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# F13a

Appeal Filed: 7/2/2021  
Substantial Issue Found: 9/9/2021  
Action Deadline: None  
Staff: Honora Montano-SF  
Staff Report: 1/20/2023  
Hearing Date: 2/10/2023

## STAFF REPORT CDP APPLICATION

**Application Number:** A-2-MAR-21-0048

**Applicants:** Graham Groneman and Brett Sibley

**Project Location:** Mostly vacant bluff face property adjacent to Muir Beach at 183 Sunset Way in the unincorporated Muir Beach community of Marin County (APN 199-235-66)

**Project Description:** Construction of a new roughly 3,000 square-foot single-family residence (2,160 square-foot residence, 430 square-foot garage, and 369 square-foot storage space), a new septic/leach field system fronted by a buried concrete pier system, after-the-fact authorization of an unpermitted lot merger, and related new residential development on a vacant bluff face property, all fronted by existing unpermitted armoring.

**Staff Recommendation:** **Approval with Conditions**

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### SUMMARY OF STAFF RECOMMENDATION

Marin County approved a coastal development permit (CDP) for a new roughly 3,000 square-foot single-family residence (including a detached garage and detached storage structure) with a new septic system and new shoreline armoring on an undeveloped bluff face property at 183 Sunset Way in the unincorporated Muir Beach area of Marin County. That CDP approval was appealed to the Commission, and the Commission found that the appeal raised substantial Coastal Act and LCP conformance issues and took jurisdiction over the CDP application following a public hearing in late 2021. This report and recommendation concerns that CDP application for the proposed project, which is unchanged from the project that the County approved other than the added

request for after-the-fact authorization of an unpermitted lot merger (currently being tracked by the Commission as a Coastal Act/LCP violation).

The primary issues with the proposed development are coastal hazard- and natural landform alteration-related and are focused on the bluff face nature of the site and the armoring associated with the project, both new proposed armoring and existing unpermitted armoring. In terms of the bluff face nature of the site itself, the site slopes steeply down from Sunset Way to the beach and ocean, and the Commission's Coastal Geologist, Dr. Joseph Street, has reviewed the relevant project materials, viewed the site from the adjacent beach, and determined that the proposed development would lie seaward of the blufftop edge. As a result, it is impossible to meet LCP blufftop setback requirements because essentially the entire site is a bluff face and does not have blufftop space to accommodate the LCP-required development setback from the blufftop edge. In short, the proposed development is fundamentally inconsistent with the LCP on this point.

With respect to the armoring issues, the proposed project includes a series of drilled concrete piers fronting the septic system leach field (that would be sited even further down the slope than the proposed residence), and also includes a series of concrete retaining walls, slabs, and additional drilled concrete piers stepping down the slope as part of the residential structures' foundations to help mitigate for the risks of building on a steeply sloping bluff face. All of these proposed project elements are designed to help maintain stability through mitigating the effect of, and impeding, natural bluff erosional processes, and thus function as coastal armoring in that sense. In addition, the base of the bluff at the site contains unpermitted riprap and unpermitted concrete/grouted rock retaining walls that also function as coastal armoring.<sup>1</sup> The Applicants' geotechnical evaluations rely on the presence of all such armoring for stability, which is prohibited by the LCP for new development such as this. Thus, even if there were an appropriate blufftop development site, which there isn't, the project is also fundamentally inconsistent with the LCP regarding armoring. By extension and given the ways in which armoring adversely impacts natural processes, including natural beach formation (and here the proposed project would lead to more than 150,000 dollars' worth of such impacts applying the Commission's typical methodologies), the proposed project is also inconsistent with other LCP (and the Coastal Act as it relates to public access and recreation) coastal resource protection requirements.

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<sup>1</sup> The unpermitted walls and riprap extend across five properties near the base of the bluffs, including the Applicants' property. The Commission's enforcement division is aware of these violations and has opened an investigation. Given the complexities of different ownerships, and the uncertainties associated with the way that removal of these structures might impact the safety and stability of adjacent structures, staff is not recommending requiring removal of any portion of such unpermitted armoring as part of this CDP action. Thus, this application does not include resolution of the armoring violations, and, even if this application is approved and the CDP is exercised and complied with, violations will remain on and adjacent to the subject property that would not be addressed by the Commission's action on this application (other than the unpermitted lot merger that would be recognized after-the-fact per staff's recommendation). The Commission's enforcement division is in the process of considering options for future action to address the armoring violations.

In addition, and perhaps not surprisingly given the steeply sloped and bluff face nature of the property, the LCP explicitly identifies these Muir Beach area bluffs as dangerous, indicating that many of Muir Beach's vacant lots have not been developed because they are considered too dangerous for building, and the LCP specifically discourages development of these areas. Further, when development is considered, the LCP clearly requires development to fit a site's topography in order to keep natural landform alteration "to an absolute minimum" and to preserve natural landforms, while also requiring that if there exists an area of a proposed development site that is not suited to development because of hazards (which, the LCP defines this entire site to be), and those hazards cannot be eliminated or substantially reduced through LCP consistent measures (as is the case here, including as discussed above), then that area is required to "remain in open space". Despite these LCP requirements, the proposed project would remove almost all of the bluff face landform at this site extending down the slope some 125 feet from Sunset Way towards the beach. This landform would be excavated, and concrete retaining walls and slabs inserted to create building pads, where the largest such cavity would be about 20 feet deep and 25 feet across into the slope. In other words, whereas the LCP dictates maximum landform protection, and for this site actually requires that it be left as natural open space, the proposed project consists of extensive landform alteration and development in a hazardous area, in order to construct a roughly 3,000 square-foot residence. Thus, the proposed project is fundamentally and fatally inconsistent with the LCP for these reasons as well.

Further, the project also results in significant impacts to the beach area public viewshed. The new buildings would extend some 30 feet above the existing slope and would extend about two to three times the distance down the slope and towards the beach beyond what is associated with adjacent residential development. In other words, not only would the natural open space area become a series of interconnected buildings, but it would also extend significantly further down the slope than adjacent structures, with taller rooflines than these nearby structures, leading to significant impacts on the public beach viewshed, including increasing the degree to which public beach views are impacted as compared to adjacent structures. In fact, while the project site is located fronting a smaller portion of the main Muir Beach, it would appear that the proposed project would result in one of the closest residential structures to the beach within the Muir Beach community, exacerbating all such impacts, and further reducing the natural ambiance and aesthetics of the overall beach viewshed as a result. While some such view impacts are to be expected when LCP-allowable development is approved on vacant sites, even vacant sites that lead to new development visible in significant public viewsheds, like the Muir Beach viewshed here, this is not LCP-allowable development in the first place, and that leads to LCP inconsistencies as well.

For these and related inconsistencies, which cannot be remedied through conditions of approval, the Coastal Act and the LCP dictate that the CDP for the proposed project must be denied. In denial cases the Commission generally evaluates whether such action could constitute an unlawful taking of private property without just compensation (which is not allowed by the State and Federal Constitutions, the Coastal Act and the LCP), and if so, whether the Commission should allow for some development as a means to avoid such a potential taking. Here, there are some facts that suggest a denial might not be a taking (e.g., related to the lot itself being a free gift to these Applicants,

the LCP direction against development of the natural slope/bluff face here, etc.), but others where a reviewing court could conclude that the Applicants have a reasonable investment-backed expectation to develop a residential project on this site (e.g., the fact that homes – albeit smaller and pre-Coastal Act homes – exist on adjacent lots on similar slopes/bluff faces, etc.). While it is clearly a judgement call, staff believes that a court could conclude that the Commission’s denial of a CDP for this project results in an unlawful taking of private property. To avoid that potential outcome, staff recommends that the Commission allow for a modified project that addresses its significant Coastal Act and LCP inconsistencies as much as possible.

To do so, staff believes it is appropriate for such a revised project to be located as far up the slope and as close to Sunset Way as possible, including ensuring that the structures are similarly-sized and don’t extend further seaward than adjacent residential structures, among other requirements. In terms of armoring, staff believes that the foundation can be modified so that it only includes embedded piers and not the significant excavation and concrete slabs and retaining walls, which not only better meets LCP provisions regarding armoring, but also reduces impacts and allows for better resilience planning as the development would be easier to remove in the future should it become endangered (and this approval would include prohibitions against armoring, and requirements for removal if endangered by coastal hazards). Unfortunately, however, and despite significant research into available options, including by the Commission’s Coastal Engineer, Jeremy Smith, as well as Dr. Street, options that could avoid armoring to protect the new septic system are not feasible at this sloping location (e.g., holding tanks pumped out on a regular basis, etc.), and the concrete pier armoring system is necessary to ensure that the septic system and its leach field do not destabilize and lead to a landslide. As a result, although staff attempted to find a solution that would avoid such new armoring, it is required if this type of residential development is to be approved here.

In short, although fundamentally LCP and Coastal Act inconsistent, staff recommends approval with conditions in this case to avoid a potential taking. As conditioned, staff believes that approval of the development addresses concerns regarding coastal hazards, biological resources, water quality, visual resources, and public access, and limits associated coastal resource impacts from the approved project as much as possible if residential development must be approved here to avoid a taking. Thus, the project, as conditioned, is as consistent as possible with the certified Marin County LCP and the public access and recreation policies of the Coastal Act while avoiding a potential taking. The motion and resolution to implement staff’s recommendation is found below on page 6.

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**EXHIBITS**

- Exhibit 1 - Location Map
- Exhibit 2 - Site Photos
- Exhibit 3 - Existing Armoring on and Adjacent to Site
- Exhibit 4 - Proposed Project Plans
- Exhibit 5 - Marin County CDP Conditions
- Exhibit 6 - Marin County Environmental Health Septic System Approval
- Exhibit 7 - Applicant's August 30, 2021, Response to CCC Substantial Issue
- Exhibit 8 - Bluff Edge Memorandum by CCC Geologist Dr. Joseph Street

## 1. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **approve** a CDP with conditions for the proposed development. To implement this recommendation, staff recommends a **yes** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion to approve CDP:*** *I move that the Commission **approve** Coastal Development Permit Number A-2-MAR-21-0048 pursuant to the staff recommendation, and I recommend a **yes** vote.*

***Resolution to approve CDP:*** *The Commission hereby approves Coastal Development Permit Number A-2-MAR-21-0048 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of the Marin County certified Local Coastal Program and with the public access and recreation policies of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## 2. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid, and development shall not commence until a copy of the permit, signed by the Permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5. Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

### 3. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

- 1. Revised Final Plans.** PRIOR TO ISSUANCE OF THE CDP, the Permittees shall submit two full size sets of Revised Project Plans to the Executive Director for review and written approval. The Plans shall be prepared by a licensed professional or professionals (i.e., geotechnical engineer, surveyor, etc.), shall be based on current professionally surveyed and certified topographic elevations for the entire site, shall include a graphic scale, and shall include detailed plans for the proposed foundation design. The Plans shall be substantially in conformance with the proposed plans (titled "Groneman Residence, 183 Sunset Way, Muir Beach, CA 94965," dated February 17, 2021; see **Exhibit 4**) except that they shall be modified to meet the following requirements:
  - a. Setbacks.** All structures, including the residence, garage, and other accessory structures including, but not limited to, stairways, decks, patios and porches and all supporting elements (e.g., foundation elements), shall be sited inland of a setback line on the bluff face as determined through a stringline analysis. The stringline setback shall be determined by connecting a 'line' using the seaward-most extent of adjacent existing residential structures (applied to exterior extents of the residential structure, garage, and any associated enclosed major structures, and not to more minor elements including patios, porches, roof overhangs, or similar) at 181 and 185 Sunset Way. The septic system and associated leach field and embedded concrete piers shall be sited as far upslope as possible, and therefore as close as possible to the residential development (which is required to be inland of the stringline setback line) and shall also be sited at the minimum required distance identified by the Marin County Environmental Health Department (i.e., 5 feet between the residence and the septic tank, and 10 feet between the residence and the leach field). All development shall also conform to all other applicable Marin County LCP requirements, with the exception that the front setback is allowed to be zero feet, and the side setbacks are allowed to be five feet.
  - b. Foundations.** The foundation system shall limit grading as much as possible, shall eliminate excavations into the slope (except for piers), shall eliminate slab and retaining wall components, and shall be made up of the minimum number and size of embedded concrete piers (limited in height above grade as much as possible, and as noted on dimensions of the Plans) required to support standard post and beam substructure located above existing grade. All other structures (e.g., stairs, connecting elements, etc.) shall be limited as much as possible and likewise located atop embedded concrete piers (subject to the same limitations). All substructure areas shall be painted (or equivalent) with an unobtrusive, earth-toned color, that blends with the surroundings.
  - c. Design.** All development shall be sited and designed to blend into the bluff environment, including limiting grading, landform alteration, and tree removal, requiring second floor step-backs in the beach viewshed, and using natural and

natural-looking materials and finishes (including but not limited to wood siding and earthen colored dark roofing, etc.). The maximum height of structures can be no taller than the average height above existing grade of the residences at 181 and 185 Sunset Way, and in no case taller than 25 feet above existing grade. Within that maximum height, all structures shall include pitched roofs, offsets, and projections to help break up otherwise uniform surfaces and that can avoid the perception of a large boxy mass in the public viewshed as much as possible.

- d. **Parking.** Two off-street vehicular parking spaces shall be provided as near to Sunset Way as possible.
- e. **Utilities.** All utilities shall be installed underground. The septic system shall comply with all Marin County Environmental Health requirements, including those for design, testing, and monitoring.
- f. **Lighting.** Exterior lighting shall be wildlife-friendly, shall use lamps that minimize the blue end of the visible spectrum, and shall be limited to the minimum lighting necessary for pedestrian safety purposes. All lighting (exterior and interior) shall be sited and designed so that it limits the amount of light or glare visible from public viewing areas offsite to the maximum extent feasible (including through the use of lowest luminosity possible, directing lighting downward, etc.). The plans shall be submitted with documentation demonstrating compliance with these lighting requirements.
- g. **Windows and Other Surfaces.** All windows shall be non-glare glass. All other surfaces shall be similarly treated to avoid reflecting light. All windows shall also be bird-safe (i.e., windows shall be frosted, partially frosted, or otherwise treated with visually permeable barriers that are designed to prevent bird strikes).
- h. **Stormwater and Drainage.** The plans shall clearly identify all stormwater and drainage infrastructure and related water quality measures (e.g., percolation areas, etc.), with preference given to natural BMPs (e.g., bioswales, vegetated filter strips, etc.). Such infrastructure and water quality measures shall provide that all project area stormwater and drainage is filtered and treated to remove expected pollutants prior to discharge and directed to existing stormwater inlets/outfalls as much as possible, or retained onsite in a manner that avoids bluff instability where not possible (including through the use of pervious areas, percolation pits and engineered storm drain systems), and otherwise hidden/camouflaged if unavoidably visible in public views. Infrastructure and water quality measures shall be sized and designed to accommodate runoff from the site produced from each and every storm event up to and including the 85th percentile 24-hour runoff event. In extreme storm situations (i.e., greater than the 85th percentile 24-hour runoff event storm) where such runoff cannot be adequately accommodated onsite through the project's stormwater and drainage infrastructure, any excess runoff shall be conveyed offsite in a non-erosive manner. All drainage system elements shall be permanently operated and maintained, and the plans shall identify all maintenance parameters for all stormwater and drainage infrastructure and related water quality measures,



including based on manufacturers recommendations, which shall be provided. At a minimum, all traps/separators and/or filters shall be inspected to determine if they need to be cleaned out or repaired prior to October 15th each year, and during each month that it rains between November 1st and April 1st. Clean-out and repairs (if necessary) shall be done as part of these inspections. At a minimum, all traps/separators and/or filters must be cleaned prior to the onset of the storm season, no later than October 15th of each year. Debris and other pollutants removed from filtration devices during clean-out shall be contained and disposed of in a proper manner. All inspection, maintenance and clean-out activities shall be documented in an annual report submitted to the Executive Director no later than June 30th of each year. It is the Permittees responsibility to maintain the drainage system in a structurally sound manner and in its approved state.

- i. **Landscaping and Irrigation.** All invasive and/or non-native species on the site, other than mature and established trees, shall be removed, and shall continue to be removed over time as they establish. The area seaward of the stringline setback (see **Special Condition 1.a.** above) and all exposed areas inland of the setback shall be landscaped with native and noninvasive plant species consistent with the mix of native species in the project vicinity selected for their ability at maturity to help reduce the perceived massing of the approved project in public views, including to completely screen from public view all understructure areas at landscape maturity (which shall remain a required visual outcome for as long as the approved development remains). Such plants shall be drought-tolerant; genetically appropriate for the location (avoiding cultivars), soil, hydrology, and atmospheric conditions; and sourced from locally collected seed (e.g., coastal Marin County). Outside irrigation shall be limited to the initial establishment period, using only drip or micro spray systems, and fertilizers shall be prohibited. All such plants shall be kept in good growing condition and shall be replaced as necessary to maintain the approved vegetation over the life of the project, including to maintain required visual softening and screening of the approved development in public views. Regular monitoring and provisions for remedial action (such as replanting as necessary) shall be identified to ensure landscaping and viewshed protection success over time.

All requirements above and all requirements of the approved Revised Final Plans shall be enforceable components of this CDP. The Permittees shall undertake development in accordance with this condition and the approved Revised Final Plans. Minor adjustments to the above requirements, as well as to the Executive Director-approved Revised Final Plans, which do not require a CDP amendment or new CDP (as determined by the Executive Director) may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.

2. **Construction Plan.** PRIOR TO ISSUANCE OF THE CDP, the Permittees shall submit two copies of a Construction Plan to the Executive Director for review and written approval. The Construction Plan shall, at a minimum, include and provide for the following:

- a. Construction Areas.** The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors in site plan view. All such areas within which construction activities and/or staging are to take place shall be minimized to the extent feasible in order to have the least impact on coastal resources, including by using inland areas for staging and storing construction equipment and materials as feasible. Construction, including but not limited to construction activities, materials, and equipment storage, is prohibited outside of the defined construction, staging, and storage areas. Special attention shall be given to siting and designing construction areas in order to minimize impacts on the ambiance and aesthetic values of Muir Beach, including but not limited to public views of and across the site.
- b. Construction Methods.** The Construction Plan shall specify the construction methods to be used, including those used to keep the construction areas separate from public recreational use areas as much as possible (including using unobtrusive temporary fencing or equivalent measures to delineate construction areas) and including verification that operation and storage of equipment and materials will not, to the maximum extent feasible, significantly degrade public views during construction. The Plan shall limit construction activities, including avoiding any lighting of work areas (other than lighting specific to internal work), to avoid coastal resource impacts as much as possible.
- c. Construction Timing.** Construction is prohibited during weekends; from the Saturday of Memorial Day through Labor Day inclusive; and during non-daytime hours (i.e., from one-hour after sunset to one-hour before sunrise), unless due to extenuating circumstances the Executive Director authorizes such work. Lighting of the adjacent beach, intertidal area, and ocean is prohibited.
- d. Construction BMPs.** The Construction Plan shall identify the type and location of all erosion control/water quality best management practices (BMPs) that will be implemented during construction to protect coastal resources, such as but not limited to coastal water quality, including at a minimum all of the following:

  - 1. Runoff Protection.** Silt fences, straw wattles, or equivalent apparatus shall be installed at the perimeter of the construction areas to prevent construction-related runoff and sediment from discharging from the construction areas or entering into storm drains or otherwise offsite or towards the beach and ocean. Special attention shall be given to appropriate filtering and treating of all runoff, and all drainage points, including storm drains, shall be equipped with appropriate construction-related containment, filtration, and treatment equipment.
  - 2. Equipment BMPs.** Equipment washing, refueling, and servicing shall take place at an appropriate off-site, level, and inland location to help prevent leaks and spills of hazardous materials at the project site and preferably on an existing hard surface area (e.g., a road) or an area where collection of materials is facilitated. All construction equipment shall also be inspected and

maintained at a similarly sited inland location to prevent leaks and spills of hazardous materials at the project site.

- 3. Good Housekeeping BMPs.** The construction site shall maintain good construction housekeeping controls and procedures at all times (e.g., clean up all leaks, drips, and other spills immediately; keep materials covered and out of the rain, including covering exposed piles of soil and wastes; dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather; remove all construction debris from the site; etc.).
- 4. Erosion and Sediment Controls.** All erosion and sediment controls shall be in place prior to the commencement of construction as well as at the end of each workday.
- e. Construction Site Documents.** The Construction Plan shall provide that copies of the signed CDP and the approved Construction Plan be maintained in a conspicuous location at the construction job site at all times and that such copies are available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the CDP and the approved Construction Plan, as well as the public review requirements applicable to them, prior to commencement of construction.
- f. Construction Coordinator.** The Construction Plan shall provide that a construction coordinator be designated to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies), and that the coordinator's contact information (i.e., address, phone numbers, email address, etc.) including, at a minimum, a telephone number and an email that will be made available 24 hours a day for the duration of construction, is conspicuously posted at the job site where such contact information is readily visible from public viewing areas while still minimizing impacts to public views, along with indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the contact information (address, email, phone number, etc.) and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry. All complaints and all actions taken in response shall be summarized and provided to the Executive Director on at least a weekly basis.
- g. Construction Specifications.** All construction specifications and materials shall include appropriate penalty provisions that require remediation for any work done inconsistent with the terms and conditions of the CDP.
- h. Notification.** The Permittees shall notify planning staff of the Coastal Commission's North Central Coast District Office at least 3 working days in

advance of commencement of construction, and immediately upon completion of construction.

All requirements above and all requirements of the approved Construction Plan shall be enforceable components of this CDP. The Permittees shall undertake development in accordance with this condition and the approved Construction Plan. Minor adjustments to the above construction requirements as well as to the Executive Director-approved Plan, which do not require a CDP amendment or new CDP (as determined by the Executive Director) may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.

3. **Coastal Hazards.** By acceptance of this CDP, the Permittees acknowledge and agree, on behalf of themselves and all successors and assigns, that:
  - a. **Coastal Hazards.** The site is and may be subject to coastal hazards including but not limited to episodic and long-term shoreline retreat and coastal erosion, high seas, ocean waves, storms, tsunamis, tidal scour, coastal flooding, landslides, bluff and geologic instability, bluff retreat, liquefaction and the interaction of same, many of which are likely to worsen with future sea level rise.
  - b. **CDP Intent.** The intent of this CDP is to allow for the approved project to be constructed and used consistent with the terms and conditions of this CDP for only as long as the development remains safe for occupancy, use, and access, without additional protective measures (such as armoring) beyond ordinary repair or maintenance to protect the development from coastal hazards. Redevelopment of the house, defined as alteration (including demolition, renovation, replacement, and addition) of 50% or more of the major structural components (i.e., exterior walls, floor structures, roof structures, and foundations) or alteration that leads a 50% or more increase in gross floor area, is prohibited.
  - c. **Shoreline Armoring Prohibited.** Shoreline armoring (including but not limited to seawalls, revetments, retaining walls, gabion baskets, tie backs, piers, groins, caissons/grade beam systems, etc.) shall be prohibited to protect the development approved by this CDP, other than the allowed embedded concrete foundation piers and septic system protection piers (see Special Condition 1). Any rights to construct shoreline armoring that may exist under Coastal Act Section 30235, the Marin County LCP, or any other applicable laws are waived, and no portion of the approved development qualifies as an "existing structure" for purposes of Section 30235.
  - d. **Public Trust.** This CDP does not allow encroachment onto public trust lands, and any future encroachment of development approved by this CDP onto public trust lands shall be removed unless the Coastal Commission determines that the encroachment is legally permissible pursuant to the Coastal Act and authorizes it to remain. Any future encroachment would also be subject to the California State Lands Commission's (or other designated trustee agency's) leasing approval.

**e. Removal and Restoration Plan.** The Permittees shall submit two copies of a Removal and Restoration Plan (RRP) to the Executive Director for review and written approval that accounts for the following when any of the following criteria are met:

- 1. Unsafe Conditions.** If a government agency with jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that any portion of the approved development is unsafe for occupancy or use due to coastal hazards, and that there are no feasible measures that could make such portion of the development suitable for occupancy or use without the use of shoreline armoring, then the RRP shall provide that all such development is removed.
- 2. Daylighting Piers.** If half or more of any of the individual septic protection piers become exposed due to bluff erosion, instability and/or other coastal hazards, then the RRP shall provide that those piers and all approved development dependent on them is removed.
- 3. Essential Services.** If essential services to the site (e.g., utilities, roads, etc.) can no longer feasibly be maintained and/or provided to the site due to coastal hazards, then the RRP shall provide that all approved development dependent on such services is removed.
- 4. Debris.** If any portion of the approved development falls onto the slope, onto the beach, and/or into the ocean, then the RRP shall provide that all such development is removed.
- 5. Adaptation Planning.** If removal of some or all of the approved development is required pursuant to LCP provisions associated with sea level rise adaptation planning, then the RRP shall provide that all such development is removed.

The RRP shall be submitted as soon as possible when any of the above criteria are met, but in any case, no later than 30 days after any of the above criteria are met. In cases where multiple criteria are met, the RRP shall be required to meet all requirements for all triggered criteria. In all cases, the RRP shall also ensure that: (a) approved development that is not required to be removed is modified if necessary to maintain remaining function (and provided such modifications are consistent with the terms and conditions of this CDP); (b) all removal areas are restored to natural areas of a quality consistent with adjacent natural areas and the landscaping requirements of this CDP; and (c) all modifications necessary to maintain compliance with the terms and conditions of this CDP, including the objectives and performance standards of these conditions, are implemented as part of the RRP. Following Executive Director approval of the RRP, the Permittees shall submit a complete CDP amendment application to implement the RRP. In cases where removal and associated activities must occur more rapidly than can be accommodated through the CDP amendment process, the Executive Director may also consider issuing an Emergency CDP.

- f. Assume Risks.** The Permittees: assume the risks to the Permittees and the property that is the subject of this CDP of injury and damage from coastal hazards in connection with this permitted development; unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the CDP against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards; and accept full responsibility for any adverse effects to people and/or property caused by the permitted development.
- 4. Public Rights.** The Coastal Commission's approval of this CDP shall not constitute a waiver of any public rights that may exist on the property. The Permittees shall not use this CDP as evidence of a waiver of any public rights that may exist on the property now or in the future.
- 5. Future Permitting.** This CDP is only for the development described in CDP A-2-MAR-21-0048, as modified through the conditions of approval. Pursuant to Title 14 California Code of Regulations (CCR) Section 13250(b)(6), the exemptions that might otherwise be provided by Coastal Act Section 30610(a) shall not apply to the development governed by this CDP. Accordingly, any future improvements to and/or modifications of the development authorized by this CDP shall require an amendment to this CDP, unless the Executive Director determines that no such amendment is legally required.
- 6. Other Authorizations.** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittees shall submit to the Executive Director evidence of authorizations for, or alternatively evidence that no such authorizations are needed, for the development authorized by this CDP from the Marin County Environmental Health Department and any other entity exercising authorization authority. The Permittees shall inform the Executive Director of any changes to the project required by such entities, where such changes shall not be incorporated into the project until the Permittees obtain a Commission-approved amendment to this CDP, unless the Executive Director determines that an amendment is not legally required.
- 7. Marin County Conditions.** This CDP has no effect on conditions imposed by Marin County pursuant to an authority other than the Coastal Act, except as provided in this condition. The Permittees are responsible for compliance with all terms and conditions of this CDP in addition to any other requirements imposed by the County pursuant to the County's non-Coastal Act authority. In the event of conflicts between terms and conditions imposed by the County and those of this CDP, the terms and conditions of this CDP shall prevail.
- 8. Real Estate Disclosure.** Disclosure documents related to any future marketing and/or sale of the property/residence, including but not limited to marketing materials, sales contracts and similar documents, shall notify potential buyers of the terms and conditions of this CDP, including explicitly the coastal hazard

requirements of **Special Condition 3**. A copy of this CDP shall be provided in all real estate disclosures.

- 9. Deed Restriction.** PRIOR TO ISSUANCE OF THE CDP, the Permittees shall submit to the Executive Director for review and written approval documentation demonstrating that the landowners have executed and recorded against the parcels governed by this CDP a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this CDP, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; (2) imposing the terms and conditions of this CDP as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description of all of the parcels governed by this CDP. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this CDP shall continue to restrict the use and enjoyment of the subject property so long as either this CDP or the development it authorizes – or any part, modification, or amendment thereof – remains in existence on or with respect to the subject property.

#### 4. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

##### **A. Project Location, Description, and History**

The proposed project is located on a mostly undeveloped 18,372 square-foot parcel<sup>2</sup> (almost half an acre) at 183 Sunset Way on a seaward bluff face in the Muir Beach community in unincorporated western Marin County, just upcoast of the main Golden Gate National Recreation Area's Muir Beach accessway. The parcel consists of a L-shaped lot with a narrower street frontage (about 45 feet wide) that remains a similar width until about halfway down the slope to the ocean, where it widens considerably to approximately about 150 feet in width, occupying the bluff area below 181 Sunset Way. The parcel slopes downward from Sunset Way (at an elevation about 130 feet above sea level) at an average slope of approximately 26 degrees toward the ocean for approximately 230 feet to a point on the bluff that is about 15 feet above sea level. The upcoast end of Muir Beach is seaward of the bluff toe. The parcel is set apart from the toe of the bluff, the beach, and the ocean by a different parcel under separate ownership (APN 199-235-57) that parallels the shoreline. See **Exhibit 1** for a location

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<sup>2</sup> The parcel in question was created by a lot merger initiated by Eric and Madeline Groneman, the parents of one of the Applicants, Graham Groneman, and the then owners of the parcels in question, who reside adjacent to them in a residence at 181 Sunset Way. That merger combined two separate assessor parcel numbers (APNs) (199-235-47 and 199-235-48) to create one larger nearly half-acre parcel (called out as new APN 199-235-66) at 183 Sunset Way in 2019 (as modified by further action in 2020). Following the merger, the newly created parcel was transferred in 2021 for \$0 from Eric and Madeline Groneman to Graham Groneman and Brett Sibley, the Applicants for this CDP, via an "interfamily deed." However, although this constituted a land division and thus is considered development, and although approved by the County through a non-CDP process, the merger was not authorized via CDP. As a result, the merger represents a Coastal Act violation that is being tracked by the Commission's enforcement unit.

map, **Exhibit 2 and 3** for photographs of the site and surrounding area, and **Exhibit 4** for parcel depictions.

The Applicants' parcel is LCP-zoned coastal residential agriculture (C-RA-B2) and is framed by single-family residences on either side and inland across Sunset Way. Portions of adjacent residential development from 181 Sunset Way extends onto the site (a propane tank and portion of a wooden deck), and it is otherwise covered in ruderal vegetation, in addition to several larger trees and smaller shrubs. The lower portion of the site nearest the beach includes a series of concrete and concrete-grouted rock retaining walls and riprap that extend across the subject site as well as onto four other neighboring properties (50 Cove Lane and 185, 187 and 189 Sunset Way). All told, riprap extends approximately 200 feet and concrete retaining walls extend approximately 150 feet in a crisscross pattern of sorts that is some 30 feet wide along the shoreline here, extending from beach level to an elevation of about 10 feet above the beach (see **Exhibit 3** for map and photos of the armoring in relation to each property). Based on aerial photo analysis, these armoring structures appear to have existed in various forms since the 1960s, with repairs and enlargements conducted in the 1980s and again in 2005, where all activities since 1972<sup>3</sup> occurred without the benefit of a CDP.<sup>4</sup>

The Applicants propose to construct a new 2,160 square-foot two-story, single-family residence, a 430 square-foot detached garage located above a 369 square-foot storage structure, and a septic system fronted by a series of embedded concrete piers (18-inch diameter piers approximately four feet on center embedded some 12-feet into the slope and extending some 75 linear feet).<sup>5</sup> The slope would be partially graded out and removed so that the proposed residence, garage, and storage space could be partially 'terraced' into the hillside, and these structures would be supported by concrete slab foundations tied into both three-sided retaining walls (i.e., constructed in the created slope cavities) and 18-inch diameter concrete piers extending up to 12 feet in depth. The septic system, leach field, and embedded concrete piers would be located further seaward and downslope from the residential structures (extending downslope another approximately 50 feet). A portion of the development would extend onto the property at 181 Sunset Way (again, owned by one of the Applicants' parents) in the form of an easement granted by the adjacent property owners, where parking for the project would be accommodated. Finally, the Applicants request after-the-fact recognition for the

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<sup>3</sup> Where February 1, 1973, was the initiation of coastal permit requirements along the California coast pursuant to 1972's Proposition 20, the "Coastal Initiative", that originally created the Coastal Commission. Such coastal permit requirements have been continuous at this location since then because the Coastal Commission and coastal permit requirements were made permanent by the Coastal Act when it was passed in 1976 and took effect on January 1, 1977.

<sup>4</sup> The Coastal Commission's enforcement division is tracking such unpermitted armoring as a violation of the Coastal Act and the LCP; see Violation section later in this report.

<sup>5</sup> The Applicants, in their letter dated November 30, 2021, have also suggested that the piers could be replaced by embedded steel mesh to provide similar functions if doing so would be considered an improvement in terms of coastal resource impacts. However, Commission technical staff believe that there would be no discernable coastal resource difference between the two options, and this report evaluates the originally proposed concrete piers.



2019/2020 lot merger, which involved merging a parcel connected to the Sunset Way public right-of-way with a parcel located down the slope that is surrounded by other private parcels and has no Sunset Way (or any other) access. Prior to the merger, at least one of the properties did not meet the LCP's minimum parcel size requirement applicable at this location (i.e., a minimum of 10,000 square feet per parcel) as the resultant parcel is less than 20,000 square feet. See **Exhibit 4** for the proposed project plans.

On May 27, 2021, the Marin County Deputy Zoning Administrator approved a CDP for the proposed project (see **Exhibit 5** for Marin County CDP Conditions) and this action was appealed to the Commission. On September 9, 2021, the Commission found the County's action approving the project raised a substantial issue of conformance with the County LCP due to apparent siting of the proposal seaward of the blufftop edge inconsistent with County LCP setback requirements, as well as the project's proposed landform alterations and foundational elements that could act as armoring, which is not allowed by the LCP for new development. The Commission also found that the County's approval did not analyze impacts from the project to sand supply, public access, or public views. By this action, the Commission took jurisdiction over the CDP application for the proposed development. Commission staff and the Applicants have coordinated since that time in an attempt to better address questions raised by the substantial issue determination, and the Applicants have since submitted additional information (i.e., in addition to the materials submitted for Commission consideration at the Substantial Issue portion of the appeal hearing),<sup>6</sup> including refined bluff and coastal hazard analyses (see **Appendix A**).

## **B. Standard of Review**

The standard of review for this CDP application is the Marin County certified LCP (which is made up of a certified Land Use Plan (LUP) and a certified Implementation Plan (IP)) and because it is located between the first public road and the sea, the public access and recreation policies of the Coastal Act, which include Coastal Act Sections 30210 through 30224. The Commission notes that most of the County's LCP was recently completely updated, where that update was certified by the Commission and took effect in 2019. However, that update did not include updates to the portion of the County LCP that addresses coastal hazards (referred to in LCP terms as "environmental hazards"). As a result, for coastal hazards provisions, the LCP standards in effect for this project are those from the 1980s-era LCP, and within that the portion applicable to Unit 1, which includes the southern half of the Marin County coastal zone, including Muir Beach. In any case, all LCP provisions must be read and interpreted consistent with the Coastal Act, from which they derive their statutory authority.<sup>7</sup>

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<sup>6</sup> Titled *Response to California Coastal Commission staff report, Substantial Issue Determination, 183 Sunset Way, Appeal Number A-2-MAR-21-0048, Muir Beach, California* (Miller Pacific Engineering Group, August 30, 2021); see **Exhibit 7**.

<sup>7</sup> See, for example, *McAllister v. California Coastal Commission* (2009, 169 Cal. App. 4th 912, 930-932) wherein the Sixth District Court of Appeal explained that LCPs must be consistent with the Coastal Act, that local governments are presumed to know that the Coastal Act prescribes minimum standards for LCPs (and drafted their LCP to be consistent with those standards), that the Commission certified the

## C. CDP Determination

### 1. Coastal Hazards

#### ***Applicable LCP Provisions***

The Marin County LCP establishes several requirements for new development to address coastal hazards, including minimizing risks to life and property, assuring stability and structural integrity, and requirements to maintain safety and stability over time, all without the reliance on shoreline armoring. The LCP also identifies that new structures are required to be set back from bluffs far enough so that they are not threatened during their economic lifetimes, stating:

***Shoreline Protection and Hazard Areas Policy 1:*** *New structures shall be set back from the Bolinas and Muir Beach bluffs a sufficient distance to ensure with reasonable certainty that they are not threatened from cliff retreat within their economic life expectancies. Adequate setback distances will be determined from information contained in required geologic reports and the setback formula established below. These setbacks will be of sufficient distance to eliminate the need for shoreline protective works. Setback (meters) = structure life (years, normally at least 40 years) x retreat rate (meters/year).*

Furthermore, the LCP also includes several policies that limit the use of shoreline armoring and landform alteration, including due to their potential for significant coastal resource degradation, including:

***Shoreline Protection and Hazard Areas Policy 4:*** *Many of the building sites in Unit I are characterized by one or more potential geologic hazards. The development of residential structures on such parcels may be subject to often sudden and destructive geologic phenomenon. The County of Marin does not encourage new residential development of such parcels and expressly states that the issuance of a coastal development permit for such property does not warrant said property's safety from geologic hazards. Further, the County of Marin will not accept liability for subsequent personal or property damage caused by geologic processes on said properties. To assure that the builder and subsequent purchasers are expressly aware of the policy, a "waiver of liability" shall be executed and recorded by said for short-term, emergency food, shelter, and said property owner prior to the issuance of a coastal development permit. Further, the County of Marin will not participate in emergency or disaster relief funding for properties so identified and would recommend such limitations on State and/or federal disaster/emergency grants and/or loans. Existing geologic information indicates this geologic hazard policy shall apply to new development (excluding improvements to existing structures that would not result in an increase of 50 percent or more of internal floor area of the structure) on lots located in the following areas:*

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LCP as consistent with the Coastal Act, and that LCP must be interpreted in a manner consistent with the Coastal Act.

- *Lands located in the "Alquist-Priolo" earthquake hazard zones, as said zones may be amended.*
- *Development within 300 feet of the mean high tide of the sea.*
- *Development on parcels with slopes averaging over 35 percent.*
- *All lots within the Seadrift sandspit to include the Patios, Calles and Seadrift Subdivision.*

***Shoreline Protection and Hazard Areas Policy 5:*** *Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline process shall be permitted when required to serve coastal-dependent uses or to protect existing structures (constructed before adoption of the LCP), or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.*

***Shoreline Protection and Hazard Areas Policy 7:*** *Because revetments, seawalls or other shoreline protective works can be detrimental to maintenance of natural shoreline processes and can interfere with visual enjoyment and coastal access, such works are discouraged.*

***Shoreline Protection and Hazard Areas Policy 8:*** *It shall be County policy to encourage property owners subject to ocean-front erosion hazards to develop responses to such hazards prior to emergency conditions. Where contiguous properties are subject to generally similar erosion hazards, joint program development should occur. The County will not finance such engineering studies (or any subsequent construction activities), but will seek aid from Federal and State agencies, colleges and universities to assist private consulting engineers in such review and recommendations. Where existing community organizations or special districts are unable to provide organizational support for such area-wide joint studies, the County, upon request, will assist in the organization and administration of such privately funded studies.*

***New Development and Land Use Policy 24:*** *Development shall be designed to fit a site's topography and existing soil, geological, and hydrological conditions so that grading, cut and fill operations, and other site preparation are kept to an absolute minimum and natural landforms are preserved. Areas of a site which are not suited to development because of known soil, geologic, flood, erosion or other hazards that exist to a degree that no amount of corrective work consistent with these policies, including but not limited to the protection of natural landforms, can eliminate or substantially reduce the hazards to the property endangered thereby shall remain in open space.*

The LCP also prohibits land divisions of beach-fronting lots, stating:

***LUP Policy C-CD-9 Division of Beachfront Lots:*** *No land division of beachfront lots shall be permitted in recognition of the cumulative negative*

*impacts such divisions would have on both public and private use of the beach. Similarly, the erection of fences, signs, or other structures seaward of any existing or proposed development and the modification of any dune or sandy beach area shall not be permitted except as provided in the Environmental Hazards policies in order to protect natural shoreline processes, the scenic and visual character of the beach, and the use of dry sand areas in accordance with Section 30211 of the Coastal Act.*

The LCP also cites and explicitly incorporates the requirements of Coastal Act Sections 30235 and 30253, which state:

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

...

**Section 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. ...*

Finally, although not cited and incorporated by reference in the LCP, and thus not a legal standard of review, it is also noted that the Coastal Act requires that the Commission consider the effects of sea level rise and related hazards in making its decisions. Section 30270 states:

**Section 30270.** *The Commission shall take into account the effects of sea level rise in coastal resources planning and management policies and activities in order to identify, assess, and, to the extent feasible, avoid and mitigate the adverse effects of sea level rise.*

Thus, the LCP requires that development be sited and designed to ensure stability and structural integrity over time, including that new development be adequately setback from bluffs to ensure stability for its economic life, all without reliance on coastal armoring, and without significant landform alteration. Further, the LCP notes that the bluffs in the Muir Beach area experience erosion at rapid rates, and thus many of Muir Beach's vacant lots have not been developed because they are considered dangerous for building, and the County explicitly "does not encourage new residential development of such parcels". Accordingly, the LCP notes that development in Muir Beach needs to be carefully scrutinized to ensure that it should be allowed at all, and when it is, to ensure that it does not include shoreline armoring or create undue risk.<sup>8</sup> In addition, the

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<sup>8</sup> See, for example, LCP text (at Section III. Shoreline Protection and Hazard Areas: Seacliff Retreat) stating "Muir Beach's sea cliffs...experience relative rapid rates of shoreline erosion. While development potential is limited to a few vacant ocean bluff lots, these lots were often earlier by-passed as

LCP requires that development fit a site's topography so that natural landforms are preserved, and the LCP prohibits armoring for proposed new residential development such as this. Finally, the LCP requires those proposing development in hazardous areas such as this to assume all risks and accept all liabilities that come with such proposals, and plan for emergency responses to hazards that may arise from developing in such areas. The Coastal Act provisions incorporated by reference into the LCP provide similar direction.

### **Analysis**

The LCP discourages development in hazardous locations like this site,<sup>9</sup> and so as a primary matter it is noted that the LCP is not, as a general rule, supportive of allowing any development here. The LCP also says similar things in general about Muir Beach vacant lots, suggesting they are vacant because they present difficult and even dangerous building locations. In other words, bracketing other issues, the LCP would suggest that these Applicants not pursue development at this location. While not necessarily determinative in terms of this CDP application, the LCP admonition against development at this site is informative, and thus provides important context for consideration of this proposed project.

When such development is nonetheless considered in Muir Beach, the LCP is structured around establishing setbacks from the bluff for safety without reliance on armoring. The first step in that exercise is to first define the bluff line from which to set back, which requires identifying the blufftop edge. At this site, the Applicants' original geotechnical report<sup>10</sup> (2020 geotechnical report) identified the blufftop edge as approximately 25 feet above sea level at this site, and about 25 feet inland of the toe of the bluff, citing evidence of the steep slope present nearest the bluff toe made up of "relatively hard, resistant graywacke sandstone." However, the report also indicates that much of the parcel is comprised of a steep slope, averaging 26 to 28 degrees, which appears to be fairly uniform extending from Sunset Way down some 130 feet of elevation to the beach and ocean below. The Applicants' most recent geotechnical report<sup>11</sup> (2021 geotechnical report) reiterates the conclusion of the first geotechnical report, asserting that the blufftop edge is at the same location about 25 feet above sea level and about 25 feet inland from the bluff toe, and further asserting that that blufftop edge is located where the approximately 42 degree slope extending upward from the beach turns into the average 26 to 28 degree slope extending up to Sunset Way (see **Exhibit 8** for a representative bluff cross-section). The Applicants also cite the "prevailing nature of existing development on steep slopes in Muir Beach," and contend

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representing more difficult or even dangerous building sites. Development on these lots must be carefully evaluated under the LCP policies to assure that the site can adequately support the proposed development without undue risk or the necessity to construct shoreline protective devices".

<sup>9</sup> Including because the site is within 300 feet of the mean high tide of the sea and is thus, for at least this reason, subject to the provisions of LCP Shoreline Protection and Hazard Areas Policy 4.

<sup>10</sup> Titled *Geotechnical Investigation New Single-Family Residence and Associated Improvements 183 Sunset Way (APN 199-235-47 and -48) Muir Beach, California* (Miller Pacific Engineering Group, August 20, 2020); see **Appendix A**.

<sup>11</sup> Titled *Updated Bluff Retreat Rate Evaluation 183 Sunset Way (APN 199-235-47 and -48) Muir Beach, California* (Miller Pacific Engineering Group, November 23, 2021); see **Appendix A**.

that the parcel's slope is similarly steep to other developed parcels in the neighborhood, and therefore should not be subject to development restrictions or bluff edge determinations, given similarly sited residences.<sup>12</sup>

The LCP provides a definition of "bluff edge"<sup>13</sup> which closely follows the definition in the Commission's implementing regulations.<sup>14</sup> The LCP states:

*Bluff Edge. The upper termination of a bluff, cliff, or sea cliff. In cases where the top edge of the bluff is rounded away from the face of the bluff as a result of erosional processes related to the presence of the steep bluff face, the bluff line or edge shall be defined as that point nearest the bluff beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the bluff. In a case where there is a steplike feature at the top of the bluff face, the landward edge of the topmost riser shall be taken to be the bluff edge. The termini of the bluff line, or edge along the seaward face of the bluff, shall be defined as a point reached by bisecting the angle formed by a line coinciding with the general trend of the bluff line along the seaward face of the bluff, and a line coinciding with the general trend of the bluff line along the inland facing portion of the bluff. Five hundred feet shall be the minimum length of bluff line or edge to be used in making these determinations. Bluff edges typically retreat landward due to coastal erosion, landslides, development of gullies, or by grading (cut). In areas where the bluff top or bluff face has been cut or notched by grading, the bluff edge shall be the landward most position of either the current or historic bluff edge. In areas where fill has been placed near or over the historic bluff edge, the original natural bluff edge, even if buried beneath fill, shall be taken to be the bluff edge.*

To help settle this critical LCP analytic question, the Commission's Coastal Geologist, Dr. Joseph Street, evaluated the Applicants' original and updated geotechnical reports, as well as other materials provided by the Applicants (including bluff cross-sections, topographic surveys, and site photos), and visited the beach fronting the site. Consistent with the Commission's approach to blufftop development statewide, Dr. Street concluded that this site is part of an uncommon bluff and lacks the level "blufftop" (often an uplifted marine terrace) characteristic of many coastal locations. Much of this part of Muir Beach is sloped, and the inclination of the overall local Muir Beach landform increases substantially moving seaward across the site, with a major change in slope ("slope break") occurring just seaward of Sunset Way when measured across the Applicants' parcel (see **Exhibit 8**, Figures 4 and 5). At this location Dr. Street notes a slope break between the approximately 26-to-28-degree average slope across the Applicants' property and the approximate 10-degree slope of the road and neighborhood inland of Sunset Way. It is this slope break that, in Dr. Street's opinion, represents the blufftop edge, and it lies roughly along the Applicants' property line along

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<sup>12</sup> This observation is not a geotechnical observation or analysis about where the blufftop edge lies, but rather an opinion provided on how the LCP should and should not be implemented.

<sup>13</sup> See LCP IP Definitions, page 146.

<sup>14</sup> See California Code of Regulations Title 14, Division 5.5, Section 13577.

Sunset Way. This blufftop edge is at approximately 130 feet of elevation at the seaward Sunset Way road edge, much higher and further inland than the Applicants' suggested blufftop edge at 20-30 feet of elevation. As to the change in slope noted at that lower elevation, Dr. Street concluded that it represents a further steepening of the bluff slope related to recent marine erosion, but that that doesn't change the evaluation of the location of the bluff and the blufftop edge. See **Exhibit 8** for Dr. Street's memo with additional details and discussion of these bluff and blufftop edge conclusions.

While the Applicants assert that because other residences were built on similarly steep bluffs in the vicinity, a new residence could be safely sited here, this is irrelevant to the blufftop edge determination for this site. Although the nature of the surrounding built and natural environment can help to provide context for CDP decisions, each proposed development under consideration for a CDP is evaluated independently against relevant LCP (and Coastal Act, as applicable) policies using project-specific materials, including geotechnical reports, and the blufftop edge is not defined by relying on nearby development trends. Further, many of the homes in the Muir Beach area were originally built before the Coastal Act was enacted in 1977 and/or before the LCP was certified in the 1980s, meaning those structures were not subject to the same requirements for safety and stability in light of coastal hazards, including as such hazards are exacerbated by sea level rise, as is required of currently proposed development. These LCP provisions also serve LCP and Coastal Act purposes other than simply establishing safety, as they are integrated with policies to avoid natural landform alteration and to protect natural shorelines, bluffs, and beaches for their coastal resource values, including for public access. In addition, it is important to note that not all steep bluffs are equally hazardous. In fact, the LCP specifically calls out remaining undeveloped bluffs in the Muir Beach area, like the subject site, as potentially hazardous, or at least requiring additional scrutiny, stating that:<sup>15</sup>

*Muir Beach's sea cliffs...experience relative rapid rates of shoreline erosion. While development potential is limited to a few vacant ocean bluff lots, these lots were often earlier by-passed as representing more difficult or even dangerous building sites. Development on these lots must be carefully evaluated under the LCP policies to assure that the site can adequately support the proposed development without undue risk or the necessity to construct shoreline protective devices.*

Again, this goes to the first LCP point noted above that the LCP actually states explicitly that development in these areas, such as the subject site, is to be discouraged, not encouraged. As is typical of many shoreline areas that have not been developed in the past 50 years of the California Coastal Management Program statewide, even when development pressure is disproportionately high for these very areas, there is often a good reason that these sites have not been developed. Here, the site is just the type of vacant, sloping site that the LCP suggests should not be developed, and for which development has not been pursued for decades. Including, as the LCP states, because these lots present difficult hazard challenges, or are even dangerous.

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<sup>15</sup> See LCP Section III. Shoreline Protection and Hazard Areas: Seacliff Retreat.

Having established that the blufftop edge is at the inland edge of the site, that the only LCP consistent siting would be set back further inland from that edge to meet Shoreline Protection and Hazard Areas Policy 1, and that essentially the entire property lies seaward of the blufftop edge, it is thus impossible for the proposed development to meet the LCP's bluff setback requirements, and therefore the proposed project is inconsistent with the LCP. In addition, there are no number of conditions that could change the project in such a way as to make the project LCP consistent on this point. This is thus a fundamental LCP inconsistency.

Even if the blufftop edge were to exist seaward of Sunset Way on the property as asserted by the Applicants, there are additional LCP hazard concerns with the proposed development. Specifically, the LCP requires that new development minimize risks and ensure stability and structural integrity without contributing significantly to erosion, geologic instability, or destruction of the site or surrounding area. Further, LCP policies, such as ***Shoreline Protection and Hazard Areas Policy 5, 7 and 8***, prohibit shoreline armoring to achieve such stability and structural integrity in order to avoid adverse impacts to coastal resources. Despite those LCP requirements, the proposed project includes the aforementioned 75 linear foot row of buried concrete piers fronting the septic system leach field to establish septic system stability, and also includes a series of retaining walls and additional drilled concrete piers stepping down the slope as part of the residential structures' foundations to help mitigate for the risks of building on a steeply sloping bluff face. All of these proposed project elements are designed to help maintain stability through mitigating the effect of, and impeding, natural bluff erosional processes, and thus function as coastal armoring in that sense, with all such structures retaining bluff materials as would a more typical seawall or bluff retaining wall form of armoring.

With regard to the septic system armoring, the 2021 geotechnical report indicates that the bluff slope is susceptible to shallow land sliding, and the 2021 geotechnical report states that these piers are needed to reduce the risk of instability due to saturation of loose sandy soils by the septic effluent. Similarly, the Marin County Environmental Health Services Department (EHS) also determined that the concrete piers are needed to ensure the safety of the leach field during the project life (see **Exhibit 6**). In other words, the septic system requires shoreline armoring in order to function properly in light of the steeply sloped site's characteristics. With regard to the residential structures' foundation system, the Applicants assert that this proposed foundation is "not extraordinary, but representative of typical hillside construction throughout California, especially following the widespread adoption and advancement of modern seismic design standards over the last 20 years" (see **Exhibit 7**). However, this design represents a substantial departure from most standard residential construction methods and includes concrete retaining walls up to ten feet tall (and the residential cavity backed by a nearly 20 feet high embedded retaining wall extending some 25 feet across the property) and drilled piers up to 12 feet deep. As indicated, this system will act just like other coastal armoring structures in the manner in which it arrests natural erosion and retains bluff materials that would otherwise nourish the beach below. All such new proposed armoring is prohibited by the LCP, and the proposed project is fundamentally inconsistent with the LCP for this reason as well.



In addition to proposing new armoring features as part of the project, the proposed project also relies on the existing unpermitted armoring near the base of the bluff for overall stability purposes. In fact, as described in the Applicants' 2020 geotechnical report, and reiterated in the Applicants' subsequent 2021 geotechnical report, in making safety and stability calculations the Applicants' geologist found that the existing unpermitted armoring has essentially halted shoreline erosion at the base of the bluff, and project siting and design relies on this fact (see **Appendix A**). Not only is the unpermitted armoring not allowed to be considered in this way,<sup>16</sup> but this also means that the proposed project relies on armoring to establish safety and stability, which is explicitly prohibited by the LCP, and thus the proposed project is fundamentally inconsistent with the LCP for this reason as well.

It is well known that armoring significantly alters natural bluffs, deprives beaches of sand, and leads to loss of beach fronting the armoring over time due to the armoring, including due to passive erosion (or 'coastal squeeze') processes.<sup>17</sup> The Applicants' proposed armoring elements, including reliance on unpermitted base-of-bluff armoring, would adversely affect natural landforms and views, shoreline processes, and ultimately beach and beach-related resources below the site. So, even were such armoring to be allowed here by the LCP, which it isn't, such project elements would lead to coastal resource impacts that are also not allowed by the LCP or the Coastal Act (see findings that follow on this point). Thus, the proposed project is fundamentally inconsistent with the LCP and Coastal Act for this reason as well.

The Applicants' 2020 geotechnical report identifies a 6-inch per year average annualized bluff retreat rate, and uses this rate to conclude that a 20-foot blufftop setback from their identified blufftop edge would provide 40 years of protection to the proposed project, where the Applicants' alleged 40 year erosion line would lie just

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<sup>16</sup> Sites with unpermitted armoring, like this, are not allowed to rely on such unpermitted development as a basis for establishing Coastal Act/LCP conformance. Rather, the baseline for CDP review and analysis is the site without the unpermitted development.

<sup>17</sup> Where passive erosion/coastal squeeze refers to the phenomenon where armoring fixes the backshore position on an eroding shoreline (and one where sea levels are rising) leading to the available beach/recreation area narrowing, being 'squeezed' between the moving shoreline and the fixed backshore, and thus leading to the loss of beach and recreational shoreline as a direct result of the armoring.

seaward of the septic system and the embedded concrete piers.<sup>18,19</sup> Subsequently, the Applicants provided a revised report in August 2021 that updated their average annualized bluff retreat rate estimate, this time without taking into account the presence of the unpermitted base-of-bluff shoreline armoring, arriving at an estimated 7.2 inches per year average annualized bluff retreat rate.<sup>20</sup> Soon thereafter, the Applicants submitted another updated retreat estimate in November 2021 of 9.5 inches per year average annualized bluff retreat rate, again without taking into account the presence of the unpermitted base-of-bluff shoreline armoring, but this time by analyzing images spanning the 1958-1982 time period.<sup>21</sup> The last report also acknowledged that the previously provided historic retreat rate of 7.2 inches per year was likely skewed by the placement of rip-rap armoring at the toe of the slope in 1986. Even using the Applicants' blufftop edge, this final report estimated that erosion would overtake portions of the embedded concrete piers fronting the septic system in 40 years and would seriously impact such piers and extend into the septic leach field itself in 100 years. These Applicant-estimated retreat rates, while getting closer to incorporating all factors at play, fall short of accurately calculating erosion rates because they do not account for the potential for increased erosion due to sea level rise, which impacts the bluff retreat rate and bluff stability at this location. In addition, they attempt to apply blufftop setbacks to what is actually the bluff face, when it is the bluff face that would be retreating in such scenarios. Thus, the value of such information, even were it to be correct, is limited in terms of measuring LCP consistency.

In order to help understand the Applicants' assertions about stability at this location, Dr. Street evaluated the Applicants' bluff retreat analyses and also examined the unarmored bluffs immediately up- and down-coast of the project site. Dr. Street estimated an average annualized bluff retreat rate of about 8.4 inches per year for unarmored bluffs in the near vicinity, with a maximum retreat rate of about 12 inches per year along the unarmored bluff toe on the eastern (downcoast) portion of the site. While the average annualized bluff retreat rate estimate of 8.4 inches per year is roughly consistent with the Applicants' estimates, a one foot per year rate is over 25% more than even their highest estimates, and future bluff retreat at or near that higher historical

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<sup>18</sup> The Applicants applied 40 years to their blufftop setback calculations and assert that this shows the project is LCP consistent in terms of setback. However, the Applicants misinterpret the applicable setback policy. Shoreline Protection and Hazard Areas Policy 1 does not stand for the premise that a 40-year setback is sufficient for LCP consistency. Rather, the actual requirement is that structures in question are setback sufficiently such "that they are not threatened from cliff retreat within their economic life expectancies" and provides a simple formula for assessing same depending on the structures' expected life, where that formula refers to 40 years as an example of an expected structure life, and states that it is "normally at least 40 years". Here, there is nothing to suggest that the Applicants only intend the proposed development to be present for 40 years, and in fact in the Commission's experience residential development is in place much longer, which is why LCPs generally rely on setbacks for at least 100 years if a year value is specified. Absent a specified and enforceable economic lifetime, 40 years has no relevance in terms of LCP setback consistency analysis.

<sup>19</sup> As indicated above, that 6 inch per year average annualized bluff retreat rate presumes the presence of the unpermitted base of bluff armoring per the Applicants' 2020 and 2021 geotechnical reports.

<sup>20</sup> Titled *Groneman Exhibit A: Miller Pacific Letter* (Miller Pacific Engineering Group, August 30, 2021).

<sup>21</sup> Titled *Updated Bluff Retreat Rate Evaluation 183 Sunset Way (APN 199-235-47 and -48) Muir Beach, California* (Miller Pacific Engineering Group, November 23, 2021); see Appendix A.

rate would likely impact the entire septic system, and even portions of the residential structures, when measured over a more accurate design life (e.g., such as 75 to 100 years). Given that these estimates do not include any multipliers for sea level rise effects over time, erosion is likely to be even higher, and the proposed development endangered even faster than such estimates. Thus, even if the bluff edge were to be as identified by the Applicants as just above the beach, even if the septic system armoring were to be allowed by the LCP, neither of which are true, and even if only historic rates of erosion were applied, the Applicants' proposed development would still not meet LCP-required bluff setback requirements.

In addition, New Development and Land Use Policy 24 requires development to fit a site's topography in order to keep natural landform alteration "to an absolute minimum" and to preserve natural landforms. In addition, that policy also requires that if there exists an area of a proposed development site that is not suited to development because of hazards (which, the LCP defines this site to be),<sup>22</sup> and those hazards cannot be eliminated or substantially reduced through LCP consistent measures (as is the case here, as described above), then that area is required to "remain in open space". Despite these LCP requirements, the proposed project would remove almost all of the bluff face landform extending down some 125 feet from Sunset Way, with an additional roughly 1,500 square feet of disturbance seaward of that for the proposed septic system. This landform would be excavated, and concrete retaining walls and slabs inserted to create pads for buildings, where the largest such cavity would be about 20 feet tall, 25 feet deep, and 25 feet across into the slope. In other words, whereas the LCP dictates maximum landform protection, and for this site actually requires that it be left as open space, the proposed project appears to have instead maximized landform alteration and proposed to occupy areas required by the LCP to be left as open space in order to construct a roughly 3,000 square-foot residential project. The proposed project is fundamentally inconsistent with the LCP for this reason as well.

Finally, in terms of the proposed after-the-fact recognition of the lot merger that occurred in late 2019/2020 without a CDP,<sup>23</sup> the main LCP question is whether creation of such a lot is allowed by the LCP in a coastal hazard area such as this where the LCP explicitly discourages development and calls for its protection as a natural landform and open space. Such a question is particularly pertinent if the lot merger creates what might be considered a 'developable' parcel from a 'non-developable' parcel or parcels, or if it increases the allowed intensity of use on the property in some way. Here, as described above, neither parcel was 'developable' pre-merger, and the merged parcel is likewise not developable, including for all of the LCP reasons articulated above. Setting aside those issues, the LCP currently does not prohibit land divisions or lot mergers in hazardous areas.<sup>24</sup> Rather, LCP Policy IP 22.70.190 uses an analysis of various

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<sup>22</sup> Both because it is located within 300 feet of mean high tide (per Shoreline Protection and Hazard Areas Policy 4), and because it is a bluff face from which the LCP requires development to be sited inland of for coastal hazard purposes.

<sup>23</sup> See also subsequent Violation section of this report.

<sup>24</sup> As described earlier, the LCP's coastal hazard provisions are from the 1980s, while the rest of the LCP was updated in 2019. Although the various attempts to update the coastal hazard provisions have not yet come to fruition, it is noted that each version – whether proposed by the County or as articulated in the

factors (e.g., impacts to coastal resources, consistency with other LCP policies, etc.) to determine when a lot merger can be approved. In this case, the policy appears to allow the proposed merger. However, at least one of the original parcels did not meet the LCP's minimum parcel size requirement (i.e., minimum parcel size at this location is required to be at least 10,000 square feet),<sup>25</sup> and arguably the merger eliminates one barrier to development where the LCP would have suggested that the parcel was not large enough to be developed. In any case, LUP Policy C-CD-9, cited above, does prohibit land divisions for beach fronting lots. The lot in question is made up of a bluff face that fronts the beach, and a merger is a land division,<sup>26</sup> and thus the LCP prohibits the proposed merger in this case. Thus, the proposed lot merger is also inconsistent with the LCP.

In conclusion, the project as proposed is significantly and fundamentally inconsistent with LCP coastal hazard policies, including at an essential level because there is no developable blufftop space available at this site and it cannot be set back as required, because it relies on shoreline armoring when that is prohibited, and because it doesn't minimize alteration of the natural landform as the LCP requires, among other reasons. As a result, the LCP requires the proposed development to be denied.

## 2. Coastal Waters and Water Quality

### ***Applicable LCP Provisions***

The LCP protects natural resources and habitats, including on and offshore marine resources and coastal waters, including as follows:

***C-BIO-22 Marine Resources.*** *Maintain, enhance, and, where feasible, restore marine resources. Provide special protection to areas and species of special biological or economic significance. Carry out uses of the marine environment in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

***C-WR-1 Water Quality Protection and Biological Productivity.*** *Monitor, protect, and enhance the quality of coastal waters for the benefit of natural communities, human health, recreational users, and the local economy. Maintain and, where feasible, restore the biological productivity and the quality of coastal*

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Commission's suggested modifications – contained provisions to prohibit any type of land division (which, by definition a lot merger is) that would result in a parcel that could not be developed consistent with the LCP due to coastal hazard or other concerns. The Commission has certified a number of LCP coastal hazard provisions in recent years with just such a provision (e.g., in the City of Half Moon Bay, City of San Clemente, etc.). Thus, such provision would dictate that the proposed lot merger be denied were it to be applicable. Since it isn't, it is immaterial to the LCP question here, but it does provide some context around the way in which both the County and the Commission view such proposals in current LCP planning practice.

<sup>25</sup> See LUP Map 29a.

<sup>26</sup> The LCP defines Land Division as: "A change in the intensity or density of use of land, including subdivision (through parcel map, tract map, grant deed), lot line adjustments, redivisions, mergers and certificates of compliance."

*waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health through means such as minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alterations of natural streams.*

The LCP also provides guidance on requirements for development of new sewage disposal systems to protect water quality, including as follows:

***LUP Policy C-PFS-6 Sewage Disposal Systems and Protection of Water Quality.*** *Require new and expanded sewage disposal systems to be designed, constructed, and maintained so as to protect the biological productivity and quality of coastal streams, wetlands, and other waters.*

Thus, the LCP requires that marine resources be maintained, enhanced, and where feasible restored, and that biological productivity and water quality be protected and enhanced. In addition, and specific to septic systems, the LCP requires that such systems be designed to protect biological productivity and quality of coastal waters.

### ***Analysis***

The Applicants' biological report<sup>27</sup> concluded that the mostly vacant project site is vegetated with ruderal grasses and shrubs, as well as a number of trees that are not native to the Muir Beach area, including Monterey cypress, Monterey pine, blackwood acacia and eucalyptus. While several of these trees are proposed to be removed to accommodate the residence and associated construction, none of the trees are protected species under the LCP. The report further concluded that the project site does not contain any environmentally sensitive habitat areas, special-status animal or plant species, or other LCP-protected habitat areas.

That said, the site is immediately adjacent to the beach and ocean, and near to Big Lagoon (in the back beach area of the main beach at Muir Beach), the latter of which includes significant wetland, lagoon, and riparian habitats, including Redwood Creek Lagoon and its coho salmon and California red-legged frog habitats. Although these wetland, lagoon, and riparian habitat areas are approximately 300 feet east (downcoast) of the project site and are unlikely to be affected by the proposed project, it is possible that the proposed development, including its temporary construction activities, could have impacts to coastal water quality if appropriate safeguards aren't put in place, including because site drainage would be directed via pipes to the beach. Without such safeguards, the proposed project would be LCP inconsistent on these points as well. For example, construction BMPs, landscaping, and ongoing water quality requirements could be specified to ensure that the development appropriately protects adjacent coastal waters. In addition, specialized requirements could be applied to the proposed septic system and its leach field, as well as the drainage system, in an attempt to

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<sup>27</sup> Titled *Biological Site Assessment for 183 Sunset Way, Marin County*, by the Huffman-Broadway Group, dated October 29, 2019; see **Appendix A**.

mitigate for their potential to contribute pollutants into coastal waters. However, the proposed project is fundamentally inconsistent with the LCP in a way that requires denial (as previously described). Thus, although these potential water quality issues could be addressed by conditions of approval, the CDP must be denied for other reasons and such conditions are not here identified, rather these coastal waters and water quality LCP issues are also reasons for denial in this case.

### 3. Public Views

#### **Applicable LCP Provisions**

The LCP provides that the scenic and visual qualities of coastal areas are resources of public importance that must be protected, that new development is required to protect public views and be designed to be visually compatible with the surrounding area, and that natural landforms are to be preserved and protected, including as follows:

***LUP C-DES-1 Compatible Design.*** Ensure that the siting, height, scale, and design (including materials and color) of new structures are compatible with the character of the surrounding natural and built environment. Structures shall be designed to follow the natural contours of the land and shall limit reflectivity of glass and other surfaces.

***LUP C-DES-2 Protection of Visual Resources.*** Development shall be sited and designed to protect significant views, including views both to and along the ocean and scenic coastal areas as seen from public viewing areas such as highways, roads, beaches, parks, coastal trails and accessways, vista points, and coastal streams and waters used for recreational purposes. The intent of this policy is the protection of significant public views rather than coastal views from private residential areas. Require development to be screened with appropriate landscaping provided that when mature, such landscaping shall not interfere with public views to and along the coast. The use of drought tolerant, native coastal plant species is encouraged. Continue to keep road and driveway construction, grading, and utility extensions to a minimum, except that longer road and driveway extensions may be necessary in highly visible areas in order to avoid or minimize other impacts.

***New Development and Land Use Policy 24:*** Development shall be designed to fit a site's topography and existing soil, geological, and hydrological conditions so that grading, cut and fill operations, and other site preparation are kept to an absolute minimum and natural landforms are preserved. Areas of a site which are not suited to development because of known soil, geologic, flood, erosion or other hazards that exist to a degree that no amount of corrective work consistent with these policies, including but not limited to the protection of natural landforms, can eliminate or substantially reduce the hazards to the property endangered thereby shall remain in open space.

The LUP provides additional requirements specific to the Muir Beach area:

***C-MB-1 Community Character of Muir Beach. Maintain the small-scale character of Muir Beach as a primarily residential community with recreational, small-scale visitor, and limited agricultural use.***

### ***Analysis***

The proposed development site is adjacent to and in full public view from heavily used Muir Beach. Currently, other than the previously described unpermitted armoring (see also Violation section that follows) the site appears visually as a back beach, natural bluff area with scrubby vegetation and several large trees and helps to provide some offsetting visual relief in relation to nearby residential development that is also visible. As such, the generally undeveloped site contributes overall to the scenic quality of the bluff, the surrounding area, and the public beach viewshed (and would even more if the unpermitted armoring weren't present). The site is also present in views across it from Sunset Way, albeit there is much more limited public use of Sunset Way, and these public views are not as significant as the public beach views.

The proposed development includes removal of 12 trees on site and replacement of much of the natural landform with some 3,000 square feet of residential development partially embedded into the bluff face. Although the LCP only allows for a maximum height of 25 feet above grade,<sup>28</sup> the proposed structures would extend up to 31 feet above grade (and up to nearly 46 feet above grade when measured from the floor of below ground elements). Thus, the project is taller than the maximum allowed by the LCP, and it is inconsistent with the LCP on this point. Furthermore, an allowed maximum height is not an entitlement to that height, rather it identifies a maximum that may be required to be reduced if necessary to make development LCP consistent. For example, a maximum height of 25 feet just means that a residence can't be higher than that, but it may also be required to be lower than that if necessary to meet more subjective LCP requirements (e.g., related to public view protection, as is applicable here).

The residence would also extend some 125 feet from Sunset Way down the slope, which is about two to three times the distance associated with adjacent residential development. In other words, not only would the open space natural area become a series of interconnected buildings, but it would also extend significantly further down the slope than adjacent structures, with taller buildings, leading to significant impacts on the public beach viewshed, including increasing the degree to which public beach views are impacted as compared to the adjacent built structures. In fact, it would appear that the proposed project would result in one of the closest residential structures to Muir Beach itself, and one of the larger, only exacerbating all such impacts, and further reducing the

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<sup>28</sup> See LCP Section 22.62.030(B). In addition, note that LCP defines height as the "vertical distance from grade...to the highest point of a structure. Maximum height shall be measured as the vertical distance from grade to an imaginary plane located the allowed number of feet above and parallel to the grade." Grade is defined as "The ground elevation used as the basis for measurement of allowed structure height. Grade shall be the elevation of the natural or finished grade at the exterior surface of the structure, whichever is more restrictive, using a topographic map prepared by a licensed Civil Engineer or Land Surveyor. Retaining walls cannot be used to raise the "Grade" and increase the allowable height of a structure.

natural ambiance and aesthetics of the overall beach viewshed as a result. Further, given that all site drainage would also be directed via pipes to the beach, such private infrastructure, both when flowing and not, would also increase the visual incongruities. In addition, the proposed project would block off about 25 lateral feet of the partially obscured public ocean view (i.e., through the existing site vegetation) currently found from Sunset Way with a building elevation that would extend some ten to twelve feet above the road grade, where remaining public views not blocked would be confined into smaller and smaller viewpoints and their viability reduced. Additionally, until the unpermitted armoring issues at the base of the bluff are resolved (e.g., including through removal and restoration), and they are not addressed and not resolved in this CDP action,<sup>29</sup> such armoring also contributes to public viewshed degradation.

While some such view impacts are to be expected when LCP-allowable development is approved on vacant sites, even vacant sites that lead to new development visible in significant public viewsheds, like the Muir Beach viewshed here, this is not LCP-allowable development. In other words, and as described in detail in the previous Coastal Hazard findings, the LCP does not condone development on this bluff face site. Rather, this proposed development is actually prohibited by the LCP, including because it is located on a bluff face, and including because it is actually required to be protected against any development and kept as a natural landform and a protected open space area, as previously detailed. All of which makes sense given the visual sensitivity of the public beach viewshed, as described above. Although at least some of these public viewshed impacts and issues could be addressed by conditions of approval if the project were approvable under the LCP, it is not. In fact, the proposed project is significantly inconsistent with the LCP in a way that requires denial, as previously described. As such, the CDP must be denied for other reasons and such conditions are not here identified, rather these public view LCP issues are also reasons for denial in this case.

#### **4. Public Access**

##### ***Applicable LCP and Coastal Act Provisions***

The Coastal Act requires that development located seaward of the first public road and the sea, such as the proposed project, be consistent with the Coastal Act's access and recreation provisions, whether located in the local government's CDP jurisdiction or the Commission's. Maximizing public recreational access opportunities is a fundamental objective of the Act, which also protects against any impacts to public access and recreation. Relevant policies include:

***Section 30210. In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted,***

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<sup>29</sup> This is because resolution of the violation is complicated due to the fact that it spans multiple properties (including the Applicants' property) with multiple property owners, and the potential effects on any one and/or all of the affected properties from removal of the unpermitted armoring and restoration of the affected area is as yet defined. As a result, impact assessment for the time the unpermitted armoring has been in place, and for any potential penalties (such as allowed by Coastal Act Section 30821), is not covered in this action, and is instead deferred to the Commission's enforcement division investigation and potential future action (again, see also subsequent Violation section).



*and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

**Section 30211.** *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

**Section 30212(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. ...*

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

**Section 30220.** *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

**Section 30221.** *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

**Section 30222.** *The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.*

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

**Section 30240(b).** *Development in areas adjacent to 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.*

These overlapping policies clearly protect access to and along the shoreline and to offshore waters for public access and recreation purposes, particularly free and low-cost access. Projects along the immediate shoreline (such as this project) that affect significant coastal public recreational access areas (such as Muir Beach) have the potential to adversely impact public access and recreation. Section 30210 of the Coastal Act requires the Commission to provide the general public maximum access and recreational opportunities, while respecting the rights of private property owners.

Section 30211 prohibits development from interfering with the public's right of access to the sea. In approving new development, Section 30212 requires new development to provide access from the nearest public roadway to the shoreline and along the coast, save for certain limited exceptions, such as if there is existing adequate access nearby. Finally, the Coastal Act Section 30210 direction to maximize access represents a different threshold than to simply provide or protect such access and is fundamentally different from other like provisions in this respect. In other words, it is not enough to simply provide access to and along the coast, and not enough to simply protect access; rather such access must also be maximized. This terminology distinguishes the Coastal Act in certain respects and provides fundamental direction with respect to projects along the California coast that raise public access issues, like this one.

These Coastal Act provisions are also reflected in the LCP, where they are amplified for the Marin County context, including specifically for Muir Beach, as follows:

***C-PA-15 Impacts of New Development on Public Use of Coastal Accessways.*** *Site and design new development so as to avoid, if feasible, and, if unavoidable, to minimize impacts to users of public coastal access and recreation areas. Measures to mitigate impacts to users of public coastal access and recreation areas shall be implemented prior to or concurrent with construction of the approved development.*

***C-PA-21 Shoreline Structures on or Near Public Coastal Accessways.*** *Ensure that construction of shoreline protection measures otherwise permitted by LCP policies maintains or enhances the same or similar shoreline access as previously existed.*

***C-PA-22 Protection Against Encroachments on Public Coastal Accessways and Offers to Dedicate Easements.*** *Seek assistance from the Coastal Commission or other entities as appropriate in order to enforce the terms of public access easements and/or offers to dedicate easements that have been blocked by private development.*

### **Analysis**

The proposed project is located on the bluff face adjacent to the namesake for the community, Muir Beach, which is a popular public access destination on the Marin County coastline and is also part of the Golden Gate National Recreation Area managed by the National Park Service. This sandy beach public recreational area includes a 165-space public parking lot with a restroom, picnic tables, and related public amenities, and serves as the trailhead for miles of blufftop trails. The sandy beach area is largest nearest the parking lot, and transitions to a rockier and much narrower beach known as "Little Beach" at the toe of the bluff seaward of the site, where some of this narrowing appears to be at least in part related to the presence of the unpermitted armoring stretching across five properties, including the subject site, at the base of the bluff here (see also subsequent Violation section).

As described earlier, the proposed project would include coastal armoring, both new armoring in the form of the development's retaining wall foundation elements and the

embedded concrete piers protecting the proposed septic system, as well as the unpermitted base-of-bluff armoring on which at least some of the Applicants' geotechnical assessment is based. As described above, the latter armoring is not addressed and not resolved in this CDP action, but the former is a part of the proposed project and is covered herein. As indicated earlier, it is well known that armoring significantly alters natural bluffs, deprives beaches of sand, and leads to loss of beach fronting the armoring over time from such armoring, including due to passive erosion (or 'coastal squeeze') processes.<sup>30</sup> In addition to the coastal hazard, water quality, natural landform, and public view impacts described above, the Applicants' proposed armoring elements would adversely affect shoreline processes, and would ultimately adversely affect beach and beach-related resources below the site.

The Commission typically evaluates such effects from armoring in three main categories: (1) the loss of the beach area on which the structure is located; (2) the long-term loss of beach that will result when the back-beach location is fixed on an eroding shoreline; and (3) the amount of material that would have been supplied to the beach if the bluff and back-beach were to erode naturally. The first two calculations affect beach and shoreline use areas, and the third is almost exclusively about providing materials that can feed the beach, but all three impact public recreational access to the beach as it relates to sand supply and, by extension, beach and shoreline recreational areas. Here, the new armoring elements are not proposed to be placed on the beach, and thus the first category is not readily applicable here. As to the second category, while some of the proposed armoring elements might be expected to eventually define and/or fix the back-beach location, they are located up the slope in such a way that it is difficult to assess and attribute their impacts in this regard. Ultimately, the clearest of the armoring impact assessment methodologies as applied to this proposed project is the third category, which is specific to retention of bluff materials.

In order to evaluate this potential impact, it is first useful to consider the erosional processes currently operating on the coastal bluff at this site. As detailed in the Applicants' geologic reports, bluff erosion is occurring through both marine and non-marine ("subaerial") processes. Over time, wave action at the bluff toe has eroded a relatively steep sea cliff into the Franciscan bedrock. Shoreline armoring structures on the beach at the site have slowed, but not eliminated, this type of erosion. Erosion of the sea cliff has also triggered surficial sliding in the loose, colluvial materials overlying the bedrock on at least the lower portion of the upper bluff. On the upper bluff slope, erosion appears to be dominated by subaerial processes, specifically shallow landsliding and soil creep attributable to wet-season runoff, saturated soils and the steepness of the upper bluff slope.

The proposed retaining wall and deep pier foundation system and the proposed embedded concrete piers fronting the proposed septic system in the bluff would both

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<sup>30</sup> Where passive erosion/coastal squeeze refers to the phenomenon where armoring fixes the backshore position on an eroding shoreline (and one where sea levels are rising) leading to the available beach/recreation area narrowing, being 'squeezed' between the moving shoreline and the fixed backshore, and thus leading to the loss of beach and recreational shoreline as a direct result of the armor.

serve to moderate natural bluff erosional processes occurring on the upper bluff slope, in particular the shallow landsliding observed to be affecting large portions of the site. The proposed retaining wall and leach field piers would stabilize the upper bluff slope, preventing further landslides and downslope movement of bluff material, and ultimately would be expected to block sand generating materials in the bluff from reaching the beach and sand supply system below. In terms of the foundation elements, although it is difficult to objectively quantify such impacts related to the concrete pier elements, the retaining walls will function just like any concrete-facing on a bluff would (e.g., shotcrete, gunnite, vertical seawall, etc.) and would retain the materials behind them for as long as they are present. Thus, the volume of total material that would have gone into the sand supply system over the life of the shoreline structure would be the volume of material between (a) the likely future bluff face location with the foundation armoring; and (b) the likely future bluff face location without the foundation armoring.

In the present case, the proposed house retaining wall would prevent the erosion and sliding of the surficial colluvial and fill materials (overlying stable bedrock), to an average depth of approximately 5 feet, on the upper portion of the slope between elevations of approximately 92 to 132 feet, representing an on-the-ground distance of approximately 75 feet. As the house retaining wall would be approximately 40 feet wide (across the bluff face), the wall would retain approximately 15,000 cubic feet (555.6 cubic yards) of bluff material that could potentially be mobilized downslope by natural erosion processes. Based on the boring logs and sediment testing results contained in the Applicants' geologic reports, the fill and colluvial material on the upper bluff may contain roughly 75% sand and gravel, or approximately 417 cubic yards of material that could otherwise eventually nourish the beach and local littoral system. Because the natural erosional processes affecting the upper bluff slope are typically infrequent or episodic, and often "incomplete" (i.e., bluff material is translated some distance downslope, but not all the way to the beach), it is difficult to quantify the impact of the retaining wall over a given time period (e.g., the 20-year assessment period typically used by the Commission for armoring structures). Nonetheless, the total volume of retained material that could *potentially* contribute to shoreline sand supply is significant.<sup>31</sup>

The piers associated with the house foundation are designed to support the structure at depth in stable bedrock, not to stabilize or retain the bluff; pier foundation systems of this type may also have some small effect on the bluff, but it is difficult to assess, and thus is not assessed here. In contrast, the embedded concrete piers seaward of the septic system are designed to enhance the stability of the upper soil layers being used for the leach field, and to prevent landsliding that could damage the leach field and thus the function of the septic system. The leach field stabilization system would consist of 18-inch diameter piers embedded 4 feet on center, thus leaving gaps of roughly 2.5 feet between piers. While the gaps between piers would, in theory, allow some degree of erosion between piers, the stabilizing effect of this system would greatly reduce the chance of significant landslides and slope movements that transfer larger volumes of

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<sup>31</sup> Wall length (40 ft) x length of slope uphill of wall (75 ft) x depth of potentially mobile soils (5 ft) equals 15,000 cubic feet, which, when divided by 27 to convert to cubic yards, equals 555.6 cubic yards of retained materials.

material (and thus sand) downslope and eventually to the shoreline. Similar to the retaining wall, the proposed piers would stabilize the colluvial materials on the middle portion of the upper bluff to a depth of about 5 feet, along the approximately 80-foot length of the pier system. Assuming the wedge of retained bluff material extends upslope as far as the house retaining wall, or about 100 feet, the leach field piers could prevent the mobilization of approximately 1,481 cubic yards (40,000 cubic feet) of bluff material, of which about 1,111 cubic yards may consist of sand and gravel. As with the retaining wall impact analysis, above, it is difficult to quantify the actual sand supply impact of the stabilization piers over time. Thus, at a minimum, it appears that the proposed project could retain some 1,528 cubic yards of sand and gravel within the bluff materials behind the proposed walls and stabilization piers. Without better information about the landsliding frequency and/or the rates of upper bluff erosion it is difficult to estimate the impacts to the beach and sand supply system over time, for example during an initial twenty-year period (where the Commission has typically looked to such calculations in twenty-year increments to facilitate mitigation calculations and requirements). Nonetheless, the total value of the beach-supporting bluff materials (sand and gravel) potentially retained behind the proposed structures (where beach quality sand delivered to Muir Beach is assumed to cost \$100 per cubic yard) could be on the order of \$153,000. While it is rather unlikely that all (or even a substantial fraction) of the retained bluff material would have been delivered to the beach over a 20- or 50-year period, the rough, generalized calculations provided here do provide a sense of the relative magnitude of the project's potential impacts.

In addition to those significant public recreational access impacts due to the proposed project, the above public view impacts are also all public recreational access impacts as the public view is an important part of the public access experience as it relates to this site, as described above. However, unlike the public view analysis, where some view impacts are to be expected when LCP-allowable development is approved on vacant sites, public access impacts are not, as a general rule, expected in the same way. In fact, here, most of these impacts emanate from proposed project elements that are not actually allowed by the LCP, on top of the fact that this is not LCP-allowable development in the first place, as described earlier. Although at least some of these public recreational access impacts and issues could be addressed by conditions of approval if the project were approvable under the LCP, it is not. In fact, the proposed project is fundamentally inconsistent with the LCP in a way requiring denial (as previously described). As such, the CDP must be denied for other reasons and such conditions are not here identified, rather these public recreational access LCP and Coastal Act issues are also reasons for denial in this case.

## **5. Violations**

Violations of the Coastal Act and the Marin County LCP exist both on and adjacent to the subject property, including a lot merger that was never authorized via CDP and the coastal armoring that is unpermitted. In terms of the unpermitted lot merger, the parcel making up the subject site was created by a lot merger initiated by Eric and Madeline Groneman, the parents of one of the Applicants (Graham Groneman), who at that time owned the parcels in question and currently live in a residence on the adjacent property at 181 Sunset Way. That merger combined two separate parcels (APNs 199-235-47

and 199-235-48) to create one larger nearly half-acre parcel (called out as new APN 199-235-66) at 183 Sunset Way in 2019 (as modified by further action in 2020). Following the merger, the newly created parcel was transferred from Eric and Madeline Groneman to Graham Groneman and Brett Sibley, the Applicants for this CDP, via an “interfamily deed.” However, despite this action constituting a land division and therefore development, and although approved by the County through a non-CDP process, the merger was never authorized via CDP.

In terms of the unpermitted armoring, the lower portion of the Applicants’ site nearest the beach includes a series of concrete and concrete-grouted rock retaining walls and riprap that extend across the subject site (183 Sunset Way) as well as onto four other neighboring properties (50 Cove Lane and 185, 187 and 189 Sunset Way). All told, riprap extends approximately 200 feet and concrete retaining walls extend approximately 150 feet in a crisscross pattern of sorts that is some 30 feet wide along the shoreline, extending from beach level to an elevation of about 10 feet above the beach (see **Exhibit 3** for map and photos of the armoring in relation to each property). Based on aerial photo analysis, these armoring structures appear to have existed in various forms since the 1960s, with repairs and enlargements conducted in the 1980s and again in 2005, where all activities since 1972<sup>32</sup> occurred without the benefit of a CDP.<sup>33</sup> Because the unpermitted armoring improvements resulted in modifying the form of the pre-Coastal Act armoring, including by significantly expanding and enlarging it in ways that require such armoring to be evaluated as a replacement structure (or a ‘new’ structure) subject to CDP authorization under the Coastal Act, the armoring no longer enjoys any pre-CDP status, and it is all considered unpermitted under the Coastal Act and the LCP.

As discussed in prior sections of this report, such unpermitted armoring structures are known to be inconsistent with Coastal Act and LCP coastal resource protection objectives and provisions, and thus are only allowed in very limited circumstances (as it applies here, for pre-Coastal Act structures that have not been redeveloped since and that are in danger from erosion), where such allowance is best understood as an exception, a variance, or a legal non-conformity in relation to Coastal Act/LCP coastal resource protection requirements. Although it is true that the unpermitted armoring all appears to have been constructed before the Applicants acquired the property, the responsibility for addressing such unpermitted development runs with the land, and thus

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<sup>32</sup> Where February 1, 1973, was the initiation of coastal permit requirements along the California coast pursuant to 1972’s Proposition 20, the “Coastal Initiative”, that originally created the Coastal Commission. Such coastal permit requirements have been continuous at this location since then because the Coastal Commission and coastal permit requirements were made permanent by the Coastal Act when it was passed in 1976 and initiated on January 1, 1977.

<sup>33</sup> The Commission approved a CDP in 1983 for a revetment fronting 185 and 187 Sunset Way, thus applying to a portion of the unpermitted revetment in question (CDP 2-83-030). However, the permittees for that CDP did not fulfill the prior to issuance conditions (which included a required offer-to-dedicate for a public access easement and a required assumption of risk deed restriction), the CDP never issued, and the CDP approval expired in 1985. As a result, that CDP action confers no CDP status to that portion of the revetment. The Commission is unaware of any other CDPs related to the unpermitted armoring.

it is the Applicants' (and the neighboring four property owners') responsibility, nonetheless.<sup>34</sup>

Although development of the unpermitted armoring has taken place prior to consideration of this subject CDP application, the Commission considered the proposed CDP application solely based upon the provisions of Chapter 3 of the Coastal Act and the Marin County LCP. Due to the complex nature of this armoring, including its presence on five separate parcels under different ownership, and the uncertainty of how removal and restoration of the affected area could impact the safety and stability of existing adjacent structures, resolution of the armoring violation is not a part of this CDP action. As a result, even if this application is approved, and the CDP exercised, violations will remain on and adjacent to the subject property that will not be addressed by the Commission's action on this application. The matter of the armoring violations has been referred to the Commission's enforcement division to consider options for future actions to address the violations on this property and the violations on the adjacent properties<sup>35</sup>.

Regarding the lot merger, CDP approval of it would authorize the land division after-the-fact, and compliance with such CDP's required conditions would remedy this violation. However, if this CDP is denied, then that violation remains as well.

Commission review and action on this CDP 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 any development undertaken on the subject site without a CDP, or that any aspects of the violation have been resolved. Accordingly, the Applicant remains subject to enforcement action for unpermitted development on the subject property after CDP action in the same way as before CDP action.

## **6. Takings**

As discussed above, the project site is subject to significant development constraints given that essentially the entire parcel is a steeply sloped bluff face subject to coastal hazard impacts now and over time. As described in detail above, the project cannot be found consistent with the LCP or the Coastal Act. Critically, the project does not comply with multiple LCP coastal hazard policies, including at a fundamental level because there is no developable blufftop space available at this site and it cannot be set back from the blufftop edge as required, because it relies on shoreline armoring that the LCP prohibits, and because it does not minimize alteration of the natural landform and the required open space at this site as the LCP requires, among other reasons. Importantly, these are not the type of inconsistencies that can be cured by project modifications through conditions of approval (e.g., if a house was two feet taller than allowed, then it could be conditioned to be made consistent by lowering it by two feet). In short, the Coastal Act and LCP require denial of this CDP application.

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<sup>35</sup> Commission staff are coordinating with the State Lands Commission to ensure that any armoring present in this vicinity is compliant with permitting and/or leasing requirements for public trust lands.

If and when the Commission considers denying a CDP application for a project, however, a question may arise as to whether the denial results in an unconstitutional “taking” of an 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 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.*

The Marin County LCP provides additional guidelines for conducting a taking evaluation for a given project under Commission or local planning review, with Section 22.70.180 (Potential Takings Evaluation) stating:

*If the application of the policies, standards or provisions of the Local Coastal Program to proposed development would potentially constitute a taking of private property, then a development that is not consistent with the LCP may be allowed on the property to avoid a taking, provided such development is as consistent as possible with all applicable policies and is the minimum amount of development necessary to avoid a taking as determined through a takings evaluation, including an evaluation of the materials required to be provided by the applicant as set forth below. The applicant shall supplement their application materials to provide the required information and analysis as specified below...*

Consequently, the Commission must assess whether denial of a CDP for the proposed development could result in an unconstitutional taking of private property. If the Commission determines that a taking is possible, then Section 30010 and Section 22.70.180 allow the Commission to approve some amount of development in order to avoid such a taking, even if the approved development is inconsistent with LCP or Coastal Act provisions, provided LCP and Coastal Act inconsistencies are avoided/minimized as much as possible while still avoiding a takings.<sup>36</sup> On the other hand, if the Commission concludes that its action likely would not constitute a taking, then it may deny the CDP for the project while still complying with Coastal Act Section 30010 and LCP Section 22.70.180. It is important to note, however, that in undertaking such analysis, the Commission is not a court, and it cannot ultimately adjudicate whether its action constitutes an unlawful taking as a matter of law. Only a court can make a final and determinative taking decision were the Commission’s decision to be challenged.

Per the Commission’s typical practice, and consistent with LCP Section 22.70.180, Commission staff requested a variety of documents from the Applicants to conduct the takings evaluation, including but not limited to a Chain of Title, information related to the

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<sup>36</sup> See, for example, CDP Nos. A-3-SCO-00-033 (Hinman); A-1-MEN-09-023 (Wernette) & 1-12-023 (Winget).



fair market value and property costs of the land, and changes in use. The Applicants provided the requested information on May 31, 2022. In the remainder of this section, the Commission considers whether, for purposes of compliance with Coastal Act Section 30010 and LCP Section 22.70.180, denial of a CDP for the proposed development could 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>37</sup> Similarly, 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.<sup>38</sup> First, there are the cases in which government authorizes a physical occupation of property.<sup>39</sup> Second, there are the cases in which government merely regulates the use of property.<sup>40</sup> A taking is less likely to be found when the interference with property is an application of a regulatory program “adjusting the benefits and burdens of economic life to promote the common good” rather than a physical appropriation. *Keystone Bituminous Coal Ass’n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, footnote 18. The Commission’s actions here would be evaluated under the standards for a regulatory taking.

The United States Supreme Court has identified two circumstances in which a regulatory taking might occur. The first is a “categorical” taking identified in *Lucas v. South Carolina Coastal Council* ((1992) 505 U.S. 1003, 1014). In *Lucas*, the Court found that a regulation that denied all economically viable use of property was a taking without undertaking a “case specific” inquiry into the public interest advanced by the challenged regulation. 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”.<sup>41</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 of the character of the government action, the economic impact of the challenged regulation, and the extent of the regulation’s interference with reasonable, investment-backed

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<sup>37</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).

<sup>38</sup> See *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523.

<sup>39</sup> See, for example, *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.

<sup>40</sup> See *Yee, supra*, 503 U.S. at pages 522-523.

<sup>41</sup> See *Lucas* at pages 1016-1017, and see *Riverside Bayview Homes, supra*, 474 U.S. at page 126 (regulatory takings occur only under “extreme circumstances”).

expectations.<sup>42</sup> In both *Lucas* and *Penn Central*, even where the challenged regulatory act falls into one of these categories, government may avoid a taking if the restriction inheres in the title of the property itself. In other words, when background principles of state property law (e.g., related to public nuisances or property title) require the same outcome as a government decision might, then the government decision does not constitute a taking.<sup>43</sup>

### **Unit of Property**

As a threshold matter, before a taking claim can be analyzed, it is necessary to define the unit of property against which the claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable legally created lot or parcel of property on which development is proposed. The issue is more complicated in cases where there are multiple lots or parcels with differing numbers of APNs (e.g., ten parcels making up a single APN), where there are questions about the legality of the lots/parcels/APNs, where the landowner owns or controls adjacent or contiguous land that are related to the proposed development, or combinations of all of the above. Under the U.S. Supreme Court decision in *Murr v. Wisconsin* ((2017) 137 S.Ct. 1933), reviewing courts must consider objectively whether reasonable expectations about property ownership would lead a landowner to anticipate that a property in question would be treated as a single unit or as separate tracts. First, courts give substantial weight to the property's treatment, in particular how it is bounded or divided, under state and local law. Second, courts look to the property's physical characteristics, including the physical relationship of tracts, topography, and the surrounding environment. Third, courts assess the property's value under the challenged regulation, with special attention to the effect of the burdened land on the value of other holdings.

In terms of the property in question in this case, it is made up of two APNs that were acquired by the Applicants in 2021.<sup>44,45</sup> These same two APNs were previously owned by the property owners at 181 Sunset Way, and these prior owners acquired these two APNs together in 1982.<sup>46</sup> They also acquired the 181 Sunset Way property and house in 1998. The two APNs were then gifted to the Applicants in 2021. The Applicants here propose development that spans the two APNs, with the proposed residence and garage on 183 Sunset, and a parking easement on 181 Sunset. There is nothing that the Commission has seen in the record to suggest that the two APNs were not legally

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<sup>42</sup> See *Penn Central*, 438 U.S. at 134. In *Palazzolo v. Rhode Island* ((2001) 533 U.S. 606), the Supreme 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 (see *Palazzolo*, rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*).

<sup>43</sup> See *Lucas*, 505 U.S. at pages 1028-1036.

<sup>44</sup> Per the 2021 title report for the property, these two APNs are actually made up of six separate parcels.

<sup>45</sup> As described earlier, the two APNs (APNs 199-235-47 and 199-235-48) were combined into one APN (called out as new APN 199-235-66) in 2019 (as modified by further action in 2020), all without benefit of a CDP. Thus, the underlying configuration of the property prior to that unpermitted development is the baseline for evaluation here.

<sup>46</sup> Prior to that, it appears that they were held together by the prior owner since 1956.

created, and they appear to have been transacted as a unit going back to at least 1956 (albeit held under common ownership with the 181 Sunset Way property from 1998 to 2021), and thus the underlying legal unit of property is the property made up of the two APNs.

As to whether the two APNs should actually be considered as part of an overall and larger property in combination with the adjacent property at 181 Sunset, the totality of the evidence suggests the two APNs should be treated as a separate tract. Specifically, the prior owners purchased the two APNs first (in 1982), and those two APNs had historically been treated as a single tract, even if they subsequently acquired the developed property at 181 Sunset Way some sixteen years later. Although development associated with 181 Sunset Way actually extends onto the two APNs,<sup>47</sup> which could be taken to suggest that the two APNs are actually more entwined, it appears to have been more an oversight at the margin of the developed property than an overall combined development arrangement. In addition, the former owners legally divested themselves of the two APNs in 2021 when they gifted them to the Applicants. Although the owners of 181 Sunset Way are the parents of one of the Applicants, and thus there is a familial connection, it does not appear that the former owners are somehow controlling the current Applicants or the CDP application, or that the gift was an attempt to create a parcel where development would need to be approved to avoid an unconstitutional taking of property. In addition, the physical characteristics of the two APNs are similar to one another as well as to other bluff face properties in the surrounding area, and it appears that the Applicants could reasonably expect them to be treated as a single unit of property, including as the two APNs have been treated that way since at least 1956. Thus, on balance, the unit of property for a taking evaluation is logically the two APNs on which the development is proposed.

### **Takings Under Lucas**

The main question under *Lucas* is whether denial would render a property valueless where no productive or economically beneficial use of land is permitted. Key to that question is understanding the allowable uses of the subject property. Here, the LCP land use designation for the site is Coastal, Residential, Agricultural (or C-R-A), which is intended to “provide areas for residential use within the context of small-scale agricultural and agriculturally-related uses, subject to specific development standards” (see LUP Policy C-AG-4). At the same time, the property is also designated for single-family development, including being identified on the LUP’s Muir Beach Land Use Policy Map as “Coastal Single Family” at very low densities (i.e., 2-4 units per acre),<sup>48</sup> and being zoned on the LUP’s Muir Beach Zoning Map as “Coastal, Residential, Agricultural (10,000 square feet minimum lot size)” or C-RA-B2,<sup>49</sup> where the C-RA district is called out as a residential zoning district in the IP (Section 22.62.030(B)). In addition to the core residential and agricultural uses, other allowed uses include, but are not limited to,

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<sup>47</sup> Including a parking easement.

<sup>48</sup> See LUP Map 19a.

<sup>49</sup> See LUP Map 29a.

bed and breakfasts, private residential recreation facilities, public parks and playgrounds, and nature preserves.<sup>50</sup>

Thus, the LCP allows for a variety of potential uses of the property, some of which could be economically viable (such as a residence, a bed and breakfast, a private residential recreation facility, or even a small-scale agricultural use (e.g., flower farm/stand)),<sup>51</sup> particularly given the fact that Applicants were gifted the property and have not (it appears) undertaken significant investments in the property to date. Ultimately, however, all such uses would be similarly constrained as the proposed residential use due to the configuration of the site almost entirely on a bluff face. Some potential uses might be less LCP and Coastal Act inconsistent (e.g., a small flower farm/stand near Sunset Way could have a significantly smaller footprint and lesser foundation/wastewater needs than a residence such as proposed), but it is unclear whether any such use could be developed/operated consistent with the LCP and the Coastal Act.

In addition, at the time the Applicants acquired the property, the Marin County Assessor's office valued the property as land value only, and at a value of \$38,645. For comparison, the land value alone (i.e., not including the value of the property with the home that is developed on it) for a similarly-sized and shaped parcel at the upcoast, directly adjacent, neighboring property with a house (at 185 Sunset Way), is estimated by the Assessor's office at nearly \$1 million (\$906,000).<sup>52</sup> In other words, the land values are almost 25 times more just next-door.

In short, the record is insufficient to determine that denial of the CDP for the proposed project would result in a categorical taking under *Lucas*.

### **Takings under Penn Central**

In addition to the *Lucas* analysis, a court would also consider whether the CDP denial would constitute a taking under the ad hoc *Penn Central* inquiry. This inquiry generally requires an examination of factors including the character of the government action, the economic impact of the challenged regulation, and the extent of the regulation's interference with reasonable, investment-backed expectations.

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

To evaluate whether the Applicants had a "reasonable and investment-backed expectation" that a residence could be developed on the property requires that

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<sup>50</sup> See IP Table 5-2-d.

<sup>51</sup> Another method of realizing value could be selling the property and/or an easement over it for conservation and preservation purposes. However, a recent Ninth Circuit Court of Appeals published decision suggests that the possibility of selling land to a government entity for preservation/non-economic purposes may not be sufficient to defeat a taking claim under *Lucas*. *Bridge Aina Le'a, LLC v. Land Use Commission*, (2020), 950 F.3d 610, 628.

<sup>52</sup> Assessor valuations of this type emanate from the purchase price when the property was acquired, and rarely keep up in the same way that the market does. In other words, the nearly million-dollar land valuation applicable next-door, based on a purchase in 2015, likely underestimates true land value that could be presumed for a developable beach and ocean fronting property like this.

expectations be measured objectively in terms of what a reasonable person might conclude about the developability of a site, and to what degree that expectation was backed by any actual investment. 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 as proposed by the Applicants, considering all the legal, regulatory, economic, physical, and other constraints that existed when the property was acquired.

Concerning whether Applicants have a reasonable expectation to develop the site with a residence, the parcel was zoned at the time of acquisition in 2021, as it is now, for residential/agricultural, as are the surrounding parcels, and the neighborhood is essentially built out with single-family residences. In fact, single-family residences exist on either side of the vacant site, including homes that extend partially down the bluff (though not to the degree proposed by Applicants in this case). The Applicants should also have been aware, however, that the property was subject to coastal hazards and was entirely comprised of a steep oceanfront bluff face, and that at the time the Applicants acquired the property it was subject to development constraints under the LCP and Coastal Act. In fact, the applicable LCP coastal hazard policies that require denial of this CDP application are the same as they have been for some 40 years, as they have not changed since the early 1980s, and are the same provisions that apply today. In other words, a reasonable person doing their due diligence to help determine what might be possible for this property prior to acquisition would appropriately have consulted the LCP to understand the various requirements and constraints to development, particularly given the obviously steeply-sloped nature of the property. The LCP lays out these provisions clearly, including explicitly talking about the dangerous nature of the Muir Beach area bluffs, and indicating that many of Muir Beach's vacant lots have not been developed because they are considered too dangerous for building.<sup>53</sup> Similarly, the LCP clearly requires development to fit a site's topography in order to keep natural landform alteration "to an absolute minimum" and to preserve natural landforms, while also requiring that if an area of a proposed development site is not suited to development because of hazards (which, the LCP defines this site to be),<sup>54</sup> and those hazards cannot be eliminated or substantially reduced through LCP consistent measures (as is the case here, as described above), then that area is required to "remain in open space".<sup>55</sup> Further, the LCP explicitly states that development of property that meets the 'dangerous' criteria, like this property does, is discouraged by Marin County.

In addition, most of the existing Muir Beach residential stock was developed before the Coastal Act and the LCP existed, and thus developed before the rules that apply now

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<sup>53</sup> See, for example, LCP Environmental Hazards Section III. Shoreline Protection and Hazard Areas: Seacliff Retreat.

<sup>54</sup> Both because it is located within 300 feet of mean high tide (per Shoreline Protection and Hazard Areas Policy 4), and because it is a bluff face from which the LCP requires development to be sited inland of for coastal hazard purposes. At the least, the 300-foot distance is a readily measurable offset that would have presented a fairly easy and objective means of determining if this property was dangerous in the ways described, and thus where development is not even allowed.

<sup>55</sup> See New Development and Land Use Policy 24.

were developed. Further, the fact that the LCP allows for a variety of uses here, including residential, is only a starting point in an applicant's understanding of what might be possible, including because it is not the same as saying something can be allowed without compliance with existing regulations. On the contrary, LCP planning requires that any development be evaluated against the site constraints and the LCP provisions that determine what can actually be approved. As laid out above, when the LCP is applied to this site, implementation of its policies requires denial of the proposed development.

The Applicants have, however, provided support for their perspective that a residence could be constructed on the site landward of the blufftop edge and in a safe manner in conformity with requirements of the certified LCP, despite all of the above. This is based on the Applicant's understanding of the location of the bluff edge. The Commission's geologist disagrees with the Applicants and concludes that the blufftop edge is further landward and that most of the development would be located on the bluff face, which is not allowed by the LCP. At the time they acquired the property, they did not have the benefit of the Commission geologist's bluff edge determination, and a reasonable person would not necessarily have known that the LCP prohibited residential development in the area that the Applicants believed to be landward of the bluff edge. This expectation would have been bolstered by consideration of the surrounding development in the Muir Beach community, and the fact that the property does not have any recorded deed restrictions that prohibit or limit residential uses of the site. Thus, a court could find that the Applicants had a reasonable expectation to construct a residence on the property.

While the Commission concludes that the Applicants could have had a reasonable expectation that they could construct a residence on the parcels, the record does not support a reasonable expectation to construct a residence as large as that proposed by the Applicants. Their proposed project includes 2,959 square feet of development, all on steep bluffs and fronted by new proposed shoreline armoring, as well as retention of existing unpermitted armoring seaward of the property line. In fact, according to real estate records, a majority of the homes immediately surrounding the subject parcel are older structures, built prior to the Coastal Act, and of modest size, with mostly smaller homes under 2,000 square feet on the oceanfront, steep side of Sunset Way. Even if a reasonable person may not have understood the location of the bluff edge or the full effect of applying the LCP policies to these parcels, a reasonable person would not have concluded they could have a larger house, located farther down the slope and nearer to the ocean, than other nearby homes. Finally, the pre-Coastal Act homes in the surrounding neighborhood were not subject to present-day LCP regulations and thus are of limited utility in terms of examples for LCP-consistent development.

As to whether the Applicants' expectation was investment-backed, the Applicants acquired the as-merged property (APN 199-235-66)<sup>56</sup> for \$0 in 2021 from Eric and Madeline Groneman (Graham Groneman's parents, who had originally purchased this property in 1982). Specifically, on January 28, 2021, a Grant Deed was recorded as Marin County Recorder's Serial No. 2021-000611, identifying the property as

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<sup>56</sup> See also Violation section of this report.

Community Property with the Right of Survivorship. The Applicants have reported various costs associated with owning the property, including a 2022 fiscal year tax bill for \$2,631, vegetation maintenance (\$1,000 per year), and development planning costs (\$175,000). The Applicants did not report any income associated with the property.

As discussed above, the land value of the property (\$38,645), according to the Marin County Assessor's office, is significantly less than the land value of adjacent properties with residences (e.g., 185 Sunset, valued at \$906,000), implying that a true investment in acquiring an undeveloped property that could be developed with a home at this location would probably be more akin to \$1 million.

On balance, although there is evidence on either side, a court could conclude that the Applicants have a reasonable investment-backed expectation to construct a house of similar size and location on the slope as those in the surrounding area of Muir Beach.

### ***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>57</sup> Here, it appears property value is something less than \$40,000, at least based on the aforementioned assessed value. The Applicants counter the assessor's valuation of their property with information from two Marin County real estate agents who provided information about both undeveloped land values and overall values once such properties are developed in Marin County.<sup>58</sup> According to that submittal, if the parcel had permits for a three-bedroom home with a septic system (i.e., if it had permits for the proposed project), then the undeveloped property in question would be listed in the \$1.2 to \$1.6 million range, given the large lot size and rarity of vacant oceanfront parcels in the area. The Applicants' submittal also estimates that a three-bedroom newer home of that nature were it to be developed at this site would list for \$4 - 6 million and noted that the rarity of such a home could drive up the sales price far above asking.

The data appears to show that a reasonable valuation for a site that could be developed with a house is over \$1 million dollars (further corroborating the above discussion related to the roughly \$1 million land value at the adjacent site). However, it is unclear what type of return the Applicants could gain from a non-residential project that would qualify as an allowable use of the site under the LCP. Although the record before the Commission does not allow for a full evaluation of all of the takings considerations, based on the difference in value between adjacent developable properties and the land value of this property, a court could conclude that denial of an application to construct a

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<sup>57</sup> See *Tahoe-Sierra Pres. Council, Inc., supra*, (citing *William C. Haas v. City and County of San Francisco* (9th 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>58</sup> From Debra Allen, a real estate agent with Compass Real Estate, who indicates that she has been selling real estate in Marin County for over 30 years, and from Sara Sherfey Gemma of Golden Gate Sotheby's International Realty.

single-family residence on the site is significant enough to result in a taking under *Penn Central*.

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

The final prong of the *Penn Central* test is the character of the government action. If the Commission were to deny the CDP application in this case for the reasons identified above, the Coastal Commission advances a legitimate public interest to regulate proposed development pursuant to the LCP, which itself implements the Coastal Act, which protects coastal resources and requires new development minimize risks to life and property in hazardous areas. With the Coastal Act, and as extended to LCPs that implement the Act on the local level, the Legislature sought to protect coastal resources while allowing for orderly future development, provided it was consistent with the Act. In this case the LCP does not allow for development of the type proposed on a steeply sloping bluff face above an important public beach where its impacts on coastal resources would be considerable. In denying a CDP for such a project, the Commission's action would not be arbitrary or capricious, rather it would be rooted in fundamental Coastal Act and LCP goals, objectives, and requirements, all of which advance legitimate public interests and coastal resource protections relevant to this site. In other words, the character of the Commission's action strongly argues against a taking.

### **Exceptions to Takings**

Finally, a regulatory action does not constitute a taking if the restrictions are inherent in the title of the affected property. In other words, if "background principles" of state real property law would have led to the same outcome as a government action, then, even if other factors might suggest a taking, there is no taking.<sup>59</sup> These background principles include a state's traditional authority to prevent public nuisances and include real property constraints that preclude the proposed development (e.g., easements and deed restrictions).

California Civil Code Section 3479 defines a nuisance as follows:

*Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.*

California Civil Code Section 3480 defines a public nuisance as follows:

*A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.*

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<sup>59</sup> See *Lucas*, supra, 505 U.S. at pp. 1028-1036.



As a threshold matter, there are no deed restrictions, easements, or other recorded restrictions that would prohibit construction of a house on the property.

While the proposed house would not constitute a public health type of nuisance per se (such as might a chemical factory that emits toxic waste onto the beach), and while a house is not an obvious public nuisance as a general rule, the nature of the proposed development on a steep bluff face above a popular public beach has some potential to create a public nuisance. As discussed above, the site is vulnerable to sea level rise, bluff erosion and retreat, and other coastal hazards over the life of the proposed development. Development of the site, therefore, could contribute to damage of surrounding areas, which includes the popular public beach at Muir Beach, under a number of circumstances. For example, it is possible that if the structures could be damaged by a storm, then debris could make its way onto the beach and/or into the ocean. Additionally, the partial or full failure of the proposed septic system and associated leach field could have significant impacts in that same way, and also in terms of dispersing pollutants that could adversely affect beach and ocean water quality and marine resources. All of these types of impacts would be direct public health, and other public nuisance, problems. The potential for the development to cause a nuisance is speculative at this time because the Applicant has provided evidence that the septic and its embedded concrete piers would be secure for approximately 40 years. At worst the project might result in a public nuisance at some point, but it would depend on a number of factors, and cannot be concluded with certainty that the project would result in a public nuisance for this reason.

The project may result in impacts to the public beach and public beach viewshed both in its construction and over its project life. These include the ways in which the proposed (and existing) armoring leads to loss of sand generating materials, and by extension loss of beach, and the intense landform alteration and introduction of structural and other development into a beach viewshed on a site that the LCP requires to be left alone as protected open space. Both types of impacts are present in terms of direct impacts, but also in terms of cumulative impacts to this area and the larger coast of which this site is a part.

The above definition of a public nuisance includes “anything which is...an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any...public park” “which affects at the same time an entire community...or any considerable number of persons....” The public beach here is a public park, and all of these types of impacts could obstruct and interfere with – and in fact diminish – customary beach access use and values for all users of this popular beach, and use of the public trust more broadly, especially over time (see also previous sections of this report for more detail). As such, the impacts could arguably lead to a public nuisance were they to come to fruition, though at this time such a conclusion is speculative. Therefore, there are arguments on both sides as to whether a public nuisance would result from the proposal and as a result that is not a clear defense to a taking claim.

## **Takings Conclusion**

There is clearly evidence that would support both sides of an argument over whether a denial of a CDP for the proposed project would be a taking. On balance, the Commission finds that a court is more likely to conclude that denial of the proposed project would constitute a take than to conclude otherwise. Thus, the Commission determines that a denial could result in a taking, and that pursuant to Section 30100 of the Coastal Act it should approve a modified project to avoid this outcome.

## **7. Allowable Project to Avoid a Taking**

The Commission finds that the project as proposed is inconsistent with the Marin County LCP and the Coastal Act. In light of the evidence that denying the proposed project could constitute an unlawful taking of the Applicants' property without just compensation, pursuant to Coastal Act Section 30010 and LCP Section 22.70.180, the Commission determines that the Applicants are entitled to a reasonable economic use of the property. Having reached this conclusion, however, the Commission also finds that the Coastal Act and LCP only instruct the Commission to apply the County's LCP and the applicable Coastal Act provisions in a manner that will avoid an unconstitutional taking of property. It does not authorize the Commission to otherwise suspend the operation of, or ignore, the provisions of the LCP and the Coastal Act in acting on this CDP application. In fact, the LCP specifically requires that the approved project consist of "the minimum amount of development necessary to avoid a taking" (LCP Section 22.70.180). Thus, the Commission must still comply with the requirements of the LCP and the Coastal Act by conditioning the project in a manner that is as consistent with the LCP and the Coastal Act as possible, while avoiding an unconstitutional taking.<sup>60</sup> In other cases, this has been described as providing for a development that is the least inconsistent with applicable LCP and Coastal Act provisions and the most protective of coastal resources as possible, including providing for offsetting and commensurate mitigation for unavoidable coastal resource impacts, while providing for a reasonable economic use.

In this case, given the takings analysis above, the Commission believes that reasonable investment-backed expectations support approval of a residential use and not the other LCP-allowed uses. In addition, Commission staff considered the surrounding residential development, which includes a range of home sizes between 650 and 2,400-square-feet, indicating that the Applicants have a reasonable expectation to construct a home in that range. Staff analysis found that a home in this size range can be reasonably accommodated at this site as conditioned above. Thus, the sections below identify the types of project changes necessary to meet the above objectives for approval of a residence to avoid a taking. At a general level, and to achieve better consistency with LCP and Coastal Act requirements, the project must be reduced in scope, and sited and designed to better conform with nearby residential development, including being located nearer to Sunset Way and further from the beach and ocean.

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<sup>60</sup> Applying conditions of approval that result in such project modifications does not constitute a regulatory taking, even if they cause some loss of value (see *Penn Central*, supra, 438 U.S. at p. 130 (finding claim "untenable" that interference with an undeveloped property interest, while viable economic uses continued, constituted a taking)).

### **General Project Siting Requirements**

As described above, there is no location on the project site that can accommodate the proposed development consistent with the LCP because it is all bluff face and the LCP is geared around setbacks from the blufftop edge, and the blufftop edge is inland of the site. Thus, the only option to limiting such siting inconsistencies is to locate the project as far inland on the site as possible. There are a variety of ways that the Commission could consider the question of ‘how far inland is sufficient’ in that context, ranging from applying erosion rate assessments to allocating the bare minimum amount of space to accommodate a small home (e.g., 500 to 1,000 square feet). However, these either lack analytic applicability (e.g., erosion rates) or suffer from a lack of supporting data (e.g., what might be the size and configuration of a ‘small home’ in such context). However, the potential takings outcome can provide a relevant barometer for siting inasmuch as a court is liable to look to adjacent residences for expectations, and it is a fairly standard land use tactic to apply ‘stringline’ setbacks to achieve relative equality between similarly-situated sites (e.g., where a home is only allowed to go as far seaward as a ‘stringline’ between adjacent homes).<sup>61</sup> Here, the adjacent homes provide an appropriate arbiter of where a house might be sited. Granted, such a stringline does not necessarily minimize the LCP siting inconsistency and does not necessarily minimize the degree of LCP inconsistency in that regard as much as other options might (such as identifying 1,000 square feet of space adjacent to the road). However, it does provide a readily defensible standard that ensures that these Applicants can develop what other similarly-situated property owners have (even though these adjacent sites were developed before LCP provisions would have also affected their own siting).

Thus, the project is conditioned to locate all development (other than the septic system – see below) including the residence, garage, and other accessory structures including, but not limited to, stairways, decks, patios and porches and all supporting elements (e.g., foundation elements) inland of a setback line on the bluff face as determined through a stringline analysis. The stringline setback is required to be determined by connecting a ‘line’ using the seaward-most extent of adjacent existing residential structures (applied to exterior extents of the residential structure, garage, and any associated enclosed accessory structure, and not to elements including patios, porches, roof overhangs, or similar) at 181 and 185 Sunset Way. As to the septic system, the Commission could also require it to be inland of the stringline, but that is clearly not the way in which adjacent development is arranged, where septic systems are downslope of such development. Given there are also septic public health setback requirements (i.e., where the Marin County Environmental Health Department requires a minimum 5-foot distance between the residence and the septic tank, and a minimum 10-foot

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<sup>61</sup> The stringline method is commonly used in the coastal zone in a variety of circumstances (e.g., related to development near beaches, dunes, bluffs, etc.), and is even used in the Marin County LCP. In fact, LCP Policy C-BIO-8 (“Stringline Method of Preventing Beach Encroachment states”) is applied to circumstances that are intended primarily to address dune setbacks, such as in Stinson Beach, but it is also informative to a case like this. That policy states: “In a developed area where most lots are developed and where there are relatively few vacant lots, no part of a proposed new development (other than an allowable shoreline protective device), including decks, shall be built farther onto a beachfront than a line drawn between the most seaward portions of the adjacent structures. Enclosed living space in a new unit or addition shall not extend farther seaward than a second line drawn between the most seaward portions of the enclosed living space of the adjacent structures.”

distance between the residence and the leach field), requiring all of these elements to be inland of the stringline would likely significantly reduce available space for the home. Thus, this approval requires the septic system, including its associated leach field, to be sited as far upslope as possible, and therefore as close as possible to the residential development (which is required to be inland of the stringline setback line), while also requiring that it be sited at the minimum required distance identified by the Environmental Health Department to ensure that it is truly as far up the slope as possible. All such development is also required to conform to all other applicable Marin County LCP requirements (e.g., for parking requirements<sup>62</sup> etc.). See **Special Condition 1**.

### ***Armoring Component Requirements***

As described earlier, the project includes proposed armoring in the form of the substantial retaining wall, slab, and deep pier foundation system, as well as the embedded concrete piers fronting the septic system/leach field area. With respect to the foundation system, it is clear that if residential development is to be accommodated on this constrained property, then some form of significant foundation will be necessary to ensure that the residence does not slide down the slope in the first big storm. That said, it is not clear why the system needs to include the significant excavations and retaining walls proposed in order to accommodate such development (where the largest such cavity would be about 20 feet tall and 25 feet deep and 25 feet across into the slope as proposed), especially given that the LCP actually requires maximum landform protection, and for this site specifically, requires it be left as open space. In addition, it appears feasible to avoid the large slope excavations and instead construct a house atop piers that does not include slope excavation otherwise. This change helps to better address multiple LCP requirements, including landform alteration and avoid armoring and its impacts. It also allows for a more resilient form of construction that can more easily be removed without significant landform damage when endangered by coastal hazards in the future (see also Coastal Hazard Response Requirements section below). Thus, this approval requires that the foundation system limit grading as much as possible, eliminate excavations into the slope (other than for approved piers), eliminate slab and retaining wall components, and be made up of the minimum number and size of embedded concrete piers (limited in height above grade as much as possible) required to support standard post and beam substructure located above existing grade. All other structures (e.g., stairs, connecting elements, etc.) are also required to be limited as much as possible and likewise located atop embedded concrete piers (subject to the same limitations). All substructure areas shall be painted (or equivalent)

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<sup>62</sup> The proposed project appears to propose a "Parking Easement" on 181 Sunset Way to satisfy some of its LCP off-street parking requirements. The easement partially occupies the same space as an existing one-vehicle garage structure at 181 Sunset Way that appears to extend some 8 feet into the public right-of-way of Sunset Way. It is not known how use of that area/garage by these Applicants might affect off-street parking requirements associated with 181 Sunset Way, as it appears to be the only parking area associated with that site. If such parking structure is legally CDP-permitted, including in terms of its encroachment into the right-of-way, and if the property owner at 181 Sunset Way (for private property) and the County (for the public right-of-way) allow such use, and if such use does not make 181 Sunset Way non-conforming in terms of off-street parking requirements, and if use of a parking easement at that location helps reduce the amount of development at 183 Sunset Way, then it can be used for parking to support this project.

with an unobtrusive, earth-toned color, that blends with the surroundings, to help reduce impact on views. See **Special Condition 1**.

With respect to the septic system armoring, the problem is more complex. Ultimately, and despite best efforts to identify a septic system that would not require armoring to protect it (such as a holding tank system that does not drain at the site but rather is pumped out on a regular basis, and that thus could avoid the leach field), the only septic system that the County will allow here is a conventional system with a leach field. Further, the County will only allow a leach field here if it includes the associated armoring to protect against slope failure and loss of the leach field down the slope with attendant negative consequences, both for the residence and the public. In fact, Marin County Environmental Health Services Department (EHS) staff also stated that an on-site holding tank would not be approvable as an alternative to a standard septic system here because the use of holding tanks for single-family residences is generally not allowed, as they do not offer a long-term solution for wastewater disposal as required by County regulations, are costly as they require frequent pump out, particularly for a full time residence such as this, and since there are no provisions in County regulations allowing for the use of such systems in a setting like this, particularly given the distance from processing facilities and the frequent truck traffic required through a residential neighborhood with constrained ingress/egress. Additionally, according to EHS staff, making an exception and approving a holding tank in a setting such as this would be precedent setting, and could render similarly constrained and hazardous lots in the County as potentially more buildable through the employment of holding tanks. Therefore, while EHS staff indicated that the subject parcel is generally a very poor location for any septic system, a conventional system protected by embedded concrete piers of the type proposed by the Applicants would meet the agency's basic requirements.<sup>63</sup>

As a result, if residential development is to be approved here, armoring must also be approved to protect the septic system. In terms of impact identification and mitigation, it is difficult to quantify the effect of the approved concrete piers for the foundation and the embedded concrete piers for the septic system on shoreline processes and sand supply. As indicated in the findings above, the piers associated with the foundation may have some effect, but it is difficult to assess, and it is not attempted here. The same can be said for the embedded concrete piers seaward of the septic system which would be 18-inch diameter piers embedded 4 feet on center, thus leaving gaps between of only roughly 2.5 feet, that would retain more materials than if they were spaced further apart. Again, it is difficult to quantify the degree to which materials would be retained. As a result, although there is likely to be an effect from such embedded elements, it cannot easily be described objectively (e.g., in the way that the Commission typically assesses armoring impacts and mitigations), and it is not here attempted.

### ***Coastal Hazard Response Requirements***

The modified development will likely be affected by coastal hazards later than might be expected by the Applicants' proposed siting, since it is required to be sited further up the

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<sup>63</sup> Personal communications between County EHS staff Gwen Baert and Commission Coastal Planner Honora Montano between May and July 2022.

slope than proposed due to the above approval requirements (where such requirements mean that the development is moved some 75 feet further up the slope than proposed). Given that their proposed siting was deemed appropriate by the Applicants for safety and stability over time, it follows that the degree of safety for the development as required to be adjusted would be sufficient to provide a residential use for an acceptable period of time. At the same time, however, it is possible that the development could be safe for longer or shorter than the Applicants' estimate, which is just a reality of developing along an eroding bluff face subject to coastal hazards, including in terms of the uncertainty that comes with analyzing the potential future effects of sea level rise. But importantly, that is the Applicants' choice here, and provided that they internalize and accept such risks, including by avoiding any future armoring when endangered by coastal hazards at some point as is required under the LCP, then the public won't be forced to bear the coastal resource impacts associated with the choice to develop in a location like this that will almost certainly be affected by coastal hazards at some point.

As such, this approval is conditioned to require the Applicants to waive liability and assume the risks of developing in a hazardous location, to prohibit armoring (beyond the approved armoring described above), to prohibit public trust encroachment, and to include removal, restoration and/or relocation triggers that are tied to criteria that will define when it is no longer appropriate to maintain the project in light of coastal hazards. These criteria include if there are unsafe conditions, where a government agency with jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that any portion of the approved development is unsafe for occupancy or use due to coastal hazards, and that there are no feasible measures that could make such portion of the development suitable for occupancy or use without the use of shoreline armoring; and/or if half or more of any of the individual septic system protection piers become exposed due to bluff erosion, instability and/or other coastal hazards. Once half or more of any of the individual septic protection piers become exposed, potential impacts to visual resources, environmental hazards and water quality due to the significant reduction of visual screening and septic system functionality are expected to be substantial. Removal criteria also include if essential services to the site can no longer feasibly be maintained and/or provided to the site due to coastal hazards; if any portion of the approved development falls onto the slope, onto the beach, and/or into the ocean; and/or if removal of some or all of the approved development is required pursuant to LCP provisions associated with sea level rise adaptation planning. These removal/relocation triggers are of particular importance for the septic system element of the project, which as discussed, is sited closer to the beach, requires new armoring to provide for its stability, and if compromised could result in significant water quality and public access issues as discussed below. See **Special Condition 3**.

### ***View, Stability, and Water Quality Requirements***

To limit its public view impacts, the approved development is required to limit its visibility and be designed subordinate to its bluff setting, including where all development is required to be sited and designed to blend into the bluff environment as much as possible, by installing all utilities underground, by limiting grading and landform alteration and tree removal as much as possible, by requiring second floor step-backs in the beach viewshed to limit massing in the key view, and by using natural and natural-looking materials and finishes (including but not limited to wood siding and earthen

colored dark roofing, etc.). Here the LCP allows a maximum height of 25 feet above existing grade. To provide for a similar development as adjacent houses, the maximum height of the structure can be no taller than the average of the maximum heights above existing grade of the residences at 181 and 185 Sunset Way, and in no case taller than 25 feet above existing grade. In addition, within that maximum height, the structures are required to include pitched roofs, offsets, and projections that avoid the perception of a large, boxy mass in the viewshed. Lighting and glares must be minimized to reduce effects on public views, especially at night (and to protect against bird strikes with respect to windows). See **Special Condition 1**.

In addition, to further protect such views and the underlying landform, both visually as well as stability-wise, the area seaward of the stringline setback and all exposed areas inland of the setback are required to be landscaped with native and noninvasive plant species consistent with the mix of native species in the project vicinity selected for their ability at maturity to help reduce the perceived massing of the approved project in public views, including to completely screen from public view all understructure areas at landscape maturity (which will remain a required visual outcome for as long as the approved development remains). Such plants are also required to be drought-tolerant; genetically appropriate for the location (avoiding cultivars), soil, hydrology, and atmospheric conditions; sourced from locally collected seed (e.g., coastal Marin County); and serviced by as limited an amount of irrigation as possible. In addition, all non-native and/or invasive species are required to be removed (other than trees), and not allowed to persist on the site otherwise. Finally, stormwater and drainage infrastructure and other water quality measures are required to ensure that project drainage be directed to existing stormwater inlets/outfalls as much as possible or retained onsite where not possible (including through the use of pervious areas, percolation pits and engineered storm drain systems), and otherwise hidden/camouflaged as much as possible if unavoidably visible in public views. To ensure that runoff and drainage from the site limits its impacts to the beach and offshore marine resources, all project stormwater and drainage is required to be filtered and treated to remove expected pollutants prior to discharge.<sup>64</sup> Additionally, the septic system is required to comply with all Marin County Environmental Health requirements for septic systems, including those for design, testing and monitoring. Again, see **Special Condition 1**.

### ***Construction Requirements***

The project would include a construction period that could lead to coastal resource impacts of a similar type as the finished project, including with respect to public views and the potential for damage to the bluff and/or the beach/ocean below the site. In fact, construction would be expected to generally intrude and negatively impact the aesthetics, ambiance, serenity, and safety/water quality of the beach and ocean recreational experience. These beach recreational use impacts can be contained through the types of construction parameters often applied by the Commission (e.g.,

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<sup>64</sup> The siting requirements above would dictate that the septic system and its leach field would end up being sited over 100 feet linearly from the ocean, which should be sufficient to limit its water quality impacts otherwise and meets the LCP's minimum standards for setbacks from water bodies more generally (see, for example, LCP Policy C-PFS-8).

parameters that limit the area of construction, limit the times when work can take place, clearly fence off the minimum construction area necessary, require inland material storage and staging, require runoff protection, equipment and good housekeeping BMPs, erosion and sediment controls, require posted construction site documents, presence of a construction coordinator, and require construction specifications that include appropriate penalty provisions that require remediation for any work done inconsistent with the terms and conditions of the CDP, etc.). See **Special Condition 2**.

At the same time, while such requirements can help to ensure that these impacts are limited, such measures cannot completely eliminate them. It is not unusual for a project of this scale at a difficult site like this, especially given the challenging slopes and significant subsurface elements that will make construction more complicated, to take a year or more to complete, where such impacts will be borne by the public for the entire time. Thus, such impacts suggest mitigation is required. However, while such impacts are oftentimes mitigated for as part of a mitigation package, there is no such obvious package to be applied in this case. Similarly, while some such impacts can be mitigated for by in-lieu mitigation fees, there is no readily available methodology to apply to this impact, and there is no clear fee amount that would be appropriate. As a result, any such impacts are deemed to be mitigated for by the approval to the degree possible.

#### ***Other Requirements***

Although the Commission has done its best to describe and address the types of public rights as might be affected by this project, the Commission also notes that there may be changes in circumstances on this point in the future. Thus, this approval is conditioned such that it does not constitute a waiver of any public rights that may exist on the property, and that the Applicants cannot use this CDP as evidence of a waiver of any public rights that may exist on the property now or in the future. See **Special Condition 4**.

Further, the Commission herein fully expects to review any future proposed development directly related to this project and/or project area, including to ensure continued compliance with the terms and conditions of this CDP through such future proposals, but also to ensure that any such future proposed development can be understood in those terms. Thus, any and all future proposed development at and/or directly related to this project, this project area, and/or this CDP shall require a new CDP or a CDP amendment that is processed through the Coastal Commission, unless the Executive Director determines a CDP or CDP amendment is not legally required. See **Special Condition 5**.

In addition, the project may require authorizations from other entities that might be expected to exercise authorization authority here (e.g., Marin County Environmental Health Department, etc.). These entities may have requirements that would change the project in various ways, and the County also approved the project with conditions that appear to emanate from authorities other than the Coastal Act/LCP. Thus, this approval is conditioned for evidence of other entities' authorizations, and for the Executive Director to assess to what degree such changes might require amendments to this CDP. In addition, this CDP has no effect on conditions imposed by Marin County pursuant to an authority other than the Coastal Act/LCP, provided that if there are any



conflicts between terms and conditions imposed by the County and those of this CDP, the terms and conditions of this CDP will prevail. See **Special Conditions 6 and 7**.

The proposed project represents a unique set of facts, including with respect to this approval being based on a potential taking and not based on LCP and Coastal Act consistency, and including in terms of required hazard response over time. Thus, this CDP includes important terms and conditions reflecting the set of facts as they apply to this approval, including the required conditions of approval. In order to ensure that the terms and conditions of this approval are clear to these Applicants as well as any future owners, this approval requires that the CDP terms and conditions be recorded as covenants, codes, and restrictions against use and enjoyment of the properties, and for them to be explicitly disclosed in all real estate transactions (see **Special Conditions 8 and 9**).

### **Conclusion**

As conditioned, the Commission concludes that approval of the development addresses coastal hazards, biological resources, water quality, visual resources, and public access, and limits associated coastal resource impacts from the approved project as much as possible if residential development must be approved here to avoid a taking. As conditioned, the Applicants could construct a home similar in size to nearby homes and one that provides a reasonable economic use of the property. Accordingly, the Commission finds that the project, as conditioned, is as consistent as possible with the certified Marin County LCP and the public access and recreation policies of the Coastal Act while avoiding a taking.

### **8. CEQA**

Section 13096 of Title 14 of the California Code of Regulations requires that a specific finding be made in conjunction with CDP applications showing the application to be consistent with any applicable requirements of 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.

Marin County, acting as the lead CEQA agency, found the project categorically exempt from CEQA (pursuant to CEQA Guidelines, Title 14, California Code of Regulations, Section 15332, for infill development projects). The Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of environmental review under CEQA. The preceding findings in this report (incorporated herein in full) have discussed the relevant coastal resource issues with the proposal, including the limited options available to develop the site in a manner that would allow the Commission to approve a modified project in order to avoid an unconstitutional taking of private property, and the CDP terms and conditions identify appropriate mitigations to avoid and/or lessen any potential for adverse impacts to said resources. Further, all public comments received to date have been addressed in the preceding findings, which are incorporated herein in their entirety by reference.

As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects which approval of the proposed project, as conditioned, would have on the environment within the meaning of CEQA. Thus, if so conditioned, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

## 5. APPENDICES

### **A. Substantive File Documents<sup>65</sup>**

- Marin County Notice of Parcel Merger
- Marin County CDP Project ID 2989
- Applicant's Geotechnical Reports
- Applicant's Biological Site Assessment

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

- Marin County Community Development Agency
- Marin County Environmental Health Services Department
- California State Lands Commission
- Surfrider Foundation

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<sup>65</sup> These documents are available for review from the Commission's North Central Coast District office.