs Recreation District, the later entity which recently dissolved and no longer exists. The Recreation District previously required a fee to enter the park and access the beach, all without necessary CDP authorization, which was the subject of longstanding Commission enforcement efforts. Those efforts proved successful, including as the fee and other impediments to general public access have been eliminated, and the Commission is working with the County on further and near-term improvements to the park to make it even more inviting in the general public.

<sup>4</sup> Via a stairway at the overlook and surf spot known as "The Hook".

<sup>5</sup> The Hooper Beach stairway is owned and maintained by the City of Capitola. The stairway has been periodically closed in the last few years due to varying sand elevations that leave a large gap between the bottom of the stairs and the beach, and/or the bottom-most section of the stairs being washed out during winter storms.

<sup>6</sup> Trees Beach, in contrast to Privates/Key Beach, is also mostly unarmored, including due to the Commission denying at least one proposed seawall in this area (CDP Application 3-02-060 (Medeiros)).

The bluffs along Opal Cliffs are steep and approximately 60 feet tall, with roughly the lower third consisting of a rocky marine sedimentary base, and the upper two-thirds consisting of softer soil-like terrace deposits. Portions of the Opal Cliffs bluffs are armored, portions are unarmored, and there are other portions where only remnants of former armoring remain. Past Commission cases along this stretch of coast have also shown that the armoring along Opal Cliffs is both permitted and unpermitted.

The bluff and beach fronting the subject site is armored with an approximately 230-foot-long vertical seawall that spans three parcels (4610, 4630, and 4640 Opal Cliff Drive)<sup>7</sup> with the subject site being the center parcel on which about 61 linear feet of that seawall is located. That seawall is sandwiched between a roughly 150-foot-long revetment on its upcoast side, and another vertical seawall (extending another some 300 feet or so) with upper bluff shotcrete on its downcoast side.<sup>8</sup>

See **Exhibit 1** for a location map and **Exhibit 2** for a project site photo.

### **C. Santa Cruz County Approval**

On June 3, 2020, the Santa Cruz County Zoning Administrator approved a CDP for the above-described project. The County's Final Local Action Notice for this CDP action was received in the Coastal Commission's Central Coast District Office on Wednesday, June 22, 2022 (see **Exhibit 3**). The Coastal Commission's ten-working-day appeal period for this action began on Wednesday, June 23, 2022 and concluded at 5pm on July 7, 2022. One valid appeal was received during the appeal period (see **Exhibit 4**).<sup>9</sup>

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<sup>7</sup> The seawall was originally constructed under County-issued CDP 3-SCO-93-029 in 1993. A Commission-issued CDP authorized an approximately two-foot-wide and eight-foot-deep expansion of the seawall seaward and beneath its previously authorized footprint in 2007 (CDP Number 3-07-031). It was recently discovered that the last approximately 10 feet of the seawall expansion fronting the site immediately downcoast from the current appeal site was not initially constructed, and the adjacent downcoast property owners have recently attempted to complete that construction. However, that effort has proven to be prohibitively difficult due to the relatively small tidal window coupled with typical accumulation of sand in front of the seawall. As part of such construction, plastic cylinders adjoined to one another and the seawall itself via metal cable were installed, none of which was permitted. It is unclear whether the cylinders were intended to serve as temporary armoring or were intended to help prevent sand accumulation fronting the seawall or for some other purpose. Although most of the cylinders were removed promptly upon request, a few cylinders became dislodged and have been witnessed in the tidal zone, partially buried in sand. The Commission has an open violation case related to the cylinders, all of which is associated with the downcoast property.

<sup>8</sup> The downcoast seawall juts out approximately 100 feet further seaward than the general orientation of the bluffs along Opal Cliffs (see photos of the areas on page 6-7, 7, and 12 of Exhibit 2 in CDP Appeal/Application # A-3-SCO-20-0027 (Sisney SFD)), and is one of the largest – if not the largest – impediments to public access along all of Opal Cliffs, blocking access between Privates/Key Beach and Trees Beach. That seawall fronts a residential property where a new residence was approved reliant on it, and the Commission took jurisdiction over that CDP application on appeal.

<sup>9</sup> The Applicants claim that the appeal was not properly filed, and that the appeal should be dismissed (see Applicants' letter, from their counsel, John J. Flynn III of Nossaman LLP, dated August 8, 2022 and located in the correspondence package for this item). The Applicants' counsel makes four main arguments, asserting that: (1) the CDP application to the County listed the architecture firm representing the client as the applicant, but the Commission's Notification of Appeal (NOA) listed the property owners as the applicant, and, as a result, failed to list the actual applicants' address; (2) the NOA did not list the

#### D. 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 County CDP decision is appealable to the Commission because the project site is located between the first public road and the sea, within 300 feet of the inland extent of the beach and the seaward face of the coastal bluff, and within an area that constitutes a sensitive coastal resource area under the LCP.

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., 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 with respect to the grounds on which the appeal was filed that the Commission, in the exercise of its discretion,

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address of the appellants; (3) the NOA didn't identify commenters at the local level; and (4) the NOA didn't identify persons known to have an interest in the proceedings. As for (1), because the firm is the agent of the property owners and the address listed on the application was the property owners address (and, in fact, the County's notice of final CDP action submitted to the Commission listed the property owners as the applicants in this case, which was reasonably relied on by the Commission), this is at most a minor technicality, and the Applicants' counsel has shown no evidence that this caused any confusion nor demonstrated that this prejudiced the Applicants in any way (see, *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal. App. 4th 1416 (substantial compliance with the Bagley-Keen Act, was sufficient, especially where there was no prejudice)). In addition, an applicant by definition is the property owner, and an applicant's representatives are just that, representatives of the applicant. And the Commission's long practice is to list the property owner as the applicant as a general rule. The Applicants here try to suggest a CDP application construct that is simply inaccurate as a basis for their claim in the first place. As for (2), this is an appeal by two Coastal Commissioners, and the Commission's address (i.e., the Appellants' address in this case) was on both the NOA envelope and the NOA letterhead. As for (3), the Appellants must only provide information of commenters at the local level "where such information is available." The Appellants were not aware of any such information. And (4), the Appellants are required to include "all other persons known by the appellant to have an interest in the matter on appeal" (emphasis added), and there is no evidence the Appellants knew of any such people. Finally, the Applicants further contend that "it is not clear the... appeal... was timely filed." However, it actually is clear. As stated herein, the appeal period extended from June 23, 2022 to 5pm on July 7, 2022, and the appeal was filed on July 5, 2022 during the time that the appeal period was open and running.



finds to be significant enough to warrant the Commission 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. In this case, the Applicant has not waived that deadline, and the Commission is required to address the substantial issue portion of the appeal within the applicable 49 working days (i.e., by September 12, 2022; after the Commission’s September meeting and before the Commission’s October meeting), and thus this matter has been scheduled for the Commission’s September meeting.

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.<sup>10</sup> At this stage, the Commission may only consider issues brought up by the appeal. In reviewing the substantial issue question, 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 testimony 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, aggrieved persons, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

If, following any 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, such as those that apply to this case, the Coastal Act’s public access

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<sup>10</sup> 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 significant question” (see California Code of Regulations, Title 14, Section 13115(b) (CCR)). CCR Section 13115(c) provides, consistent 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.

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

### **E. Summary of Appeal Contentions**

The appeal contends that the County’s approval of the project raises Coastal Act access and LCP consistency questions because: (1) the approved new residence relies on shoreline armoring to establish project and site stability, which is not allowed by the LCP; (2) the existing development that the armoring was authorized to protect is being demolished, and thus the armoring would protect new development, which is not allowed by the LCP; and (3) the existing armoring impedes lateral access and public beach use, inconsistent with LCP and Coastal Act public access provisions. See **Exhibit 4** for the full text of the appeal.

### **F. Standard of Review**

The standard of review for this phase of the appeal is the Santa Cruz County LCP and the Coastal Act’s public access provisions. The appeal alleges that the County-approved project does not conform with that standard of review, and the Commission here is charged with evaluating those allegations in light of LCP provisions and Coastal Act public access provisions.

### **G. Substantial Issue Determination**

#### **1. Coastal Hazards**

The appeal contends that the approved project is inconsistent with the coastal hazard provisions of the LCP, including with respect to the siting of the approved residence. The LCP’s coastal hazards provisions (see **Exhibit 5**) require that new development proposed within areas subject to coastal hazards, such as this location, be sited and designed for stability and structural integrity without reliance on shoreline armoring as measured against at least a 100-year period.<sup>11</sup> Further, the LCP only allows shoreline armoring “to protect existing structures from a significant threat” (LUP Policy 6.2.16). Thus, the LCP has a two-part minimum 100-year stability requirement: first, there must be a portion of the site in question sufficient to accommodate the proposed development that will be stable for at least 100 years in a pre-development (i.e., a no project) scenario, and without reliance on structural development and/or armoring to achieve that safe siting; and second, any development then introduced onto the site must also be stable for its lifetime, evaluated analytically for at least 100 years, and without reliance on extraordinary engineering measures and/or armoring. The LCP

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<sup>11</sup> See, for example, LUP Policy 6.2.15, which requires that development not be dependent on any shoreline or coastal bluff protection structures, and IP Section 16.10.070(H)(1)(c), which requires that the 100 years of stability be established through the use of appropriate setbacks and siting, and without reliance on any proposed engineering measures “such as shoreline protection structures, retaining walls, or deep piers”.

further requires that site design minimize grading including specifically that “foundation designs should minimize excavation or fill” (LUP Policy 6.3.9(c)).

In this case, the Applicants’ geologic investigation<sup>12</sup> states that “[t]he construction of the seawall has frozen the base of bluff in place, because it will no longer retreat and undermine the overlying bedrock and Marine Terrace deposits.” In other words, that geologic investigation finds that the base of the bluff has been fixed since installation of the vertical seawall in 1993, and that the base of the bluff should remain fixed in its current location for the life of the proposed project (i.e., evaluated against the next 100 years). The investigation does, however, anticipate some terrestrial (i.e., upper bluff) erosion, likely in response to long duration storms and nearby earthquakes, stating “it is our opinion that the rock face exposed above the top of the [sea]wall will gradually dilate and fail within the next 100 years [...] eventually lay[ing] back to an angle of about 35 degrees, through repeated shallow landsliding and erosion events.”

In other words, the position of the 100-year coastal hazard setback line as determined by the applicant’s consultant, which is seaward of the current residential development envelope, is predicated on the assumption that the seawall will be maintained and/or bolstered as needed to continue to provide the same degree of protection as it has for the nearly 30 years since its installation. The geologic investigation does not use an estimated annualized erosion rate based on periods when the armoring was not present (previous estimates for the four parcels downcoast were estimated at 0.88 feet/year (measured from 1928 to 1996) and 0.98 feet/year (measured from 1950 to 1996))<sup>13</sup>, nor does it assume an analytic scenario where no armoring is present to derive the LCP required setback. Rather, the Applicants’ consultants relied on the existing armoring to develop the setback line, including based on assumptions that the armoring will be maintained, including through improvements, enhancements, and/or augmentations to provide for its continued function.<sup>14</sup> And, in fact, it is not uncommon for vertical seawalls to experience erosion behind, underneath, and/or adjacent to the seawall as witnessed by the immediately adjacent vertical seawall,<sup>15</sup> and also nearby vertical seawalls.<sup>16</sup> And

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<sup>12</sup> “Geologic Investigation” by Greg Easton, dated August 25, 2021 and updated March 1, 2022 (see Appendix A).

<sup>13</sup> See Appendix A in Appeal Number A-3-SCO-20-0027 (Sisney SFD).

<sup>14</sup> The geologic investigation does not acknowledge that there is a void beneath/behind the seawall along both of the immediately downcoast two parcels. It also does not acknowledge that the last approximately 10 feet of the seawall expansion authorized under CDP 3-07-031 has not been constructed, nor has the contractor been able to complete its construction in the few years’ time since it was discovered that it was not constructed pursuant to CDP 3-07-031. And thus, there are outstanding questions whether the remaining 10 feet can or will be constructed; whether and under what timeline voids may increase in size; and how those variables may affect the seawall as a whole.

<sup>15</sup> The armoring fronting 4660 Opal Cliff Drive (two properties downcoast from the subject site) is deteriorating and the bluff is continuing to erode in ways that are precipitating proposed armoring projects at the site, including a recent augmentation authorized by the County in 2018 (for upper bluff shotcrete and 27 cubic yards of fill behind the seawall), as well as an unfiled CDP application pending at the Commission for a new seawall foundation expansion for the upcoast portion of this same seawall.

<sup>16</sup> The seawall fronting 4850 Cliff Drive (located approximately 1,000 feet downcoast from the subject site) has been modified/expanded to include a sea cave fill on the upcoast end of the seawall (see CDP Number A-3-CAP-99-023, as amended), and the seawall fronting 4460 Opal Cliff Drive (located

thus, given that the seawall is nearly 30 years old, it is reasonable to assume, and is in fact acknowledged by the Applicants' geotechnical investigation<sup>17</sup> that the existing seawall is likely to come to the end of its useful life and/or that the armoring itself would require maintenance/improvements before the end of the required 100-year evaluation period. Therefore, the County-approved 100-year coastal hazard setback line relies on existing armoring that will likely require maintenance/improvements and/or come to the end of its useful life well before the required 100-year evaluation period. And perhaps more fundamentally, as indicated above, armoring is not allowed to protect new development such as the new residence here under the LCP, yet that is exactly what the County approved.

Finally, the Applicants' geotechnical investigation recommends a pier foundation with piers embedded a minimum of 20 feet into the bluff, raising additional questions including: 1) whether the proposed foundation itself qualifies as shoreline armoring (and thus whether the proposed project is reliant upon not just existing but also new armoring to establish the requisite 100-year development envelope); and 2) whether the proposed pier foundation would constitute major landform alteration, and whether it can meet the LCP's requirement that foundation designs minimize excavation, and if it would be more difficult to remove compared to other foundation types should it be necessary in response to either marine or terrestrial erosion.

For all of the above reasons, the County's approval raises a substantial LCP conformance issue with respect to coastal hazards.

## **2. Public Access/Recreation**

The appeal contends that the approved project's reliance on armoring when such armoring is not allowed under the LCP means that the armoring will remain and will continue to significantly adversely impact public access, particularly related to the beach, inconsistent with both the LCP and the Coastal Act. Specifically, the appeal contends that the County's approval allows the existing armoring to remain even though the existing house (for which the armoring was previously authorized because it was deemed both an existing structure and in danger from erosion) would be demolished and replaced with a new house, and that the armoring will thus be protecting new development inconsistent with the LCP, and that the continued presence of this armoring will lead to ongoing and worsening public access impacts along the stretch of beach seaward of the project site.

With respect to public access, the California Constitution mandates the protection and enhancement of public access to and along California's coastline. The Coastal Act redoubles these protections, including mandating that public recreational access

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approximately 800 feet upcoast from the subject site) has contacted Commission staff regarding their intention to submit an application for seawall modification and/or seawall redevelopment.

<sup>17</sup> "Geotechnical Investigation" by Pacific Crest Engineering Inc., dated August 26, 2021. That investigation acknowledges that "Coastal protection measures have finite lifespans and typically require maintenance or repair during their lifespan. Continued and routine maintenance of the existing coastal protection system will be essential to reduce (but never eliminate) the potential for wave action to damage structures landward of the coastal bluff."

opportunities to and along the California coastline be maximized (see Coastal Act Section 30210 in **Exhibit 5**). Coastal Act Section 30210's direction to maximize such access opportunities represents a different threshold than to simply provide or protect such access, and it is therefore fundamentally different from other like provisions in this respect. Under Section 30210, the Legislature has declared that it is not enough to simply provide public access to and along the coast, and it is not enough to simply protect public access, rather such public access must also be maximized. This terminology distinguishes the Coastal Act and provides fundamental direction to projects along the California coast that raise public access issues.

The County's LCP also provides protection for public beach access and recreation (see, for example, LUP Policy 7.7.10), including by: prohibiting non-recreational structures and incompatible uses on beaches (LUP Policy 7.7.4), encouraging access and connections between parks (LUP Policy 7.7.6), and requiring lateral access dedications where new development may affect public lateral access along beaches (LUP Policy 7.7.12). Other relevant Coastal Act provisions require that development not interfere with certain types of existing access (Section 30211); require access to be provided in new development projects (Section 30212); require that lower cost recreational uses and areas be protected and provided (Section 30213); require coastal areas suited for water recreational activities to be protected for that purpose (Section 30220); require oceanfront land to be protected for recreational uses (Section 30221); and require that upland areas be protected for coastal recreational uses (Section 30223). See **Exhibit 5** for the cited Coastal Act and LCP policies.

As described previously, the armoring in question occupies public beach space, limits lateral public beach access, and adversely effects public access overall. The County neglected to analyze these problems with the armoring, despite it being a required element of the proposed new residential project, and despite such armoring not being allowed under the LCP to protect new development. The County also neglected to analyze how and whether the project may serve to extend the anticipated life of the existing armoring and thus prolong its adverse coastal resource impacts, especially because the proposed project's hazard setback line is predicated on the seawall being maintained and modified as needed to continue to provide the same degree of protection as it has to date. In addition, it is worth noting that such coastal resource impacts due to the armoring are only expected to increase over time, and will only be further exacerbated as the severity and effects of sea level rise become more apparent.

For these reasons, the County-approved project also raises a substantial issue with respect to the approved project's conformance with the above-cited Coastal Act and LCP public access and recreation policies.

### **3. The "Five Substantial Issue" Factors**

When considering a project on appeal, the Commission must first determine whether the project raises a substantial issue of LCP (and Coastal Act, as applicable) conformity, such that the Commission should assert jurisdiction over the CDP application 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 and Coastal Act (where applicable, such as in this case) conformance. The Commission's regulations

lay out the following five factors that it may consider when determining whether the issues raised in a given appeal are “substantial”: the degree of factual and legal support for the local government’s decision; the extent and scope of the development as approved or denied by the local government; the significance of the coastal resources affected by the decision; the precedential value of the local government’s decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance (see CCR Section 13115(c)). 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.

In this case, these five factors, considered together, support a conclusion that the County’s approval of a CDP for this project does raise a substantial issue of Coastal Act public access and LCP conformance. In terms of factual and legal support, the appeal raises valid questions regarding the County’s interpretations of the LCP’s coastal hazards provisions. In particular, the LCP requires that new development proposed within areas subject to coastal hazards be sited and designed for stability and structural integrity without reliance on shoreline armoring as measured against at least a 100-year period. Here, the County identified a 100-year setback line that would actually be located seaward of the existing to-be-demolished residence, and that was derived based on the continued existence and maintenance of the armoring fronting the site. In other words, the new development proposed requires shoreline armoring to meet its LCP setback requirements, which is not allowed by the LCP. Additionally, the County did not consider the undermining beneath/behind the seawall along the two immediately downcoast properties for the purpose of establishing the LCP-required 100-year setback line.

With respect to public access and recreation, the armoring in question occupies public beach space, blocks lateral public beach access, and generally adversely affects public access.<sup>18</sup> However, the County did not consider or analyze the problems associated with the armoring, despite it being a required element of the proposed new residential project, and despite such armoring not being allowed under the LCP to protect new development. In addition, such coastal resource impacts due to the armoring are only expected to increase over time, and will only be further exacerbated as the severity and effects of sea level rise become more apparent.<sup>19</sup>

In terms of the extent and scope of development, the new house is not sited and

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<sup>18</sup> The adverse public recreational impacts of seawalls are well-documented. See, for example “The Impacts of Sea-level rise on the California Coast,” Cal. Climate Change Center, Pacific Inst. (2009) and “The Effects of Armoring Shorelines—The California Experience” (2010). Also see the Commission’s sea level rise guidance document, and see Commission CDP and Appeal Numbers 3-07-019 (Pleasure Point seawall), 3-09-025 (Pebble Beach Company Beach Club Seawall), 3-09-042 (O’Neill Seawall), 2-10-039 (Land’s End Seawall), 3-14-0488 (Iceplant LLC Seawall), 2-17-0702 (Sharp Park Golf Course), 3-16-0345 (Honjo), 2-16-0684 (Aimco), A-3-SCO-06-006 (Willmott), 3-12-030 (Pebble Beach Company), 2-16-0784 (2 Mirada), and 2-17-0438 (AMJT Capital/BCPUD)).

<sup>19</sup> In addition to the citations in the previous footnote, see, for example, “A Holistic Framework for Evaluating Adaptation Approaches to Coastal Hazards and Sea Level Rise: A Case Study from Imperial Beach,” Revell, King, Giliam, Calili, Jenkins, Helmer, Nakagawa, Synder, Ellis, and Jamieson (2021).

designed to avoid the need for coastal armoring as required by the LCP. On the contrary, it relies on existing armoring that blocks and otherwise impedes public beach access along this stretch of coast, which argues for substantial issue.

In terms of potential precedential and prejudicial impact, the approved project could impact future County interpretations of its LCP with respect to the important issues of shoreline armoring and new development and how armoring is and is not allowed in such contexts, particularly as it relates to developing required 100-year coastal hazard setbacks. The approved project also has the potential to prejudice the County's ongoing efforts to update the coastal hazards components of its LCP for the same reasons, all of which needs to be understood in light of best available science and understandings associated with anticipated sea level rise and increased storm frequency scenarios.

In terms of the significance of the coastal resources involved, projects that have the potential to adversely affect finite and irreplaceable bluff, shoreline, and beach areas, such as this project, affect significant coastal resources. The significant coastal resources at play in this project again argue for a substantial issue finding.

Finally, in terms of whether the appeal raises only local issues as opposed to regional or statewide issues, the use of armoring to protect new development raises issues of statewide significance. Taken together, the County-approved CDP for the project does not adequately address Coastal Act public access and LCP coastal resource protection issues, and the five factors, individually, and on the whole, support a finding of substantial issue as to conformity of it with the Coastal Act and the certified LCP.

For the reasons stated herein, the Commission finds that Appeal Number A-3-SCO-22-0033 raises substantial Coastal Act and LCP conformance issues in terms of coastal hazards and public access. Therefore, the Commission finds that **a substantial issue exists** with respect to the County-approved project's conformance with the certified LCP and the public access policies of the Coastal Act, and takes jurisdiction over the CDP application for the proposed project.

#### 4. Violation

Violations of the Coastal Act and LCP exist on the subject property including but not necessarily limited to, the construction of a blufftop deck and associated railing that spans the entire width of the seaward-facing side of the property and extends to the blufftop edge without a CDP. Commission staff became aware of the unpermitted deck through its post-certification review of the subject project as the County CDP application was pending locally, and identified it as a violation at that time, including because there are no CDP exemptions or exclusions that would apply for constructing the deck in this location, and therefore its installation required a CDP. Commission staff highlighted the applicability of the CDP requirement for the deck, amongst other issues, in a letter to the County Zoning Administrator dated April 12, 2022. In response to that letter, the Zoning Administrator modified the pending County CDP to address this violation by requiring removal of the deck (see Condition III on page 16 of **Exhibit 3**). If the Commission were to find this appeal not to raise any substantial issues, compliance with the aforementioned condition in the County CDP would resolve the violation moving forward, but that condition does not require any mitigation for impacts to coastal

resources that may have accrued already due to the unpermitted development, nor does it resolve any accrued civil liabilities associated with the violation. However, since the Commission finds this appeal to raise a substantial issue, the CDP will come back to the Commission for de novo review, and staff will work to resolve the violation moving forward as well as potentially address accumulated impacts and other liabilities through the de novo permit action. In other words, regardless of the staff recommendation and Commission action on this appeal, the Commission's enforcement staff would have continued to work towards full resolution of the violation.

Although development has taken place prior to submission of the CDP application, consideration of this appeal by the Commission is based solely upon the LCP and applicable policies of the Coastal Act. Commission review and action on this appeal does not constitute a waiver of any legal action with regard to the alleged violations (or any other violations), nor does it constitute an implied statement of the Commission's position regarding the legality of the development undertaken on the subject site without a coastal permit, or of any other development.

### **5. Information Needed for De Novo Review of the CDP Application**

Although the Commission can and will move forward to de novo review of this CDP application based on the material thus far developed through the County's CDP process, the Commission notes that it would be helpful if that record were supplemented to address some of the analytic and information gaps present and discussed in this report. For example, without a geotechnical evaluation (based on best available science and information) that (1) identifies the required 100-year setback without reliance on shoreline armoring, including with consideration to the lack of seawall footing and the void underneath/behind the seawall along the two downcoast properties and when evaluated based on the removal of the existing armoring fronting the site; and (2) evaluates the use of a 'standard' foundation as opposed to deep piers, the Commission may not be in a position to explicitly and specifically determine what it would take to provide for a Coastal Act and LCP conforming development at this location (e.g., in terms of the 100-year required setback, etc.). In other words, without certainty on these points, there simply may not be the type of information available to make the required CDP approval findings. That is not to say that a CDP approval would be guaranteed by submittal of such information, rather it is to say that the lack of such information could make CDP denial more likely, and CDP approval less likely. The Applicant is encouraged to work with Commission staff on this point, and to supplement the record accordingly as soon as possible.

## 3. APPENDICIES

### **A. Substantive File Documents<sup>20</sup>**

- Geologic Investigation, by Greg Easton, dated August 25, 2021
- Geologic Investigation Addendum, by Greg Easton, dated March 1, 2022

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<sup>20</sup> These documents are available for review in the Commission's Central Coast District office.



- Geotechnical Investigation, by Pacific Crest Engineering, Inc., dated August 26, 2021
- Commission CDP File 3-07-031, including amendments A1 and A2

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

- Santa Cruz County Community Development and Infrastructure Department