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F18a

Prepared February 9, 2023 for February 10,2023 Hearing

To: Commissioners and Interested Persons

From: Kevin Kahn, Central Coast District Manager
Katie Butler, Central Coast District Supervisor

Subject: Additional hearing materials for F18a
CDP Application Number 3-23-0014 (Grossman Armoring)

This package includes additional materials related to the above-referenced hearing item as follows:

Additional correspondence received in the time since the staff report was distributed

February 2, 2022

To: Chair, Donne Brownsey, California Coastal Commission

Cc: District Director, Dan Carl, California Coastal Commission
District Supervisor, Katie Butler, California Coastal Commission

Re: Item F18a, Application No. 3-23-0014 - Grossman Seawall at 121 Indio Drive in Pismo Beach

Dear Chair Brownsey and Commissioners,

Surfrider Foundation is a grassroots organization working to protect the world's ocean, waves and beaches for all people. The San Luis Obispo County chapter has worked to help preserve the County's 100 miles of coastline for several decades. Surfrider is concerned about the coastal armoring at 121 Indio Drive in Pismo Beach. The proposed development will occur on a highly scenic but rapidly eroding beach. We support the staff recommendation regarding the proposed after-the-fact (ATF) and new coastal armoring at 121 Indio Drive and suggest several improvements to ensure protection of our public trust land and vital remaining beaches.

In summary, Surfrider:

1. Supports Special Condition 4 and the use of the real estate valuation method and the $1,287,905 mitigation fee to offset impacts to sand supply and recreational use;
2. Suggests Special Condition 4 state a clear preference for mitigation expenditure on a nature-based adaptation project within the region and removal of purely sand nourishment projects due to the limitations in effectiveness for such projects within the vicinity;
3. Supports the 20-year reopener to reassess the armoring and mitigation; and suggest language be added to Special Condition 7 to clarify that there is no guarantee that the CDP Amendment will be approved for additional validity of the armoring after 20 years;

4. Suggests that Special Condition 7 be further improved by assessing the life of the structure the seawall will protect (the house at 121 Indio Drive) and prohibit use of shoreline armoring after that given timeframe.

We offer the following comments to each of these requests:

1. **Support for Special Condition 4 and the use of the real estate valuation method and the $1,287,905 mitigation fee to offset impacts to sand supply and recreational use**

The staff recommendation satisfies the Commission's legal duty to allow shoreline armoring for an existing structure and further satisfies Coastal Act requirements to protect the public trust by requiring reevaluation in twenty years and mitigating for its impacts. However, the approved seawall will exist below the mean high tide line on public trust land and occupy nearly 2,651 square feet of sandy beach area that has been offered for dedication as a lateral access and passive recreation use. This is a substantial loss to the public trust that will impact coastal access and recreation, marine life and the coastal economy.

While there is no way to truly mitigate a seawall's impacts to public trust and the taking of public trust land, the real estate valuation method is a reasonable calculation when assessing the value of public trust. The mitigation fee will help offset adverse beach and shoreline impacts through the next twenty years that will be lost due to the proposed project.

Seawalls exacerbate beach erosion and cut off bluff erosion as a source of sediment - harming wildlife by diminishing our vital remaining beach space. Disappearance of our beaches also inhibits equitable coastal access and provides an economic disservice to coastal towns by destroying that which makes coastal economies thrive – wildlife, scenic views, walkable beaches and recreational opportunities.

While the real estate valuation method still likely underestimates the impacts of seawalls to the ecosystem and coastal economy, it is the best tool we currently have. Surfrider strongly supports Special Condition 4 and the staff recommended mitigation fee.

2. **Suggests Special Condition 4 state a clear preference for mitigation expenditure on a nature-based adaptation project within the region and removal of purely sand nourishment projects due to the limitations in effectiveness for such projects within the vicinity.**

Due to the extensive impacts this seawall will have on public resources, it is imperative that the mitigation fee be appropriately spent. Special Condition 4 as written will allow for expenditure of nearly $1.3 million on projects that have little chance of significant coastal improvements.

Special Condition 4 should be modified to state a clear preference for nature-based projects with living shoreline components anywhere within the region. These types of projects have the potential to enhance coastal access and habitat and avoid coastal armoring elsewhere.

Sand nourishment should also be listed as inadequate. The process of trucking or pumping sand onto eroding beaches – known as “beach nourishment” – is a long-time management tool with mixed results. Sand replenishment projects are not only expensive and ecologically challenging, but are often very short-lived. For instance, a $17.5 million, two-million cubic-yard sand replenishment project along a six-mile stretch of San Diego County coastline in the summer of 2001, and another at Torrey Pines State Beach down the road, quickly washed out to sea the following winter.

We suggest Special Condition 4 be rewritten as such (suggestions in red):

> **4. Mitigation.** BY FEBRUARY 10, 2024, the Permittee shall pay $1,287,905 to the City of Pismo Beach or other appropriate entity approved by the Executive Director to be held in an interest-bearing account. The sole purpose of these funds shall be for nature-based adaptation projects with living shoreline components or projects that reduce coastal armoring within the region where possible or public access and recreational projects in the City of Pismo Beach if no nature based project can be identified within five years and permitted within ten (i.e., cobble berm with dune restoration or projects that provide access to and along the shoreline, including but not limited to new public beach access stairways, or stairway repairs/improvements to ensure vertical beach access; new coastal pathways or pathway repairs/improvements; new blufftop or beach park or park repair/improvement

projects; beach creation through nourishment and/or property acquisition; etc.). Sand nourishment projects will not meet these criteria. The City of Pismo Beach must submit an analysis of possible nature-based projects within the region along with any expenditure proposal. All funds and any accrued interest shall be used for the above-stated purposes, in consultation with the Executive Director, within ten years of the date of this approval (i.e., by February 10, 2033), which time may be extended for good cause by the Executive Director.

3. **Supports Special Conditions 7, 13 and 15 – especially the 20-year reopener to reassess the armoring and mitigation; and suggest language be added to Special Condition 7 to clarify that there is no guarantee that the CDP Amendment will be approved for additional validity of the armoring after 20 years**

The requirement in Special Condition 7 to reevaluate the propriety of the seawall two decades from now, toward the end of its useful life, is appropriate considering scientific uncertainty over the future effects of accelerating sea-level rise along the Southern California coast and the Commission's inalienable fiduciary duty to protect the public trust tidelands from destruction.

Special Conditions 7, 13 and 15 recommended in the staff report will limit further encroachment on the public resources (adjacent bluff and beach) by the ATF and proposed armoring devices. These conditions allow for potential removal of the seawall when it is no longer necessary to protect the development that required the seawall. Through these conditions, the property owners will acknowledge the risks inherent in the subject property and that there are limits to the structural protective measures that may be permitted along the shoreline to protect the existing development in its current location. The conditions will also put the property owners on notice that redevelopment of the parcels should not rely on bluff or shoreline protective works for stability and such alternatives as removing the seaward portion(s) of the structure, relocation inland, and/or reduction in size should be considered to avoid the need for bluff or shoreline protective devices in this hazardous area. In other words, the proposed seawall is in a hazardous location and not a permanent structure.

Language should be added to special condition 7 to clarify that the Commission does not guarantee reauthorization after twenty years and that the seawall will be re-evaluated based on its own merits at that time.

4. **Suggests that Special Condition 7 be further improved by assessing the life of the structure the seawall will protect (the house at 121 Indio Drive) and prohibit use of shoreline armoring after that given timeframe**

The Coastal Commission should require that every approved shoreline development, including "redevelopment" be given a defined regulatory life. As sea levels rise, we must recognize that no shoreline development can be considered permanent. Ultimately, development, including the shoreline protective devices that protect it in its current location, must move inland or simply be removed if we are to preserve public trust lands and the mandates of the Coastal Act. Given the political and legal/constitutional context this will not happen quickly or uniformly. But to have it happen at all, we must give up on the notion of permanently located development, and of permanently existing parcels and infrastructure.

The best way to do this, consistent with current regulatory takings law, is to condition every permit for any development along the shoreline with a time-certain "life", after which it is no longer a beneficiary of statutory protection (per § 30235), and after which, when nature comes to take away its utility and existence, it must be removed.

As such, we strongly suggest that Special Condition 7 include language that not only ties the seawall to the life of the structure but also defines the expected life of the house and ties the seawall permit duration to that life.

As the Commission moves forward with sea level rise and climate change adaptation guidance, this practice will help create more certainty around the future of the coast for coastal users and property owners. Thank you for your consideration.

Sincerely,

James Miers
Chair
San Luis Chapter
Surfrider Foundation

Mandy Sackett
California Policy Coordinator
Surfrider Foundation

2/3/2023

ITEM F18a
Staff CDP Application 3-23-0014
(Grossman, 121 Indio Drive, Pismo Beach)

A copy of this letter has been sent to all Commissioners and Staff

Dear Commissioners,

My representatives, Norbert and Stevie Dall, are separately addressing the Staff Report, but I wanted to share my personal thoughts with you in hopes of a favorable result.

I would like to start this letter conveying my appreciation for your and your staffs' time regarding this matter. I deeply appreciate the recommendation for approval. I look forward to concluding the remaining repairs needed.

Although I am grateful, I would like to express my concerns about the staff report mitigations and adversarial nature of the report and staff's behavior.

While I have always agreed to sand mitigations, the sand mitigation calculations in this staff report are very suspect if not completely far-fetched. Additionally, there is little addressed to demonstrate why one would calculate sand accretion based on house and property value rather than on the actual cost of sand replacement, or why the Coastal Act would apply and not the LCP, as the Court of Appeal specifically determined in the 2005 case upholding your then decision on the seawall spanning mine and the other properties. As a point of reference, the sand mitigation fee in the 2003 permit (which covered vastly more area) was $10,000. The only basis for the number now before you are punitive. Also, the staff recommends the removal of a deck that was permitted on three separate occasions, twice by the City and once by the Commission in its decision that was appealed yet approved by the courts. So, this request again seems punitive. What possible public benefit is to be found here. Apart from its having been approved, it blocks no access, and it doesn't provide private access to the beach, which I dedicated to the public in satisfying the 2003 approval. Removal of the deck won't change its shape. Although I don't believe there is any supportable basis for changing the decision that approved it, if that was the one thing that would satisfy the Commission, I would sadly and reluctantly remove it.

I have had excellent relations with the CCC staff in the past and had every reason to believe the CCC staff would behave in a reasonable manner befitting a public agency. This has not been the case over the last year. We have provided transparency, courtesy, and open communication throughout the submittal of my two applications. While the staff was initially helpful, there seems to have been a conscious effort to not be transparent, courteous, or communicative over the past year. The issues (as what little has been shared to us) should have taken a face-to-face meeting or two to come to an appropriate resolution to everyone's satisfaction, assuming there was a genuine desire by staff to do so. The attempt at mischaracterizing 18-year-old, permitted home repairs as a violation appears to be a disingenuous strategy to attack the "existing" status of protection afforded by the LCP, City of Pismo, prior commission,

and judiciary. When the evidence demonstrated there was no violation (and even in the current staff's reluctant acquiescence) they still make this a bold statement on the staff report before you. At its best, this is an attempt to mislead the commission. At worst it seems as a targeted threat. When our team first applied for the applications to address the bluff damage, the staff was very cooperative. There was change in attitude some months after the work was concluded (and nearly 2 years after the applications were submitted). Daily records of the work done will show we meticulously monitored the site and took very seriously the staff's requirements. Every aspect was discussed with staff continuously through the installation. I'm not sure any applicant has been as focused on careful execution of staff requirements.

In 2003, your Commission approved the seawall on my property, my upcoast neighbor's property, and the street end at Florin Street. That gave rise to the 2005 court decision which upheld your then interpretation of "existing." It should not escape your attention that I was the applicant in that case. Most recently, since learning that staff was considering the position that my house may not be considered "existing" under the Commission's new interpretation, it seems I have been under continuous attack. It appeared that if they couldn't deny protection due to the 2003 legal standing, they looked to try to determine I was no longer protected due to 18-year-old house repairs.

I suspect, as others speculated, the staff's unusual and abrupt disengagement was prompted by responding to the Commission's recent focus on eliminating private bluff protection. Published interviews of staff's new position on private property protection certainly back this speculation. So it's not surprising, yet certainly a surprise when staff eventually brought up supposed 18-year old violations with my 18-year old (2005) house repairs. Staff sent these concerns to the city of Pismo. They were addressed rapidly by the City of Pismo, acting under the LCP you certified, and your own staff records confirming that staff had reviewed calculations at that time and did not feel they were inconsistent with the then governing laws and policies.

None of this came up until after the emergency work was done. Going backwards didn't (and still doesn't) seem to be a realistic alternative as it would have caused destruction to the bluff and exacerbate a danger to the public, not to mention accelerating the destruction of my home of 27 years. As I had a lot of reason to believe there was ample evidence the repairs were permitted correctly, my consultants provided staff with information as to why we believe the 18-year-old work done on the home had already been dealt with satisfactory to all agencies. As mentioned, this was rapidly confirmed by the City of Pismo. This seemed to get the staff antagonistic with me, even though the evidence is compelling and confirmed by the City of Pismo Beach and prior CCC staff. The City again more recently addressed this issue at staff's request and, contrary to the staff report which omits it, it did not decline to address the issue but wrote staff indicating that it reviewed the matter and determined that there is no violation.

The staff continued to punt and avoid meetings to talk with me directly about this and any other issues for over a year. We started getting threatened with unnamed phantom violations. To this moment I don't know what the staff is alluding to, as they have never filed a violation notice in 27 years, nor afforded me the courtesy of a meeting to discuss any concerns. It is difficult for me to view these actions as anything

other than an expression of frustration that prior CCC commissions, CCC staff, the city of Pismo, and judiciary all confirmed the decisions that protect my home. I assume staff will say they were doing due diligence and investigating an 18-year-old non violation. This was asked and answered.

One thing that seems an authentic complexity is the 400sf of shotcrete that may have been placed in erroneously, but not done purposely without a permit. There was a long history that led up to that work. There were multiple amendments dealing with several parts of the bluff at this location. In any event, I didn't try to hide it, but in fact pointed it out to staff. The staff appears to agree that no harm was done because the current application addressed the removal of much of this shotcrete and the incorporation of the balance was to be brought up to the staff's standards as part of the application. As a matter of obviousness, had it not been installed, that portion of the bluff would have collapsed (as my neighbor's adjacent bluff did) a long time ago requiring a much earlier need to address that area (as considered by the technical team on the original 2003 submittals.)

After a year of repeated attempts, we finally got Jack Ainsworth to return our call and speak to us late last year. He was polite, well versed, and he committed to meet (and asked for a week to set the date) and discuss a resolution. He said he agreed the staff would find assessing a violation on my 18-year-old repair work difficult, and he was not inclined to pursue this line any longer. We now believed we would have a meaningful conversation regarding mitigations and procedures to complete the remaking repairs. We were finally making some progress! Oddly, after repeated requests, the staff declined to follow through with this meeting or commitment, blaming the holidays. At this point our team agreed to follow a legal method (the California streamlining act) to incentivize the staff to get us a meeting or put us on a hearing schedule. We alerted staff to this in advance. The staff instead asked for more and an unlimited time to review a project that they clearly were not considering a priority.

As a result, my home was in a state of limbo, the sale or value of my home was in jeopardy. I had no hope of any conclusions and how to deal the subsequent other emergency repairs needed. We understood that pressing the staff through legal means might incite their ire. I think in truth we just wanted the promised meeting and get a hearing date so we could all move on. It seems at this point staff did become adversarial and made their decision to put the full force of treating us as an enemy.

On the face of things, staff called and asked for us to delay the required special meeting date and allow the meeting to proceed in February at the commission regular hearing. They indicated to us that as Jack Ainsworth said, there were no outstanding violations of substance, and we could meet and resolve any outstanding issues. We again thought this was great progress. So, in good faith, we did what the staff asked) even when it was in our best interest not to do so). This brings us to our current situation.

Last Friday at nearly the last moment possible, after absolutely no discussion with us, staff released a report that was frustrating in many ways. There are many factual and technical inaccuracies. There is a biased historical context. The report omits important facts. The report in its arrangement seems designed to make the applicant appear to be a bad person confronting multiple violations in need of investigation (not once in 27 years of owning this home have, I ever been sent a notice of violation by the CCC.). The

report doesn't address the applications correctly and provides no substantiation to their findings. It appears designed to be vindictive and is certainly not in the spirit of what was discussed in the short time discussion was afforded to us.

The way this entire process unfolded looks like an assault on my character. I did not attempt to circumvent the CCC or lie or cheat or connive any permits regarding my house. Every single permit went through the appropriate processes and the CCC staff was aware of these processes at the time of their permitting. They had ample opportunity to appeal or provide notice of potential violations, or even post violations. They did not because every permit was discussed, vetted, and concluded. I'll admit the exception being the small shotcrete area, as I have no proof of a separate approval, but believed it to be part of the additional minor modifications that had been approved. It is being dealt with in the current application in any event.

So over 18 years of cooperation and friendly relations seem to turn into a focus to punish me for the past approvals of prior commissions. I understand that priorities and agendas may change, but it is with tremendous disappointment that the staff has chosen to attempt a reinterpretation to promote a newer agenda. I might expect this nonsense from politically driven organizations, using alt facts to promote a specific cause. The last group I'd expect this targeted behavior from is the CCC, a vanguard for democracy, decisions based on science, not unsubstantiated opinions.

While this message is an emotional plea, I ask of you to review our staff report corrections and request for mitigations with an appropriate nexus.

Yours Truly,

Gary H. Grossman TRE

121 Indio Drive

Pismo Beach

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Refer To File # 504304-0001

February 6, 2023

F18a

Donne Brownsey, Chair
Honorable Coastal Commissioners
California Coastal Commission
Central Coast District
720 Front Street, Suite 300
Santa Cruz, CA 95060

Attn: CentralCoast@coastal.ca.gov

Re: Reply to the Staff Report for Staff's CDP Application 3-23-0014
(Grossman, 121 Indio Drive, Pismo Beach)
Agenda Item, Friday 18a

Dear Chair Brownsey and Honorable Commissioners,

This firm, along with Dall and Associates, represents the applicant, Gary H. Grossman, Trustee of the Gary H. Grossman Trust. This letter is in addition to the letter submitted today in response to the Staff Report submitted by the Dall and Associates. Its purpose is to address two issues: (1) The proper standard of review for the Commission in reviewing the Project applied for, and (2) what the Legislature intended by term "existing" in Coastal Act section 30235, assuming the Section were to apply (which it does not).

The project before you is truly unique in terms of the applicant, Mr. Grossman, the project's location landward of the Mean High Tide Line (MHTL), and its history before the City of Pismo Beach, the Commission, and in previous litigation concerning the Commission's approval of the existing seawall on this property. Although the discussion of the two issues below is robust, the simple request is that any approval be based on the City's certified LCP because, as the Commission and the courts have previously determined, the LCP is the correct standard of review, thus avoiding the need for the Commission to address the Section 30235 issue.

A copy of this letter has been provided to Staff in the Central Coast District Office

I. THE STANDARD OF REVIEW WHICH GOVERNS AS TO THIS PROJECT IS THE CITY'S CERTIFIED LCP, NOT THE COASTAL ACT, AS THE COURT OF APPEAL PREVIOUSLY HELD

As explained in the letter from Dall and Associates, in 2003, this Commission approved a seawall applied for by Mr. Grossman (at 121 Indio Drive) and his adjacent neighbor, Walter Cavanagh (at 125 Indio Drive). The Commission determined that the seawall was necessary to protect the pre-Coastal Act Grossman home, the post-Coastal Act Cavanagh home, and the City's Florin Street cul-de-sac, an important public viewpoint. Surfrider Foundation sued the Commission and Messrs. Grossman and Cavanagh, arguing that the word "existing" in Section 30235 means "existing as of January 1, 1977." The Commission and Grossman/Cavanagh disagreed. The trial court rejected Surfrider's argument, agreeing with the Commission and its long-standing interpretation that the word "existing" means "existing at the time the seawall approval is being sought." (Trial Court ruling, p. 17.)

Surfrider appealed. On appeal, in an unpublished opinion, the Court of Appeal upheld the trial court judgment and Commission's decision to approve the seawall. Because the seawall approved, and the homes and street end protected, are landward of the MHTL, the Court of Appeal determined that Coastal Act section 30235 does not apply, but rather the Commission's decision was controlled by the Pismo Beach LCP. The Court explained that it was not aware of any authority that holds the coastal commissioners can, by discussion, changed their statutorily mandated jurisdiction. Further, it noted that in approving the seawall, the Commission found that "the development as conditions will be in conformity with the policies of the certified City of Pismo Beach Local Coastal Program." The Court ended its opinion, stating: "We conclude that the trial court properly denied Surfrider's petition because it was based on a statute [Section 30235] that did not apply to the decision being challenged."

The staff report here errs in stating that the applicable standard of review is the Coastal Act. The Commission's original jurisdiction, and hence application of the Coastal Act, ends at the MHTL. Based on the location of the seawall improvements sought, the existing seawall, and home it protects, the standard of review here is the City's LCP. Although the Court of Appeal opinion in *Surfrider Foundation v. California Coastal Com.* was unpublished, it is nonetheless binding and res judicata as to Mr. Grossman and the Commission. (Cal. Rule of Court, 8.1115(b) [An unpublished opinion may be cited or relied on (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel"].) For that reason, the Commission may not legally proceed on the basis of the current analysis set forth in the Staff Report.

II. THE LEGISLATURE INTENDED THAT THE TERM "EXISTING" IN COASTAL ACT SECTION 30235 TO MEAN "EXISTING AT THE TIME THE SEAWALL APPROVAL IS BEING SOUGHT," NOT "EXISTING AS OF 1-1-77"

While Section 30235 does not apply, the Staff Report continues with the erroneous reinterpretation of that provision, asserting that the word "existing" was intended by the Legislature to mean "existing as of January 1, 1977," the effective date of the Coastal Act. This should not be a reoccurring issue because, based on extensive analysis, there now have been two trial court decisions which have flatly rejected that interpretation.

Section 30325 provides that a revetment or seawall "shall be permitted when required to . . . protect existing structures." From 1977 to 2015 – 38 years, the Commission well understood and explained that "existing," as used in the Section, means "existing at the time the seawall approval is being sought." The issue came to a head in 2003, when the Commission approved the seawall to protect the Grossman home (built years before the Coastal Act), the Cavanagh home (Post-Coastal Act), and the Florin Street end from a failing bluff. At the hearing, the Commission's then Chief Counsel, Ralph Faust, explained to the Commission and the public the Commission's consistent administrative interpretation of Section 30235 since the inception of the Coastal Act in 1977:

> ". . . the Commission interpreted existing structure to mean whatever structure was there legally at the time that it was making its decision, and so structures that had been approved by the Commission, subsequent to the Coastal Act, were deemed to be existing structures for purposes of Section 30235, and the Commission found that under Section 30235, those structures need to be protected where it was required, and that shoreline protective devices were approvable."

The Surfrider Foundation sued challenging approval of the seawalls, arguing that "existing" means "existing as of January 1, 1977." The Commission and Messrs. Grossman and Cavanagh, whom we represented, disagreed. Under separate cover, we have provided you and Staff with the Commission's briefs in that case, the oral argument before the Court (including the argument on Commission's behalf by then Deputy Attorney General, now California PUC President, Alice Busching Reynolds), and the trial court's ruling. In a detailed, 17-page ruling, the Court agreed with the Commission, concluding:

> "[T]he reasonable interpretation of Section 30235 of the Coastal Act permits the Commission to authorize seawall protection for structures that are 'existing' at the time the Commission makes its decision on an application for permit, not structures that were existing when the Act was passed almost 30 years ago." (Ruling, p. 2.)

> ". . . [T]he term "existing," meaning existing at the time the seawall approval is being sought, is essential to limit seawall approval to protection of structures existing at the time of approval, thereby harmonizing Sections 30235 and 30253." (Ruling, p. 17.)

Now, on January 10, 2023, in *Casa Mira Homeowners v. California Coastal Commission*, the Santa Mateo Superior Court has similarly issued its ruling rejecting the Commission and staff's reinterpretation of Section 30235. As the court stated:

> "The Court finds that (i) Respondent CCC has misinterpreted an unambiguous statute; (ii) Respondent is attempting to add language to the statute; (iii) Respondent's interpretation is contrary to the stated purposes of the Coastal Act; and (iv) Respondent's interpretation is unreasonable." (Ruling, p. 6.)
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> As to the Commission's reinterpretation of the statute, the Court explained:
>
> "It is Respondent's position that the Coastal Act should be interpreted such that all sea-side homes and buildings constructed after 1976, if endangered by erosion, should be allowed to fall into the sea and be destroyed, in complete deference to creation of beach sand by erosion of beach cliffs." (*Id.*)

The Court hit the nail on the head: In enacting the Coastal Act, the Legislature did not intend that post-Coastal residences and buildings simply fall unprotected into the sea. In determining what "existing" in Section 30235 means, the question is not what the Commission or Staff would like it to mean or how the Section might be rewritten, but what the Legislature actually intended by its use of the term in 1977. As discussed below, "existing" necessarily means "existing at the time the seawall approval is being sought," not "existing as of January 1, 1977." The fuller discussion as to why the two trial court rulings are necessarily correct is set forth below.

A. Legislative Intent – The Plain Meaning of "Existing" in the First Sentence of Section 30235

There are two sentences in Section 30235. The Section states, in relevant part:

> "Revetments, . . . seawalls . . that alter natural shoreline processes shall be permitted when required to . . . protect existing structures . . . and designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible." (Emphasis added.)

The language of Section 30235 is couched in mandatory terms – revetments and seawalls "shall be permitted" – and it is clear and unqualified. It does not state "existing as of January 1, 1977," although it could have if that truly was the Legislature's intent. As noted, in enacting the Coastal Act, the Legislature did not intend for existing structures to fall into the ocean at any time, which also was the Commission's interpretation of the provision until the 2015 Sea Level Rise Guidance prepared by Staff reversed course and offered a novel reinterpretation, ignoring the legislative intent underlying the Section.

B. Legislative Intent – The Consistent Meaning of "Existing" in the Second Sentence of Section 30235

Equally telling as to the Legislature's intent is the very next sentence in the same Section, which also uses the term "existing": "Existing marine structures causing water stagnation contributing to pollution problem and fishkills should be phased out or upgraded where feasible." (Emphasis added.) Clearly, Commissioners, the Legislature did not intend to discourage only those "existing marine structures" constructed as of the effective date of the Coastal Act, but not those constructed thereafter. The coastal resource evil sought to be remedied – when such structures cause water stagnation that contributes to pollution problems and fishkills – pertains equally to more recently approved and constructed "marine structures." It would make no sense for the term "existing" in the case of revetments and seawalls to have a different meaning from the identical word used elsewhere in the Section, or to apply the policy only to "existing marine structures" as of January 1, 1977, but not to "existing marine structures" approved and constructed between January 1, 1977 and 2021.

C. Legislative Intent – The Legislature's Rejection Twice to Redefine "Existing" as "Existing as of January 1, 1977

As noted, the Legislature could have written the Section to qualify "existing" as "existing as of January 1, 1977," but it did not do so. In fact, it has done just the opposite. The Legislature has twice been presented with the opportunity to rewrite the Section to define "existing" in that manner – Assembly Bills in 2002 and 2017 – but instead it rebuffed both bills. (AB 2943 [2002 Wiggins – "existing structure" means "a structure that has obtained a vested right as of January 1, 1977], AB 1129 [2017 Stone – "existing structure" means "structure that is legally authorized and in existence as of January 1, 1977"].) I have also separately provided those bills and the legislative record to you and Staff.

D. Legislative Intent – Consistent Coastal Policies Using "Existing" to Mean "Existing at the Time the Commission Acts on the Permit Application

Still further, the Legislature's use of the word "existing" in the remainder of Chapter 3 of the Coastal Act (§§ 30200-30265.5), which contains all of the mandatory resource policies of the Coastal Act, provides further consistent confirmation that "existing" refers to conditions as they

exist "on the date the Commission acts on a permit application," not at the time of the Coastal Act's passage. These include:

- Providing additional berthing space in "existing harbors" (§ 30224);
- Maintaining "existing depths in "existing" navigational channels (§ 30233(a)(2));
- Allowing maintenance of "existing" intake lines (§ 30233(a)(5));
- Limiting diking, filling and dredging of "existing" estuaries and wetlands (§30233(c));
- Restricting reduction of "existing" boating harbor space (§ 30234);
- Limiting conversion of agricultural lands where viability of "existing agricultural use is severely limited (§§ 30241, 30241.5);
- Restricting land divisions outside "existing" developed areas (§ 30250(a));
- Siting new hazardous industrial development away from "existing" development (§ 30250(b);
- Locating visitor-serving development in "existing" developed areas (§ 30250(c));
- Favoring certain types of uses where "existing" public facilities are located (§ 30254); and
- Encouraging multicompany use of "existing" tanker facilities (§ 30261).

These Chapter 3 policies all logically refer to conditions that exist on the date the Commission considers and acts on a permit application. Substitute the words "existing as of January 1, 1977" in the foregoing policies and ask yourself whether that makes any sense. It does not. As with Section 30235, it would make no sense to evaluate permit applications under conditions as they existed over 47 years ago, ignoring the considerable changes that have taken place along California's dynamic coastline since the Coastal Act took effect.

E. Legislative Intent – Other Coastal Act Provisions Treating "Existing" As Currently Existing

Outside of Chapter 3, several other Coastal Act provisions also consistently treat "existing" as currently existing. (See § 30705(b) ["existing water depths"]; § 30711(a)(3) ["existing water quality"]; § 30610(g)(1) ["existing zoning requirements"]; § 30812(g) ["existing administrative methods for resolving a violation"].)

F. Legislative Intent – Other Coastal Act Provisions Specifically Qualifying "Existing"When the Legislature Intended to Do So

But, the Legislature twice used specific dates when it intended "existing" to mean something other than currently existing. Section 30610.6 limits the section's application to any "legal lot existing . . . on the effective date of this section." Similarly, Section 30614 refers to "permit conditions existing as of January 1, 2002."

Thus, in enacting the Coastal Act, when the Legislature intended to limit the term "existing" to be at certain point in time, it did so specifically. This includes when the Legislature intended to limit the term to the effective date of the Coastal Act. (§ 30608 [no person who has obtained a vested right for development "prior to the effective date of" the Coastal Act is required to obtain approval of the development under the Act].)

G. Legislative Intent – Harmonizing Coastal Act Sections 30235 and 30253

The Staff argument for reading "January 1, 1977" into Section 30235 ignores all of the foregoing, and instead asserts that Section 30235 conflicts with Section 30253. Basic rules of statutory construction dictate that you do not read out one adopted provision at the expense of another. You harmonize them. The plain language of both sections demonstrates that there is no conflict and they are easily harmonized. Section 30253 is directed at "new" development and instructs the Commission to take all reasonable measures to ensure that such development will not require a shoreline protective device. But, as this Commission and trial court explained in the Surfrider lawsuit:

> "Nevertheless, the coast is a dynamic environment, and in spite of best efforts, the Coastal Act also recognizes that seawalls may sometimes be necessary and permitted. To this end, Section 30235 specifically authorizes the approval of new seawalls and similar protective devices, but only where these devices are necessary to ensure the safety of "existing structures" (meaning, structures existing at the time the application for seawall is considered by the Commission) and only when such structures are "in danger of erosion" and certain other criteria are met. In sum, the two provisions are harmonious because Section 30253 governs the design and siting of new development so that, based on bluff retreat rate predictions, it will not require a seawall, while the other provision, Section 30235, recognizes that even the best of intentions can go awry, and it mandates the Commission to approve seawalls to protect "existing structures in danger from erosion."

The trial court in *Casa Mira* reached essentially the same conclusion.

For that reason, in approving new development, the Commission has long-imposed a condition requiring the "waiver of future shoreline protection." As the Attorney General explained to the court in the Surfrider lawsuit, "so the Commission is not saying, well the house isn't existing once it's built, they are just saying that we are asking that person to waive their right to come in and ask for a seawall." (Transcript of oral argument, p. 71.)

H. The City of Pismo Beach LCP Seawall Provision Must Receive the Same Interpretation the Commission Gave Section 30235 at the Time the Commission Certified the City's LCP

As explained above, conformity with the City's certified LCP is the standard of review here. The LCP includes a provision S-6, which is essentially the same as Section 30235. Certification of the LCP in 1984 predated the Commission's approval of the Grossman/Cavanagh/Florin Street seawall in 2003. At that time the Commission's position, as reflected in the 2005 *Surfrider Foundation* lawsuit and thereafter until 2015, was that the term "existing" means "existing as of the time the seawall approval is being sought." Thus, the term "existing" in LCP Policy S-6 must necessarily have the same interpretation.

I. The Certified Pismo Beach LCP Does Not Include a Provision Similar to Section 30253

As further explained above, although rejected now by two courts, Staff has based its reinterpretation of Coastal Act Section 30235 on the application of Coastal Act Section 30253, which is directed at new development. However, as demonstrated above, the Coastal Act is not appropriate standard of review here. Rather, it is the Pismo Beach LCP, and while the LCP includes as a "background" statement Section 30253, there is no identical or similar Coastal policy in the City's LCP which sets forth the "new development" provision. Section 30253 simply does not apply here, and thus even the underpinning for staff's reinterpretation does not exist.

J. Concluding Thoughts

For 38 years after the effective date of the Coastal Act the Commission consistently made clear that the term "existing" means "existing as of the time the seawall approval is being sought." Putting aside the obvious legislative intent discussed above, it is fundamentally unfair for the Commission to peremptorily reinterpret the Section and then backdate it to January 1, 1977. That is why local governments and private parties, including Mr. Grossman, who was the litigant in the 2005 *Surfrider Foundation* lawsuit, have consistently objected to that reinterpretation.

Courts "do not lightly imply terms or requirements that have not been expressly included in a statute" (*Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 454), and it is very clear that when it comes to shoreline protection needed to protect existing structures, Section 30235 does not state that "existing" means only structures that existed 47 years ago. The same is true as to the counterpart to that section in the City's LCP. Nothing in the Coastal Act or certainly its legislative history remotely suggests that the Legislature intended the mandatory terms in Section 30235 expressly authorizing seawalls to mean in the same breath that structures after 1977 cannot protected and must be left to fall into the ocean.

All that said, on the unique facts presented, the Commission does not need to address the appropriate interpretation of Section 30235 here, but rather the projects proposed must be reviewed instead based on the City's certified LCP, which authorizes their approval.

We appreciate your consideration of these additional points.

Sincerely,

Steven H. Kaufmann
Nossaman LLP

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Refer To File # 504304-0001

February 6, 2023

F18a

Donne Brownsey, Chair
Honorable Coastal Commissioners
California Coastal Commission
Central Coast District
720 Front Street, Suite 300
Santa Cruz, CA 95060

Attn: CentralCoast@coastal.ca.gov

Re: Reply to the Staff Report for Staff's CDP Application 3-23-0014
(Grossman, 121 Indio Drive, Pismo Beach)
Agenda Item, Friday 18a

Dear Chair Brownsey and Honorable Commissioners,

Concurrently with this letter, we have sent you a letter in reply to the Staff Report. Attached please find the following documents that were referenced in the letter:

1. The Commission's Opposition Brief in the trial court in *Surfrider Foundation v. Califonia Coastal Commission*, SFSC Case No. CPF 03503643.
2. The Commission's Respondent's Brief in the Court of Appeal in *Surfrider Foundation v. California Coastal Commission*, Court of Appeal Case No. A110033.
3. The transcript of oral argument in the trial court in *Surfrider Foundation v. California Coastal Commission*, SFSC Case No. CPF 03503643.
4. The trial court decision in *Surfrider Foundation v. California Coastal Commission,* SFSC Case No. CPF 03503643.
5. Assembly Bills 2943 [2002 Wiggins] and 1129 [2017 Stone] and the legislative record relating to both bills.
6. The trial court decision in *Casa Mira Homeowners Association v. California Coastal Com*., SMSC Case No. 19CIV04677.

A copy of this letter has been provided to Staff in the Central Coast District Office

I hope these are helpful to you.

Sincerely,

Steven H. Kaufmann
Nossaman LLP

Cc: John Ainsworth, Executive Director
Kate Huckelbridge, Senior Deputy Director/Executive Director
Dan Carl, District Director
Kevin Kahn, Central Coast District Director
Katie Butler, District Supervisor
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The Commission's Opposition Brief in the trial court in *Surfrider Foundation v. California Coastal Com.*, San Francisco Sup. Court Case No. CPF 03603643

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SURFRIDER FOUNDATION, a California nonprofit public benefit corporation, Petitioner, v. **CALIFORNIA COASTAL COMMISSION,** Respondent. **WALTER CAVANAGH, et al.,** Real Parties in Interest.	CASE NO. CPF03503643 **CALIFORNIA COASTAL COMMISSION'S OPPOSITION TO PETITIONER'S OPENING BRIEF** Date: Sept. 13, 2004 Time: 9:30 a.m. Dept: 301 Judge: The Honorable James L. Warren Action Filed: Oct. 5, 2003

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I. INTRODUCTION

In this case, Petitioner Surfrider Foundation ("petitioner") challenges a permit decision involving a unique set of facts, yet seeks a broad ruling regarding the interpretation of important coastal protection policies. The California Coastal Commission ("Commission") agrees with many of petitioner's concerns, but, unlike petitioner, contends that its ultimate decision was reasonable and consistent with the requirements of the California Coastal Act. In particular, the Commission agrees that shoreline protective devices, including seawalls, can cause serious harm to existing beaches along the California coast. The Commission also agrees with petitioner's contention that, under the Coastal Act, shoreline armoring is disfavored and should be allowed only if specific criteria are met and all alternatives are carefully considered. Nevertheless, petitioner is incorrect in asserting that the Commission had no discretion to approve the shoreline protection device in this case.

On August 6, 2003, the Commission approved with conditions the issuance of a coastal development permit to real parties in interest Walter Cavanagh and Gary Grossman (collectively, "real parties") for a seawall to protect two houses located on a coastal bluff in the City of Pismo Beach. One of these structures, the Grossman residence at 121 Indio Drive, was originally built on the bluff more than 30 years ago, before the passage of the Coastal Act in 1976. The other home, owned by Walter Cavanagh and located at 125 Indio Drive, was built in 1998, just five years before the Commission's approval of the seawall at issue in this case.

The original permit for the residence at 125 Indio Drive was approved by the City of Pismo Beach in 1997 pursuant to its local coastal program and was never appealed to the Commission. The City analyzed predicted bluff erosion rates and required that the structure be set back at least 25 feet from the bluff edge. Shortly after the City approved the permit, the El Niño storms of 1997-1998 caused the sudden and unexpected collapse of five feet of the bluff at the rear of 125 Indio Drive. Following this event, new scientific evidence revealed that predicted future erosion threatened the stability of both the 125 Indio Drive and the 121 Indio Drive residences. Seeking protection for both structures, real parties applied for a coastal development permit to authorize the seawall at issue here. The permit for the seawall was approved by the City and then by the Commission on appeal.

Petitioner now challenges the Commission's decision to approve the seawall. Petitioner's legal

challenge, however, is fundamentally flawed because it applies the wrong legal standard. In cases such as the permit decision here where the Commission is considering an appeal of a local government decision, the Commission's review is limited to a determination of whether the project is in conformity with the local coastal program ("LCP"). Petitioner ignores the existence of the LCP, however, and instead seeks an interpretation of Coastal Act provisions that do not apply to this permit decision.

Petitioner's legal challenge in this case is based on the contention that Coastal Act sections 30235 and 30253 are inconsistent unless the words "as of January 1, 1977" are impliedly read into the provisions of section 30235 to modify the term "existing." This interpretation of section 30235 would have the effect of limiting the structures that can be protected by new seawalls to those structures in existence prior to the effective date of the Coastal Act. Because the Commission's decision here was based on the City of Pismo Beach's LCP rather than section 30235 of the Coastal Act, petitioner's arguments are inapplicable here. Moreover, even if the Court evaluates petitioner's theory regarding the meaning of the term "existing" as it is used in section 30235, petitioner should not prevail because the Commission's interpretation of the term "existing" is a reasonable one to which the Court should give great weight. Accordingly, the petition for writ of mandate should be denied.

II. BACKGROUND

Petitioner challenges the Commission's approval of a shoreline protection device, or "seawall," to protect two residential structures at 121 and 125 Indio Drive, which are located on a bluff overlooking the ocean in Pismo Beach. (Petition for Writ of Mandamus ("Petition") at p. 9; 11 AR 2083-2084.) As approved, the 18-inch wide seawall would run 165 feet along the bluff face to support the approximately 40-foot high, nearly vertical cliff at the rear of the two residences. (11 Administrative Record ("AR") 2078-2079, 2083, 2106; see also 11 AR 2143-2146 [plans depicting proposed seawall].) The seawall would connect two existing shoreline protective devices on both sides of a public cul-de-sac. (*Ibid.*)

One of the bluff-top houses, 121 Indio Drive, was constructed prior to January 1, 1977, the effective date of the Coastal Act. (11 AR 2102.) Construction of the other residence at 125 Indio

Drive was approved by the City of Pismo Beach in 1997 and completed in 1998. (11 AR 2084.) The City's approval of the 125 Indio Drive house was not appealed to the Commission and therefore the Commission never reviewed or approved the project. (11 AR 2078.)

The City's 1997 approval of the residence at 125 Indio Drive included an evaluation of bluff erosion and a corresponding assessment of sufficient set-back requirements to insure that the project site would be stable given the estimated rate of bluff retreat. (11 AR 2084.) After considering all available scientific evidence, the City required that the structure be set back 25 feet from the bluff face. (11 AR 2084 & 2132.) The City considered this distance to be sufficient based on evidence of a bluff retreat rate of two to three inches per year. (*Ibid.*) In light of the predicted bluff retreat rate, the City determined that the 25-foot set-back would insure the safety of the 125 Indo Drive house for the estimated economic lifespan of the home, or 100 years. (11 AR 2086; 2102.)

Shortly after the 125 Indio Drive residence was completed, the El Niño storms of 1997-1998 caused approximately 22 inches of rain to fall in the area. (3 AR 400; 11 AR 2103.) The ensuing loss of a five-foot section of the bluff at the rear of 125 Indio Drive — one-fifth of the rear set back area — was not predicted in the geological report reviewed by the City and therefore was not reflected in the estimated bluff retreat rate. (2 AR 344-346 [Terratech Inc. Report, Jan. 9, 1997]; 3 AR 400; 11 AR 2084, 2103.) Following the winter storms, real parties conducted new studies. (11 AR 2087-2088.) The new geological reports concluded that, four years after construction of the residence, the structure was in fact at risk from erosion.[1] (11 AR 2087.) Real parties submitted these reports with an application to the City for a seawall to protect both 121 and 125 Indio Drive from future erosion. The City approved the application, finding that the expert reports, demonstrated the need for a seawall to insure the stability of both residences. (3 AR 400-403; 11 AR 2088; 3 AR 379.) Two Commissioners appealed this decision to the Commission. (11 AR 2136-2142.)

The Commission determined that the appeals raised a substantial issue as to the consistency of the City's approval with the LCP (11 AR 2083-2091) and conducted a de novo review of the project

1. Petitioner implies that real parties' original expert reports were biased, yet provides no evidence of bias and does not challenge the conclusions. The question framed by petitioner here is not whether the Commission had substantial evidence to support the finding that a seawall was necessary to protect the structure.

(11 AR 2100-2121). The Commission's conclusions are summarized in its staff report, including the statement of findings adopted by the Commission in support of the project approval. (11 AR 2077-2160.)

As demonstrated by the findings, the Commission applied the City's LCP, including policy S-6, which mandates that a seawall "be permitted only when necessary to protect existing principal structures . . . in danger of erosion." (11 AR 2100 & 2102-2105.) The Commission noted that both structures at issue were legally present at the site — the 121 Indio Drive residence was constructed prior to the enactment of the Coastal Act and the 125 Indio Drive residence was constructed pursuant to the City's approval in 1997 — and concluded that they were both "existing." (11 AR 2102, 2105 ["the residences qualify as . . . existing structure[s]"].)

In approving the seawall, however, the Commission also undertook a detailed analysis of additional LCP requirements that discourage the approval of shoreline protective devices. For example, the Commission's staff geologist, Mark Johnsson, visited the site and analyzed all available geotechnical reports to determine whether the two residences were "in danger from erosion."[2/] (11 AR 2086-2088 & 2102-2103.) (*Ibid.*) Consistent with the LCP policies and the Commission's practices, Dr. Johnsson evaluated whether residences at 121 and 125 Indio Drive "would be unsafe to occupy in the next two or three storm cycles (generally, the next few years) if nothing were to be done [to protect the structures]." (11 AR 2102; see also 10 AR 1835-1836, 1850-1851.) Based on all available scientific evidence and recognizing that it was a "borderline" case, the Commission found that "the fact that waves now routinely impact an area that consists of poorly consolidated

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2. The following geological assessments were reviewed by the Commission's geologist: (1) *Geologic Assessment of Bluff Erosion and Sea Cliff Retreat,* Terratech, Jan. 9, 1997; (2) *Geologic Assessment of Bluff Erosion and Sea Cliff Retreat,* GeoSolutions LLC, Jan. 26, 1998; (3) *Bluff Protection Plan for 121 and 125 Indo Drive,* Fred Schott & Associates, Nov. 6, 2000; (4) Golden State Aerial Surveys, Inc. photogrammetric data; (5) R.T. Wooley report, Mar. 11, 2001; (6) Earth Systems Pacific report, Jan. 15, 2001 and June 8, 2001; R.T. Wooley report, July 31, 2001; (7) R.T. Wooley report, Feb. 13, 2002; (8) *Geotechnical Investigation of Potential Seacliff Hazards,* (9) Cotton, Shires, & Assoc., Inc. report, Jan. 23, 2003; (10) *Review of Seacliff Hazards Report,* Earth Systems Pacific, Feb. 13, 2003; (11) *Coastal Hazard Study,* Skelly Engineering, Feb. 17, 2003; (12) *Response to Peer Review of Cotton, Shires and Associates, Inc. Report,* Cotton, Shires, and Assoc., Inc., Mar. 12, 2003; (13) *Beach Bedrock Survey and MHTL Projection to Proposed Protective Structure,* Cotton, Shires, and Assoc., Inc. June 5, 2003. (11 AR 2086-2088 & 2102; 4 AR 1850.)

marine terrace material indicates that, absent some form of shore protection, a clear danger from erosion would exist in the very near future." (11 AR 2105.) In light of these circumstances, it concluded that the residences at 121 and 125 Indio Drive met the requirements of LCP policy S-6 as "existing principal structures . . . in danger from erosion." (11 AR 2102-2103.)

The Commission also found that, in addition to the residential structures, the Florin Street cul-de-sac, an important public viewpoint, was in danger from erosion. (11 AR 2104 & 2120.) The proposed seawall would protect all three lots and would connect two existing shoreline protection devices, a quarry stone revetment on the Florin Street end and a shotcrete wall at 121 Indio Drive. (11 AR 2106; 2143-2146.)

As required by the LCP, real parties and the Commission also analyzed various alternative methods of reducing the bluff-retreat risk. For example, real parties considered the relocation of the structures farther from the bluff edge, as well as alternative shoreline armoring systems such as a drilled caisson system or a rip-rap revetment located on the beach. (11 AR 2105-2106.) Based on feasibility studies evaluating each alternative, expert reports concluded that a vertical seawall would be the most environmentally suitable and only feasible alternative. (*Ibid.*) The Commission concurred with the conclusions of these studies, but further refined the proposed seawall's design to insure it occupied the minimum footprint necessary and required modifications to improve visual aspects, such as a texture and color that would complement the natural landscape. (11 AR 2114 & 2092.) The approval also included mitigation for the impacts of the seawall, including installation of a new storm water filtering system, removal of the existing storm water outfall pipe and pedestal, and a fee to improve public access at the Florin Street cul-de-sac. (11 AR 2092-2100.) The permit was approved with conditions requiring construction best management plans, drainage and landscaping controls, and beach restoration. (11 AR 2092-2100.)

The Commission approved the seawall permit on August 6, 2003. Petitioner filed this writ of mandate action challenging the Commission's decision on October 5, 2003.

III. ARGUMENT

A. The Roles of the Coastal Act and the City's Local Coastal Program.

The Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.) is the permanent replacement

of Proposition 20, the original coastal protection initiative passed by California voters in 1972.[3] Both the initiative and the Act have as their primary purpose the avoidance of deleterious consequences of development on coastal resources. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158 163; *CEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 315, 321.) The Coastal Act is recognized as a comprehensive scheme to govern land use planning for the entire coastal zone of California. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565.)

The Act initially vests the Commission with the authority to issue permits for any coastal development. (Pub. Resources Code, § 30600, subd. (a).) The statutory scheme, however, is designed to transfer primary permitting authority from the Commission to local governments through the creation of local coastal programs ("LCPs"). An LCP consists of land use plans, zoning ordinances and other implementing actions which are designed to satisfy the policies of the Act. (*Id.*, § 30108.6.)

The local government is responsible for preparing an LCP and submitting it to the Commission for its review and approval. (*Id.*, §§ 30500-30525.) Once the Commission certifies that the entire LCP (including the land use plan, the zoning ordinances and other implementation) is in conformity with the resource protection policies of the Coastal Act, permit authority over coastal zone development is transferred to the local government. (*Id.*, §§ 30512, 30519.) The local government will then issue coastal development permits ("CDP") for any project that conforms with the provisions of the LCP.

Even after it certifies an LCP, the Commission retains appellate jurisdiction over local government CDP decisions for certain forms of development, such as development "between the sea and the first public road paralleling the sea." (Pub. Resources Code, § 30603.) Decisions of local governments under their LCPs may be appealed to the Commission by members of the public who have participated in the local government's proceedings or by members of the Commission itself. (*Id.*, § 30625, 30603, subd. (b)(1).) Unless the Commission finds that an appeal raises no substantial issue with respect to the grounds raised by the appeal, the Commission conducts a de novo review

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3. Proposition 20 was codified in the Coastal Zone Conservation Act of 1972 (former Pub. Resources Code, § 27000, et seq.). The Coastal Zone Conservation Act expired on December 31, 1976 and was replaced by the Coastal Act of 1976.

of the permit application. (Pub. Resources Code, § 30625, subd. (b)(2); see also Pub. Resources Code, § 30621; Cal. Code Regs., tit. 14, §§ 13115, subd. (b), 13321; *Coronado Yacht Club v. California Coastal Commission* (1993) 13 Cal.App.4th 860, 867.) Like the City's review of the initial permit application, the Commission's de novo review involves an evaluation of whether the project is in conformity with the LCP. (Pub. Resources Code, § 30604, subd. (b); Cal. Code Regs., tit. 14, § 13119.) In addition, for projects like the seawall here that are located between the first public road and the sea, the Commission is required to make the additional finding that the project conforms with the public access and recreation policies of Chapter Three of the Coastal Act (Pub. Resources Code, §§ 30210-30224). (*Id.*, § 30604, subd. (c).)

The City of Pismo Beach has a certified LCP. (4 AR 607-700.) The City originally approved the Grossman/Cavanagh seawall, and two of the Coastal Commissioners filed an appeal of the City's action. (11 AR 2136-2142.) On appeal, the Commission found a substantial issue was raised and conducted a do novo review of the application, properly evaluating the proposed seawall for consistency with the City's LCP. (11 AR 2077-2121.) Following the Commission staff's review of the project and the applicants' substantial revisions to the proposed design of the seawall, the Commission approved the application on August 6, 2003 as being in conformity with the City's LCP. (11 AR 2075 & 2079.) The issue raised by petitioner here is whether the Commission's decision is inconsistent with section 30235 of the Coastal Act, which states in pertinent part: "seawalls . . . shall be permitted when required to . . . protect existing structures . . . ." (See Petition at p. 9-10.)

B. Courts Afford Deference to an Administrative Agency's Interpretation of its Own Laws and Policies.

Typically, Courts evaluate decisions of administrative agencies by applying the "substantial evidence" standard to review all questions of fact. (See, e.g., *Paoli v. California Coastal Com.* (1986) 178 Cal.App.3d 544, 550-51; *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, 251.) In applying this standard, "the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) In this case, however, petitioner

only raises a question of law, conceding that the evidence was sufficient to support the Commission's decision. Although the Court exercises independent review over questions of law (see, e.g., *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888), "courts must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities" (*Mason v. Retirement Board of the City and County of San Francisco* (2003) 111 Cal.App.4th 1221, 1228). "Consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight." (*Ibid.*)

Here, the Commission evaluated the seawall project for conformity with the City's LCP, a land use planning document that was certified by the Commission pursuant to authority delegated to the Commission by the Legislature. (See Pub. Resources Code, § 30512, 30512.1, 30512.2.) The Commission's interpretation of a City's certified LCP is entitled to deference because the Commission is essentially "charged with putting [the LCP] into effect." (*Mason v. Retirement Board of the City and County of San Francisco, supra,* 111 Cal.App.4th at 1228; see also Pub. Resources Code, § 30625, subd. (c) [Commission decisions shall guide local government actions under the Coastal Act].) Additionally, the Court should defer to the Commission's decision in this case because the Commission's interpretation of "existing structure" has been consistent. (11 AR 2018-2019 [testimony at the public hearing on this permit by the Commission's chief counsel indicates that the Commission has "interpreted existing structure to mean whatever structure was there legally at the time that it was making its decision"]; see *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 12 [evidence that an agency's statutory construction has been consistent weighs in favor of affording deference to that interpretation].)

Petitioner cites the Commission's Chief Counsel's testimony, insisting that the Commission has "vacillated" in its interpretation of "existing structure." (Petitioner's Opening Brief, at pp. 15:2-16:6.) This contention, however, is based on an inaccurate quotation of the hearing testimony. (*Id.*, at p. 15:12-13 [the parenthetical "[of existing structure]" is improperly inserted in the block quote].) Petitioner also misconstrues the testimony, suggesting that the Commission has previously determined that the terms "existing structure" under section 30235 apply only to pre-Coastal Act

structures. To the contrary, the Chief Counsel's testimony, read in context, clarifies that the "change," cited by petitioner, was the new practice of incorporating a "no future seawall" condition in permits for new bluff-top development, not a change in the interpretation of "existing structure." (11 AR 2018-2019; see section III.D, *infra*, for discussion of "no future seawall" conditions.) Indeed, even petitioner tacitly concedes that the Commission has never determined that seawall approval under section 30235 is limited to protection of pre-Coastal Act structures. (*Id.*, at pp. 16:8-27 & 15, fn. 14.) Petitioner cites examples of permit decisions where the Commission did not need to interpret the term "existing structure" for purposes of section 30235 and insists that these decisions are "further evidence of vacillation." (*Id.*, at p. 16:8-27.) Despite the desires of petitioner, the Commission has no obligation to decide questions that are not raised by the application before it.

Thus, the Court should defer to the Commission's interpretation of the City of Pismo Beach's LCP and the Coastal Act. (*Ibid.*)

C. The Policies Applicable to the Permit Decision Here are Found in the City's LCP Not the Coastal Act.

In this writ action, petitioner urges the Court to interpret two provisions of the Coastal Act: Public Resources Code sections 30235 and 30253. These sections provide:

> **Section 30235. Construction altering natural shoreline**
>
> 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. Minimization of adverse impacts**
>
> New development shall: . . . [¶]
>
> (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Petitioner does not challenge the substantial evidence in support of the Commission's decision, but instead raises the purely legal question of the interpretation of the term "existing structure" in section 30235 of the Coastal Act.

Although it is not apparent from the Petition or petitioner's opening brief, the Commission

did not rely on sections 30235 and 30253 in approving the seawall here because its review consisted of an appeal from the City of Pismo Beach's CDP decision. Accordingly, the Commission properly looked to the provisions of the LCP applicable to seawalls and determined that the project was in conformity with the LCP. (Pub. Resources Code, § 30604, subd. (b); 11 AR 2100-2101.)

1. Although Seawalls are Disfavored Under the LCP, the Requirements For Seawall Authorization Were Met In this Case.

The Pismo Beach LCP includes policies intended to prevent the need for seawalls after new development is approved. For example, LCP policy S-3 addresses bluff set-backs:

> S-3 Bluff Set-Backs
>
> All structures shall be set back a safe distance from the top of the bluff in order to retain the structure for a minimum of 100 years, and to neither create nor contribute significantly to erosion, geologic instability or destruction of the site or require construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

(California Coastal Commission's Request for Judicial Notice in Support of Opposition ("RFJN"), Exh. B at p. S-6; 11 AR 2100.) In order to avoid the need for shoreline protection devices, this policy thus requires an applicant seeking approval of a new beachfront structure to anticipate naturally occurring erosion. The structure must then be designed with a sufficient "set back," or distance from the bluff edge, to account for the anticipated erosion. When the bluff naturally retreats over time, the structure — if properly sited and designed — should still have a safe buffer separating it from the cliff edge, and there should be no need to use an artificial device to support the existing bluff.

In addition, once a structure is in place, the LCP places limitations on shoreline armoring, allowing such devices to protect the structure only under very limited circumstances. Specifically, LCP policy S-6 provides:

> S-6 Shoreline Protective Devices
>
> *Shoreline protective devices, such as seawalls, revetments, groins, breakwaters, and riprap shall be permitted only when necessary to protect existing principal structures, coastal dependent uses, and public beaches in danger of erosion.* If no feasible alternative is available, shoreline protection structures shall be designed and constructed in conformance with Section 30235 of the Coastal Act and all other policies and standards of the City's Local Coastal Program. Devices must be designed to eliminate or mitigate adverse impacts on local shoreline sand supply, and to maintain public access to and along the shoreline. Design and construction of

> protection devices shall minimize alteration of natural landforms, and shall be constructed to minimize visual impacts. The City shall develop detailed standards for the construction of new and repair of existing shoreline protective structure and devices. As funding is available, the City will inventory all existing shoreline protective structures within its boundaries.

(RFJN, Exh. B at p. S-8 & Exh. C at p. 15 [showing final version of policy S-6 as modified by the Commission]; 11 AR 2100-2101 [emphasis added].) A seawall is thus available under the LCP to protect an "existing principal structure," only if "no feasible alternative is available," the device is designed in conformance with Coastal Act section 30235[4] and the policies of the LCP, it is designed to "eliminate or mitigate adverse impacts on local shoreline sand supply," public access to the shoreline is maintained, and it is designed to "minimize alteration of natural landforms" and "minimize visual impacts." In addition, the City must have "detailed standards" for seawall construction.

In addition, LCP section 17.078.060 prohibits seawall approvals unless specific criteria are met:

> (4) Seawalls shall not be permitted unless the City has determined that there are no other less environmentally damaging alternatives for protection of existing development or coastal dependent uses. If permitted, seawall design must a) respect natural landforms; b) provide for lateral beach access; and c) use visually compatible colors and materials and will [sic] eliminate or mitigate any adverse impacts on local shoreline sand supply.

(6 AR 1029; 11 AR 2101.) The LCP also requires that shoreline structures be designed to "(a) Eliminate or mitigate impacts on local shoreline sand supply; (b) Provide lateral beach access; (c) Avoid significant rocky points and intertidal or subtidal areas; [and] (d) Enhance public recreational opportunities." (LCP section 17.078.060, subd. (6); 6 AR 1029; 11 AR 2101.)

These provisions demonstrate that the LCP disfavors shoreline protective devices, specifying that should be reviewed carefully and used sparingly. In this case, the Commission looked at the particular facts regarding the physical condition of the bluff and potential effects of possible storm and earthquake events. It considered all alternatives, including relocation of the structures. Applying the LCP policies, it determined that the 121 and 125 Indio residences were "existing

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4. Notably, policy S-6 refers to section 30235 on with respect to construction and design issues, not for guidance on whether a seawall can be approved at the site.

structures" that were "in danger from erosion" under policy S-6.

2. The Commission Has Discretion to Interpret the LCP to Allow Seawalls for Structures "Existing" as of the Date of the Seawall Approval.

Surfrider does not challenge the Commission's finding that the 125 Indio Drive residence was an "existing structure" under the LCP, but instead argues the 125 Indio Drive residence was not an "existing structure" under section 30235 of the Coastal Act. It contends that section 30235 cannot be interpreted to include 125 Indio as an "existing structure" because the residence was not in existence when the Coastal Act became effective on January 1, 1977. The legal standard here, however, is the City's LCP, not the general policies in the Coastal Act. (Pub. Resources Code, § 30604, subd. (b).) In this case, the Commission chose to treat the 125 Indio Drive residence as an "existing principal structure" under LCP policy S-6, implicitly interpreting the term "existing" to mean any structure in existence at the time the seawall application was filed. Nothing in the LCP suggests that this interpretation of policy S-6 is unreasonable.

The City of Pismo Beach adopted the original version of its LCP in 1981 and obtained permit authority when the Commission certified the LCP in 1984. (4 AR 607-608.) The City amended the several times after 1984 and, in 1992, completely revised and replaced the land use plan ("LUP") component of the LCP, including the seawall policies. The Commission certified the new updated plan on April 14, 1993. (RFJN, Exh. A at 1.) The LUP policies regarding shoreline protection in the 1993 LUP were the applicable policies at the time of the Commission's approval of the seawall in this case. (See 11 AR 2100-2101.)

In its original form, the LUP policy that addressed approval of seawalls included the same limitation found in the current version, allowing new seawalls to protect "existing" structures. (4 AR 681[Policy S-13].) In 1993, this policy was replaced by an amended version, but the reference to "existing" structures was retained. (RFJN, Exh. A at 3 [Policy S-6]; see also 11 AR 2100-2101.) Neither the original LUP nor the current LUP as amended in 1993 indicates that the term "existing" means "existing as of January 1, 1977." (4 AR 681; RFJN, Exh. A at 3; 11 AR 2100-2101.) Without a specific reference in the LCP to the date that the Coastal Act was adopted, it is reasonable to decline to read such a limitation into policy S-6. Indeed, it is unlikely that an ordinary reader of

the LCP — a document serving as part of the "City's constitution for land use decision making" (4 AR 621) — would rely on independent knowledge of the effective date of the Coastal Act to interpret the term "existing" to mean "existing as of January 1, 1997." Although seawalls are clearly disfavored under the LCP, it is illogical to claim that a document adopted in 1984 or 1993 would use the term "existing" to refer only to structures "existing" as of January 1, 1977.

The petition should be denied because the Commission's approval is based on a reasonable interpretation of the LCP.

D. Even If Coastal Act Sections 30253 and 30235 Governed the Commission's Analysis a Finding that the 125 Indio Residence Is an "Existing Structure" Would Be Reasonable.

Because the LCP controls, petitioner's argument that section 30235 applies only to pre-Coastal Act structures is misdirected. Nevertheless, if section 30235 applied in this case, it is within the Commission's discretion to find that the 125 Indio Drive residence is an "existing structure" under section 30235.

The "touchstone" of statutory interpretation is legislative intent. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) In evaluating the meaning of a statute "the aim . . . should be the ascertainment of legislative intent so that the purpose of the law may be effectuated." (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.) We must look at "the purpose sought to be achieved and the evils to be eliminated . . . in ascertaining the legislative intent." (*Freedland v. Grecko* (1955) 45 Cal.2d 462, 467.) Statutory provisions must be harmonized if possible (*Consumers Union of United States, Inc. v. California Milk Producers Advisory Board* (1978) 82 Cal.App.3d 445-447), and statutes are to be construed to give meaning to every provision and to avoid making any provision surplusage (*Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 752). "[I]t is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (*Stillwell v. State Bar of California* (1946) 29 Cal.2d 119, 123.)

The Legislative intent of section 30235 can be discerned from review of the Coastal Act as a whole. For instance, the Legislature has used the term "existing" in other Coastal Act provisions.

"Existing" is used to refer to current conditions such as "existing water depths" (§ 30705, subd. (b)), "existing water quality" (§ 30711, subd. (a)(3)), "existing zoning requirements" (§ 30610, subd. (g)(1)), "existing administrative methods for resolving a violation [of the Act]" (30812, subd. (g)). Additionally, section 30235 itself refers to the phasing out of "[e]xisting marine structures." (*Id.*, § 30235.) Nowhere in any of these provisions in there any indication that the legislature intended to limit the Commission's review to the water depths, water quality, zoning requirements, administrative methods or marine structures that existed as of January 1, 1977. Indeed, this would be patently absurd. Similarly, when viewed in light of these provisions, it is reasonable to interpret the term "existing structure" to similarly refer to currently existing structures rather than structures existing as of the effective date of the Coastal Act.

In addition, in two provisions the Coastal Act specifically include a date to clarify the term "existing." Section 30610.6, refers to existing legal lots, but specifically limits the application of the section to any "legal lot existing . . . on the effective date of this section." Similarly, in section 30614, the Act refers to "coastal development permit conditions existing as of January 1, 2002." (Pub. Resources Code, § 30614.) Thus, when the Legislature intended to limit the term "existing" to a certain point in time, it did so specifically. That it did not do so in Section 30235 is a further indication that it is not unreasonable for the Commission to interpret the term "existing structure" in section 30235 as existing at the time the decision regarding the shoreline protection device is made.[5]

Petitioner also contends that section 30235 and section 30253 are conflicting. Of course, such an argument is on its face inconsistent with rules of statutory construction that require that a

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5. Two years ago, the California Legislature considered the addition of the specific language that petitioner seeks to "read into" section 30235. AB 2943, if adopted, would have amended section 30235 to add two new subdivisions. The proposed subdivision (c) defined "existing structure" for the purposes of section 30235 to mean "a structure that has obtained a vested right as of January 1, 1977, the effective date of the California Coastal Act of 1976." (RFJN, Exh. C [Sen. Amend. to Assem. Bill No. 2943 (2001-2002 Reg. Sess.) Aug. 26, 2002].) AB 2943 died on the Senate inactive file on November 30, 2002. (*Id.*, Exh. D [Complete Bill History].) Although "only limited inferences can be drawn from [unpassed bills]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795), the Legislature's rejection of AB 2943 undermines petitioner's interpretation of section 30235. Without the specific provisions of the failed amendment, there is no requirement that the Commission interpret that section to apply solely to pre-Coastal Act structures.

statute must be read "with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." (*People v. Kennedy* (2001) 91 Cal.App.4th 288, 293; see also *Romano v. Rockwell* (1996) 14 Cal.4th 479, 493.) Here, there is no conflict and the seawall sections of the Coastal Act are easily harmonized.

Section 30253 is directed at new development and instructs the Commission to take all reasonable measures to insure that new development will not require a shoreline protective device. In carrying out this policy, the Commission typically reviews new development proposed for coastal bluffs to determine if it has been adequately designed to prevent the need for any shoreline protective device for the lifetime of the project. As section 30253 makes clear, an application for development on the shoreline must show that the new development will not "in any way require the construction of protective devices." In effectuating this policy, the Commission may require that a development be reduced in size or set back farther from the bluff to reduce the likelihood that a seawall might be necessary to preserve the structure in the future. Indeed, in certain instances, the Commission has even imposed a "no future seawall" condition to forewarn property owners that a seawall will not be permitted at a later date. (11 AR 2019.) With such a condition, the development can be approved, but it is subject to a requirement that, for that particular development, a shoreline protective device will never be proposed as a means to stabilize an eroding bluff at the site. The permit therefore insures that a property owner does not attempt to circumvent the requirements of section 30253 after a structure is completed.

Nevertheless, the coast is a dynamic environment and in spite of best efforts the Coastal Act also recognizes that seawalls may sometimes be necessary and permitted. To this end, section 30235 specifically authorizes the approval of new seawalls and similar protective devices, but only where these devices are necessary to ensure the safety of "existing structures" (meaning structures existing at the time the application for a seawall is filed with the Commission) and only when such structures are "in danger of erosion" and certain other criteria are met. In sum, the two provisions are harmonious because, as even petitioner concedes, "one prohibits the construction of new development in a manner that would require a seawall in the future" (Petitioner's Opening Brief, at p. 2:26-27 [referring to section 30253]), while the other recognizes that even the best of intentions

can go awry and allows the Commission to approve seawalls to protect "existing structures in danger from erosion" (section 30235).

Additionally, contrary to petitioner's assertion, the Commission's interpretation of the term "existing" in section 30235 does not render it a meaningless, surplus term. (See Petitioner's Opening Brief, at p. 12:22-24.) With the term "existing," section 30235 prevents a permit applicant from requesting a seawall as a component of an application for a new bluff-top structure. If "existing" is omitted from section 30235, the Commission could be asked to approve seawalls for any *planned* structures that met the additional requirements of the section. In other words, an applicant could request a seawall as part of an application a new development project when erosion of the development site could not otherwise be prevented. Thus, the term "existing," meaning currently existing, is essential to limit seawall approval to protection of structures existing at the time of the approval, thereby harmonizing sections 30235 and 30253.[6]

V. CONCLUSION

Reasonable application of the policies by the City, implementing the analogous seawall policies in the LCP, is demonstrated by this case. When the City initially reviewed the proposal to construct a residence at 125 Indio Drive residence, it conducted a thorough review of the facts to insure no future seawall would be necessary. And based on uncontradicted evidence that demonstrated the structure would be adequately set back from the bluff edge given predicted erosion rates for the area, the project was approved. If the Coastal Commission had reviewed this project, it might have also imposed a "no future seawall" condition to provide notice that a seawall would not be allowed if these predictions and evidence proved false, but this project was instead approved by the City, so no such condition was adopted. Unfortunately, an unpredicted acceleration in the bluff erosion rate occurred after the residence was constructed and it is uncontested that it is now in jeopardy. In such a situation, where an existing structure is in danger from erosion, approval of a seawall is permitted by the Coastal Act. Nothing in the Act or LCP mandates that this house must

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6. Similarly, petitioner's argument regarding early legislative bills proposing section 30235 (Petitioner's Opening Brief, at pp. 11-13) is unpersuasive. There is no evidence that the addition of the term "existing" in the bill that was ultimately passed by the Legislature requires the Commission to limit "existing structures" to pre-Coastal Act structures.

be allowed to fall into the sea.

Accordingly, the Court should deny the petition for writ of mandamus.

Dated: July 30, 2004

Respectfully submitted,

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PROOF OF SERVICE

CASE NAME: ***Surfrider Foundation v. California Coastal Commission***

CASE NO.: Superior Court of the State of California County of San Francisco
Case No. CPF03503643

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is P. O. Box 70550; 1515 Clay Street, 20th Floor, Oakland, California 94612-0550. On **July 30, 2004**, I served the following document(s):

1. **CALIFORNIA COASTAL COMMISSION'S OPPOSITION TO PETITIONER'S OPENING BRIEF**
2. CALIFORNIA COASTAL COMMISSION'S REQUEST FOR JUDICIAL NOTICE

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) **By First Class Mail**: I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.

(B) **By Messenger Service**: I caused each such envelope to be delivered by a courier employed by King Courier, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.

(C) **By Overnite Mail**: I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.

(D) **By Facsimile**: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.

TYPE OF SERVICE	ADDRESSEE
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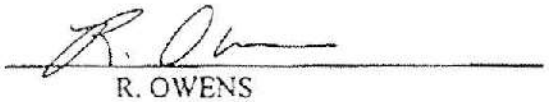
I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **July 30, 2004**, at Oakland, California.



R. OWENS

The Commission's Respondent's Brief in the Court of Appeal in *Surfrider Foundation v. California Coastal Com*.

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

SURFRIDER FOUNDATION,
Petitioner and Appellant,
v.
CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent,
WALTER CAVANAGH, et al.,
Real Parties In Interest and Respondents.

Case No. A110033

San Francisco County Superior Court No. CPF 03-503643
The Honorable James L. Warren, Judge

BRIEF OF RESPONDENT CALIFORNIA COASTAL COMMISSION

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INTRODUCTION

This is a case in which the rules of statutory construction, sound public policy and common sense converge in harmony. A landowner's 1997 coastal development permit required that he set his proposed house 25 feet back from the bluff to assure the stability of the site and avoid the later need for a seawall. The 1997-98 El Niño storms unexpectedly caused substantial loss of the bluff top, causing the landowner to apply for a seawall to protect his home. After the California Coastal Commission's staff geologist agreed with the conclusion of numerous experts that the house was in substantial danger, the Commission approved a coastal development permit for the seawall. The Commission imposed 15 stringent conditions that would mitigate the seawall's impacts on sand supply and public access. The Surfrider Foundation then brought this action to argue that the Commission had no discretion as a matter of law to allow the seawall.

The trial court rejected Surfrider's argument, and the trial court's judgment should be affirmed. Section 30235 of the Coastal Act allows the construction of shoreline protective structures to protect "existing" structures in danger from erosion when they are designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Because the Commission found that the landowner's existing home was in danger from erosion and that his proposed seawall as conditioned would mitigate its adverse impacts—factual findings never contested by Surfrider—the Commission properly approved the construction of the seawall.

Surfrider, however, wishes to add some language to section 30235. It contends that "'[e]xisting structure' must be interpreted to mean 'existing structure as of 1976.'" (Surfrider Br. at p. 41.) To support its reworking of section 30235, Surfrider argues that the Commission's interpretation of section 30235 conflicts with section 30253. Section 30253 provides that new

development should not require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. But there is no conflict between these two provisions—section 30253 requires that new development be constructed in a way that avoids the need for protective devices; section 30235 allows the Commission to approve a seawall if, despite this effort, the development later becomes endangered by erosion and a properly designed seawall can avoid adverse impacts.

The manner in which the word "existing" appears throughout the Coastal Act confirms the trial court's conclusion that existing structures are those structures that exist at the time of the seawall application. Chapter 3 of the Coastal Act (Pub. Resources Code, §§ 30200-30265.5) contains the resource policies that the Commission applies to pending applications. (*Id.*, § 30604(a).) Including section 30235, the word "existing" appears no fewer than 15 times in Chapter 3 and each time refers to currently existing conditions. (*Post*, at pp. 18-19.) It is logical that these Chapter 3 policies, including section 30235, refer to conditions that exist at the time of a permit application. It would make little sense to evaluate permit applications under conditions as they existed thirty or more years ago and ignore the considerable changes that have taken place along California's coast since the Coastal Act's passage.

Finally, Surfrider's antagonism toward the Commission is misdirected. Surfrider suggests that the Commission is indifferent to the impacts of seawalls and that its interpretation of section 30235 would "guarantee" every applicant a seawall. (E.g., Surfrider Br. at p. 37.) Under the Commission's interpretation, however, obtaining approval for a seawall remains a taxing proposition. Applicants must demonstrate that their existing structures are in genuine danger and they must design protective devices in a way to eliminate or mitigate their adverse impacts. (Pub. Resources Code, § 30235.) For the applicants here, that meant submitting over 15 technical reports, accepting important design

modifications, and agreeing to numerous conditions that will mitigate the seawall's possible impact on shoreline processes, visual resources and public access.

When these exacting standards are met, section 30235 authorizes the Commission to approve seawalls. The Commission's interpretation of section 30235 is "absurd" only if one is prepared to say that it would be absurd for the Legislature to pass a law that allows the construction of properly designed seawalls to protect existing houses, roads and other structures, not to mention human lives, that are endangered by the ravages of the ocean.

The trial court's judgment should be affirmed.

BACKGROUND

Surfrider challenges the Commission's approval of a single shoreline protection device, or "seawall," to protect two residential structures at 121 and 125 Indio Drive in Pismo Beach that are located on a bluff overlooking the ocean. (11 Administrative Record ("AR") 2083-2084.) The 165-foot long seawall would connect two existing shoreline protective devices on both sides of a public cul-de-sac. (11 AR 2078-2079, 2083, 2106, 2143-2146 [proposed seawall plans].) Gary Grossman owns the house at 121 Indio Drive and Walter Cavanagh owns the house at 125 Indio Drive. (The real parties in interest are referred to in this brief collectively as "the applicants.")[1]

The house at 121 Indio Drive was constructed before January 1, 1977, the effective date of the Coastal Act. (11 AR 2102.) In 1997, acting under its local coastal program (or "LCP"), the City of Pismo Beach approved a coastal development permit for construction of the house at 125 Indio Drive. (11 AR

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1. Grossman at one time also owned 125 Indio Drive property, and applied for the 1997 permit to build the house. He later sold the 125 Indio Drive property to Cavanagh, who joined with Grossman as a co-applicant for the seawall in dispute. (1 AR 77; 7 AR 1138.)

2084.) The City's approval was not appealed to the Commission, and therefore the Commission never reviewed the project. (11 AR 2078.) The house at 125 Indio Drive was constructed in 1998. (11 AR 2084.)

Before it approved the house at 125 Indio Drive, the City evaluated the site's potential for bluff erosion and considered the distance that the house would need to be set back so that the project site would be stable. (11 AR 2084.) After receiving expert evidence that the bluff retreat rate was two to three inches per year, the City required that the structure be set back 25 feet from the bluff face. (11 AR 2084, 2132.) The City determined that the 25-foot setback would be adequate to withstand 100 years of erosion. (11 AR 2086; 2102.)

After the City approved the house at 125 Indio Drive house, the El Niño storms of 1997-1998 brought approximately 22 inches of rainfall to the area. (3 AR 400; 11 AR 2103.) These storms caused the loss of a five-foot section of the bluff at the rear of 125 Indio Drive. (11 AR 2083.) This unexpected loss was not predicted in the geological report that the City reviewed and was not reflected in the estimated bluff retreat rate. (2 AR 344-346 [Terratech Inc. Report, Jan. 9, 1997]; 3 AR 400; 11 AR 2084, 2103.) Following the winter storms, the applicants conducted new studies. (11 AR 2087-2088.) The new geological reports concluded that their houses were in serious jeopardy from erosion. (11 AR 2087.) The applicants submitted these reports to the City with an application for a coastal permit to construct a single seawall to protect both houses from future erosion. The City approved the coastal permit, finding that the expert reports demonstrated that both residences required a seawall to insure their stability. (3 AR 400-403; 11 AR 2088; 3 AR 379.) Two Commission members appealed the City's decision to the Commission. (11 AR 2136-2142.)

The Commission determined that the appeals raised a substantial issue whether the City's approval was consistent with the City's LCP. (11 AR 2083-

2091.) Having found a substantial issue, the Commission conducted a de novo review of the project. (Pub. Resources Code, § 30621.) After a public hearing, the Commission approved the proposed seawall, subject to 15 special conditions. (11 AR 2100-2121). The Commission adopted its staff's proposed findings in support of its decision. (11 AR 2077-2160.)

Because the Coastal Act requires that the Commission on appeal apply the policies of the LCP, not the Coastal Act (see Pub. Resources Code, § 30604(d)), the Commission's findings addressed whether the project was consistent with the relevant policies of the City's LCP. The primary policy was LCP policy S-6, which provides that a seawall "be permitted only when necessary to protect existing principal structures . . . in danger of erosion." (11 AR 2100, 2102-2105.) The Commission found that "the residences qualify as . . . existing structure[s]" under LCP policy S-6. (11 AR 2102, 2105.)

The Commission then considered whether these existing structures were in "danger of erosion." To meet this standard, the Commission required proof that the houses "would be unsafe to occupy in the next two or three storm cycles (generally, the next few years) if nothing were to be done [to protect the structures]." (11 AR 2102; see also 10 AR 1835-1836, 1850-1851.) The Commission's staff geologist, Mark Johnsson, visited the site and analyzed no fewer than 14 expert reports to determine whether the two houses were endangered. (11 AR 2086-2088, 2102-2103.)[2] Using Dr. Johnsson's analysis,

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2. These geotechnical reports included: (1) *Geologic Assessment of Bluff Erosion and Sea Cliff Retreat,* Terratech, Jan. 9, 1997 (1 AR 111); (2) *Geologic Assessment of Bluff Erosion and Sea Cliff Retreat,* GeoSolutions LLC, Jan. 26, 1998 (1 AR 92); (3) *Bluff Protection Plan for 121 and 125 Indo Drive,* Fred Schott & Associates, Nov. 6, 2000; (4) Golden State Aerial Surveys, Inc. photogrammetric data (1 AR 133); (5) R.T. Wooley report, Mar. 11, 2001 (1 AR 130); (6) Earth Systems Pacific report, Jan. 15, 2001 (1 AR 124); (7) Earth Systems Pacific report, June 8, 2001 (1 AR 128); (8) R.T. Wooley report, July 31, 2001 (1 AR 173); (9) R.T. Wooley report, Feb. 13, 2002 (3 AR 448); (10) *Geotechnical Investigation of Potential Seacliff Hazards,* Cotton, Shires, and

the Commission found that the houses were in danger: "the fact that waves now routinely impact an area that consists of poorly consolidated marine terrace material indicates that, absent some form of shore protection, a clear danger from erosion would exist in the very near future." (11 AR 2105.)

The Commission also found that, in addition to the residential structures, the Florin Street cul-de-sac, an important public viewpoint, was in danger from erosion. (11 AR 2104, 2120.) The proposed seawall would protect both the houses and the viewpoint, by connecting with two existing shoreline protection devices, a quarry stone revetment on the Florin Street end and a shotcrete wall at 121 Indio Drive. (11 AR 2106, 2143-2146.)

The Commission also analyzed alternative methods of reducing the bluff-retreat risk, as required by the LCP. For example, the applicants' experts considered relocating the structures farther from the bluff edge, as well as installing alternative shoreline armoring systems such as a drilled caisson system or a rip-rap revetment located on the beach. (11 AR 2105-2106.) Based on feasibility studies evaluating each alternative, the geotechnical reports concluded that a vertical seawall would be the most environmentally suitable and the only feasible alternative. (*Ibid.*) The Commission concurred with these conclusions, but required substantial changes in the proposed seawall's design to insure that the seawall occupied the minimum footprint necessary and that it was less visually intrusive than the one proposed. (11 AR 2114, 2092.) In all, the Commission imposed 15 conditions to mitigate or eliminate any remaining adverse impacts of the project. Among others, these conditions required that

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Assoc., Jan. 23, 2003 (8 AR 1258); (11) *Review of Seacliff Hazards Report*, Earth Systems Pacific, Feb. 13, 2003 (8 AR 1412); (12) *Coastal Hazard Study*, Skelly Engineering, Feb. 17, 2003 (8 AR 1420); (13) *Response to Peer Review*, Cotton, Shires, and Assoc., Mar. 12, 2003 (8 AR 1403); (14) *Beach Bedrock Survey and MHTL Projection to Proposed Protective Structure*, Cotton, Shires, and Assoc., June 5, 2003 (9 AR 1535).

the applicants:

- Limit the width of the toe of the seawall to 18 inches (11 AR 2066);
- Face the seawall with a sculpted concrete surface that mimics natural bluffs in color, texture and undulation (*ibid.*);
- Install a new storm water filtering system, remove the existing storm water outfall pipe, and make a $50,000 deposit to implement the City's nonpoint source storm water runoff control (*ibid.*);
- Install permanent devices to collect all surface runoff from the two houses (11 AR 2068);
- Implement a native plant landscaping plan (11 AR 2068-2069);
- Before finishing construction, test to the Commission's satisfaction that the seawall facing met the permit requirements (11 AR 2069-2070);
- Pay $10,000 for public access improvements at the Florin cul-de-sac (AR 2070-2071);
- Make an irrevocable offer to dedicate permanent public access to the beachfront property that is west of the seawall on Grossman's property (11 AR 2071); and
- Monitor the success of the seawall and storm water outfall on a permanent basis (11 AR 2071-2072).

Surfrider filed a timely petition for a writ of mandate challenging the Commission's decision. (CT 1.) After briefing and oral argument, the trial court denied Surfrider's petition. (CT 301.) The trial court rejected the applicants' argument that the City should have been named as a real party interest. (CT 7-9.) It also rejected the Commission's argument that the writ should be denied because Surfrider failed to challenge whether the project was consistent with the LCP. (CT 9-11.)

On the merits, however, the trial court determined that the Commission's

treatment of the 125 Indio house as an "existing" structure was reasonable and within the Commission's discretion. (CT 310-317.) Among many reasons, the trial court found that the Commission's interpretation of section 30235 comported with the plain language of the statute; that the Commission's interpretation of the statute was longstanding; that the word "existing" throughout the Coastal Act referred to currently existing conditions, not just those that existed as of January 1, 1977; and that sections 30235 and 30253 were not in conflict but easily harmonized. (*Ibid.*)

Surfrider filed a timely appeal and has served its opening brief.

STANDARD OF REVIEW

In reviewing an appeal from a trial court's determination of a petition for a writ of administrative mandamus, the Court of Appeal occupies the same position as the trial court. (E.g., *City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 232; *McGill v. Regents of University of California* (1996) 44 Cal. App. 4th 1776, 1786.) The Commission's permit decisions must be upheld if they are supported by "substantial evidence" in light of the entire record. (E.g., *Paoli v. California Coastal Commission* (1986) 178 Cal.App.3d 544, 550-51.) The agency's decision is presumed correct, and unless the petitioners produce or cite evidence to the contrary, the decision is presumed to be supported by substantial evidence. (See *Smith v. Regents of the University of California* (1976) 58 Cal.App.3d 397, 404-05; *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 690-91.) The Court exercises independent review over questions of law. (E.g., *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

In this action, Surfrider raises only a single question of law—the meaning of the word "existing" in Public Resources Code section 30235. Surfrider's tactical decision means that the Court must accept as true the Commission's unchallenged factual findings, including its findings that the applicants' houses

were in danger from erosion and that the permits as conditioned comply with the policies of the Coastal Act. In addition, because Surfrider does not describe the material evidence in the administrative record, it has waived any challenge to the sufficiency of the evidence to support the Commission's decision. (See, e.g., *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

RULES OF STATUTORY CONSTRUCTION

The usual rules apply. The "touchstone" of statutory interpretation is legislative intent. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) In evaluating the meaning of a statute "the aim . . . should be the ascertainment of legislative intent so that the purpose of the law may be effectuated." (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.) The courts look at "the purpose sought to be achieved and the evils to be eliminated . . . in ascertaining the legislative intent." (*Freedland v. Grecko* (1955) 45 Cal.2d 462, 467.) Statutory provisions must be harmonized if possible (*Consumers Union of United States, Inc. v. California Milk Producers Advisory Board* (1978) 82 Cal.App.3d 431, 445-447), and statutes are to be construed to give meaning to every provision and to avoid making any provision surplusage (*Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 752). "[I]t is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (*Stillwell v. State Bar of California* (1946) 29 Cal.2d 119, 123.)

ARGUMENT

I. SURFRIDER'S PETITION SHOULD BE DENIED BECAUSE SURFRIDER DOES NOT CHALLENGE THE COMMISSION'S FINDING THAT THE PROPOSED SEAWALL IS IN CONFORMITY WITH THE CITY'S LOCAL COASTAL PROGRAM

Surfrider's approach has caused it a real problem. Surfrider raises only the issue whether the Commission's action violated Coastal Act section 30235. But that issue was not before the Commission, which considered (and legally was only allowed to consider) whether the project was consistent with the City's LCP. (Pub. Resources Code, § 30604(d).) Because it failed to challenge the basis upon which the Commission acted, Surfrider's appeal should be denied.

The Coastal Act initially vests the Commission with the authority to issue permits for coastal development. (Pub. Resources Code, § 30600(a).) The Act transfers primary permitting authority to local governments through the creation of local coastal programs. An LCP consists of a local government's land use plans, zoning ordinances and other implementing actions that the Commission has certified as consistent with the resource protection policies contained in Chapter 3 of the Coastal Act. (See *id.*, §§ 30108.6, 30512, 30519.) A certified LCP may be more restrictive than the Chapter 3 policies, but it may not be less restrictive. (Pub. Resources Code, § 30512(c); see *Yost v. Thomas* (1984) 36 Cal.3d 561, 572.) Once the Commission has certified the local government's LCP, permitting authority is transferred to the local government. (Pub. Resources Code, § 30600(d).)

Local government LCP permit decisions in many circumstances may be appealed to the Commission. (Pub. Resources Code, §§ 30603, 30625.) Unless the Commission finds that an appeal raises no substantial issue, the Commission conducts a de novo review of the permit application. (*Id.*, § 30625(b)(2); see *id.*, § 30621; Cal. Code Regs., tit. 14, §§ 13115(b), 13321;

Coronado Yacht Club v. California Coastal Commission (1993) 13 Cal.App.4th 860, 867.) The Commission's de novo review requires that it determine whether the project is in conformity with the LCP and, where applicable, the public access and recreation policies of the Coastal Act, but not the other Chapter 3 policies such as section 30235. (Pub. Resources Code, § 30604(b), (c); Cal. Code Regs., tit. 14, § 13119.) The Commission here found that the seawall as conditioned was in conformity with the seawall policies in the City's LCP. (E.g., 11 AR 2085-2086.)

Therefore, to set aside the Commission's decision on appeal, Surfrider must demonstrate that there is no substantial evidence to support the Commission's finding that the project is in conformity with the City's LCP. But Surfrider does not challenge this finding. It contends that the Commission misinterpreted the word "existing" in section 30235 in the Coastal Act. Even if the Court were to agree with Surfrider, it could not accord Surfrider relief because the Commission's finding that the project was in conformity with the policies of the City's LCP would not be affected.

Surfrider perhaps can be extricated from this dilemma if the Court chooses to do two things. First, the Court would be required to assume that the word "existing" in section 30235 has the same meaning as "existing" in the City's LCP. It is fair to make this assumption because the Commission may not certify an LCP that is less restrictive than the Chapter 3 policies of the Coastal Act. (*Post*, at p. 10.) Second, the Court would be required to treat Surfrider's argument about the meaning of section 30235 as an implicit challenge to the Commission's interpretation of "existing" in LCP Policy S-6. Because Surfrider has never requested to amend its petition to state a proper cause of action, however, there is no compelling reason why the Court on its own should allow a de facto amendment of Surfrider's petition.

In summary of this point, the Court should deny Surfrider's petition

because it failed to challenge the legal basis on which the Commission made its decision. Alternatively, should the Court consider the appeal, it should treat the petition as if it were directed to the Commission's interpretation of the LCP.

For the remainder of this brief, the Commission will assume that the words "existing" in section 30235 and in LCP policy S-6 have the same meaning and that the Court will construe Surfrider's argument about the interpretation of section 30235 as an implicit challenge to the Commission's decision under the LCP.[3]

II. SURFRIDER'S PETITION SHOULD BE DENIED BECAUSE THE TERM "EXISTING STRUCTURES" REFERS TO EXISTING STRUCTURES AT THE TIME OF THE PERMIT APPLICATION AND IS NOT LIMITED TO STRUCTURES THAT PREDATED THE COASTAL ACT

A. Substantial Evidence Supports the Commission's Decision That the Proposed Seawall Was in Conformity With the City's LCP.

Substantial evidence supports the Commission's decision that the proposed seawall was in conformity with the City's LCP.

Under LCP policy S-6, a seawall may be approved to protect an "existing principal structure," only if no feasible alternative is available and the device is designed to eliminate or mitigate adverse impacts on local shoreline sand supply, maintain public access to the shoreline, and minimize visual impacts.[4]

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3. Although the trial court rejected this argument, the Commission may raise this argument on appeal without a cross appeal because the trial court made no order adverse to the Commission. (See, e.g., *Selger v. Stevens Bros., Inc.* (1990) 222 Cal.App.3d 1585, 1593-1594.)

4. LCP policy S-6 provides:

> Shoreline protective devices, such as seawalls, revetments, groins, breakwaters, and riprap shall be permitted only when necessary to protect existing principal structures, coastal dependent uses, and public beaches in danger of erosion. If no feasible alternative is available,

Related LCP policies require that shoreline structures provide lateral beach access, avoid significant rocky points and intertidal or subtidal areas, and enhance public recreational opportunities. (6 AR 1029; 11 AR 2101 [LCP section 17.078.060(6)].)

The Commission found that the applicants' proposed seawall was in conformity with the City's LCP. The Commission found that their houses legally existed at the time of the application, that the houses were in danger from erosion, that there were no feasible alternatives to the proposed seawall, and that, as conditioned, the seawall was designed in a manner that would mitigate its impact on shoreline sand supply, public access and visual resources. (11 AR 2077-2160; *ante*, at pp. 5-7.) The Commission's decision was supported by abundant expert analysis, including the independent review of its own staff geologist. Surfrider does not challenge these findings, and the Commission's decision is presumptively supported by substantial evidence. (*Ante,* at pp. 8-9.)

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shoreline protection structures shall be designed and constructed in conformance with Section 30235 of the Coastal Act and all other policies and standards of the City's Local Coastal Program. Devices must be designed to eliminate or mitigate adverse impacts on local shoreline sand supply, and to maintain public access to and along the shoreline. Design and construction of protection devices shall minimize alteration of natural landforms, and shall be constructed to minimize visual impacts. The City shall develop detailed standards for the construction of new and repair of existing shoreline protective structure and devices. As funding is available, the City will inventory all existing shoreline protective structures within its boundaries. (11 AR 2100-2101.)

B. The Commission's Interpretation of Section 30235 Is Compelled by Both the Language of the Statute and the Legislature's Intent to Allow Seawalls Where Necessary to Protect Life and Property.

In the face of this, Surfrider maintains one argument. It contends that the word "existing" as used in section 30235[5] (and implicitly LCP policy S-6) means "existing as of January 1, 1977," the date that the Coastal Act went into effect; in other words, the Commission may approve a seawall only to protect structures that existed on January 1, 1977. Because Cavanagh's house did not exist until 1998, Surfrider contends that, as a matter of law, the Commission had no discretion to approve his seawall.

This argument is meritless. The Commission's interpretation follows the plain language of the statute: "Existing" means "existing" and Cavanagh's house legally existed on the date that he applied for the seawall.

The Commission's interpretation makes sense and comports with the Legislature's intent. Protective shoreline devices are disfavored under the Coastal Act, but the Legislature did not ban them. Even Surfrider concedes that, at least as to structures that predated the Coastal Act, section 30235 allows the Commission to approve protective devices in appropriate circumstances. As proof of this, Surfrider does not challenge the Commission's decision to approve a seawall to protect the 121 Indio residence that predated the Coastal Act. (Surfrider Br. at p. 7, fn. 7.)

The question implicitly raised by Surfrider—but one that it scrupulously

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5. Section 30235 provides in part:

> 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

avoids asking—is whether the Legislature intended that, as a matter of law, the Commission may not approve seawalls to protect structures that were legally built after the enactment of the Coastal Act regardless of how much life and property might be lost if the structures were not protected. Although Surfrider nods in the direction of legislative intent, its abstract conception of legislative intent is divorced from reality and common sense. As the trial court pointed out, section 30235 protects a wide range of existing structures, not just private residences. (CT 317, fn.6.) Assume, for example, that the Commission in the 1980's approved a state park facility that included a parking lot, restrooms, landscaping, public walkways and stairs that were later severely damaged by winter storms. In Surfrider's view, the Commission would be precluded from approving a seawall to protect this public park facility regardless of how endangered it might be. But Surfrider does not demonstrate that the Legislature would have intended such a harmful result.

Although Surfrider asserts that the Commission's interpretation of section 30235 conflicts with section 30253 (Surfrider Br. at pp. 34-39), the Commission's interpretation harmonizes the two statutes because it gives effect to the Legislature's wish to avoid the harmful impacts of seawalls as well as its wish to protect legally existing structures in danger from erosion. Section 30253 provides in part that:

> New development shall: . . . [¶] (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Section 30253 requires that new development be constructed in a way that does not require the later construction of protective devices. It does not govern already existing development. Read together, sections 30235 and 30253 nicely complement each other. Section 30253 assures that new development is constructed and sited in a way that avoids the future need for a seawall. Section

30235 recognizes that, despite the best efforts to avoid the later need for seawalls, it may sometimes be necessary to protect lives and property endangered by erosion. Therefore, the Commission may approve seawalls for post-Coastal Act structures where the effort to avoid a seawall has failed and the new structure is in danger from erosion.

C. When the Word "Existing" Is Used in Chapter 3 of the Coastal Act, It Refers to Currently Existing Conditions Because Permit Applications Are Typically Evaluated Under Conditions That Exist at the Time of the Application.

When a word or phrase has been given a particular meaning in one part of a law it typically is given the same meaning in other parts of the law. (*Stillwell v. State Bar of California, supra,* 29 Cal.2d at p. 123.) The manner in which the word "existing" appears throughout the Coastal Act confirms the Commission's interpretation.

The word "existing" appears frequently in the Coastal Act but one reference stands out. Section 30236 limits the approval of flood control projects to the situation "where no other method for protecting existing structures in the flood plain is feasible and where such protection is necessary for public safety or to protect existing development." Once again, the Legislature balanced the need to protect the public from physical harm with the need to avoid the adverse impacts of a particular type of development (flood control projects). As in section 30235, the Legislature found that it could prevent the destruction of post-Coastal Act development by permitting the erection of protective structures but adopting strict standards calibrated to avoid environmental harms.

The use of "existing" in the last sentence of section 30235 makes a similar point. This sentence provides that "[e]xisting marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out

or upgraded where feasible." Suppose that the Commission in 1978 approved a permit for a marine structure that today is causing water stagnation and pollution despite the imposition of permit conditions in 1978 designed to avoid those impacts. The polluting marine structure should be treating as "existing" and phased out, even though it was constructed after the Coastal Act's passage.

The Legislature's use of the word "existing" in the remainder of Chapter 3 of the Coastal Act also provides powerful confirmation of the Commission's interpretation of the word "existing." Chapter 3 (Pub. Resources Code, §§ 30200-30265.5) contains the resource policies that the Commission applies when reviewing permit applications. (*Id.*, § 30604(a).) The word "existing" appears throughout Chapter 3 and each time refers to conditions as they exist at the time of the application, not at the time of the Coastal Act's passage. In addition to sections 30235 and 30236, the references to "existing" in Chapter 3 include:

- Providing additional berthing space in "existing harbors" (Pub. Resources Code, § 30224);
- Maintaining "existing" depths in "existing" navigational channels (*id.*, § 30233(a)(2));
- Allowing maintenance of "existing" intake lines (*id.*, § 30233(a)(5));
- Limiting diking, filling and dredging of "existing" estuary and wetlands (*id.*, § 30233(c));
- Restricting reduction of "existing" boating harbor space (*id.*, § 30234);
- Limiting conversion of agricultural lands where viability of "existing" agricultural use is severely limited (*id.*, §§ 30241, 30241.5);
- Restricting land divisions outside "existing" developed areas (*id.*, § 30250(a));
- Siting new hazardous industrial development away from "existing"

development (*id.*, § 30250(b));

- Locating visitor-serving development in "existing" developed areas (*id.*, § 30250(c));
- Favoring certain types of uses where "existing" public facilities are limited (*id.*, § 30254));
- Encouraging multicompany use of "existing" tanker facilities (*id.*, § 30261); and
- Defining "expanded oil extraction" as an increase in the geographical extent of "existing" leases.

These Chapter 3 provisions logically refer to conditions that exist at the time of a permit application. It would make little sense to evaluate permit applications under conditions as they existed thirty or more years ago and ignore the considerable changes that have taken place along California's coast since the Coastal Act's passage. Consistent with the use of "existing" throughout Chapter 3, section 30235 should be construed to refer to currently existing structures.

Outside of Chapter 3, there are a number of other Coastal Act provisions that treat "existing" as currently existing. (See Pub. Resources Code, § 30705(b) ["existing water depths"]; § 30711(a)(3) ["existing water quality"]; § 30610(g)(1) ["existing zoning requirements"]; *id.*, 30812(g) ["existing administrative methods for resolving a violation"].) In addition, the Legislature twice used specific dates when it intended "existing" to mean something other than currently existing. Section 30610.6 limits the section's application to any "legal lot existing . . . on the effective date of this section." Similarly, section 30614 refers to "permit conditions existing as of January 1, 2002." (*Id.*, § 30614.)

Surfrider's response is anemic. Surfrider points to four Coastal Act sections where, it contends, the word "existing" refers to conditions existing on

the date of the Coastal Act's passage. (Surfrider Br. at pp. 25-26 [citing sections 30001(d), 30004(b), 30007 and 30103.5(b)].) Sections 30001(b) and 30007 juxtapose "existing" with references to future developments and future laws, expressing the Legislature's specific intent that "existing" in those provisions refers to conditions on the date of the Coastal Act's passage. Moreover, Surfrider's citations are mostly found in the "findings" section of the Coastal Act, in which the Legislature would be expected to refer to conditions as they then existed to explain the need for the Act. None of the provisions upon which Surfrider relies (other than section 30235 itself) are found in Chapter 3 of the Coastal Act.

The Commission's harmonious construction of the Coastal Act confirms that the Legislature intended that section 30235 be applied to structures that existed on the date of the permit application.[6]

D. The Court Should Defer to the Commission's Interpretation of Section 30235 and the LCP.

Surfrider incorrectly contends that the Commission's interpretation of section 30235 is "vacillating" and not entitled to deference. (Surfrider Br. at pp. 41-45.) The Commission's interpretation of section 30235 has been consistent, and provides more weight to support the Court's interpretation.

Courts "must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities." (*Mason*

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6. Three years ago, the Legislature considered adding the specific language that Surfrider seeks to read into section 30235. AB 2943, if adopted, would have defined "existing structure" in section 30235 to mean "a structure that has obtained a vested right as of January 1, 1977, the effective date of the California Coastal Act of 1976." (CT 119-120 [Sen. Amend. to Assem. Bill No. 2943 (2001-2002 Reg. Sess.) Aug. 26, 2002].) AB 2943 died on the Senate inactive file on November 30, 2002. (CT 122.) Although "only limited inferences can be drawn from [unpassed bills]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795), the Legislature's rejection of AB 2943 undermines Surfrider's interpretation of section 30235.

v. Retirement Board of the City and County of San Francisco (2003) 111 Cal.App.4th 1221, 1228 (Jones, J).) "Consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight." (*Ibid.*)

Here, the Commission evaluated the seawall project for conformity with the City's LCP that the Commission previously had certified. (See Pub. Resources Code, §§ 30512, 30512.1, 30512.2.) The Commission's interpretation of a certified LCP is entitled to deference because, when an appeal reaches it, the Commission is charged with putting the LCP into effect. (*Mason v. Retirement Board of the City and County of San Francisco, supra,* 111 Cal.App.4th at p. 1228; see also Pub. Resources Code, § 30625(c) [Commission decisions shall guide local government actions under the Coastal Act].) The Commission's interpretation of section 30235 is entitled to no less weight, because the Commission alone is responsible for administering the Coastal Act.

In addition, the Court should accord the Commission's interpretation of "existing structures" great weight because the Commission has consistently interpreted section 30235 to refer to structures that exist at the time of the application. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) As proof of this, the Commission's chief counsel confirmed at the public hearing that the Commission has "interpreted existing structure to mean whatever structure was there legally at the time that it was making its decision." (11 AR 2018-2019.)

Surfrider contends that the Commission has "vacillated" because in two previous permit decisions the Commission found that it did not need to reach the issue whether the term "existing structure" was limited to pre-Coastal Act structures. (Surfrider Br. at pp. 41-45.) The Commission's decision to refrain from reaching an issue that was not raised by a pending permit application

reflects judicious decisionmaking, not vacillation. (See *id.* at p. 44 [conceding that the issue was not before the Commission].)

Surfrider also cites the chief counsel's testimony as an additional indication that the Commission has "vacillated" in its interpretation of "existing structure." (Surfrider Br. at p. 45.) Surfrider, however, has inaccurately quoted the chief counsel's testimony, improperly inserting the parenthetical "[of existing structure]" into the quotation. (Cal. Style Manual (4th ed. 2000) § 4.16 [may not use brackets to rewrite quotation].) Surfrider then misconstrues the testimony, suggesting that the Commission has previously determined that the term "existing structure" in section 30235 applies only to pre-Coastal Act structures. Instead, the complete text of the chief counsel's statement demonstrates that the "change" to which he referred was the Commission's recent practice of incorporating a "no future seawall" condition in permits for new bluff-top development, not a change in the interpretation of "existing structure." (11 AR 2018-2019; see *post,* at p. 24.)

The Commission is not aware of a single instance in the history of the Coastal Act in which it has determined that "existing structures" in section 30235 refers only to structures that predated the Coastal Act. The Court should defer to the Commission's construction of section 30235 and the corresponding LCP provisions.

III. NONE OF SURFRIDER'S REMAINING ARGUMENTS HAVE MERIT.

Most of Surfrider's arguments have been addressed. There are a few others, but none have merit.

1. Surfrider repeatedly states that the Commission's interpretation would "entitle" or "guarantee" a seawall to any completed structure. (E.g., Surfrider Br. at pp. 4, 37, 39, 47, fn. 9.) This is a gross misstatement. The Commission's interpretation of section 30235 does not entitle or guarantee anyone a seawall.

The Commission may approve a seawall only if, at a minimum, the applicant establishes that a structure is in danger of erosion and that the seawall is designed to eliminate or mitigate the seawall's impacts on sand supply. (Pub. Resources Code, §§ 30235, 30604(a).) The applicant also would be required to satisfy numerous other conditions designed to mitigate project impacts on public access and other coastal resources. The California Environmental Quality Act also requires the Commission to evaluate feasible alternatives and mitigation measures. (Pub. Resources Code, § 21080.5(d)(2)(A).)

2. The Commission agrees that the Coastal Act should be liberally construed in favor of protecting coastal resources. (Surfrider Br. at pp. 12-13.) That rule of construction does not come into play here because the language of section 30235 and rules of statutory construction support the Commission's interpretation. The Commission's interpretation both protects coastal resources and fulfills the Legislature's intent to protect endangered structures in appropriate circumstances.

3. Surfrider argues that the legislative history of the Coastal Act supports its interpretation. (Surfrider Br. at pp. 28-32.) This argument has two components. First, Surfrider argues that the Legislature rejected the "developer friendly" coastal legislation and enacted the bill favored by environmentalists. Surfrider never explains why an "environmentally friendly" Coastal Act would necessarily require that the Commission deny seawalls to protect endangered post-Coastal Act structures.

Second, Surfrider argues that, shortly before the Coastal Act's passage, the Legislature amended SB 1277 to include the word "existing" before structures in section 30235. (Surfrider Br. at p. 32.) Surfrider provides no other evidence about this amendment. Nevertheless, Surfrider says that there was "no rational reason" why the Legislature would have added this word unless to clarify that section 30235 applied only to structures that predated the Coastal Act.

Actually, there is a very rational explanation. Had the Legislature not included the word "existing" in section 30235, applicants could apply to build seawalls to protect a future proposed structure, rather than be forced to site the proposed structure so that it would not necessitate a seawall. Far from making the word "existing" in section 30235 "surplusage," as Surfrider contends (Surfrider Br. at pp. 33-34), the Commission's interpretation harmonizes sections 30235 and 30253. Section 30253 requires that proposed new development be designed so that it does not require a seawall; without the word "existing," section 30235 could have been construed to allow a seawall for a proposed structure that would have been forbidden by section 30253.

4. Surfrider mistakenly relies on Public Resources Code section 30007.5 when arguing that the Court should resolve doubts in its favor. (Surfrider Br. at pp. 14, 15, 38.) Section 30007.5 provides that conflicts among Coastal Act policies should be resolved in a manner that on balance is most protective of coastal resources. Section 30007.5 is a mechanism for resolving policy conflicts that the Commission must employ when reviewing permit applications. (See, e.g., *Sierra Club v. California Coastal Comm'n* (1993) 19 Cal.App.4th 547, 562 [section 30007.5 authorized Commission to resolve conflict] .) It is not a directive to the courts about how to interpret provisions of the Coastal Act, but guides how the Commission should implement conflicting Coastal Act policies as they apply to a specific project. In this case, the Commission found that the project met the criteria in section 30235, and there was no conflict among applicable policies.

5. The Commission's interpretation of section 30235 does not make the "mandatory setback provisions" of section 30253 "meaningless." (Surfrider Br. at p. 4.) Enforcement of section 30253's setback provisions for new structures is meaningful because it makes seawalls unnecessary in most instances. It is only on those infrequent occasions that bluff retreat drastically exceeds its

predicted retreat that a seawall may become necessary.

6. Surfrider argues that landowners would have an incentive to mislead the Commission into approving structures through the use of "purchased science" that would misstate erosion rates with the hope of later qualifying for a seawall, and it suggests that happened here. (Surfrider Br. at pp. 39-41.) Surfrider's insinuations are misguided. There is no evidence that the applicants' experts intentionally tried to mislead anyone; the unchallenged evidence demonstrated that the bluff rate was caused by the unforeseen El Niño storms. Moreover, anyone who intentionally supplies false evidence may be subject to a permit revocation. (Cal. Code Regs., tit., §§ 13104-13108.5.) And, because no one is "guaranteed" a seawall, anyone who plays the high-stakes game proposed by Surfrider risks having their seawall application turned down.

7. Finally, Surfrider contends that the Commission's imposition of a "no new seawall" condition on recent permits for new structures exceeds the Commission's power because this condition would force the Commission to deny seawalls that might otherwise be entitled to a permit under section 30235. (Surfrider Br. at p. 47.) This case does not involve a "no new seawall" condition, and there is no reason for the Court to offer an advisory opinion about whether the Commission might impose one.

Moreover, this is a strange argument for Surfrider to make. The Commission has imposed a "no future seawall" condition on new bluff top development so that property owners will not seek a shoreline protective device in the future. (11 AR 2019.) The Commission's approach deters applicants from circumventing section's 30253 setback requirements and minimizes the need for new seawalls in the future—an approach that is consistent with the philosophy that Surfrider purports to advocate. The Commission's reasoned approach, however, undermines the need to adopt the extreme position advocated by Surfrider, which may explain Surfrider's criticism.

CONCLUSION

The trial court's judgment should be affirmed.

Dated: January 9, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 14(c)(1) and (4) of the California Rules of Court, counsel for Respondent California Coastal Commission certifies that this brief contains 7,216 as counted by the Corel WordPerfect version 8 word-processing program used to generate the brief.

Dated: January 9, 2006

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Surfrider Foundation, et al. v. California Coastal Commission***

Case No. **CPF03503643**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 10 2006, I served the **BRIEF OF RESPONDENT CALIFORNIA COASTAL COMMISSION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, Suite 2000, P.O. Box 70550, Oakland, California 94612-0550, addressed as follows:

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Proof of Service Continued.

The Honorable James L. Warren
San Francisco Superior Court
Department 301
Civic Center Courthouse
400 McAllister Street
San Francisco, CA 94102-4512

Clerk of the Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102
5 COPIES

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 10, 2006 at Oakland, California.

TANISHA MARSHALL — Tanisha Marshall

Declarant — Signature

The transcript of oral argument in the trial court in *Surfrider Foundation v. California Coastal Com*.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

HONORABLE JAMES L. WARREN, JUDGE

DEPARTMENT 301

---oOo---

SURFRIDER FOUNDATION, Petitioner,	)	
vs.	)	Case No. 503643
CALIFORNIA COASTAL COMMISSION, Respondent.	)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

Held on Tuesday, October 29, 2004

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A P P E A R A N C E S :

For the Petitioner : MARCO A. GONZALEZ, ESQ.
TODD T. CARDIFF, ESQ.

	COAST LAW GROUP 169 SAXONY ROAD, #201 ENCINITAS, CA 92024
For the Respondent : Coastal Commission	ALICE BUSCHING REYNOLDS, DAG DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1515 CLAY STREET, 20TH FLOOR OAKLAND, CA 94612

A P P E A R A N C E S (Cont'd.) :

For the Respondents : Cavanagh and Grossman	STEVEN H. KAUFMANN, ESQ. RICHARDS WATSON GERSHON 355 SOUTH GRAND AVENUE, 40TH FLOOR LOS ANGELES, CA 90071
Official Court Reporter :	Christina T. Paxton, C.S.R. Certificate No. 1558

San Francisco, California October 19, 2004

PROCEEDINGS:

THE CLERK: Line 13, Surfrider Foundation versus California Coastal Commission.

MR. GONZALEZ: Good morning, Your Honor. Marco Gonzalez and Todd Cardiff of Coast Law Group on behalf of petitioner Surfrider Foundation.

THE COURT: Mr. Gonzalez and I am sorry?

MR. CARDIFF: Todd Cardiff on behalf of Surfrider Foundation.

THE COURT: Mr. Cardiff, good morning.

MR. CARDIFF: Good morning.

MS. REYNOLDS: Good morning, Your Honor. Alice Reynolds on behalf of respondent California Coastal Commission.

THE COURT: Ms. Reynolds, good morning.

MR. KAUFMANN: Good morning, Your Honor. Steven Kaufmann with the law firm of Richard, Watson and Gershon for real parties in interest Walter Cavanagh and Gary Grossman.

THE COURT: Mr. Kaufmann?

MR. KAUFMANN: Kaufmann.

THE COURT: Kaufmann.

All right. We are talking about the property down at 121 and 125 Indio as well as the Florin Street cul-de-sac. What we have is a substantial dispute about the seawall that I understand is almost constructed. Is that correct?

MR. GONZALEZ: That is correct.

THE COURT: That might be an issue that you people are going to want to address. This might almost be a moot situation.

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But what we have here is an argument regarding the Public Resources Code 30235 versus 30253 -- which I wish you guys could have chosen two sections that didn't interlock their numbers quite so well -- dealing with what is an "existing structure." And the word "existing" is the key word here, how that fits in with 30007, I guess, .5, which is an ultimate resolution situation, and how that all fits in with the Local Coastal Program that has been certified by the Coastal Commission,

applies to this area -- this is the one by Pismo Beach -- and which has been approved.

First of all, let me address specifically the Foundation here. Anybody from there? All right. We received a purported amicus brief from Pacific Legal Foundation. It didn't get permission to file it, it was filed late. To the extent the filing of their brief is deemed a request to file it, it's denied for failing to follow court procedures.

Counsel, I note that you have got -- I see all kinds of stuff that you have got here so why don't I simply turn this over to you. I read your papers. My colleague, who has been working on it with me, is in court to be able to watch everything that is going on. I might have some questions later on but why don't you --

MR. GONZALEZ: Mr. Cardiff will begin the presentation, approximately 15-20 minutes that will bring us through the case. I will respond to any comments made by the opposition.

THE COURT: Hold on for just a second.

Okay.

(Whereupon, there followed an off-the-record discussion,

after which the following proceedings were had:)

MR. GONZALEZ: Your Honor, I would like to approach the bench and give you a copy of our presentation. Do you have an

extra copy for my colleague by any chance?

MR. GONZALEZ: I do in black and white.

THE COURT: That's okay.

MR. CARDIFF: Your Honor, we would also like to submit our slides to opposing counsel.

THE COURT: I am sorry. I thought they had copies of it. They definitely should have copies.

THE COURT: Mr. Cardiff.

MR. CARDIFF: Thank you, Your Honor.

Before you today is Surfrider's petition for writ of mandamus requesting that you overturn a seawall permit granted to 125 and 121 Indio in Pismo Beach, California granted by the Coastal Commission. The Coastal Commission granted a coastal development permit to both 121 and 125 Indio based on their interpretation of Coastal Act Section 30235, based on their interpretation that both 121 and 125 Indio were existing structures despite the fact that 125 Indio was built just five years ago and was required by law to have a 100 years setback. They were off by 95 years.

And as you noted in your opening remarks, this is really more than just asking you to overturn a coastal development permit, this is asking you to resolve a conflict between two sections of the Coastal Act. One section, a mandatory section, states that new development shall not in any way require the construction of protective devices that would substantially

alter natural landforms along bluffs and cliffs. This has been interpreted consistently as requiring sufficient setback by new development so that a seawall is not required for the economic life of the structure, estimated to be 75 to 100 years depending on the jurisdiction.

This other section, Coastal Act Section 30235, states that seawalls shall be permitted to protect existing structures from danger of erosion. Thus you have a direct conflict between two mandatory policies, one that says that for new development, no seawalls may be permitted and another one that says for existing development -- for an existing development or existing structures, seawalls must be permitted. And of course as you recognize, this comes down to an interpretation of "existing structure."

THE COURT: Did you say those two are at odds with each other?

MR. CARDIFF: Yes. Yes, Your Honor, they are in direct odds with each other, and this is how it works. If new development can suddenly become an existing structure as soon as it's built, two minutes after the paint is dry --

THE COURT: I remember your wet paint analogy there.

MR. CARDIFF: Two minutes after the paint is dry, then Coastal Act Section 30253, which mandates a proper setback, mandates that construction, new development shall not in any way

require the construction of a protective device, that is meaningless. That is just a permissive section that is open to be violated at will ad nauseam just like we see in this case.

THE COURT: Well, is the Commission really arguing that this

is a as-soon-as-the-paint-is-dry type situation? There is a somewhat teutonic break that we won't use here but bad things happen.

And one of their arguments as I read it -- and correct me if I am wrong -- seems to be look, a proper reading of this statute is existing -- and they point to 15 places in the Coastal Act where the word "existing" is used in connection with all other areas.

"Existing" means a building that is there regardless of when it was put up. It does not go back to 1977 when the Coastal Act was passed. It can be any time because bad things happen. If you go to both the Coastal Act and the Local Coastal Program, you are correct as I read it that buildings have to be constructed in such a way that a certain amount of -- of time has to be built into the construction so that natural erosion is taken into account and economic life of the building is built in such a way as to address that. So by the time the coast erodes up to the point where the building becomes unsafe, it's probably going to be torn down anyway because it simply exhausted the

economic life.

What they seem to say is that sure, all buildings -- and nobody argues this -- all buildings that were in existence -- and this, of course, would include Mr. Grossman. Nobody is disputing that he doesn't have a right to a seawall because his building was in existence at 121 Indio when the Coastal Act was passed. All buildings that are in existence are entitled to the protection of a seawall, which is the last resort because they are dangerous, they do bad things to the coastline. The Coastal

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Act is designed to protect the coastline. However, if new structures are built and they are built in compliance with either the Coastal Act or the Local Coastal Program, which is passed and which then -- it must be in compliance with the Coastal Act. It can be more restrictive but not less restrictive as I read the case.

When you take into account something such as the El Nino phenomenon, that seems to be what we are talking about here as an example, that when Mr. Cavanagh's house went up, they predicted -- I believe it was a Terratech design team came up with a two to three inches per year erosion factor and the house was built with that in mind and then all of a sudden in 1998, five feet of the cliff disappeared. So I haven't bothered to divide five feet by two to three inches a year to see how many years are swallowed up by that one year.

Why isn't a reasonable interpretation that as soon as a structure goes up that built into it the 75 or 100-year economic life, that when something unanticipated happens, that a protective device is entitled to go into place? And on the other hand, why isn't the interpretation -- I am not sure that the two sections you are talking about, 30235 and 30253, are at odds with each other. In fact, I think they tend to compliment each other and they tend to compliment each other in a way that conforms to your argument, namely that -235 says it's okay to put up a seawall to protect structures that were in existence at the time this was passed in 1977 but any new development -- and this is the -253 section -- will not permit the construction of seawalls. Or I guess the better way of saying it is new

development will not require construction of seawalls that would substantially alter the shoreline. Doesn't that actually tend to support the position that you are taking? So I am not sure why you say the two are in conflict with each other because I think they can be read harmoniously, but they can also be read the way the Coastal Commission is arguing. That I think is reasonable, too.

MR. CARDIFF: Well, and let me be clear. There is a conflict in interpretation only and it's only a conflict when an existing structure -- or a new development suddenly becomes an

existing structure as soon as it's completed.

But let me just address --

THE COURT: Wait a second, wait. You are kind of jumping over this. I think it's an important point. This is -- I think it's very catchy to give the paint dry argument, but if the paint dry argument is right, then somebody is in violation of law by permitting that structure in the first instance because you can't put a building up under 30253 that requires a seawall or that might require a seawall such that as soon as the paint is dry, you put in an application for a seawall.

I mean the only thing I can think of that might happen is you put a structure up and San Andreas fault goes off and a week after the paint is dry, that he gets a terrible earthquake that suddenly creates something unanticipated that would require some protective device on the shoreline. But otherwise, I think if anybody tried to say I am building a building, I am building it so close to the coastline that there is going to be an erosion problem, as soon as the paint is dry, I have got an existing

building, gotcha, now I get my seawall, that probably wouldn't be granted and there probably most likely would be a cause of action against the people who granted it in the first place for failing to follow the statutory requirements for mandating the construction taking into account a 75 to 100-year economic life.

MR. CARDIFF: Well, first of all, two responses. We are

concerned here with what was the intent of the Legislature, not what the Coastal Act -- Coastal Commission says now but what was the intent of the Legislature, which I can address right now if that is what you like.

Factually, we are looking at a situation where somebody really is -- was in danger even before the paint is dry. If you look at what happened here -- and let me just barge ahead if you don't mind. I am going to have to tell you which slide I am on.

THE COURT: I can find it.

MR. CARDIFF: This is Slide A.

THE COURT: Yes, I have got it except mine has a circle on it.

MR. CARDIFF: Yes, you do.

The structure circled is 125 Indio. That was built in 1998. And right to the south of it in fact is 121 Indio, right to the south of that is, in fact, new development at 117 Indio. We are all wondering when they are going to come to seek a seawall. And right below them is 113 Indio, which was seeking a seawall by the way at the same time as Mr. Grossman was seeking a coastal development permit.

THE COURT: Looks like that one already has a seawall of some kind.

MR. CARDIFF: Now, it has a seawall but in 1997, in fact I

worked on this and this is reflected in the administrative record. When I was giving a presentation to the Coastal Commission, 113 Indio actually was seeking a seawall for their house, which was 25 feet from the edge of the bluff, and I went to the Coastal Commission and I said how could 113 Indio possibly be in danger from erosion when Mr. Grossman is seeking new development.

But the fact is 125 Indio, if you flip to the next slide, you know, if you look at the record here, you know, we have Mr. Grossman has an empty lot and on January 9th, 1997, he has this geologist named Richard Pfost, P-f-o-s-t, provide him a geology report that you see that says 25 set -- foot setback is fine for a 100 year, it's two or three inches of erosion. And, in fact, actually Mr. Grossman got -- he put his house even closer. He wanted to have his house -- the balcony actually 20 feet from the edge of the shoreline. And you can see that from the pillars.

But nevertheless, he received a coastal development permit on May 13th, 1997 and it wasn't until late in the year that he received his -- his building permits, in December. And then he received -- then about a month later, the bluff collapsed at the start of the construction. We don't know when he actually started his construction. He may have had the foundation poured but we know that the bluff collapse probably was somewhere around January 23rd, 1998. And if you look at the record, at 1

AR 93, the geologist doesn't mention a structure there because there wasn't a structure there but it says that a seawall will

be necessary to mitigate erosion.

Then late in 1998, Mr. Grossman finished the -- finished his project and sold it to Mr. Cavanagh at 125 Indio, the current owner, and Mr. Cavanagh immediately started seeking shoreline armor or a seawall. And, of course, Mr. Cavanagh got his own geologist.

By the way, I just want to say one point. On January 23rd, 1998, it was the very same geologist that a year before had said that this would be safe, this siding of the structure would be safe for a hundred years, he came back a year later and said now it needs a seawall.

Going back, though, to July 31st, 2001, then Mr. Cavanagh gets his own geologist, who said now the erosion rate in the last ten years is 22 and a half feet, and this is -- this is the kind of thing that the Coastal Act was designed to prevent. This is exactly what the -- what the Legislature was trying to prevent when they inserted the word "existing" before structures, and that was a very, very conscious act.

On August 2nd, 1976, the Legislature changed one -- one term in there and that was to insert the word "existing" and our job here is to determine what that meaning was.

Now, the Coastal Commission -- and I am going to have to

jump around here because we are -- we are doing this a little bit out of order, but the Coastal Commission --

THE COURT: No problem.

MR. CARDIFF: But the Coastal Commission -- and just go to the next slide. This is my legislative intent slide and it shows the progression of these coastal bills.

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The top bill is Senate Bill 1277 as it was submitted. And if you notice there, this early version that was Section 30204, which was eventually changed to 30235, but it says that a seawall shall be permitted at structures in danger from erosion.

There is another section, it's somewhat relevant. It's AD 3875. It's a developer friendly bill, and that version of course would allow seawalls to serve coastal-related uses or to protect structures, nonexisting structures, development of beaches or cliffs in danger from erosion. We know that's not the legislative intent.

The final is what we see as 30235, and that says of course as we know that seawalls shall be permitted when required to serve coastal-dependent uses or to protect existing structures.

And on August 2nd, 1976, the Legislature did a very, very important thing, which was inserting that word "existing." Now, the Coastal Commission is arguing that the word "existing" is to distinguish between those structures that are existing now at

any time and future structures, i.e. empty lots. Well, I ask you if you look at the original -- the original language as submitted, doesn't the word "structure" already prevent granting seawalls to protect against -- protect empty lots? I mean one of the main purposes or main canons of statutory construction is that every word is important and every word must be given force and effect and their interpretation doesn't give existing force and effect and does create a direct conflict between 30235 and 30253.

The other thing that should be noted -- and I am going to have to jump again to another section of my presentation -- is

that when the Coastal Commission says --

THE COURT: If I don't know it well enough to be able to be able to jump around with you, then I shouldn't be here listening to you.

MR. CARDIFF: Well, I fully appreciate that and I am glad that you are following along with this and I think that these are great questions because there is questions that I have looked at as well. And what the -- what the Coastal Commission is suddenly arguing is that this 30235 isn't a grandfather clause as we contend that it is, but it's a safety net. It's a safety net. But you have to remember -- and I am going to jump. I have to jump backwards all the way to what Chief Counsel Ralph Faust said on Slide 6.

THE COURT: Okay.

MR. CARDIFF: What you have to remember is that the Coastal Commission changed its interpretation -- changed its interpretation. And I am going to read this directly. It says "Approximately half a dozen years ago, six or seven years ago, the Commission changed its interpretation and began applying what I characterized a moment ago as the no future seawall condition. Basically, in instances where this Commission was approving new development along the shoreline, finding that that new development was new development rather than existing development within the meaning of both 30253 and 30235, and as a consequence imposing the no future seawall condition to insure that someone did not come in in the future and propose a seawall and get it pursuant to the mandate of Section 30235."

Now, not only does it talk about the change in

interpretation but the power to -- to enforce and impose this no future seawall condition necessarily requires a rejection of the Coastal Commission's now safety net theory because if Section 30235 is a safety net, they don't have the power to impose this no future seawall condition. This required a change in interpretation and a change in interpretation to exactly what we are suggesting today.

MR. GONZALEZ: Your Honor, just to -- to close up, you

started the line of questioning with the issue of harmony. You stated that you thought that they could be read both in harmony from their perspective and from our perspective, but the problem is the harmonization of these two statutory provisions also has to be read in harmony with the rest of the Coastal Act.

THE COURT: That is -- that is the nub of it. I can read these two together and I really don't have a problem coming down in support of either one of you.

MR. GONZALEZ: Exactly. And that's exactly why it's important to put yourself in two different positions. One is in the context of the Legislature and the citizens who wrote Prop. 20 because at that time, they were looking at rampant coastal development without coastal protections and so they were thinking let's protect what we have. Sure, if you came before and you built something, it makes sense to allow you to protect it, but let's not lose the battle as we move forward. So it would make sense that they would say don't build anything new that is going to require a seawall, and that we find in 30235 -- or 0253. Now, I even get them confused.

Obviously, that was codified, but then the first period the

Coastal Commission was considering these applications, it's common sense that all of the structures that would be coming forward would be those existing structures for the first few years and then obviously the politics of the Commission, they

are appointed bodies, it changes. But underlying the entire vein of development of the Coastal Act law is the notion that the coastal law has been developed for long-term protection. So looking at down the road, if you are allowed to build something and next week come in and say it's existing, eventually the entire coast will be full of seawalls.

The Coastal Commission, themselves, in their brief acknowledge that coastal arming is bad for public access, for recreation, it has negative impacts. Mr. Faust states here they have now recognized to the extent that they are going to limit anybody who comes in today by derestriction from ever coming back for a seawall. Well, when you harmonize this intent of the Coastal Act as a whole to protect above all else natural resources and the public's right to access those resources, it's impossible to fathom that at some point in the future this act was written to allow for the seawallification of the entire coast as would be the natural result if you took this immediately existing entitled to a seawall provision.

THE COURT: All right. Mr. Cardiff.

MR. CARDIFF: Do you have any other questions, Your Honor?

THE COURT: No. I interrupted your presentation and --

MR. CARDIFF: Well, again, I would like to point out that the -- that the Coastal -- that the Legislature really told you how to proceed in this way. And I guess I really do need to

talk about the standard of review and what kind of deference that you should be giving to the Coastal Commission.

Now, the Coastal Commission as we have just pointed out states that they have had a long-standing interpretation. And we question that, whether there has been a long-standing interpretation. This is a question of first impression for the Court and, quite frankly, this is really a case of first impression for the Coastal Commission. This is the first time in history that this issue has come directly before the Coastal Commission that we are aware of, directly before the Coastal Commission and directly in a way that the Coastal Commission had to rule on whether a structure built after 1976 was an existing structure. So we question that. And then, of course, there has been a change of interpretation. So we are all the way down to as we see in Yamaha, the Yamaha case, which discusses what kind of deference to give to the agency down to a no deference situation.

Plus you have got to look at it that here, the Coastal Commission is arguing for something that is absolutely contrary to the beneficial purpose of the -- of the Coastal Act. They are actually arguing that development is more important than the natural resources and that is completely adverse to the way the Coastal -- sorry. This is completely adverse to the way the Legislature intended the Coastal Act to be interpreted.

The Coastal Act is to be interpreted as it states in 30001(b) that scenic and natural resources are of paramount concern, they are a (inaudible) development. Further, you can see in 30725 that it says if there is conflicts within the

policies, -- and I believe that there is a conflict in interpretation only -- that this must be resolved in a manner that is most protective of significant cultural resources. What is a significant cultural resource? The beach, public access, recreation like surfing. Those are all significant coastal resources. Single-family residences are not significant coastal resources. Thank you.

THE COURT: Okay. Mr. Gonzalez, anything further?

MR. GONZALEZ: No, Your Honor. We will respond to questions.

THE COURT: Ms. Reynolds, Mr. Kaufmann.

MS. REYNOLDS: Your Honor, I don't have a fancy power point presentation but it sounds like from Your Honor's characteristic of the case that you have a good understanding of the background and the way each Coastal Act provision fits together.

THE COURT: I have gone through it but I need to be educated.

MS. REYNOLDS: Okay. Surfriders brought up the purely legal question of whether the Commission is required to read language into Section 30235 that is not in the statute. They contend

that the Commission has no discretion to interpret the word "existing structure" to mean what it says, any structure that is there at the time that the Commission is making its decision. And the contention raised here is that instead, the Commission is required to read that language to mean existing as of the effective date of the Coastal Act. That's language that is not included in that code section.

The Commission shares the Commissioner's concerns about the

proliferation of seawalls along the coast and clearly the Coastal Act reflects an intent to protect natural resources, natural landforms, to allow erosion to occur naturally and a preference for this natural erosion rather than using seawalls as support of the bluffs. However, the Coastal Act also reflects consideration for the interest of property owners, and we see in Section 30235 a recognition that the reality is sometimes certain seawalls are going to be required to protect houses from falling into the ocean.

You mentioned at the beginning of this hearing that -- that recognized that 30253 will normally prevent the need for seawalls. So when an applicant comes in with wanting to build a new structure on the bluff, there is a rigorous scrutiny that is undertaken and I think that any applicant would be surprised to hear the petitioners say that the section is meaningless when --

because they know that the scrutiny that they have to go through to present reports from experts and really make a showing that their structure is stable. It needs to be set back sufficiently, they need to have experts present reports to show that this is the estimated rate of erosion and this is why we think the structure is going to be safe. In the City of Pismo Beach, that time period is 100 years. So normally, the situation is that -- that 30253 will prevent seawalls from being built and allow the coast to erode naturally.

30235 recognizes that in some instances seawalls may be approved, and this is also after the Commission takes a hard look at an application for a seawall and determines whether this structure is, in fact, going to fall into the ocean or is, in

fact, in danger from erosion. Someone can't just come in and ask for a seawall and say I want a seawall, I think my house is not stable. Again, the Coastal Commission will look at that carefully.

And at times when the requirements of 30253 don't work such as the situation we have here where all of a sudden El Nino comes along and the predicted rate of erosion is very different from the actual rate of erosion, then sometimes we need to allow seawalls.

It sounds like part of petitioner's complaint is with the original approval and so they were referring to the expert

reports that were presented at the time that the Cavanagh house was originally built. And so what may have happened is that -- that their complaint should have been raised at that point, say well, your house really isn't set back far enough, these predictions are unrealistic, and at that point they could have come in and challenged the original permit. They chose not to do that.

The petitioner also claims that the word "existing" is not necessary in the statute, in Section 203 -- 30235 and we disagree.

THE COURT: I am glad to see that you people who have worked with this for so much longer than I have have the same problem.

MS. REYNOLDS: You are right, it's the 3 and the 5.

The word "existing" is necessary in the statute to harmonize the two sections. So Section 30235 makes it clear that someone can't come in with plans -- come into the Coastal Commission and say we have plans to build a house and here is where we need to

put it according to the local requirements for setbacks from the street and the only place we can put our house is here but it's not stable and so we need to -- we have a seawall here proposed and we need that seawall to protect the structure that we are going to build.

30235 prevents this type of application because seawalls are

only allowed to protect existing structures. So they look at that and say that structure is not existing so we are not going to even look into your expert reports about how the bluff is unstable, you need to comply with 30253 and set the structure back sufficiently and make sure it's stable. So the word "existing" harmonizes the two sections to make them fit better.

The other argument that the petitioner makes is that the Commission has vacillated in its interpretation so they argue that at some point it changed the way it looked at the word "existing." This is not correct and the only -- notably the petitioner has not submitted any showing that there has been a seawall application that the Commission has looked at and said well, your house was built after the Coastal Act was enacted so it's not existing. We haven't seen that. What we have is testimony from the Commission's General Counsel that talks about what's been -- it starts out -- and we have a slide here and it's also quoted in the brief. The General Counsel talks about the Commission's longstanding interpretation of -- to interpret "existing" as meaning what's there at the time the Commission considered the application. And then he references a change in -- what he calls a change in interpretation. But if you look at it in contrast and you look at the description, it's really a

change in the tactic that six or seven years ago, the Commission began looking at the initial application for new development so

when they are applying 30253 and looking at where they go through the analysis of making sure that the structure is going to be stable and it's set back far enough from the bluff. But the other thing they do is they get the applicant to agree that the applicant is never going to come in and seek the protection of 30235.

So it's not that they would interpret 30235 differently, it's really a waiver by the applicant. And so the applicant says -- stands by an experts' report initially and says these are expert reports, we think that the structure is going to be stable for a hundred years and we are so sure that we are willing to agree to the condition that waives the benefit of 30235 so we can't come in later and ask for a seawall. So the Commission is not saying well, that house isn't existing once it's built, they are just saying that we are asking that person to waive their right to come in and ask for a seawall.

In addition, there is nothing in the legislative history to suggest that the Commission's interpretation is incorrect. So there is nothing that the Legislature did or said or no reference to any other section of the Coastal Commission which requires the Commission to -- Coastal Act -- which requires the Commission to read in this extra language.

As you mentioned, there are other sections of the Coastal Act that use the word "existing," refer to things like water ducts (phonetic), water quality. It's obvious you are not going

to go back and look at the water ducts that were the condition

at the time the Coastal Act was passed. So similarly, the word "existing" in Section 30235 refers to the condition. You look at the condition, the structure, whether it's existing at the time that the Commission is considering its decision.

I think it's evident that this is a unique case and it's -- we don't have to fear that all of a sudden seawalls are going to spring up everywhere. As I have subscribed, we still have the protection of 30253, we have the Commission's practice of imposing this agreement of waiver of the rights under 30235, the no future seawall condition.

This case is unique because when the Cavanagh residence was originally approved, it never came to the Commission, it was approved under the Local Coastal Program so there is no new future seawall provision -- or condition that applies to this house. And I think Surfrider recognizes that it's unique and that is why it's saying it's the first time we have seen this.

The Commission's intent that the Court should not require it to depart from its consistent interpretation of 30235 by reading the words as of January 1, 1977 into the section. And it requests that the Court find that the Commission did not abuse its discretion in interpreting the section to mean what it says and that because the Indio Drive structure was present at the

time the Commission considered the seawall and the other stringent requirements of Section 30235 have been met, the Commission's approval of the seawall was correct.

THE COURT: Part of the problem here is that as I understand it, I haven't seen a picture of it, but I gather that the seawall is largely in, in place. Is that substantially correct?

MS. REYNOLDS: That is my understanding. I think probably counsel for the real parties can address that.

THE COURT: Mr. Kaufmann.

MR. KAUFMANN: The answer is yes.

THE COURT: Okay. I also understand that when the original seawall was designed -- I think it was Cotton, Shires or somebody, because we have got the 121 Indio house that clearly is entitled to protection, the 125 Indio house is up for grabs as far as you are concerned, and then the cul-de-sac down there is also entitled to protection as I understand it, there was a determination made, although it wasn't stated in this way, that in order for --it's rather like a sandwich. In order to protect the pieces of bread on either end and to avoid the term, which I am simply interpreting sort of laid back here, the seawall has to be integrated and it has to run in front of 125 Indio simply to protect the coast as it relates to the two properties that are clearly entitled to a seawall. How does that fit into this?

MS. REYNOLDS: Well, I think that is a reasonable assumption and any layperson can look at the properties and think that is probably the case. In this case, the Commission never made a determination of whether the seawall would work.

THE COURT: Okay. I understand it wasn't.

MS. REYNOLDS: Uh-huh.

THE COURT: I don't know whether a seawall in front of 121 by itself would create more or less a problem or was it considered. I don't know whether that should play a role in here or not.

How about joining the City of Pismo Beach?

MS. REYNOLDS: We have haven't addressed that issue and I think that counsel for the real parties is probably better to address that.

THE COURT: All right. Counsel.

Are we finished with the slides so we could put the lights back on?

MR. GONZALEZ: We will be using it on rebuttal.

MR. KAUFMANN: At the outset, the Court raised a question of mootness and I would like to start with that.

We don't contend that it's moot. Frankly, I think there is case law that would say that you take the risk. What we did do was this. In the fall, we got our permit, we talked to

Surfrider, let them know we were going forward, we were prepared to argue this in the fall on a TRO, preliminary injunction, however they wished to proceed and they elected to let us go forward. They said you are taking the risk and they wanted to address this on the merits.

As I said, I think what we have here today is an academic argument. I want to come back to it because I would like to go to the procedural issue first, but I will have to say that all the discussion today centers around two Coastal Act sections. And I will twist my tongue on it, too, I have done it for 27 years but the way I get around it is this. This case is not about the Coastal Act, it's not about those code sections. It's about Policy S-6 and Section 177860 in the City's LCP and to decide it otherwise would be to ignore the Commission's decision and to ignore the LCP process.

THE COURT: I understand that is your basic argument.

MR. KAUFMANN: Let me start first with the procedural issues. We had two of them. One, I am not going to dwell on. That was the question of the failure to state a cause of action against Mr. Grossman. The fact is his house predates the Coastal Act. They concede, they raise no issues with respect to his house. And he doesn't own 125 Indio. That's Mr. Cavanagh, who is here today.

So there is no cause of action stated against Mr. Grossman.

But I think that the fact that he was named as a real party is probably more telling on the issue of the failure to name the City as the indispensable party. And the case that I would bring to the Courts' attention that we cite was Sierra Club versus California Coastal Commission, 95 Cal.App.3d. It's a case where the Sierra Club, which is like this organization, sued the Commission over the approval of redevelopment but they failed to name the person whose real interest was at stake as a real party and as a result, the court held that that failure to do so in a timely manner, 60 days statute of limitations, barred the action.

The City here is just like the real party is here. It owns the land being eroded. You can see it from the photo although it doesn't really show all of it. I don't know if this helps, Judge, but this is the seawall on the other side, this is Florin Street. There is the indention for the Cavanagh residence and then the Grossman residence here (indicating). The City property is in this area here (indicating). It's quite substantial.

THE COURT: I really can't see it that well.

MR. KAUFMANN: May I approach? You can keep this if you wish because I am going to use the other side, too.

Thank you. I will address another point.

The City's property consists of the Florin Street LCP designated distal point. It's a street in, it's a flush top, it's a 42-inch drain, all of which without any dispute in this case are in danger of collapse. And even if the petitioner concedes that the City has a right to protect its property because the improvements on it predate the Coastal Act, if the Court were to agree with Surfrider and to overturn the Commission's decision, the entire permit approval, not just a piece of it will go by the by including the protection of the City's property and the City would lose that opportunity to protect its property.

Now, they named Mr. Grossman. They should have named the City and is fatal to their case in my judgment.

So they question what would the City have brought to the table. If we are in court today, what would the City being saying here in court. Well, we concentrate mostly on our own private property. That's my client. I don't represent the City. But you would have heard the City defend its property rights. It may be equally important. You would have heard the City jump up and down and say wait a second, why are we talking about Sections 30235 and 30523, that is not our LCP, our LCP is this document, the document with our own policies in it. And they could have perhaps told you that there is a record on this. They could have told you anything. I don't know. I don't

represent the City.

The flaw here is that they focused on the wrong statutes and that's a problem. I think there is also a potential problem with inconsistent judgments. If you were to rule in favor of Surfrider and somehow read into the City's LCP a different date for existing, the City or some other property owner who comes in for a seawall later might disagree with that. They wouldn't have been necessarily bound by a judgment.

While they ignore Sierra Club, they rely on the Deltakeeper case, and I wanted to make clear that the Court understood there is a real difference between these cases. Deltakeeper involved nonjoined parties that had a litigation agreement with defendants that allowed them to vote and control litigation. We don't have that here. The nonjoined parties actually conceded that the defendants could fully represent their interests in the litigation. We don't have that here. And Deltakeeper, the defendants had an escape clause in the contract with the nonjoining parties that would protect them in the event the court struck down the environmental reported issue. We don't have that here. The City doesn't have any protection.

Two other points I wanted to raise on this if I may. One is that the petitioners had said that the City's permit had a requirement that the real parties in interest indemnify the City in the event of a challenge to the City's permit. They didn't give you a cite to that but I will. It's at Volume II of the

administrative record at Page 384. The City did have a condition. But this was appealed to the Commission and as a result of that, much like when the Supreme Court takes a case,

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the Court of Appeal decision was vacated. And this is elementary. It's a coastal case on this, City of San Diego versus Coastal Commission, 119 Cal.App.3d at Page 228, Section Footnote 3. Basically the only permit now is the Commission's permit.

And the last point on indispensable party related to the exhibit. The Court hit the nail on the head when it noted that this property is indented. So when they say well, the City can just go and issue itself an after-the-fact permit, it can't.

Was it studied? Actually, it was studied in the Cotton, Shires report. I don't have that cite right in front of me but Cotton Shires proposed the integrated seawall for a reason. It's-- it's completely evident when you look at this. If the City were to armor its part, Mr. Grossman were to armor his part, it would cause the water to go right to the most -- to the weakest spot of this bluff.

That's my argument on indispensable party.

THE COURT: All right.

MR. KAUFMANN: I want to talk briefly about --I think it's really the only true issue on the merits -- the question of the

LCP versus Section 30235. Frankly, there is no doubt that Mr. Cardiff was passionate about this issue. He wrote an Law Review article on it and this is his day to argue the Law Review article. Yet you saw no reference to the sections that apply here. You saw only sections that would apply if this was an uncertified portion of the coast. Wrong statute, wrong standard of review, wrong case to make this argument. The case simply has no merit.

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I guess in a sense, they failed to state a cause of action in this case. What they have attempted to do is craft their own definition of "existing" and then import that into the City's LCP and say well, it's a default definition. And there is really nothing in the record that supports that.

Certainly the City used the word "existing" in its own seawall policy but it did so during this entire period of time when the Chief Counsel explained that the Commission interpreted "existing" to mean existing at the time the application is being considered. That's what the City intended when it approved this, that is what the Commission -- that is how the Commission applied it. And, in fact, there wouldn't have been any reason why the City, in adopting its own seawall policy in 1993 is the operative policy, would have intended "existing" to mean existing as of January 1, 1977. Again, the Commission, itself, never interpreted it that way so why should the City of Pismo

Beach do that? And it is the city of Pismo Beach's document, it's not the Coastal Act.

But by contrast, the City knew exactly how to qualify "existing" in this LCP and cited an example of an ordinance dealing with nonconforming uses where the City referred to structural alterations to -- and I will quote -- "any buildings or structures existing as of the date of the adoption of this ordinance." The point is the City could have done it, the City didn't do it.

The petitioner suggests that somehow or another an LCP is a rubber stamp for the Coastal Act. I have been doing this for 27 years, half on one side representing the Commission, half on the

other and I can tell you there is no LCP that is a mere rubber stamp for the Coastal Act. The fact is -- and this case illustrates it -- knowledge and experience in this coastal regulatory process is an evolving thing. It goes generally from much looser back in the early 1980's to much more stringent today and it comes with experience. And what was approved in this LCP back then is different perhaps than what some other city might come up with today or what the Commission might certify.

It's true that this LCP does pick up portions of 30235 and 30253 but I just wanted to compare two sections, compare Section

30253, that's the one. You can't see it, I am sure it looks like I am holding something up.

THE COURT: I know.

MR. KAUFMANN: It says "New development shall not in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." We know that. But that's not what S-6 said. S-6 folds in those concepts. S-6 says "Design and construction of protective devices shall minimize alterations of natural landforms." It's really a less strict standard. In fact, the argument that they are advancing, assuming that there was a conflict and we completely disagreed with that, it wouldn't work if you apply the LCP and the LCP control. So the lawsuit is misdirected, the argument today I think is misdirected. But I would like to address that and I will see if I can avoid duplicating the argument because I recognize the Court has indulged us.

Let me just say this. The Legislature in 19 -- in 2002

rejected the Wiggins (phonetic) Bill. In the reply brief, they say well, Wiggins was just a qualification of existing law. When a bill is intended to be a clarification of existing law, it says so. This one didn't. They say the bill wasn't rejected, it was just placed on inactive status. Well, it was proposed in 2002 and it wasn't adopted, it was rejected.

And lastly, they argue that the bill is irrelevant in

determining the legislative intent and they are wrong on the law. The parties really rely on two different principles here. They rely on a case that says candidly that the California Supreme Court is not clear on the issue of whether the failure of the Legislature is determinative of legislative intent.

Here, we have a different rule and the reason is because we are dealing here with a long continued administrative practice and the Legislature is presumed to know of that practice. So the governing rule is this. Where the Legislature acquiesces in that administrative construction or practice, failing to take any action towards its repeal of the amendment, that's a strong factor indicating that the construction or practice is consistent with legislative intent.

The Court made reference to the coastal policy provisions that deal with the word "existing." I won't repeat them. The Attorney General actually cited two from the chapter of the Coastal Act dealing with port (phonetic) policies. Same thing. Existing water depths, existing zoning requirements could not possibly mean January 1, 1977.

Petitioners offered in their reply brief what they say were numerous sections on this issue. In fact, there were four that

they cited but let me just give you the flavor of it because it really doesn't help their argument.

First was 30001(d), general legislative finding that refers to "existing developed uses and future developments." They are in context so the Legislature knew how to distinguish between existing and future and it said so.

30007, nothing in the Coastal Act regarding meeting its obligation related to housing imposed by existing law or any law hereinafter enacted. Yes, it uses the word "existing" but clearly the Legislature was able to differentiate.

When you look at Section 3 -- I am sorry. I am going to rap this up real quick. When you look at 30235, you have to look at this section in context. Before "existing" was added to this section in the coastal bill, there was a sentence already in the provision that said "Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible."

Then the Legislature comes along in the very next bill version and adds the word "existing." They are forced to argue that the word "existing marine structures" really means only those structures that were in place on January 1, 1977. I got to tell you the evil here is whether these marine structures caused water stagnation that contributes to pollution and fishkills and it shouldn't matter whether they are replaced in -- in 1977 or any time between then and now. The evil is the same. This policy could not possibly have been tailored to that.

28 The Court actually made a comment that I thought was

1 interesting. There is this well-established principle cited by
2 both parties here that great weight has to be given to the
3 administrative construction of those charged with the
4 enforcement and interpretation of the statute. And the rule
5 goes on to say the court will not depart from such construction
6 unless it is clearly erroneous.
7 On Page 9 of their opening brief, they say both arguments
8 are reasonable on their face. The Court says I think I could go
9 either way. That's not clearly erroneous so they cannot
10 prevail.
11 The Commission has not vacillated. I think they really have
12 given you a partial quote they showed on the screen and, in
13 fact, the Commission's interpretation was the same at the time
14 they certified the Pismo LCP, at the time it acted on its
15 application and at the time it adopted the no future seawall
16 condition. If the Commission agreed that existing meant
17 something else, it would never have had to adopt a no future
18 seawall condition. It could have simply said sorry, it really
19 wasn't existing as of January 1, '77 so you are out of luck.
20 And so this is brought home by the Commission Chairman's
21 explanation in the record in Volume XI at Page 2026 where he
22 says about this condition, it really doesn't speak to the
23 different interpretation of the word "existing", it simply

speaks to the new process that the Commission adopted about that time in terms of how we treat seawalls. And the Commission Chief Counsel said yes, that's correct.

There has been a lot of discussion about the interplay of these two sections and I am not going to repeat that. I will

say this. This case evidences that this is not an exact science. If you look at Footnote 2 in the Attorney General's brief, you will see the litany of reports that were done on this and it didn't even include the Commission's expert, who is of more recent vintage than this exercise.

I am going to close with two points. I think petitioners are really afraid to say this but I think that their position is this. The threatened structure must fall into the ocean. But there is nothing here in the legislative record to suggest that that is what the Legislature intended, nothing to suggest that the Legislature intended to jeopardize life and property of those who simply happen to live on the coast or that the Legislature intended to have a destroyed structure sitting up on a bluff that everybody could see as a visual light. This is part of the coastal resource. There is nothing to suggest the Legislature intended to require a house chunk off the bluff and dump all its debris. And imagine what the debris would consist of: Glass, metal, wood, bricks, et cetera, et cetera. Dump it

onto the beach or into the water where there are swimmers or surfers. It could not have been the legislative intent but that's the logical consequence of petitioner's argument.

And I think the argument is even further misguided because in their brief, they make it clear that what they are directing their concern at is single-family residential development. And yet "structure" in Section 30235 doesn't only include houses. It includes all sorts of public facilities. And that was a point in the coastal plan in Volume XI at Page 1937 where it said "to protect public facilities" -- and I can give you a

laundry list of public facilities, we have one here, the Florin Street Vista Point -- "worthy of protection." So I think they are reading it too narrowly but frankly, I don't think it's really the argument that is the true issue in this case. Thank you very much.

THE COURT: Thank you. Mr. Gonzalez, Mr. Cardiff.

MR. GONZALEZ: Mr. Cardiff will respond.

MR. CARDIFF: I want to start my rebuttal regarding the issue of joinder of Pismo Beach.

First of all, I believe that the Sierra Club case can easily be distinguished. First of all, there the Sierra Club failed to add the -- add the applicant -- the actual applicant for it. And when they tried to add the applicant later, then the applicant moved to dismiss it and based on 389. And of course,

we don't see Pismo Beach here screaming about that they want to be in this lawsuit.

And really, even if you look at some of the other cases like Save our Bay, in that case, you know, it was a landowner that was specifically damaged because of the -- and it was specifically identified in the Coastal Commission report. But if you look at some of the other cases, specifically cases from -- from this case -- from this jurisdiction such as the Deltakeeper, you notice that it's prejudice that really was looked at by the court.

If you look at, for example, the Save Our Bay case, the Save our Bay only -- only was suing the agency and the Port District and the Port District didn't care who was -- who was actually developing a port.

So it really comes down to prejudice. And, in fact, one of the very interesting cases, if you look at -- and we did not cite this because it just very minorly talks about 389, but if you look at Citizens Association for Sensible Development of Bishop Area versus the County of Inyo at 172 Cal.App.3d 151 at 157, they discuss an essential party and they discuss a very similar issue. And I can provide you the case if you would like.

THE COURT: All right.

MR. CARDIFF: Would you like the case provided to you right now?

THE COURT: Any objection?

MR. KAUFMANN: No.

THE COURT: Sure.

MR. CARDIFF: One of the very interesting parts of this case was that the -- the real parties in interest was named, was the developer who actually was an escrow buyer of certain property. And in that case, of course the citizen group challenged and made declarations of its own and the court there looked at it and said well, the person who owns the land is really in the exact same position as the escrow holder, the developer and the developer is in court arguing vociferously and very ably that this -- these mitigating (inaudible) are proper and therefore the project should go forward.

Well, that's exactly what we have here. We have two applicants, the two named applicants. Of course, the City of Pismo wasn't really an applicant for the seawall project but instead just a beneficiary, which are arguing vociferously first

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of all that the LCP is what controls and that they deserve a seawall under the Coastal Act or under the LCP or apparently because they feel that we want their house to fall in the ocean, which is not true. We would like them to move back from the ocean. So really, it becomes a question of prejudice.

And in this case, there is no prejudice because the -- because of Mr. Kaufmann, who is a very able attorney. And quite frankly, I didn't get to see his case, which he claimed that the indemnity provision is waived as soon as a Coastal Act case is appealed to the Coastal Commission. But I believe that it is important to note that I believe that the indemnity provision would be enforced and Mr. Kaufmann would be up here representing every single real parties in interest, including the City of Pismo.

And I guess we have to ask would the City of Pismo bring anything into this case? We have a very, very narrow issue. They are going to be -- they are going to be relegated to either what Mr. Kaufmann argued: That the LCP controls, or that the Coastal Act states what the Coastal Commission is asking. So if you look at the Deltakeeper case, which is controlling, it is out of the Sixth District and this Court of Appeal, they really state that if somebody is representing with the same interest in court, there is no prejudice to the real parties in interest.

And I do not believe -- I question whether they are a necessary party under the City of Inyo case. But I definitely question whether they are an indispensable party because they wouldn't bring anything. There is no extra evidence that they can provide here.

Regarding the Wiggins bill, I was there. We know how politics works, don't we? It's not -- there are so many good bills out there that don't get passed and there is a variety of reasons. This bill was really to clarify the Coastal Act. That's what the author -- the author talking to me discussed. And we discussed how we wanted to bring this bill forward. And, in effect, if you look -- if you look at the history of that bill making it through the Legislature, you -- you would be truly amazed because it passed almost unanimously out of the Assembly by some Republicans and it passed out of the Natural Resources Committee and the Appropriations Committee in the -- in the Senate. And we were actually quite surprised when it got pulled off the schedule and we actually do not know why it didn't come before the Legislature for a vote. But the case law is pretty clear. If you are hanging a hat on the inaction of the Legislature, that is a very weak hat to wear. So it really is irrelevant.

Mr. Gonzalez, did you want to talk about the LCP issue?

MR. GONZALEZ: Your Honor, Mr. Kaufmann takes the majority of his brief and his strongest statements today stating that it's the LCP provisions that the Court should be focusing on, that challenging these provisions of the Coastal Act are improper procedurally. But what we have to ask ourselves is what does the LCP say, what does it do to change the Coastal Act's version of "existing"? And we to do that within the

construct of the notion that the LCP must comply with the Coastal Act, that it can be more stringent but it can't be less.

One word: Principle. It doesn't change what the word

"existing" means. When the Coastal Commission certified the LCP back in 1984, we were in the midst of that 20-year period that Mr. Faust, Chief Counsel, called before.

Now, it was characterized as a change in tactic but when we go back and look at what it was that Mr. Faust actually said, he said it was a change in interpretation. And if you look at the transcript that was quoted, Chairman Reilly, when he brought -- he brought up the issue of whether this was, in fact, a reconsideration of -- he said "It simply speaks to the process that the Commission adopted about that time in terms of about how you treat seawalls." Chief Counsel Faust said "Yes, that is correct." Chairman Reilly said "All right." Well, then Chief Counsel Faust said "But that ultimately pertains to what is existing."

The entire discussion at the Coastal Commission was about this issue of the Coastal Act. The conflict that was discussed there, the decision that was rendered there was in the context of what Mr. Faust called this change in interpretation. So to simply say that because we didn't go and appeal the setback provision at the LCP stage does not change the fact that upon de novo review at the Coastal Commission, this issue was squarely

before the Commission and the facts are as we have presented them here to you.

I think with that being said, we have addressed most of the issues that they raised.

THE COURT: One more question. You pointed me to S-6 as part of Pismo Beach's LCP. The argument isn't made but it just crossed my mind. You are referring there to "existing." That

was certified as I recall in 1984, something like that, by the Coastal Commission. Is there an argument that "existing" as it relates to the LCP relates to acts that are existing as of 1984?

MR. GONZALEZ: Well, I believe that --

THE COURT: Because that refers back.

MR. GONZALEZ: There is an argument, it's not a correct argument. I think that the argument could be made that an LCP interprets a provision of the Coastal Act in a way that is inconsistent with the Coastal Act and thereby gains a right. I don't think that there is anything in the law that would presume that -- that conflict could be able to withstand.

You raised an interesting point earlier about when in the process the public is supposed to come forward and challenge these types of scenarios, these types of circumstances. Geotechnical expertise is purchased. The public doesn't purchase it, the applicant purchases it. And as we saw in this

case, the applicant purchases essentially what they need. And we have seen this time and time again throughout the coast and that is why we are before you: Because we are sick of it.

When they want to come forward with an application to put their house on the bluff, the geologist comes forward as they did here and says the retreat rate is so slow, two or three inches, that you could probably build ten feet away and it wouldn't be a problem but we are going to be conservative and go to 25, which is the legal limit. And then as soon they get that house in and they have this up running of waves into that cliff base creating an undercutting or any kind of a change to the base of their bluff -- you have to look at this picture very

closely. You can see that immediately south of 125 Indio, where you have an undercutting of the base, that is when they come forward for a seawall. And then they come forward saying that is going to collapse and five or six feet is going to fall and then my house will truly be in danger.

But, Your Honor, isn't it a little difficult to imagine 121 Indio sitting there with an exposed gunite wall, two houses down a seawall coming in, the Florin Street viewpoint falling apart because of erosion. Are you going to tell me -- well, granted it's the central coast -- that anybody believed that the coast wasn't eroding here? Political decisions based on purchased science are not what the Coastal Act is about and that's why we

are here before you today. The administrative record is factually as good as we could get to show when the same geologist says oops, I made a mistake. Their action is against the geologist, not against the public's interest and the public's right to access this beach and have it in perpetuity.

THE COURT: Mr. Cardiff.

MR. CARDIFF: Your Honor, I would like to also address the question of -- of "existing" in other portions s of the Coastal Act. First of all, I think that if you took a good look at the statutes that, for example, Mr. Kaufmann and the Coastal Commission has cited, it's not quite as clear as they make it out to be.

And I think that -- that our citation specifically in our reply or response brief really points out all the different statutes that -- that appear to be -- at least if you were looking at it as "existing" meaning existing at that time. Sure

it might also say, you know, existing or future structures, which even shows even more clearly that "existing" meant existing at the time the Coastal Act was enacted.

Now, when it comes to -- if you can put on Coastal Act Section 30235, the full section. Sorry. Passed it by.

THE COURT: There it is.

MR. CARDIFF: 30235. Okay. I have looked at this so long

and quite frankly, I was -- I was confused by the last sentence of "existing marine structures" for a very long time. And I was wondering well, why is "existing marine structures" even in there, it doesn't even seem like it fits with everything else unless you look at the title: "Construction altering natural shoreline." And I believe -- and when I am looking at that, I go wow, "existing marine structures causing water stagnation contributing to pollution problems and fishkills to be phased out or upgraded where feasible." In other words, it is saying that those existing marine structures that cause water stagnation and pollution problems and fishkills are not entitled to construction altering natural shorelines.

That even -- that shows even to a greater extent that this is a grandfather clause. That last sentence is denying grandfather clause -- grandfather status to those structures that cause pollution, which makes total sense. They certainly weren't talking about phasing out future structures, were they? They were talking about phasing out those structures and not allowing them to have revetments, breakwaters, groins, harbor channels, seawalls or other such construction that alters natural shoreline. That is really what they are talking about.

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It's a denial of the grandfather status.

So in closing, first of all, we disagree that this is about the LCP, the LCP must comply with the Coastal Act, the default

definition of "existing" is the Coastal Act, Coastal Act Section 30235.

And finally, we do believe that the Coastal Commission's interpretation first of all, it has -- it has changed. It was required to be changed per the seawall condition. And the current interpretation which they have right now creates a conflict and it provides a very clear conflict. You can see the pictures. You see what's happening at Pismo Beach, you see what's happening at Pismo Beach. There is going to be another new development that comes down and asks for a seawall in very short order and there it is stacked up with red tiles right there on 117 Indio on the other side.

I do have one other question to address. What is before us today doesn't have anything to do with the integration of the seawall, it doesn't. And that would be a completely different issue. If the Coastal Commission had addressed that issue and said that the only way to protect the -- the street and 121 Indio is by protecting this new development, that's a completely separate issue than what we have today. The issue that we have today is 125 Indio, new development. Thank you.

THE COURT: Mr. Cardiff, thank you.

Ms. Reynolds, Mr. Kaufmann.

MS. REYNOLDS: The only thing I am going to address is the last point on existing marine structures, --

THE COURT: Yes.

MS. REYNOLDS: -- the explanation that we heard from Mr. Cardiff on the meaning of the second portion of 30235. And I am not sure I quite understood his interpretation of that section but I will tell you that existing marine structures can refer to something like a breakwater or a groin, that the marine structure sometimes causes water stagnation and in those instances where it does cause that water stagnation, the section is saying that it should be upgraded or phased out. So it pretty simply, you know, just refers to that marine structure that's not built correctly.

As to the other points, I feel that this side of the podium has addressed everything that was raised.

THE COURT: All right, counsel. I told you before I am going to take the matter under submission. What I would like you to do is this. I will write an opinion for you on this because that seems to be what you are looking for.

How long would it take for you to get to me the order that you think the Court should enter from your respective positions?

MR. KAUFMANN: When you say "order," Judge, do you mean just the form of the order?

THE COURT: No.

MR. KAUFMANN: You mean a written statement of decision?

THE COURT: You want a statement of decision, right. How

long will that take?

As I understand it, given the structure here, nothing is going to happen to stop the seawall so there really isn't a time limit on it.

MR. GONZALEZ: Your Honor, I think 30 days would be

appropriate.

THE COURT: Does that work for you?

MS. REYNOLDS: That is fine.

MR. KAUFMANN: Should we submit it jointly on this side?

THE COURT: I will let you do it however you wish.

MR. KAUFMANN: Okay.

THE COURT: If you want to submit a joint one, that is fine. If each one of you has -- if you want to submit a partial joint plus a separate part that relates specifically to the real party in interest, the Coastal Commission's individual points, that is fine.

Today is the 20th, right -- 19th. You want to have it submitted on the 19th of November? Does that work?

MR. KAUFMANN: (Nods head up and down.)

THE COURT: Okay. One caveat. When you submit it, please give me the disk that goes with it.

MS. REYNOLDS: The disk?

THE COURT: The disk, yes, either Word or Word Perfect, preferably Word.

So this matter will be deemed continued, then, to the 19th. I would like to have it submitted simultaneously. And when you file that with me on the 19th, it will be submitted as of that date, and then I will get an opinion out to you as soon as I can.

MR. GONZALEZ: Thank you for indulging us both in time and with argument.

THE COURT: No. Appreciate it.

Incidentally there is a -- we ran over an hour. There is

going to be a court reporter cost.

MR. KAUFMANN: Thank you, Your Honor.

MS. REYNOLDS: Thank you.

THE COURT: Thank you all very much.

MR. GONZALEZ: Thank you, Your Honor.

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State of California)
) ss.
County of San Francisco)

I, Christina T. Paxton, Official Court Reporter for the Superior Court of California, County of San Francisco, do hereby certify:

That I was present at the time of the above proceedings;

That I took down in machine shorthand notes all proceedings had and testimony given;

That I thereafter transcribed said shorthand notes with the aid of a computer;

That the above and foregoing is a full, true and correct transcription of said shorthand notes and a full, true and correct transcript of all proceedings had and testimony taken;

That I am not a party to the action or related to a party or counsel;

That I have no financial or other interest in the outcome of the action.

Dated: November 3, 2004.

Christina T. Paxton, C.S.R.
Certificate No. 1558

CHRISTINA T. PAXTON, C.S.R.
2728 MONSERAT AVENUE
BELMONT, CA 94002
(415) 551-3838

DATE : NOVEMBER 3, 2004

TO : MR. TODD CARDIFF, ESQ.
169 SAXONY ROAD, SUITE 201
ENCINITAS, CA 92024

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FOR : REPORTER'S TRANSCRIPT OF PROCEEDINGS

#503643 SURFRIDER FOUNDATION v. CA COASTAL COMMISSION

(X) Original & 1 - Hearing of 10-19-04 (Expedited)

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The trial court decision in *Surfrider Foundation v. California Coastal Com*.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SURFRIDER FOUNDATION, a California nonprofit public benefit corporation; Petitioner, vs. **CALIFORNIA COASTAL COMMISSION**; a California Public Agency; Respondent.	Case No. CPF 03503643 **STATEMENT OF DECISION DENYING WRIT OF MANDAMUS**
WALTER CAVANAGH, an individual; and **GARY GROSSMAN**, an individual; and DOES 1 through 5, inclusive; Real Parties in Interest.	Hearing Date: October 19, 2004 Dept.: 301 Time: 9:30 a.m. Action Filed: October 5, 2003 The Honorable James L. Warren

INTRODUCTION

Petitioner's First Amended Petition for Writ of Mandamus ("writ petition") came on regularly for hearing before this Court on October 19, 2004. Marco A. Gonzalez, Esq., and Todd T. Cardiff, Esq., of the Coast Law Group, appeared on behalf of Petitioner Surfrider Foundation. Alice Busching Reynolds, Deputy Attorney General, appeared on behalf of Respondent California Coastal Commission. Steven H. Kaufmann, Esq., of Richards, Watson & Gershon,

appeared on behalf of Real Parties in Interest Walter Cavanagh and Gary Grossman. The Pacific Legal Foundation, which attempted to file an amicus curiae brief in support of Real Parties and in opposition to the writ petition, did not appear at the hearing.[1] The Court, having reviewed and admitted into evidence the Administrative Record, the Requests for Judicial Notice having been granted, the briefs filed by the parties having been considered along with the oral argument of counsel, now issues its Statement of Decision DENYING the writ petition.

In this case, Petitioner challenges the Coastal Commission's decision to approve, with conditions, a combined retaining wall, seawall ("Seawall") and bluff restoration project to protect two residential structures at 121 and 125 Indio Drive and a City street end and vista point in the City of Pismo Beach. The Commission found the project to be consistent with the requirements of the Local Coastal Program ("LCP") adopted by the City of Pismo Beach, including the seawall and bluff protection policies set forth in LCP Policy S-6 and Section 17.078.060 of the City's LCP Implementation Plan. Petitioner asks this Court to construe Sections 30235 and 30253 of the Coastal Act (Pub. Resources Code § 30000 et seq.), and contends that Section 30235 permits seawalls only to protect structures that were "existing" as of the effective date of the Coastal Act, which was January 1, 1977. Petitioner does not challenge the right of the City of Pismo or Real Party Grossman to protect the City improvements or the Grossman residence, both of which pre-date the Coastal Act. Rather, Petitioner argues that the Commission erred in its decision because it approved a seawall to protect the Cavanagh residence, which was built more recently in 1998, obviously long after the effective date of the Coastal Act.

As discussed below, the Court concludes that the writ petition must be DENIED. The Court concludes that the reasonable interpretation of Section 30235 of the Coastal Act permits the Commission to authorize seawall protection for structures that are "existing" at the time the Commission makes its decision on an application for permit, not structures that were existing when the Act was passed almost 30 years ago.

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[1] The Pacific Legal Foundation's filing of its amicus brief shall be deemed a request to file the brief, (...continued)

PROCEDURAL AND FACTUAL BACKGROUND

Real Parties Grossman and Cavanagh own existing homes on a bluff overlooking the ocean in Pismo Beach. The Cavanagh residence, at 125 Indio Drive, is located between the Grossman residence downcoast at 121 Indio Drive and the City of Pismo Beach Florin Street cul-de-sac and vista point upcoast. (8 AR 1292; 10 AR 1679-1684.) The Grossman residence and City improvements were built prior to the effective date of the Coastal Act, January 1, 1977. The Cavanagh residence was approved by the City of Pismo in 1997, and was constructed in 1997-1998. (1 AR 50-66; 11 AR 2102.)

The blufftop in this location lies 40 feet above mean sea level and consists of poorly consolidated material that expert evidence demonstrates is susceptible to accelerating bluff retreat from combined high tide and storm wave events that erode the base and face of the bluff, as well as from groundwater discharge along the contact between the marine terrace and underlying bedrock. (8 AR 1267, 1295; 11 AR 2083.)

The City's 1997 approval of the Cavanagh residence included an evaluation of bluff erosion and a corresponding assessment of sufficient setback requirements to ensure that the project site would be stable given the estimated rate of bluff retreat. (11 AR 2084.) After considering all available scientific evidence, the City required that the structure be set back 25 feet from the bluff face. (11 AR 2084, 2132.) The City considered this distance to be sufficient based on evidence of a bluff retreat rate of two to three inches per year. (Id.) In light of the predicted bluff retreat rate, the City determined that the 25-foot setback would ensure the safety of the 125 Indio house for the estimated economic lifespan of the home. (11 AR 2086, 2102.) The City's decision was not appealed to the Coastal Commission.

The El Nino winter of 1997-1998 produced the wettest February on record since 1967. Nearly 22 inches of rain fell on Central California from late January through February 1998. (11 AR 2013.) As a result, this particular area subsequently experienced unanticipated and significant episodic bluff loss, some 5 feet of blufftop near the 121-125 Indio Drive property

(...continued)
which request is denied for failure to comply with this Court's procedures.

line. (7 AR 1171; 8 AR 1278.) Large tension cracks formed in the blufftop, and active new seacave formation at the bedrock-marine terrace interface, incising approximately 10 feet into the bluff, revealed bluff failure and continuing substantial bluff retreat. (8 AR 1282, 1292-1293, 1424-1427.)

Following the El Nino storms, Real Parties conducted new studies. (11 AR 2087-2088.) The new geological reports concluded that nearly four years after construction of the 125 Indio residence, the structure was in fact at risk from erosion. (11 AR 2087.) Real Parties submitted these reports with an application to the City for a seawall to protect both 121 and 125 Indio Drive, as well as the City street end and vista point from further erosion. On December 11, 2001, the City approved the construction of a continuous concrete seawall on and above the back beach, with a width on the beach of 5-10 feet and a visible height of 9-11 feet.[2] (3 AR 379-443.) Two Coastal Commissioners then appealed the City's decision to the Coastal Commission. (4 AR 562-567.) By this time, the distances between the top of the bluff and the nearest part of the Grossman and Cavanagh residences were only 13 feet and 19 feet, respectively, and the Florin Street cul-de-sac and vista point was only 8.5 feet from the bluff. (8 AR 1266.)

The project then underwent additional geotechnical review – a report, "Geotechnical Investigation Potential Seacliff Hazards," prepared by Cotton, Shires & Associates, Inc., (Jan. 2003) (8 AR 1258-1402), a "Coastal Hazard Study" prepared by Skelly Engineering (Feb. 2003) (8 AR 1420-1441), and a peer review by Earth Systems Pacific (Feb. 2003) (8 AR 1412-1419). Each expert concurred in the conclusion reached by Cotton Shires (at 8 AR 1266, 1303, 1314, 1325) that without seawall protection, the existing residences and the Florin Street street end and vista point would be in imminent danger from erosion. (8 AR 1418-19, 1423.)

Cotton Shires recommended an "integrated" seawall to protect both houses and the Florin Street cul-de-sac (designing the structure to "be integrated with (keyed into) existing adjacent protective structures at the foot of Florin Street and 121 Indio Drive to avoid flanking"). (8 AR

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[2] The Court notes that at the time of the application approximately the southeasterly two-thirds of the property at 121 Indio Drive was already protected by a pre-existing shotcrete-rebar seawall (8 AR 1265, 1276, 1287, 1292), and eight other residences along Indio Drive also were already protected by shoreline protective devices – (...continued)

1348.) Based on further geotechnical recommendations, Real Parties amended their permit application to redesign and scale back the seawall, so that instead of extending 5 to 10 feet on to the sandy beach, the "structure would consist of a minimized, approximately 18-inches thick, concrete-covered reinforced steel wall, with tie-backs." (9 AR 1462, 1483.)

In March and April 2003, the Coastal Commission's staff geologist, Mark Johnsson, visited the site and analyzed all of the geological reports prepared for these properties to determine whether the two residences were in danger from erosion. (10 AR 1835-1836, 1850-1851.) He concluded: ". . . [T]he analyses presented do, in my opinion, demonstrate that a sufficiently low factor of safety exists to indicate that the structures are at risk. Most convincing are the seismic analyses for both wedge-type or circular failure surfaces, which show that the pseudostatic factor of safety drops below 1.0 within the footprint of both 121 and 125 Indio Drive, as well as within the Florin Street cul-de-sac. The static analyses indicate a much higher factor of safety, although a small portion of the structures at 121 Indio Drive, as well as the Florin Street end, lie seaward of the 1.1 (or less) factor of safety line." (10 AR 1851.)

On July 17, 2004, the Commission's staff prepared a comprehensive staff report and recommendation on the project. (11 AR 2077-2121 (as revised at the hearing to reflect a revision to special conditions, the "adopted staff report").) The staff report systematically analyzed the project for its conformity with the provisions of the City of Pismo Beach Local Coastal Program, and reviewed the additional geotechnical evidence pointing to the unstable, hazardous condition of the site.

On August 6, 2003, after a public hearing, the Commission voted to approve the project, as amended, with a substantially revised and less intrusive seawall – an 18 inch wide, 15-20 feet high, contoured, bluff-colored, vertical seawall along the toe of the bluff, with native vegetation restoration of the upper bluff face and blufftop, and replacement of the large storm drain outfall that presently occupies the beach with a pipe that discharges through the seawall. (11 AR 1975-2036.) The Commission imposed five standard conditions and 15 detailed special conditions

(...continued)
rock revetments, bulkheads and seawalls. (8 AR 1292, 1422; 10 AR 1673, 1682.)

requiring water quality improvements (a requirement proposed and paid for by Real Parties), vista point improvements, beach sand supply, and an offer to dedicate a public beach access easement. (11 AR 2091-2100.)

In its 45-page decision, the Commission found the project, as conditioned, to be in conformity with the certified City LCP.[3] The Commission applied the City's LCP, including Policy S-6, which mandates that a seawall be permitted only when necessary "to protect existing principal structures . . . in danger from erosion." (11 AR 2100, 2102-2105.) The Commission noted that both residential structures were legally present at the site, and concluded that both were "existing" and, based on substantial expert evidence, in imminent danger of erosion. (11 AR 2100-2105.) The Commission analyzed alternatives to the seawall (id. at 2105-2106), and found that the project, as modified, is the superior alternative because, among other things, "it minimizes the footprint [of the seawall] on the sandy beach, is much less visually intrusive, and it addresses problems associated with the failed storm water outfall." (Id. at 2106.) The Commission further addressed and mitigated the potential impacts of the seawall on sand supply. (Id. at 2106-2111.) To ensure compliance with the City's certified LCP and the Coastal Act's public access and recreation policies (§§ 30210-30224), the Commission required Real Parties to pay a $10,000 fee for vista point improvements and beach sand replenishment, and required Real Party Grossman to offer to dedicate a beach access easement. (Id. at 1185-1186.) The Commission found, after a review of expert reports and an independent peer review:

> "This site presents some unique geologic conditions and facts that complicate the degree of threat evaluation. The materials exposed in the bluff are highly erodable, consisting almost entirely of nearly cohesionless sand. These erodable materials are subject to wave attack, as the marine terrace deposits make up the majority of the sea cliff. Because of this, there is little margin for error in determining risk in a no project, no revetment scenario. When all factors are considered together, and evaluated in the context of an extreme storm event, the Applicant's consulting geotechnical engineers and geologist have concluded that the existing residence is in danger of being undermined. The Commission's

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[3] Under the Commission's regulations, the staff report, with minor revisions to special conditions made at the hearing, became the decision of the Commission. (Tit. 14 Cal. Code Regs., § 13096(b) ("Unless other specified at the time of the vote, an action taken consistent with the staff recommendation shall be deemed to have been taken on the basis of, and to have adopted, the reasons, findings and conclusions set forth in the staff report.").)

> geologist has concluded that the evidence is borderline regarding whether the existing structure is 'in danger from erosion' at this time. But the fact that waves now routinely impact an area that consists of poorly consolidated marine terrace material indicates that, absent some form of shore protection, a clear danger from erosion would exist in the very near future. To err on the side of protecting life and property, it is prudent to conclude in this case that the existing structure[s] are in danger from erosion."
>
> "As such, the residences qualify as an existing structure in danger from erosion for purposes of section S-6 of the certified LCP." (11 AR 2104-2105; emphasis added.)

At oral argument, the parties represented that the Coastal Commission has since issued a coastal development permit for the project, and that the seawall has been substantially completed to protect the existing residences and the City street and vista improvements.

ANALYSIS

A. The Failure to Name the City of Pismo Beach as a Necessary and Indispensable Party does not Bar the Action.

As a threshold procedural issue, Real Parties contend that the City's property rights are unavoidably intertwined with their seawall and bluff stabilization project, and that the City is therefore a necessary and indispensable party to this action. Real Parties-in-Interest argue that Petitioner's failure to name the City of Pismo Beach is fatal to Petitioner's action pursuant to Code of Civil Procedure section 389. The court disagrees that the City is an indispensable party, or that the action should be dismissed pursuant to section 389. Code of Civil Procedure section 389 states:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.
>
> (b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a

party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

Using the analysis outlined in *Deltakeeper v. Oakdale Irrigation Dist.*, 94 Cal. App. 4th 1092 (2001), the court finds complete relief can be afforded in the absence of the City of Pismo Beach, because the issue before the court is whether the permit complies with Coastal Act section 30235. The court, through its power of mandamus, has the ability to provide complete relief to the parties present. Further, the court finds that persons already parties will not incur inconsistent obligations by the absence of the City of Pismo Beach.

The real question is whether the absence of the City will, as a practical matter, impair or impede its ability to protect that interest. Both the applicants for the project were named in the lawsuit, and were highly motivated to uphold the seawall permit. The City is not an applicant to the project, and although the City received a benefit from the project, its interests were exactly the same as the named Real Parties-in-Interest. Therefore, it is unlikely that the City would have contributed anything outside of what was already present in the administrative record, and the City would have been relegated to arguing the same points as the other real parties-in-interest. *Deltakeeper*, *supra*, at 1107-08. As a practical matter the City's ability to protect its interest in this case has not been not impaired or impeded.

However, as in *Deltakeeper v. Oakdale Irrigation Dist.*, this court continues the analysis under section 389, notwithstanding that the City's interest can be adequately represented by the named Real Parties-in-Interest. The court finds that even if the City was impaired in its ability to protect its interest, the City is not an indispensable party.

Preliminarily, the court must be careful not to convert section 389 from a discretionary power or rule of fairness into a burdensome requirement that thwarts rather than accomplishes justice. *Bank of California v. Superior Court*, 16 Cal. 2d 516, 521 (1940). The first factor, "(1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties" is the same analysis done under section 389 (a)(2). *Deltakeeper*, 94 Cal. App. 4th at 1107. As the court noted above, the City's interests are adequately represented by the named Real Parties-in-Interest. Most importantly, however, Petitioner will not have any remedy if the court chooses to dismiss the case on the basis of section 389 due to the sixty-day statute of limitations. Such factor weighs heavily against dismissing the action. Thus, in weighing the factors outlined by section 389, equity and good conscience demand that the court allow the action to proceed, regardless of the absence of the City of Pismo Beach.

B. The Petition is not Misdirected to Coastal Act Section 30235.

Real Parties in Interest and the Commission also assert that the Court must deny the writ petition because it challenges Section 30235 of the Coastal Act, which Real Parties contend is not relevant here. Petitioner's argument raises the purely legal question of the interpretation of the term "existing" structure in Section 30235 of the Coastal Act, which Petitioner contends must mean "existing as of the effective date of the Coastal Act, January 1, 1977." Real Parties and the Commission argue that Section 30235 is inapplicable in this case because the City of Pismo Beach has a certified Local Coastal Program ("LCP") that the Commission acted upon on appeal from the City's decision on Real Parties' application for a coastal development permit and, following certification, the LCP governs this application, not the Coastal Act. As noted below, however, as a practical matter, the Court will be faced with a legal interpretation of the term "existing" no matter which statute is under consideration.

The applicable statutory framework is as follows: The Coastal Act requires each local government within the state's coastal zone to prepare a LCP containing a land use plan and implementing ordinances designed to promote the Act's objectives of protecting the coastline

and its resources and to maximize public access. (§§ 30001.5, 30512, 30513.) The precise content of each LCP is to be determined by the local government, in consultation with the Commission and with full public participation. (§ 30500(c).)

Of course, Local Governments may "adopt and enforce additional regulations, not in conflict with the act, imposing further conditions, restrictions or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone." Pub. Res. Code § 30005. Thus, while an LCP can be more restrictive than the Coastal Act, it cannot be less restrictive. "The Coastal Act sets the minimum standards and policies with which local governments within the coastal zone must comply." *Yost v. Thomas*, 36 Cal. 3d 561, 572 (1984). The Coastal Act is the primary law from which the LCP arises.

Pismo Beach's LCP Policy S-6 essentially mirrors Public Resources Code section 30235, stating, in relevant part, "Shoreline protective devices such as seawalls...shall be permitted only when necessary to protect existing principal structures..." Thus, like the Coastal Act, it uses the term "existing" prior to "structures," without defining the term "existing." The LCP does not shed any light on the Coastal Commission's interpretation of section 30235, now or at the time of certification of the LCP. Because the LCP uses the same term as the Coastal Act, it must be presumed to have the same meaning. Clearly, it would not be proper for the LCP's definition of "existing" to be less restrictive on development than the Coastal Act. *Yost*, 36 Cal. 3d at 572. Further, in public hearing, the Coastal Commission clearly concentrated on the interpretation of Public Resources Code section 30235, not the interpretation of Pismo Beach's LCP Policy S-6. (11 AR 2017-36). The Commission's interpretation of section 30235 necessarily affects the proper interpretation of Pismo Beach's LCP.

C. The Commission's Finding that the 125 Indio Residence is "Existing" Within the Meaning of Section 30235 and 30253 was Reasonable and Within the Commission's Discretion.

The "touchstone" of statutory interpretation is legislative intent. (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 632.) In evaluating the meaning of a statute, the aim should be the ascertainment of legislative intent so

that the purpose of the law may be effectuated. (Select Base Materials, Inc. v. Board of Equalization (1959) 51 Cal.2d 640, 645.) "In construing a statute, the court's first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, the court looks no further and simply enforces the statute according to its terms." (DuBois v. W.C.A.B. (1993) 5 Cal.4th 382, 387-88; citations omitted.)

Petitioner argues that the language of Section 30235 is ambiguous. (Petr. Opening Brief at 9:5-6.) However, the Court has reviewed Section 30235, and finds that, in context, the language in question is not ambiguous: Section 30235 states: ". . . [S]eawalls . . . shall be permitted when required . . . to protect existing structures . . . in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. . . ." (Emphasis added.) The Section draws a reasonable distinction between structures merely proposed by an applicant (for which seawall protection is not mandated), and those that are "existing" and require protection because they are in danger from erosion. By its terms, Section 30235 applies only to the latter.

The record before the Court demonstrates that this reading of Section 30235 conforms to the Commission's long-standing administrative construction of the section. Although the Court exercises independent review over questions of law (see e.g., Crocker National Bank v. City and County of San Francisco (1989) 49 Cal.3d 881, 888), "courts must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities." (Mason v. Retirement Board of the City and County of San Francisco (2003) 11 Cal.App.4th 1221, 1228.) "Consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight." (Id.; see also Yamaha Corp. of America v. State Board of Equalization (1998) 19 Cal.4th 1, 12 (explaining that evidence that an agency's statutory construction has been consistent weighs in favor of affording deference to the agency's interpretation).)

In this case, the Commission authorized the seawall at issue, finding that the residences at both 121 and 125 Indio Drive were existing structures because they were legally there at the time

the Commission was making its decision. As the Commission's Chief Counsel explained in testimony at the administrative hearing, this determination is consistent with the long-standing practice of the Commission. (11 AR 2018-2019.)

Petitioner cites other portions of the Chief Counsel's testimony, claiming that the Commission has "vacillated" in its interpretation of "existing structure." (Petr. Opening Brief at pp. 15:2-16:6.) Although the cited testimony does refer to a change in interpretation, the context of this statement and the ultimate Commission vote, adopting a finding that the Cavanagh house is "existing," shows that the purported "change" was the Commission's more recent practice of incorporating a "no future seawall" condition in permits for new bluff-top development, not a change in the interpretation of "existing structure." (11 AR 2018-2019.) As the Commission's Chairman explained: "It really doesn't speak to any different interpretation of the word 'existing.' It simply speaks to the new process that the Commission adopted about that time, in terms of how we treat seawalls." (11 AR 2026; see also Chief Counsel's response: "Yes, that is correct.".) Indeed, the Court notes that there would have been no need for a "no future seawall" condition if the Commission simply had agreed with Petitioner's interpretation. Equally important, Petitioner provided no evidence of any Commission decision that included a finding that a post-Coastal Act structure, built pursuant to a coastal development permit issued under either the Coastal Act or a local coastal program, is *not* an existing structure.

In the absence of any evidence that the Commission has strayed from its consistent interpretation of "existing structure" as meaning any structure legally present at the time its decision is made, the Court concludes that the Commission's interpretation is entitled to great weight and applies the standard set forth in Mason v. Retirement Board of the City and County of San Francisco, supra.

To advance its argument, Petitioner would, in effect, re-write Section 30235 to provide its applicability only to "structures existing as of January 1, 1977. . . ." The Surfrider Foundation argues that section 30235 is a grandfather clause intended to protect solely those structures built prior the enactment of the Coastal Act. In other words, the term "existing structure" means those

structures existing at the time the Coastal Act was enacted. All other structures are "new development" within the meaning of Public Resources Code section 30253, and "shall...[not] in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." Petitioner argues the Coastal Commission's interpretation creates a conflict between Public Resources Code sections 30235 and 30253. As will be shown, Petitioners interpretation of "existing" structures does not fit with the statutory construction of the Coastal Act.

The legislative intent of Section 30235 can be discerned from review of the Coastal Act as a whole. A statute must be read "with reference to the entire scheme of which it is a part so that the whole may be harmonized and retain effectiveness." (People v. Pieters (1991) 52 Cal.3d 894, 899; see also Calatayud v. State of California (1998) 18 Cal.4th 1057, 1064.) "[I]t is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (Stillwell v. State Bar of California (1946) 29 Cal.2d 119, 123.)

While Petitioner focuses exclusively on the seawall policy in Section 30235, there are numerous other policy provisions in the Coastal Act, enacted at the same time, which similarly use the word "existing" to refer to existing conditions such as "existing water depths" (§ 30705(b)), "existing water quality" (§ 30711(a)(3)), "existing zoning requirements" (§ 30610(g)(1)), "existing administrative methods for resolving a violation [of the Coastal Act]" (30812(g)), and "diking, dredging, or filling in existing estuaries and wetlands." (§ 30233(c)). (See also Pub. Resources Code §§ 30233(a)(2), 30233(a)(5), 30234, 30236,30250(a).) Nowhere in any of these provisions is there any indication that the Legislature intended to limit the Commission's review to water depths, water quality, zoning requirements, administrative methods, or estuaries and wetlands only that existed as of January 1, 1977.

In addition, Section 30235 itself refers to phasing out of "[e]xisting marine structures." As noted, the Section provides:

"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. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible." (§ 30235; emphasis added.)

The underscored portion of Section 30235, which pertains to "existing marine structures," was already in the legislative bill that gave rise to the Coastal Act at the time the word "existing" was added to the portion of the policy addressing seawalls. (Real Parties' RJN, Exh. 3.) The Court concludes that it would not have been rational for the Legislature to discourage only those "existing marine structures" constructed as of the effective date of the Coastal Act. The evil sought to be remedied – when such structures cause water stagnation that contributes to pollution problems and fishkills – would pertain equally to more recently approved and constructed "marine structures." Nothing in the legislative record presented to the Court suggests that the addition of the term "existing" in the case of seawalls was intended to have some different meaning from the identical word used elsewhere in the Section, or to apply the policy to "existing marine structures" as of January 1, 1977, but not to "existing marine structures" approved and constructed between January 1, 1977 and 2004. The Legislature certainly could have defined "existing" by date if it wished; however, it did not. When viewed in light of the aforementioned Coastal Act provisions, including Section 30235 itself, it is reasonable to interpret the term "existing structure" to refer to currently existing structures, rather than structures existing as of the effective date of the Coastal Act, January 1, 1977.

The Court notes further that, unlike Section 30235, other provisions of the Coastal Act specifically include a date to clarify the term "existing" to mean "as of the effective date of the Coastal Act, January 1, 1977" or some other date. Section 30610.6, refers to existing legal lots, but specifically limits the application of the section to any "legal lot existing . . . on the effective date of this section." Similarly, in Section 30614, the Act refers to "coastal development permit conditions existing as of January 1, 2002." Thus, when the Legislature intended to limit the term

"existing" to a certain point in time, it did so specifically.[4]

Petitioner cites a handful of other Coastal Act sections that also use the term "existing," and contends that the term is "clearly use[d] . . . to mean 'existing at the time of enactment.'" (Petr. Reply to Respondent's Opposition at p. 6 (citing Pub. Resources Code §§ 30001(d), 30004(b), 30007, and 30103.5).) But, the code sections cited are not analogous to Section 30235. Unlike Section 30235, three of the provisions cited by Petitioner (§§ 30001(d), 30004(b) and 30007) are legislative findings and declarations in Chapter 1 of the Coastal Act, which reflected the then present thinking of the Legislature. In contrast, Section 30235, like the code sections cited above using the term "existing" to mean present conditions, is a policy statement in Chapter 3 of the Act intended to provide direct requirements applicable to administrative decisions on an on-going basis. In two of the sections cited by Petitioner, the Legislature expressly distinguished between "existing" and "future" developments or laws. (§ 30001(d) ("existing developed uses, and future developments"); § 30007 ("existing law or any law hereafter enacted").) Section 30103.5(b) does not clearly refer to the effective date of the Coastal Act. That section was enacted as an amendment to the Coastal Act in 1978; there is no indication that use of the term "existing" was meant to refer back to January 1, 1977, a year before Section 30103.5 was enacted. Lastly, Section 30004 refers to coordinating activities of any "existing [state] agency." However, nothing in the section suggests it was intended to limit its provisions only to agencies whose jurisdiction might overlap as of the effective date of the Coastal Act. (See e.g., § 30419, which the Legislature added in 1984 to deal with the overlapping jurisdiction of the Commission and the Department of Boating and Waterways.)

Petitioner further contends that, without limiting the term "existing" to pre-Coastal Act structures, Sections 30235 and 30253 are conflicting. The Court concludes, however, that the plain language of these sections shows that there is no conflict and they are easily harmonized.

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[4] Other provisions of the Coastal Act cite the effective date of the Act, showing that the Legislature added specific language when it intended to refer to that date. (See e.g., Pub. Resource Code § 30600(a) ("on or after January 1, 1977, any person wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit"); § 30608 (no person who has obtained a vested right for development "prior to the effective date of" the Coastal Act is required to obtain approval of the development under the Coastal Act.)

Section 30253 is directed at new development and instructs the Commission to take all reasonable measures to ensure that such development will not require a shoreline protective device. In carrying out this policy, the record shows that the Commission typically reviews new development proposed for coastal bluffs to determine if it has been adequately designed to prevent the need for any shoreline protective device for the lifetime of the project. As Section 30253 states, an application for development on the shoreline must show that the new development will not "in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs."[5] In implementing this policy, the Commission may require that a development be reduced in size or set back farther from the bluff to reduce the likelihood that a seawall might be necessary to preserve the structure in the future. Indeed, the record shows that in certain instances, the Commission has even imposed a "no future seawall" condition to forewarn property owners that a seawall will not be permitted at a later date. (11 AR 2019.)

Nevertheless, the coast is a dynamic environment, and in spite of best efforts, the Coastal Act also recognizes that seawalls may sometimes be necessary and permitted. To this end, Section 30235 specifically authorizes the approval of new seawalls and similar protective devices, but only where these devices are necessary to ensure safety of "existing structures" (meaning, structures existing at the time the application for seawall is considered by the Commission) and only when such structures are "in danger of erosion" and certain other criteria are met. In sum, the two provisions are harmonious because Section 30253 governs the design and siting of new development so that, based on all bluff retreat rate predictions, it will not require a seawall, while the other provision, Section 30235, recognizes that even the best of intentions can go awry, and it mandates the Commission to approve seawalls to protect "existing structures in danger from erosion."

The Court also finds, contrary to Petitioner's claim, that the Commission's interpretation of the term "existing" in Section 30235 does not render it a meaningless, surplus term. (See Petr.

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[5] The Court notes that LCP Policy S-6, which is applicable here, is worded somewhat differently:

(...continued)

Opening Brief at p.12:22-24.) With the term "existing," Section 30235 prevents a permit applicant from requesting a seawall as a component of an application for a new blufftop structure. If "existing" is omitted from Section 30235, an applicant could ask the Commission to approve seawalls for any *proposed* structures that meet the additional requirements of the Section. In other words, an applicant could request a seawall as part of an application for a new development project when erosion of the development site could not otherwise be prevented. Thus, the term "existing," meaning existing at the time seawall approval is being sought, is essential to limit seawall approval to protection of structures existing at the time of the approval, thereby harmonizing Sections 30235 and 30253.[6] The Court concludes that this is a reasonable construction of Section 30235, and that the Commission did not err in concluding that the residences at 121 and 125 Indio are "existing" under that provision.

CONCLUSION

For all the reasons set forth herein, Petitioner's First Amended Petition for Writ of Mandamus is denied, along with its request for attorney's fees and costs.

Dated: 2/16/05

HONORABLE JAMES L. WARREN
Judge of the Superior Court

(...continued)
"Design and construction of protective devices shall minimize alteration of natural landforms." (Emphasis added.)

[6] The Court notes that Petitioner's argument is directed principally to seawalls that are proposed to protect existing *private* residential structures. (Petr. Opening Brief at pp. 17:19-20.) However, the word "structure" in Section 30235 is broad and unqualified. The seawall protection mandated by Section 30235 extends to all sorts of "existing structures," including existing oceanside roads and highways, oceanfront parking lots, permanent lifeguard facilities, beachfront recreational complexes and visitor-serving uses, coastal vista points, and public accessways on blufftops. As noted, the California coast is not static, and nothing in the Coastal Act or its legislative history remotely suggests that the Legislature intended to foreclose protection where such "existing structures" are threatened by imminent erosion. Even the Coastal Plan, which the Commission submitted to the Legislature under the 1972 Coastal Act (Pub. Resources Code § 30002), explained that shoreline structures should be permitted as necessary to "protect existing buildings and public facilities." (11 AR 1937; emphasis added.)

Assembly Bills 2943 (2002 Wiggins) and 1129 (2017 Stone) and the Legislative Record relating to both Bills

AMENDED IN SENATE AUGUST 26, 2002

AMENDED IN SENATE JUNE 5, 2002

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL No. 2943

Introduced by Assembly Member Wiggins

February 25, 2002

An act to amend Section 30235 of the Public Resources Code, relating to the California Coastal Commission.

LEGISLATIVE COUNSEL'S DIGEST

AB 2943, as amended, Wiggins. California Coastal Commission: local government: construction.

Existing law requires any person wishing to perform or undertake any development in the coastal zone to obtain a coastal development permit from the California Coastal Commission or from a local government. Existing law requires revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes to 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.

~~This bill would instead authorize that construction to be permitted.~~

This bill would provide that seawalls, cliff retaining walls, seacave fills, and other construction permitted for the purpose of protecting an existing structure, as defined, shall only be permitted if designed to eliminate or mitigate adverse impacts on natural shoreline processes

and only for so long as the structure has a useful economic life, but in no event any later than January 1, 2051.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 30235 of the Public Resources Code is amended to read:

30235. *(a)* Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other ~~such~~ construction that alters natural shoreline processes ~~may~~ *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. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible.

(b) Seawalls, cliff retaining walls, seacave fills, and other construction that alters natural shoreline processes shall be permitted to protect an existing structure in danger from erosion only when designed to eliminate or mitigate adverse impacts on natural shoreline processes while that structure has a remaining useful economic life. A seawall, cliff retaining wall, seacave fill, or other construction permitted pursuant to this subdivision shall not be permitted on and after January 1, 2051.

(c) For the purposes of this section, the following terms have the following meaning:

(1) "Existing structure" means a structure that has obtained a vested right as of January 1, 1977, the effective date of the California Coastal Act of 1976.

(2) "Vested right" means that substantial construction was performed and that substantial expenditures were incurred in good faith reliance on either a building permit or final discretionary approval, whichever is applicable.

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COMPLETE BILL HISTORY

BILL NUMBER : A.B. No. 2943
AUTHOR : Wiggins
TOPIC : California Coastal Commission: local government: construction.

TYPE OF BILL :
Inactive
Non-Urgency
Non-Appropriations
Majority Vote Required
Non-State-Mandated Local Program
Fiscal
Non-Tax Levy

BILL HISTORY
2002
Nov. 30 Died on Senate inactive file.
Aug. 30 To inactive file on motion of Senator Chesbro.
Aug. 27 Read second time. To third reading.
Aug. 26 Read third time, amended. To second reading.
Aug. 7 Read second time. To third reading.
Aug. 6 From committee: Be placed on second reading file pursuant to Senate Rule 28.8.
July 1 In committee: Hearing postponed by committee.
June 18 In committee: Hearing postponed by committee.
June 11 From committee: Do pass, and re-refer to Com. on APPR. Re-referred. (Ayes 6. Noes 3.).
June 5 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on REV. & TAX.
May 9 Referred to Com. on N.R. & W.
May 2 In Senate. Read first time. To Com. on RLS. for assignment.
May 2 Read third time, passed, and to Senate. (Ayes 58. Noes 7. Page 5858.)
Apr. 29 Read second time. To third reading.
Apr. 25 From committee: Do pass. (Ayes 23. Noes 0.) (April 24).
Apr. 9 From committee: Do pass, and re-refer to Com. on APPR. Re-referred. (Ayes 10. Noes 0.) (April 8).
Apr. 2 In committee: Hearing postponed by committee.
Mar. 14 Referred to Com. on NAT. RES.
Feb. 26 From printer. May be heard in committee March 28.
Feb. 25 Joint Rule 54 (a) suspended. Assembly Rule 49(a) suspended. Read first time. To print.

AB-1129 Coastal resources: structures: beach access and protection. (2017-2018)

Date Published: 04/26/2017 09:00 PM

AMENDED IN ASSEMBLY APRIL 26, 2017

AMENDED IN ASSEMBLY MARCH 09, 2017

CALIFORNIA LEGISLATURE— 2017–2018 REGULAR SESSION

ASSEMBLY BILL NO. 1129

Introduced by Assembly Member Mark Stone

February 17, 2017

An act to amend Sections 30235, 30624, and 30821 of the Public Resources Code, relating to coastal resources.

LEGISLATIVE COUNSEL'S DIGEST

AB 1129, as amended, Mark Stone. Coastal resources: structures: beach access and protection.

Existing law, the California Coastal Act of 1976, provides for planning and regulation of development in the coastal zone, as defined. The act specifies planning and management policies for the location of new residential, commercial, and industrial development in the coastal zone.

The act requires the permitting of revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes 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.

This bill would also require that the permitted construction of those structures be consistent with the policies of the act, including policies regarding protection of public access, shoreline ecology, natural landforms, and other impacts on coastal resources, and would define the term "existing structure" for the purposes of those provisions.

The act requires any person wishing to perform or undertake any development in the coastal zone, as defined, to obtain a coastal development permit, but exempts from those requirements specified emergency projects undertaken, carried out, or approved by a public agency, as prescribed.

This bill would specify that any emergency permit issued under those provisions is a temporary authorization intended to allow the minimum amount of temporary development necessary to address the identified emergency, and minimize any potential harm or adverse coastal impacts related to addressing the emergency. The bill would specify that any subsequent development that is carried out that is beyond the scope of the

emergency permit shall require a coastal development permit and is not subject to emergency authorization granted under those provisions.

The act imposes specified civil penalties on a person, including a landowner, who is in violation of the public access provisions of the act for each violation of the act.

This bill would additionally impose those civil penalties on a person, including a landowner, who has *placed or caused to be placed* an unpermitted shoreline protection structure ~~on his or her property located in~~ *within* the coastal zone.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) California beaches provide recreation opportunities for residents across the state, as well as visitors from around the world.

(2) The coastal economy is based upon the maintenance of precious natural areas, beaches, parks, and urban areas as tourist destinations, and their economic benefit to the state depends on protection of their scenic and recreational value.

(3) As climate change occurs, much of the coast is under threat due to sea level rise and amplified coastal erosion.

(4) The economic and environmental health of human and natural coastal communities depends on their resilience and their ability to survive and rebound from adverse effects.

(5) In response to erosion and storm events, Californians have built seawalls, revetments, and other armoring structures along more than 10 percent of California's coast.

(6) Coastal armoring structures placed on eroding beaches prevent coastal ecosystems from migrating inland and cut off sand supply by preventing natural erosion processes. The placement of these structures on coastal lands also causes beaches to narrow and eventually disappear, diminishing coastal habitat.

(7) Coastal armoring limits beach access, impedes coastal recreation, and causes increased erosion to neighboring properties.

(8) A variety of alternatives to coastal armoring exist that use natural features and processes to protect property. While these nature-based alternatives have been shown to cost less or about the same as armoring, they also have the additional benefit of restoring and enhancing the natural character of the coast and ensuring coastal beach access for the public.

(b) It is therefore the intent of the Legislature to provide clear direction and enhanced authority to the California Coastal Commission to maximize the use of natural infrastructure to protect the state's coastline, while minimizing the use of coastal armoring and its related negative impacts.

SEC. 2. Section 30235 of the Public Resources Code is amended to read:

30235. (a) 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 an existing structure or public beach in danger from erosion and when that construction is (1) designed to eliminate or mitigate adverse impacts on local shoreline sand supply, and (2) consistent with the policies of this division, including policies pertaining to protection of public access, shoreline ecology, natural landforms, and other impacts on coastal resources. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible.

(b) For purposes of this section, and consistent with existing practice, "existing structure" means a structure that is legally authorized and in existence as of January 1, 1977.

SEC. 3. Section 30624 of the Public Resources Code is amended to read:

30624. (a) The commission shall provide, by regulation, for the issuance of coastal development permits by the executive director of the commission or, where the coastal development permit authority has been delegated to a local government pursuant to Section 30600.5, by an appropriate local official designated by resolution of the local government without compliance with the procedures specified in this chapter in cases of emergency, other than an emergency provided for under Section 30611, and for the following nonemergency developments: improvements to any existing structure; any single-family dwelling; any development of four dwelling units or less within any incorporated area that does not require demolition; any other developments not in excess of one hundred thousand dollars ($100,000) other than any division of land; and any development specifically authorized as a principal permitted use and proposed in an area for which the land use portion of the applicable local coastal program has been certified. That permit for nonemergency development shall not be effective until after reasonable public notice and adequate time for the review of the issuance has been provided.

(b) If one-third of the appointed members of the commission so request at the first meeting following the issuance of that permit by the executive director, that issuance shall not be effective, and, instead, the application shall be processed in accordance with the commission's procedures for permits and pursuant to the provisions of this chapter.

(c) Any permit issued by a local official pursuant to the provisions of this section shall be scheduled on the agenda of the governing body of the local agency at its first scheduled meeting after that permit has been issued. If, at that meeting, one-third of the members of that governing body so request, the permit issued by the local official shall not go into effect and the application for a coastal development permit shall be processed by the local government pursuant to Section 30600.5.

(d) No monetary limitations shall be required for emergencies covered by the provisions of this section.

(e) (1) An emergency permit issued under this section is a temporary authorization intended to allow the minimum amount of temporary development necessary to address the identified emergency, and minimize any potential harm or adverse coastal impacts related to addressing the emergency. Any subsequent development that is carried out that is beyond the scope of the emergency permit shall require a coastal development permit and is not subject to the emergency authorization granted under this section. Any development in the coastal zone that is covered under an emergency authorization granted pursuant to this section shall be removed at the end of the term of the permit unless authorized by a subsequent coastal development permit or a determination that no permit is needed, and any area affected by the development shall be restored to its prior condition.

(2) Any violation of paragraph (1) shall constitute a knowing and intentional violation of this division, subject to any penalties provided in Article 2 (commencing with Section 30820) of Chapter 9.

SEC. 4. Section 30821 of the Public Resources Code is amended to read:

30821. (a) In addition to any other penalties imposed pursuant to this division, a person, including a landowner, who is in violation of the public access provisions of this division, or who has *placed or caused to be placed* an unpermitted shoreline protection structure, such as a seawall, revetment, retaining wall, or other like structure, ~~on his or her property located in~~ *within* the coastal zone, is subject to an administrative civil penalty that may be imposed by the commission in an amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation. The administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.

(b) All penalties imposed pursuant to subdivision (a) shall be imposed by majority vote of the commissioners present in a duly noticed public hearing in compliance with the requirements of Section 30810, 30811, or 30812.

(c) In determining the amount of civil liability, the commission shall take into account the factors set forth in subdivision (c) of Section 30820.

(d) A person shall not be subject to both monetary civil liability imposed under this section and monetary civil liability imposed by the superior court for the same act or failure to act. If a person who is assessed a penalty under this section fails to pay the administrative penalty, otherwise fails to comply with a restoration or cease and desist order issued by the commission in connection with the penalty action, or challenges any of these actions by the commission in a court of law, the commission may maintain an action or otherwise engage in judicial proceedings to enforce those requirements and the court may grant any relief as provided under this chapter.

(e) If a person fails to pay a penalty imposed by the commission pursuant to this section, the commission may record a lien on the property in the amount of the penalty assessed by the commission. This lien shall have the force, effect, and priority of a judgment lien.

(f) In enacting this section, it is the intent of the Legislature to ensure that unintentional, minor violations of this division that only cause de minimis harm will not lead to the imposition of administrative penalties if the violator has acted expeditiously to correct the violation.

(g) "Person," for the purpose of this section, does not include a local government, a special district, or an agency thereof, when acting in a legislative or adjudicative capacity.

(h) Administrative penalties pursuant to subdivision (a) shall not be assessed if the property owner corrects the violation consistent with this division within 30 days of receiving written notification from the commission regarding the violation, and if the alleged violator can correct the violation without undertaking additional development that requires a permit under this division. This 30-day timeframe for corrective action does not apply to previous violations of permit conditions incurred by a property owner.

(i) The commission shall prepare and submit, pursuant to Section 9795 of the Government Code, a report to the Legislature by January 15, 2019, that includes all of the following:

(1) The number of new violations reported annually to the commission from January 1, 2015, to December 31, 2018, inclusive.

(2) The number of violations resolved from January 1, 2015, to December 31, 2018, inclusive.

(3) The number of administrative penalties issued pursuant to this section, the dollar amount of the penalties, and a description of the violations from January 1, 2015, to December 31, 2018, inclusive.

(j) Revenues derived pursuant to this section shall be deposited into the Violation Remediation Account of the Coastal Conservancy Fund and expended pursuant to Section 30823.

AB-1129 Coastal resources: structures: beach access and protection. (2017-2018)

Date	Action
02/01/18	Died on inactive file.
06/01/17	Ordered to inactive file at the request of Assembly Member Mark Stone.
05/18/17	Read second time. Ordered to third reading.
05/17/17	From committee: Do pass. (Ayes 9. Noes 7.) (May 17).
04/27/17	Re-referred to Com. on APPR.
04/26/17	From committee chair, with author's amendments: Amend, and re-refer to Com. on APPR. Read second time and amended.
04/18/17	From committee: Do pass and re-refer to Com. on APPR. (Ayes 7. Noes 3.) (April 17). Re-referred to Com. on APPR.
03/13/17	Re-referred to Com. on NAT. RES.
03/09/17	From committee chair, with author's amendments: Amend, and re-refer to Com. on NAT. RES. Read second time and amended.
03/09/17	Referred to Com. on NAT. RES.
02/19/17	From printer. May be heard in committee March 21.
02/17/17	Read first time. To print.

Trial Court Ruling in
Casa Mira Homeowners Association v. CCC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

CASA MIRA HOMEOWNERS ASSOCIATION, et al.,
Petitioners and Plaintiffs,

vs.

CALIFORNIA COASTAL COMMISSION, et al.,
Respondent and Defendant.
_____/

CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, et al.,
Real Parties in Interest.
_____/

Case No. 19CIV04677
CEQA ACTION

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

TENTATIVE DECISION AFTER COURT TRIAL/HEARING ON PETITION FOR WRIT

On October 12, 2022, a Court Trial/Hearing was held on the first and second claims alleged in the Verified Second Amended Petition for Writ of Administrative Mandamus and/or Traditional Mandamus filed in 19CIV04677, in Department 2 of this Court before the Honorable Marie S. Weiner. Thomas Roth, Esq. appeared on behalf of Petitioners and Plaintiffs; Nicholas Tsukamaki, Deputy Attorney General appeared on behalf of Real Party in Interest California Department of Parks and Recreation; Joel Jacobs, Deputy Attorney General, appeared on behalf of Respondents and Defendants California Coastal Commission and Jack Ainsworth as Executive Director of the CCC;

Fran Layton of Shute Mihaly & Weinberger LLP appeared on behalf of Real Party in Interest City of Half Moon Bay; Antoinette Ranit of Wittwer Parkin LLP appeared on behalf of Real Party in Interest Granada Community Services District; and Jennifer Wendell Lentz of Folger Levin LLP appeared on behalf of Top of Mirada LLC and Jennifer Thomas.

Counsel for the parties previously stipulated to set the Petition (first and second "causes of action") in 19CIV04677 for trial, and to bifurcate and adjudicate later the Complaint for inverse condemnation (third and fourth causes of action) in 19CIV04677.

Upon due consideration of the evidence set forth in the Administrative Record, the Verified Petition and Answers, and the briefs and oral arguments of counsel for the parties, and having taken the matter under submission,

THE COURT *TENTATIVELY* DECIDES AND ORDERS as follows:

The Petition is GRANTED. Respondent California Coastal Commission committed abuse of discretion, committed prejudicial legal error, failed to make necessary findings, and/or the findings made are not supported by the evidence; and Respondent mandated "conditions" which are unreasonable and/or infeasible.

A Writ shall issue ordering Respondent California Coastal Commission to VACATE and set aside its July 11, 2019 Decision on Coastal Development Permit Application No. 2-16-0784, and subsequent Commission Action on November 13, 2019; and to rehear and consider CDP Application No. 2-16-0784 in light of, and consistent with, this Court's rulings and determinations.

Petitioners' Evidentiary Objections are SUSTAINED. On Petition for Writ reviewing the decision of the CCC on a CDP permit, the Court should conduct such review relying upon the Administrative Record, and not evidence that is not part of the

Administrative Record. Sierra Club v. CCC (2005) 35 Cal.4th 839, 863. There was no motion to augment the record here. Petitioners' Second Requests for Judicial Notice are DENIED. Petitioners' initial Request for Judicial Notice No. 1 is DENIED; and Requests Nos. 2 and 3 that this Court take notice of the verified pleadings filed in this lawsuit is GRANTED (but unnecessary, as the Court can always consider the docket of the case upon which it is ruling).

Respondent's Requests for Judicial Notice are DENIED.

THE COURT *TENTATIVELY* FINDS as follows:

Standard for Statutory Interpretation of the Coastal Act

More recently in the case of Surfrider Foundation v. Martins Beach 1 LLC (2017) 14 Cal.App.5th 238, 251, the First Appellate District set forth the standard for statutory interpretation of the Coastal Act:

> "'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.' [Citation.] We begin by examining the statutory language because the words of a statute are generally the most reliable indicator of legislative intent. [Citations.] We give the words of the statute their ordinary and usual meaning and view them in their statutory context. [Citation.] We harmonize the various parts of the enactment by considering them in the context of the statutory framework as a whole. [Citations.] 'If the statute's text evinces an unmistakable plain meaning, we need go no further.' [Citation.] 'Only when the statute's language is ambiguous or susceptible of more than one

reasonable interpretation, may the court turn to extrinsic aids to ssist in interpretation.'" [Citation.] "When a provision of the Coastal Act is at issue, we are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations." [Citation.]

Section 30235 of the Coastal Act Applies to All Developments and Structures in CDP Application No. 2-16-0784

The CDP Application No. 2-16-0784, by Petitioner Casa Mira Homeowners Association and by 2 Mirada Road Ownership Group, seeks to construct a tied-back shotcrete seawall, 257 feet in length by 2.5 feet in width, along with a public access staircase along the bluff face, to replace existing emergency riprap revetment (sometimes referred to herein as the Project). The seawall is to shore-up an eroding bluff, and thus to protect four condominium buildings in the Casa Mira condo complex, *and* a multi-family apartment building at 2 Mirada Road, *and* a segment of the California Coastal Trial, *and* a sewer line of the Granada Sanitary District – all located in the City of Half Moon Bay, California.

Respondent California Coastal Commission *rejected* its Staff's Recommendations (whereby Staff recommended approval) and rejected its Staff's Proposed Findings at the hearing on July 11, 2019.

Of the 257 feet of seawall for the Project, Respondent California Coastal Commission only approved 50 feet located at the 2 Mirada Road location, but no protection of the California Coastal Trail or of the Casa Mira condo buildings. Respondent CCC decided that Petitioner Casa Mira Homeowners Association's buildings

were not entitled to any seawall protection under Section 30235, and neither is the Granada Sanitary District sewer line; but decided that the 2 Mirada Road buildings are subject to protection under the Coastal Act. Respondent further decided that the California Coastal Trail is in danger from erosion and is subject to protection under Section 30235, ***but*** *denied it seawall protection* – deciding instead, that it is a "feasible alternative" to simply *move* the Coastal Trail away from the ocean and place it *behind* Petitioner's buildings.

The key issue in this Petition proceeding is the interpretation of Section 30235 of the Public Resources Code, which states as follows:

> 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. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible.

This Court finds that the statute is unambiguous, and the disputed terms are used and to be interpreted in their ordinary, general, common sense meaning.

The phrase "shall be permitted" uses the future tense. The phrase "to protect existing structures" uses words in a present tense. A natural and ordinary reading of the statute is that if a structure *exists* presently, and the existing structure is now in danger from erosion, a seawall or revetment shall be permitted (i.e., a permit shall be issued for its construction) as long as the planned construction is also designed to eliminate or

mitigate adverse impacts on local shoreline sand supply. It is clear that the statute supports people protecting their existing structures from the danger of property damage due to subsequent erosion.

Respondent CCC advocates for a different interpretation. Specifically Respondent takes the position that Section 30235 only applies to "structures" that "existed" *before* the Coastal Act was enacted in 1976. It is Respondent's position that the Coastal Act should be interpreted such that all sea-side homes and buildings constructed after 1976, if endangered by erosion, should be allowed to fall into the sea and be destroyed, in complete deference to creation of beach sand by erosion of beach cliffs.

The Court finds that (i) Respondent CCC has misinterpreted an unambiguous statute; (ii) Respondent is attempting to add language to the statute; (iii) Respondent's interpretation is contrary to the stated purposes of the Coastal Act; and (iv) Respondent's interpretation is unreasonable.

Based upon Respondent's own erroneous interpretation and application of Section 30235, Respondent here erroneously decided that Petitioner's condo complex properties and Granada's sewer lines were not subject to Section 30235 and were not entitled to any seawall or other protection against erosion. Accordingly, Respondent failed to make any findings as to the propriety of the CDP Application as to Petitioner.

As for the California Coastal Trail, and obvious "coastal-dependent use", Respondent erroneously concluded that a seawall or other protection against erosion was not "required" – again misapplying Section 30235. Instead, Respondent decided that the subject portion of the Trail should *stop being used*, and instead moved to a different location away from the sea. This proposition was created *sui sponte* by members of the

CCC, for which proposal Respondent lacked substantive evidence to make any findings that the Trail could so be moved.

Respondent's Interpretation of Section 30235 is Erroneous and Unreasonable

Respondent CCC asserts that Section 30235 only applies to structures existing prior to the 1976 enactment of the Coastal Act, and relies upon multiple bases.

First, CCC asserts that the words "prior to the enactment of the Coastal Act" or "prior to the enactment of this statute" should be implied within the stated term "existing structures". "Existing structures" is not a defined term in the Coastal Act, and this Court had applied the term using common understanding. Adding language to a statute -- especially where, as here, the statutory language can be applied as written – is not appropriate. The Coastal Act does not permit the Court to add limiting descriptive phrases to its stated statutory language. Surfrider, at p. 253/

Indeed, Respondent CCC concedes that it previously interpreted and enforced Section 20235 with the understanding that "existing structures" meant exactly what this Court has found to be the meaning. Respondent CCC admits that it has only recently changed its mind, and now decided that it only means pre-Coastal Act buildings.

Second, Respondent argues that Legislative history should be considered in interpretation of Section 30235. The law is established that if a statute in unambiguous, Legislative history is irrelevant. Surfrider, at p. 255 fn. 14 ("Because the plain language of section 30106 controls, it is unnecessary to address appellants' arguments based on the legislative history of the Coastal Act.") Even if there was an argument to consider it here, counsel for all parties conceded *that there is no Legislative history* specifically regarding Section 30235 or any special meaning or purpose of the phrase "existing structures" at the time it was enacted. Even the articles that Respondent asked the Court

to consider – as to which evidentiary objections are sustained – *do not rely upon Legislative history* from the time of enactment of Section 30235. Section 30235 has never been amended since its enactment.

Third, Respondent argues that Section 30235 must be read in conjunction with Section 30253, and that such joint reading results in a conclusion that a seawall can never be authorized. Although the Court agrees that the statutes should be read in harmony, the Court finds that the construction of a seawall to protect "existing buildings", including those built after 1976, does not conflict with Section 30253.

Section 30253 states, in pertinent part: "New development shall do all of the following: . . . (b) Assure stability and structural integrity, and neither create or 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. . . ."

Courts have a "duty to 'harmonize' the 'various elements' of the Coastal Act 'in order to carry out the overriding legislative purpose as gleaned from a reading of the entire act.' [Citations.]" Sierra Club v. California Coastal Commission (2005) 35 Cal.4th 839, 858.Sections 30235 and 30253 can easily be read in harmony. As an example, we use the very simply example of a coast-side home. Section 30253 expressly applies to ***new*** construction. If a person wants to build a new house on coast-side property, under Section 30253, the person should not be allowed to build this "**new** development" in the first place **if** land stability and structural integrity would require that a seawall (or other fortification) be built at the same time as the house. Section 30235 expressly applies to *existing* construction. If a person already had a house on coast-side property, i.e., development that had already been considered by authorities and approved to build and is

built, and the situation arises that subsequent erosion necessitates that a seawall (or other fortification) be built to protect the existing (previously approved) home, then Section 30235 would allow such seawall construction.

Fourth, Respondent argues that this Superior Court should simply defer to the CCC's interpretation of the Coastal Act statutes, as it is a state agency. That is not the law. Interpretation of a law, which is not a regulation propounded by that agency, is in excess f its jurisdiction, "because interpretation of a statute is purely a matter of law, the final determination of the applicability of that law to the agency is outside the agency's jurisdiction. [Citations.]" California Administrative Mandamus §3.58.

In Yamaha Corp. of America v. State Board of Equalization 91998) 19 Cal.4th 1, 7, the Supreme Court held that an administrative body's interpretation of a statute may be "entitled to consideration and respect by the court, however, unlike quasi-legislative regulations adopted by an agency to which the legislature has confided the power to 'make law,'", it is the courts that have the final say on interpretation of statutes. "The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." Yamaha, at p. 7, quoting from Bodinson Mfg. Co. v. California e. Comm. (1941) 17 Cal.2d 321, 326.

The Court finds that Respondent's position is contrary to the stated purposes of the Coastal Act. It is Respondent's position that all structures along the coast that become endangered or unstable or damaged due to erosion should be allowed to deteriorate and collapse. Respondent takes the position that the erosion of sea-side cliffs creates beach sand, and that continued creation of a sandy beach is the ultimate goal –

and private property rights are insignificant. That is an unreasonable interpretation of the Coastal Act.

Rather, the Coastal Act requires a weighing and consideration of protection and enjoyment of nature *and* protection and enjoyment of private property. In Section 30001(d), the Legislature found and declared: "That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone." In Section 30001.5, the Legislature found and declared that a basic goals of the state for the coastal zone is to

In addition, this Court notes that evidence was presented, and it is uncontested, that Respondent CCC now regularly mandates that coast-side builders affirmatively waive all rights to request fortifications un the future, under Section 30235, in order to get a CDP approval by the CCC. No such waiver was requested or obtained as to the structures and developments that are the subject of Petitioner's CDP Application. Thus, Respondent's position is completely inconsistent: If Section 30235 allegedly only applies to structures "existing" prior to 1976, then why is CCC requiring applicants to affirmatively waive Section 30235 in order to obtain approval to build *new* structures post-1976? The waiver condition makes no practical sense unless Section 30235 applies in the first place.

Accordingly, Respondent's "interpretation" of Section 30235 is rejected as erroneous and unreasonable.

DATED: January 10, 2023

HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT

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By Electronic Mail

Sent to Commissioners and Staff

February 7, 2023

ITEM FRIDAY-18a
February 10, 2023
(Grossman, 121 Indio Drive, Pismo Beach)

California Coastal Commission
455 Market Street, Suite 300
San Francisco, California 94105
Attn.:Kate.Huckelbridge@coastal.ca.gov
Dan.Carl@coastal.ca.gov

RE: REPLY TO THE STAFF REPORT FOR STAFF'S CDP APPLICATION 3-23-0014 (DATED JANUARY 27, 2023) AND REQUEST FOR COMMISSION ADJUDICATION OF DEEMED FILED SEPARATE CDP AMENDMENT APPLICATIONS A-3-PSB-02-016-A2 AND A-3-PSB-02-016-A3[1]

Dear Madam Chair, Commissioners, and Executive Director Huckelbridge,

The undersigned, together with expert geotechnical consultants Patrick Shires and John Wallace of Cotton, Shires & Associates, Inc. (CSA) and Steven Kaufmann, Esq. of Nossaman, LLP, represent Gary H. Grossman, Trustee of the Gary H. Grossman Trust. Together, we have nearly 170 years of professional experience with the California coastal program.

1. Introduction. Our client is the sole owner of the shoreline property at 121 Indio Drive in the Sunset Palisades neighborhood of the City of Pismo Beach. (APN 010-205-002.)[2] The parcel

[1] Our client appreciates the time afforded by Executive Director Huckelbridge to this matter. The unfortunately delayed release by Commission staff of its complex, lengthy, and inuendo-laden Item 18a staff report on January 27, 2023 has required a high level of subsequent work by our client and his representatives, including on nights and weekends, through today to reply to the staff report. As of mid-day on February 7, 2023, we have not received the documents from Commission file 3-23-0014 that we requested pursuant to the Public Records Act on February 1, 2023. The project site at 121 Indio Drive, Pismo Beach also remains without the required notice of pending permit posting for "CDP application 3-23-0014", and thus has denied required notice to the public that traverses the City's Indio Drive upland lateral public accessway through the Sunset Palisades area of Shell Beach and Pismo Beach.

[2] The Commission and staff have neither the requisite real property interest in the parcel to lodge their own CDP application with regard to it, nor any legislatively delegated plenary authority to a consolidate unavoidably separately filed regular CDP amendment applications as a result of emergency conditions, the Commission's information requirements, or post-emergency CDP issuance permitting requirements.

extends between the Indio Drive right-of-way on the east and the 18.6-year epoch Mean High Tide Line (MHTL of the Pacific Ocean in San Luis Obispo Bay on the west,[3] and consists of the bluff top area adjacent to the street, the undulated (recurved) bluff, and the beach.

The 1950's era pre-Coastal Act single-story single-family residence is a legal conforming use located on the bluff top of the property, without available room for horizontal or vertical expansion, or for relocation. The Commission effectively certified the City LCP for all areas in its jurisdiction upland of the MHTL in April, 1984. CSA, based on site-specific investigation and analysis, has rendered its further professional opinion that the necessarily sequenced and separate Phase I sea cave and the Phase II replacement cutoff wall were constructed to landward of the MHTL, and all other proposed Phase II components by design and location will also be constructed upland of the MHTL.[4] Thus, the City's certified Local Coastal Program constitutes the standard of review for coastal development permit review.

1. Introduction. Our client, as further discussed below, respectfully requests the Commission's recognition of his property's unique site-specific facts, history, and project consistency with the applicable standards of review, including as analyzed in the Commission's findings of approval, confirmed at trial and on appeal, that:

(a) the subject pre-Coastal Act residence, including as repaired and maintained with all required permits, constitutes a "structure" under the meaning of City LCP Policy S-6 and Coastal Act § 30235;

(b) the residence therefore qualifies for protection against marine erosion of the property on which it is located, provided that such development conforms (as it does) to the standards in certified City LCP Policy S-6 and its implementation program;

(c) in 2003, the Commission – in full recognition that the LCP constitutes the applicable standard of review for our client's application for proposed bluff shotcrete facing,[5] cutoff wall, bluff drainage, and vegetation restoration

[3] The property boundaries were recorded at the time of the subdivision that created the parcel in 1950.

[4] **Exhibit 1**, CSA, Response to California Coastal Commission Staff report dated January 27, 2023, RE: Coastal Development Permit Application Number 3-23-0014, 121 Indio Drive, Pismo Beach, California (APN 010-205-002), dated February 7, 2023.

[5] The approved bluff shotcrete facing includes steps and a patio, which provide essential monitoring, maintenance/repair, and emergency access to the shoreline protective structures and the otherwise not readily accessible beach public recreational easement that our client dedicated to the City.

development (in harmony with the Coastal Act's public access and recreation standards) – in relevant part on *de novo* review on appeal in in CDP A-3-PSB-02-016 approved the cutoff wall, bluff shotcrete facing (with the patio and steps), bluff drainage system, and restoration of overhanging vegetation, with (1) conditions that include (i) dedication to the City of the public recreational access easement on the beach, (ii) payment of a mitigation fee for Florin Street vista point public access improvements and beach sand supply, (iii) requirement for maintenance and repair of the shoreline protective components over the 75-year term of the approved project description, (iv) regular monitoring of the authorized development and reporting to Commission staff, for authorization of recommended maintenance and repair and continuation of the CDP monitoring, repair, and maintenance protocol during successive five-year periods, (v) a specific requirement that changes to the approved project plans require a CDP amendment (rather than a new CDP application),[6] and (2) a finding pursuant to CEQA that the project, as modified by our client on appeal before the Commission and as conditioned by the CDP, will avoid significant adverse effects on the environment;[7]

(d) in 2004, the Commission issued the CDP after our client satisfied all of its conditions precedent to issuance;

(e) in 2005, Commission staff reviewed and approved CSA's as-built plans for the bluff shotcrete facing,[8] cutoff wall, bluff drainage, and vegetation restoration;

(f) In 2004-2005, our client and the Commission jointly and successfully defended the Commission's CDP approval in Superior Court and the State Appeals Court against third party litigation. (*Surfrider Foundation v. California Coastal Commission,* San Francisco Sup. Ct. No. CPF 03503643 (2004), California Ct. of App. No. A 110033 (Div. 5, 2005).[9])

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[6] CDP A-3-PSB-02-016, at 17 ("No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is necessary. ")

[7] CDP A-3-PSB-02-016, at 45.

[8] The approved development includes steps and a patio on the bluff shotcrete facing.

[9] The briefs and Court decisions are already in the Commission's files; we include them here by reference.

(g) In 2005-2006, in a separate project, (1) our client performed work to repair and maintain the residence in a manner that was congruent with its pre-Coastal Act footprint, (2) the residential repair and maintenance work (a major portion of which was directed by City building officials to bring parts of the *interior* structure up to code) received all City building and other ministerial permits determined by the City to be required, (3) the LCP-delegated City official (City Community Development Director) determined – and a licensed California architect, on inquiry by Commission *policy* staff, by detailed, site-specific quantified analysis confirmed - that the work had no coastal resource impacts and did not rise to the level where a CDP was required, and informed Commission enforcement staff that no LCP violation had occurred,[10] and (4) the Commission demonstrably acquiesced , in that (i) Commission enforcement staff at no point has either served our client with a notice of alleged LCP or Coastal Act violation, or even contacted him, (ii) enforcement staff took no other action to halt the ongoing repair and maintenance work, which proceeded into 2006, with the City continuing to issue ministerial permits until the work was completed and passed plan check, (iii) between 2005 and 2022, enforcement staff pursued the matter no further for 17 years when it again sent a letter to then City reasserting the allegations asserted in 2005, in response to which the City did not simply "decline" to pursue a violation – the City once more informed Commission enforcement staff that no LCP violation had occurred, yet inexplicably, (iv) now 18 years later, the thinly stretched enforcement staff is still "investigating" this matter;

(h) in 2009, 2013, and 2018, in compliance with permit conditions, our client's consultants performed the requisite monitoring and reporting of the approved shoreline protection, continuing to confer with staff about the findings and recommendations, receiving staff's authorization for repair and maintenance during the respectively following monitoring period, and our client subsequently implemented the staff-authorized repair and maintenance work;[11]

(i) In March-April, 2020, CSA's site-specific geotechnical analysis identified that a substantial new sea cave had recently outflanked, undercut, overcut, locally

[10] The letter from Matthew Downing, AICP, Community Development Director, City of Pismo Beach, to Ms. EIllie Oliver, California Coastal Commission, February 28, 2022, summarizes these facts.

[11] The demise in 2008 of 2003 co-permittee Mr. Walter Cavanagh, then owner of 125 Indio Drive, Pismo Beach, and uncertainties regarding his estate unavoidably postponed the scheduled 2008 monitoring to 2009, in which Commission staff concurred.

fractured, and eroded the (2005) cutoff wall, and had also eroded various areas of the bluff and bluff shotcrete facing on our client's property, which endangered the bluff and residence with catastrophic collapse to the beach, with resultant danger to the public health and safety of persons using the dedicated beach accessway and to nearshore coastal resources.

CSA recommended an immediate action plan (Phase I) for infilling of the sea cave with shotcrete to buttress the fractured sandstone above it and the in turn overlying relatively unconsolidated terrace materials on which the house is located.[12] CSA further recommended that the unreinforced infill be sufficiently recessed below overhanging material along the mouth of the cave to facilitate installation of a Phase II replacement cutoff wall within the contoured alignment of the approved as-built (2005) cutoff wall, with other bluff slope stabilizations that would be designed based on further site-specific geotechnical investigation following completion of the Phase I sea cave infill.

CSA clearly informed the Commission that the sea cave infill was neither designed nor would be constructed as a shoreline protective device, but rather that the stability and functionality over its 15-20 year design life depended on the installation of the to-be designed replacement cutoff wall, bluff shotcrete facing repairs, and, likely, other downcoast bluff stabilization measures. In that context, CSA determined – advised technical and regulatory staff in the course of professional consultation in early April 2020 that concurrent Phase I and Phase II design work was infeasible because of the emergency conditions at the site that required sequential site-specific geotechnical investigation and analysis, preparation of separate site-specific supplemental geotechnical reports, and immediate implementation of the Phase I sea cave infill, with associated emergency CDP and regular CDP amendment processing, monitoring, and reporting, while Phase II replacement cutoff wall, bluff shotcrete facing repair, bluff drainage repairs and enhancement, and stabilization of the downcoast bluff would require temporally and in parts spatially separate design, regulatory processing, and construction, monitoring, and reporting schedules.

The respective Phase I and Phase II schedules were further separated by the need for coordination, subsequently occurring emergency conditions that required additional emergency CDP design, regulatory processing, and construction monitoring, reporting, and adaptive design and management (that resulted in

[12] CSA, March 30, 2020; CSA, April 6, 2020.

further minimization of the downcoast sea cave infill envelope and replacement cutoff wall height). In sequence, Commission staff performed additional review of CSA's geotechnical analysis and recommendations, found that an emergency existed due to bluff instability, and issued requested emergency CDP G-3-20-0025 and emergency CDP G-3-21-0023 for infill of the sea cave in 2020 and 2021, respectively, followed by emergency CDP G-3-20-0035 for construction of the replacement cutoff wall along the outside edge of the previously completed infill, to protect the infill and adjacent overlying sandstone and terrace materials against direct, undercutting, and flanking marine erosion.[13] The Commission in each instance concurred in these three sequenced emergency CDP's. Commission staff helped shape that sequenced Phase I and Phase II schedule by limiting the respective scopes of the Phase I and Phase II emergency bluff instability mitigation projects, while nearshore ocean conditions during the Fall, 2021 and Winter, 2021-2022 contributed significantly to delays in the completion of the replacement cutoff wall.

(j) **Exhibit 2**, to be transmitted under separate cover, analyzes with specificity the applicable LCP and Coastal Act Chapter 3 public access-recreation standards to the Phase I and Phase II development described in our client's applications for CDP A-3-PSB-02-016-A2, CDP A-3-PSB-02-016-A3, emergency CDP G-3-20-0025, emergency CDP G-3-21-0023, and emergency CDP G-3-21-0035.

2. Background.

(a) Our client holds Commission-issued and judicially sustained CDP A-3-PSB-02-016, which remains contractually binding on both our client and the Commission. Our client also holds all required permits for the repair, maintenance, and

[13] For example, in issuing emergency CDP G-3-20-0025, staff found and declared that "Based on the materials presented by the Permittee (with reference to " CDP A-3-PSB-02-016" in the preceding paragraph) (Gary Grossman), wave action associated with storms during the 2018-2019 and 2019-2020 winter seasons created an approximately 70-foot long, up to 27-foot deep, and up to 3-foot high (*sic*) sea cave that compromises the bluff, the existing approved armoring, and the residence on the property. The Permittee's geotechnical engineers determined that failure of the bluff could occur suddenly at any time if no action is taken to support the overlying Pismo Formation bedrock and terrace deposits. The Coastal Commission's staff engineer and the Coastal Commission's staff geologist reviewed the Permittee's geotechnical report, consulted with the Permittee's geotechnical consultants, and concur in their findings. The proposed emergency development is therefore necessary to prevent or mitigate loss or damage to private property that would result if the ceiling of the cave were to collapse. The Commission did not object to staff's findings and issuance of this, or the other two, emergency CDP's.

improvement of the pre-Coastal Act residence on the property. Although the Item 18a staff report raises the specter of violations in connection with the City-approved work on the residence, it acknowledges that the evidence therefor is lacking, in fact – as carefully analyzed by a California licensed architect and provided to Commission staff in 2005 – none exist, and Commission enforcement staff has at no time written to our client during the past 18 years to allege that the work violated any applicable LCP (or, for that matter, any Coastal Act public access and recreation) standard.

(b) The Commission has been in possession of our client's two certified accurate and complete, unavoidably and necessarily phased, and fully mitigated applications for the regular Phase I CDP amendment since August 7, 2020, and for the regular Phase II CDP amendment since November 12, 2020. Both applications were accompanied by our client's payment in full of the Commission's respective permit application fees. By deeming our client's two separate CDP amendment applications to be separately filed on or about May 20, 2021, and assigning them separate Commission CDP application numbers A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3 later that year, Commission staff plainly acknowledged and concurred with our client that the development proposed in these two functionally related projects could not feasibly be the subject of a single permit application pursuant to the Commission's relevant regulation at 14 CCR § 13053.4(a).[14]

(c) Commission staff agrees that the residence constitutes a Coastal Act § 30235 regulatory "structure" and a LCP Policy S-6 "principal structure, consistent with the Commission's finding in 2003, and thus the residence qualifies for shoreline protection;[15]

(d) the CDP issued in 2004, with a regulatory term for the fully mitigated project shoreline protection development by approved application description to 2078,[16];

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[14] "To the maximum extent feasible, functionally related developments to be performed by the same applicant shall be the subject of a single permit application."

[15] Item 18a Staff Report at 38 ("based on the available data, the Commission finds that it must treat the residence at 121 Indio Drive as still qualifying, as it did in 2003 when the Commission approved the CDP for the original seawall, as an existing principal structure for the purposes of Coastal Act Section 30235 and the LCP").

[16] CDP Special Condition 1 requires that the Permittee shall perform development as described in the "Amended Project Description" (April 22, 2003) and supplemented descriptions (May 5, 2003, June 16,

(e) after our client satisfied all conditions precedent to issuance, including, but not limited to (1) compliance with CSA's January 2003 geotechnical investigation report, (2) dedication to the City of the public beach access easement, and (3) payment of the beach access/sand supply mitigation fee to the City, the issued CDP authorized *and required* our client to construct, repair, and maintain – pursuant to completed regular monitoring/reporting and processing of CDP amendments, as applicable -- the bluff shotcrete facing, bluff drains, patio and steps, cutoff wall, and restoration of overhanging vegetation on the upper bluff;[17]

(f) the residence has been determined by CSA to be in danger from marine erosion for purposes of the relevant shoreline protection standards (LCP Policy S-6 and Coastal Act § 30235, referenced therein);[18]

(g) our client has clarified the Phase II CDP amendment application A-3-PSB-02-016-A3 by incorporating (1) CSA's quantified, site-specific, sand production analysis and beach quality sand mitigation recommendations as part of the project description, (2) CSA's location of the monitoring-reported as-built replacement cutoff wall alignment, including its undulating, concave, contoured, textured, and reference bluff site color-harmonized facing, and (3) CSA's recommendation that the six *in situ* soil nails be retained in place behind the proposed new (400 sf) bluff shotcrete facing, to avoid disturbance of the relatively unconsolidated Terrace Materials;

(h) no feasible alternative exists to the Phase I sea cave infill because (a) CSA on site-specific geotechnical analysis has analyzed that without the infill's stabilizing effect of the Pismo Formation (Tmp) and Terrace Materials (Qt) above the sea cave, the bluff and residence would collapse, and (b) removal of the emergency infill from

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2003, and June 25, 2003), which based on analysis by the project coastal engineer identify the regulatory/economic life of the shoreline protection to be 75 years. The CDP notes that the City rates the reasonable economic life of the project as a minimum of 100 years. (At 26.). Inconsistently and without reference as to source, the CDP also parenthetically identifies the "life of the project" to be 50 years (at 32) and by reference to project design engineers, with shoreline protection "for 50 years or more". (At 36.)

[17] CDP, Special Condition(d), at 17; Special Condition 4, at 19; Special Condition 11, at 21; Special Condition 12(b), at 22.

[18] ECDP G-3-20-0023, at 1, ECDP G-3-20-0025, at 1; ECDP G-3-0035, at 1; Item 18a staff report, at 41.

the ±1.6 foot to 6 foot high cave is infeasible pursuant to CalOSHA worker safety standards and would result in the same catastrophic collapse;[19]

(i) no feasible alternative exists to CSA's recommended Phase II shoreline protection components, as proposed in CDP amendment application A-3-PSB-02-016-A3, because:

(1) the CDP requires that the CDP-authorized bluff shotcrete facing and Bluff drains be repaired and maintained, as recommended by CSA in 2003;[20]

(2) the limited area on the bluff top in relation to the Indio Drive right-of-way, the strict height limits that apply to the area, and the absence of any proportionate transfer of development program in the substantially built-out and also eroding Shell Beach area preclude relocating the residence, e.g., to landward on the property or elsewhere on a similarly situated property in Shell Beach, reconstructing the residence as a narrowed two-story structure, or reducing the footprint of the residence to a narrow single-family structure adjacent to the street right-of-way; reduction of the modestly-sized residence would substantially diminish its functionality as a single-family residence, its economic value, and implicate an unconstitutional taking of the property given that LCP Policy S-6, referenced Coastal Act § 30235, and the California Constitution, which provide for the protection of the residence against erosion, subject to applicable mitigation as discussed below;

(C) CSA, on further site-specific geotechnical investigation and analysis, has determined that the unreinforced sea cave infill on the warped sea cave plane was not (could not be) designed or constructed to function as shoreline protection against direct, undercutting, flanking or overcutting marine erosion, and hence the (further minimized during construction) replacement cutoff wall is necessary for the protection of the bluff, residence, and essential sea cave infill, and cannot be removed;[21]

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[19] CSA, Maintenance/Repair/Restoration/Protection - Phase II Supplemental Geotechnical Investigation Report, 121 Indio Drive Coastal Bluff Erosion and Under-Cutting, Pismo Beach, California (APN 010-205-002), dated October 13, 2020, at 25-27; Item 18a staff report, at 41-42.

[20] CDP, at 22-23, 24.

[21] CSA, Phase II Supplemental Geological Report, October 13, 2020; Item 18a staff report at 41-42.

(D) CSA, on further site-specific geotechnical investigation and analysis, has also determined that a partial or full underpinned foundation of the residence does not constitute a feasible alternative to the replacement cutoff wall because such underpinning (i) would not protect it against continued direct, flanking, and undercutting marine erosion of the unreinforced concrete fill area, which would ultimately fail, and the caissons would then be threatened, (ii) would require extensive demolition and reconstruction of the residence and (iii) would itself require a shoreline protective structure to prevent that marine erosion;

(E) CSA, on further site-specific geotechnical investigation and analysis, has additionally determined that annual and seasonal importation of substantial volumes of beach quality sand that are necessary to raise the beach sand profile to the levels of the top of the sea cave infill, so as to protect it against erosive wave attack and runup, is infeasible because it would (i) abrade the erosional channel-bisected sandstone beach plane, (ii) over time destabilize and erode the unreinforced concrete fill and adjacent Tmp, and (iii) require reconstruction of the down-worn sandstone beach plane to seaward of the sea cave infill;

(F) CSA, on further site-specific geotechnical investigation and analysis, has further determined that (i) a shallow cutoff wall (with a 1-2 foot deep keyway foundation) would have a limited service life of less than five years, before it would require replacement, inconsistent with the purpose of the project, and would also be inconsistent with the proposed shoreline protection of the heavily eroded adjacent (downcoast) residentially developed property, (ii) an intermediate depth replacement cutoff wall, as was constructed to mitigate emergency conditions pursuant to ECDP G-3-21-0035, without the recommended tie-backs, bluff drain maintenance, repair, and enhancement, bluff slope restoration, and 400 sf bluff shotcrete facing would not meet the project objective of fully bluff stabilization to protect the residence, (iii) a deep foundation replacement cutoff wall, with a keyway foundation of 8 foot depth, may protect the residence against marine erosion for 50 years, but would require extensive and disruptive construction over an extended period of time, with substantial disruption of the Indio Drive bluff top lateral accessway, substantial traffic interruptions on cul-de-sac Indio Dive, and disturbance of the neighborhood.

(G) CSA has analyzed that (1) the as-built Phase I sea cave infill, as-built Phase II replacement cutoff wall, and proposed Phase II bluff shotcrete facing repair, downcoast overhanging bluff slope restoration grading, tiebacks, and bluff drain repairs, maintenance, and enhancement constitute necessary and essential bluff

stabilization to prevent and mitigate the near-term catastrophic failure of the bluff and our client's residence, and, (2) removal of the completed replacement cutoff wall and completed sea cave infill would consign the bluff and our client's residence to near-term catastrophic failure and render the property economically valueless. A Commission action to deny or require removal of these essential bluff stabilization measures would therefore be inconsistent with the constitutional and Coastal Act prohibitions of a physical or regulatory taking by the Commission.

3. Standard of Review. Following its certification in April 1984, the City LCP became the applicable standard of review for new development (as well as for exemptions from the general CDP requirement), whether by the City or the Commission (Coastal Act §§ 30519(a); 30604(b)), provided that such development is also required by the Coastal Act to be consistent with the public access and recreation policies of Coastal Act Chapter 3. (Coastal Act § 30604(c).)

In the underlying CDP (2003), the Commission on recommendation of staff held that the area of the cutoff wall, bluff shotcrete facing, bluff drains, and overhanging vegetation are subject to the LCP standards of review, while the project by its location between the first road and the sea must also be consistent with the Coastal Act Chapter 3 access and recreation policies.[22] Again, CSA has determined that all of the completed emergency cutoff wall, with its keyway in Pismo Formation sandstone, and all other Phase I and Phase II components contained in CDP amendment applications A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3 are located upland of the 18.6-year MHTL datum (in San Luis Obispo Bay, 4.62 feet MLLW), and thus not within the Commission's retained permit regulatory jurisdiction below the MHTL, pursuant to Coastal Act § 30519(b), where the Commission review might be guided, but is not bound, by the certified LCP.

First, the Item F18a staff report errs in characterizing the location of the replacement cutoff wall on the area below the 18.6-year MHTL (tidelands), which by CSA's site-specific analysis is located on the beach plane *seaward* of the seaward edge of the replacement cutoff wall. The staff report has produced no site-specific survey data, and can produce none, that locates any of the Phase I or Phase II shoreline protection structures to seaward of the 18.6 year MHTL on the beach plane.

Second, the staff report also errs in characterizing the location of the replacement cutoff wall on submerged lands, which reach from the ordinary low water mark on the beach plane (here, 1.04 feet on the beach plane) out to the state-federal fixed boundary three geographic miles offshore. Again, the keyway is not located on the "beach", but rather in sandstone that prior to keyway

[22] See: CDP A-3-PSB-02-016, at 24 ("The standard of review for this CDP determination is the City LCP and the Coastal Act access and recreation policies.")

excavation was located (a) to landward of the 18.6-year MHTL, and (b) in the outer sea cave beneath overhanging Pismo Formation, beneath the extant (2005) cutoff wall in 2021, and/or beneath extant overhanging (2005) bluff shotcrete facing.[23]

4. Sea Cave Infill Development Envelope (CDP amendment A-3-PSB-02-016-A2, ECDP G-3-20-0025, ECDP G-3-201-0023). The proposed and as-built Phase I unreinforced sea cave shotcrete infill – *necessary to prevent the catastrophic failure of the bluff and residence onto the dedicated beach public recreational easement* - is located to landward of the 18.6-year MHTL, below overhanging sandstone and (2005) bluff shotcrete, and upland of mapped topographical contour elevations 6-8 feet MLLW.[24] Staff concurs with our client that the area of the sea cave infill was not currently usable beach space in 2020 or 2021, when the infill was installed during emergency conditions.[25]

Staff errs, however, in its speculative "passive erosion calculation" premise that the sea cave would have – or in the 75-year regulatory life of the CDP, would – become "usable space" as the bluff above it would have eroded away. The Item F18a staff report contains no site-specific geotechnical analysis to support such a contention, but instead relies on generalized and inapplicable bluff erosion modeling that is premised on the absence of any of the existing, CDP-approved, and proposed Phase II protective measures, notwithstanding that the staff report acknowledges, in harmony with CSA's site specific geotechnical analysis, that no feasible alternatives to the proposed and completed emergency protective measures exist.[26] CDP-

[23] CSA, Emergency Replacement Cutoff Wall and Minor Cutoff Wall/Return Wall Extension (ECDP G-3-21-0035) – Condition 10 Checklist, 121 Indio Drive Coastal Bluff Under-Cutting, Pismo Beach, California (APN 010-205-002), March 25, 2022, Figure 1, Figure 2.

[24] CSA Maintenance/Repair/Restoration - Phase I Special Condition 10 Checklist, 121 Indio Drive Coastal Bluff Under-Cutting, Pismo Beach, California (APN 010-205-002), Figure 2, dated May 28, 2020, depicts the location (in plan view, by a gray overlay) of the partly completed sea cave infill performed in April, 2020, pursuant to emergency CDP G-3-20-0025. Figure 3 illustrates the typical location of the partly completed sea cave infill in April, 2020, in cross-section views (by gray overlay). CSA, Maintenance/Repair/Restoration and Completion of Residual Sea Cave Shotcrete Infill – Condition 10 Checklist, 121 Indio Drive Coastal Bluff Under-Cutting, Pismo Beach, California, (APN 010-205-002), Figure 1, dated May 2021 depicts the location (in plan view, by a gray overlay) of the partly completed sea cave infill performed in April 2020, pursuant to emergency CDP G-3-20-0025. Figure 2 depicts the location of the downcoast sea cave infill and shotcrete infill repairs performed in June 2021, pursuant to emergency CDP G-3-21-0023 (in plan view, both by blue overlay). Figure 3 illustrates typical cross-section views of the infill in 2020 (by gray overlay), and in 2021 of the downcoast end of the sea cave and areas of infilled interstices upcoast from it (both by blue overlay).

[25] Item F18a Staff Report, at 48.

[26] Item F18a Staff Report, at 41-43.

required repair and maintenance of the CDP-approved and authorized bluff shotcrete facing in combination with the required emergency replacement cutoff wall (requested to be made permanent through CDP application A-3-PSB-02-016) and the proposed limited new downcoast shoreline protection above it will function, consistent with LCP Policy S-6, to preclude such "passive erosion", as further discussed below.

5. Cutoff Wall, Bluff Shotcrete Facing, Bluff Drains, Downcoast Bluff Restoration and Stabilization (CDP amendment A-3-PSB-02-016-A3). The proposed and as-built Phase II replacement cutoff wall, repair and maintenance of the CDP-approved bluff shotcrete facing and bluff drains, and new downcoast grading to restore a stable bluff slope in relatively unconsolidated overlaying terrace materials, stabilization tiebacks, retained six soil nails, 20x20 foot bluff shotcrete facing, and associated bluff drains - *necessary to prevent the catastrophic failure of the bluff and residence onto the dedicated beach public recreational easement* - is located to landward of the 18.6-year MHTL, below overhanging sandstone and (2005) bluff shotcrete, and mapped topographical contour elevations 5-10 feet MLLW.[27] CSA on site-specific analysis has determined that (a) the 18.6-year MHTL is located on the beach plane *to seaward of* the contoured replacement cutoff wall,[28] (b) the as-built bluff shotcrete facing starts at elevations 14-15 feet NAVD88 and extends to elevations ±43 feet,[29] (c) the tieback lock-off positions will be located at the new bluff shotcrete facing at elevations ±24 feet NAVD88 to elevation ±40 feet NAVD88, with their anchor points 38 feet (h) to nearly 90 feet (h) inland thereof,[30] (d) the repaired and new bluff drains will be located at elevations 16 fee NAVD88 (h) to 38 feet NAVD88 (h) and 2-68 feet (h) of the replacement cutoff wall,[31] (e) the proposed retained *in situ* soil nails will be located at elevations ±20 feet NAVD88 to ±30 feet NAVD 88, ±5

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[27] CSA, Maintenance/Repair/Restoration/Protection - Phase II Supplemental Geotechnical Investigation Report, 121 Indio Drive Coastal Bluff Erosion and Under-Cutting, Pismo Beach, California (APN 010-205-002), dated October 13, 2020, Figure 6.

[28] CSA, Geotechnical Response to California Coastal Commission Staff Report dated January 27, 2023, RE: Coastal Development Permit Application Number 3-23-0014 121 Indio Drive, Pismo Beach, California, (APN 010-205-002) , dated February 6, 2023, at 6.

[29] CSA, Emergency Replacement Cutoff Wall and Minor Cutoff Wall/Return Wall Extension (ECDP G-3-21-0035) – Condition 10 Checklist, 121 Indio Drive Coastal Bluff Under-Cutting, Pismo Beach, California, (APN 010-205-002), dated March 25, 2022, Figure 2.

[30] CSA, CSA, Maintenance/Repair/Restoration/Protection - Phase II Supplemental Geotechnical Investigation Report, 121 Indio Drive Coastal Bluff Erosion and Under-Cutting, Pismo Beach, California (APN 010-205-002), dated October 13, 2020, Figure 9.

[31] Id., at Figures 7-9.

feet (h) to ±30 feet (h) landward of the replacement cutoff wall below,[32] (f) the as-built undulated, contoured, concave, textured, and reference bluff color-harmonized replacement cutoff wall has been built substantially in the alignment of the (2005) cutoff wall, to landward of overhanging bluff shotcrete facing and sandstone, and CSA's recommended alignment,[33] and (i) overhanging draping vegetation on the upper bluff face will be restored as illustrated by CSA in its October 13, 2020 Supplemental Geotechnical Report, typical cross section of draping vegetation in Figure 4.

The Item F18a staff thus errs in its assertion, unsupported by any site-specific mapping in topographical plan or section view, that the as-built and proposed Phase II project components are located on the beach,[34] seaward of the mean high tide line,[35] and on submerged lands.[36]

6. Beach/Shoreline Area Loss. The Phase I and Phase II development will result in a small net gain (on the order of 5 sf) of publicly accessible beach plane area on our client's property.[37]

Our client has proposed mitigation measures in what he submitted to the Commission and had ultimately requested, in the meeting on November 4, 2022 with then-Executive Director Jack Ainsworth and staff, to have before the Commission this month. However, although neither the Phase I nor the Phase II projects involve any structural development on the beach, the Item F18a staff report proposes – without any valid nexus or proportionality to any specifically identified project impacts from the Phase I and Phase II components on the beach or shoreline area - that the Commission exact a $1.2 million (and possibly over $1.6 million) "beach/shoreline area loss" mitigation fee, payable to the City, for "public access and recreational projects in the City of Pismo Beach (i.e., projects that provide access to and along the shoreline, including but not limited to new public beach access stairways, or stairway repairs/improvements to ensure

[32] Item 18a Exhibit 8, Page 1 of 2.

[33] CSA, Emergency Replacement Cutoff Wall and Minor Cutoff Wall/Return Wall Extension (ECDP G-3-21-0035) – Condition 10 Checklist, 121 Indio Drive Coastal Bluff Under-Cutting, Pismo Beach, California (APN 010-205-002), at 4 and Figure 1.

[34] Item F18a Staff Report, at 1, "Project Location".

[35] Item F18a Staff Report, at 25.

[36] Id.

[37] Geotechnical Response to California Coastal Commission Staff Report dated January 27, 2023 RE: Coastal Development Permit Application Number 3-23-0014 121 Indio Drive, Pismo Beach, California, (APN 010-205-002), at 6. Reproduced in Exhibit 2, hereto.

vertical beach access; new coastal pathways or pathway repairs/improvements; new blufftop or beach park or park repair/improvement projects; beach creation through nourishment and/or property acquisition; etc.)."[38]

Commission-required mitigation measures (effectuated through terms and conditions on approved CDP's) must be reasonable and are limited to ensuring that approved development will be in accordance with the provisions of the applicable standards of review. (Coastal Act § 30607). The Commission has no plenary authority to impose any other conditions (mitigations).[39] Staff bases its mitigation fee calculation on speculation about future bluff retreat at our client's property, an inapplicable historic bluff retreat rate, unfounded denial that the CDP-approved shoreline protective measures exist *and* have a fully mitigated authorization to exist through 2078, and a wish – unsupported by any adopted or promulgated regulation – to generate substantial revenue by an unpermitted tax on this applicant for two specific, filed CDP amendment applications that staff has for over two years declined to bring to the Commission for hearing and action, while issuing three emergency CDPs for shoreline protective works that staff was informed by CSA could effectively not be removed without causing the catastrophic failure of the residence.

The Item F18a staff report's beach/shore area loss scheme reflects a fanciful calculation by which the footprint of a "CDP seawall footing/foundation" (for which our client has not applied) and "void fill" (which was performed as part of the implementation of emergency CDP G-3-21-0023) implicates a "loss of approximately 2,651 square feet of beach and shoreline recreational area (236 square feet associated with the seawall's footprint and 2,415 square feet associated

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[38] Item F18a staff report, at 11.

[39] *See*, SB 1579, § 30333, as amended in the Senate, April 19, 1976, where author's amendments to this first-stage coastal bill in the enactment history of the California Coastal Act of 1976 specifically deleted from the bill the proposed provision, contained in the bill as introduced in the Senate on February 10, 1976, that: "The commission may~~, from time to time, prepare and adopt amend, and rescind~~ *adopt* rules and regulations that may be necessary to carry out the purposes and provisions of this division, and to govern procedures of the commission and regional commissions. ~~Except as provided in Section 20400, such rules and regulations shall be adopted in accordance with the Administrative Procedure Act (Chapter 4.5 (commencing with Section 11370), Part 1, Division 3, Title 2 of the Government Code) and shall be consistent with this division and other applicable law.~~ **~~The commission and each regional commission has, and may exercise, any express power granted to it pursuant to this division and any powers necessary to, implied in, or incidental to any such express power.~~** Each regional commission may adopt any regulations or take any action it deems reasonable and necessary to carry out the provisions of this division; provided, however, that no regulation ~~shall be~~ adopted by a regional commission ~~unless~~ *shall take effect until* the commission has first reviewed such proposed regulation and found it consistent with this division." (Deletions are shown by strike-outs. Emphasis added.)

with coastal squeeze due to such armoring over the initial 23-year time frame)“ because the “footprint” and “squeeze” “the public may be prevented from accessing land that would otherwise become public trust”.[40] To that area, which cannot be developed with a residential use, staff proposes to apply a value of $450.25 per square-foot, for an astonishing demand that our client pay $1,287,905.

First, our client in the CDP amendment applications A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3 has applied for no ““CDP seawall footing/foundation”, whatever that inchoate phrase may signify. We construe it to perhaps mean the keyway for the Phase II cutoff wall (not a *new* structure, but rather the *replacement* for the failed, previously approved cutoff wall) , which – although seaward of the Phase I sea cave infill, and by design and location serves as its shoreline protective structure – is nonetheless located above the MHTL. However, in fully mitigating the previously CDP-authorized cutoff wall with respect to any impacts on public access it may have over the 75-year regulatory life of the CDP-authorized shoreline protection, our client has not only satisfied that requirement, but cannot now be again compelled to pay another mitigation fee for the replacement cutoff in substantially the same keyway location.

Second, the Item F18a staff report erroneously calculates as “void fill” the entire Phase I unreinforced sea cave infill area, which by design and construction provides bluff support but does not serve as shoreline protection, as CSA has made clear since its April 6, 2020 Phase I supplemental geotechnical report. The staff report thus erroneously double dips into its would-be mitigation source.

Third, the Item F18a staff report land valuation of $450.25/square foot for the replacement cutoff wall keyway foundation and “void fill” areas, if they were *arguendo* otherwise valid bases for mitigation, is unsupported by a professional appraisal of the value of that land, and therefore without requisite foundation.

Fourth, staff’s “footprint” and aptly, if ironically named, “squeeze” mitigation calculation is unsupported by a requisite Commission adopted and promulgated regulation, and thereon constitutes an invalid underground regulation that staff cannot apply to exact monies from either the Phase I or the Phase II project.

Fifth, staff’s proposed $1,287,905 “beach/shoreline access loss” mitigation fee is (a) unrelated (lack nexus) to a valid public purpose, given that staff’s stated beneficiaries -- new public beach access stairways, or stairway repairs/improvements to ensure vertical beach access; new public coastal pathways or public pathway repairs/improvements; and/or new blufftop or beach park or park repair/improvement projects -- are unrelated (and in fact unrelatable) to the spatial impact

[40] Id., at 61.

on lateral beach public access that staff claim the Phase I sea cave infill and Phase II replacement cutoff wall would have *at 121 Indio Drive*,[41] and (b) lack proportionality to any such impacts, in that (1) the City previously determined, and the Commission certified in the LCP, that no new beach access stairs would be built (and none now exist) for public access from the Florin Street vista point to the Florin Street Cove pocket beach, from which the public could then obtain lateral access along the beach on and adjacent to 121 Indio Drive; (2) no other public coastal pathways exist or could be repaired or improved on 121 Indio Drive and the adjacent developed parcels in private ownership; (3) no vacant land exists in any blufftop, beach, or park area near 121 Indio Drive that could otherwise be lawfully acquired *that would provide safe access to and along the shoreline and thereby offset any Phase I seawall infill or Phase II replacement cutoff wall coastal hazards impacts.*

7. Beach Quality Sand Mitigation. (a) The underlying CDP in relevant parts authorized, for its 75-year term from 2003, the protection the residence against shoreline erosion provided by the authorized cutoff wall and bluff shotcrete facing, *and required our client, as a condition precedent to issuance of the CDP, to fully mitigate sand loss associated with the project over its 75 year life by the payment of an in-lieu fee to the City.* Pursuant to emergency CDP G-3-21-0035, the downcoast end of the as-built, here curved and thereby further minimized, cutoff wall has been extended 7 feet along the downcoast end of our client's property and by a return wall along the property line to Station 0+0 feet. Per CSA's recommendation, the keyway, in excavated sandstone, for the foundation of the replacement cutoff has also been deepened to a minimum of four feet below adjacent, variously fractured, undercut, and channel-eroded, sandstone. As a result, only the ±20 x ±20 foot area (±400 sf) of relatively unconsolidated terrace materials and the fractured, friable, underlying Pismo Formation sandstone above the downcoast cutoff wall remains exposed to destructive direct and flanking marine erosion.

(b) CSA, on laboratory analysis (2003) of site-specific sampling of the Pismo Formation sandstone (Tmp) and the overlying Terrace Materials (Qt), has identified that degradation of them generates beach quality (particle size) sand by volume of 8.0% and 7.3%, respectively. Smaller particles of sand do not persist on the beach plane.

CSA has calculated that the unprotected 400 sf area will likely contribute 12.6 cubic yards of beach quality sand to the local sand budget.[42] By comparison, the Santa Maria River watershed

[41] Our client understands, on information and belief, that no beach level real property exists or is currently available for purchase in the Sunset Palisades neighborhood (i.e, within walking distance of Florin Street Cove

[42] CSA, Calculation of Projected Volumes of Beach Quality Sand Production During 20 Years at 121 Indio Drive Without Phase I and Phase II Development, California Coastal Commission Staff Letters, dated September 10, 2020, October 23, 2020 and December 14, 2020, Regarding Pending Applications for Phase I and Phase II Amendments to Coastal Development Permit A- 3-PSB-02-016, 121 Indio Drive, Pismo Beach, California (APN 010-205-002), dated February 17, 2021, at 15.

that constitutes the primary producer of beach quality sand to the littoral cell in which the beach at 121 Indio Drive is located, has been reported to generate ±60,000 cy of such sand per year.

At Commission staff's request, CSA also calculated, based on its site-specific laboratory data, the projected beach quality sand loss associated with the Phase I sea cave infill. Using the Commission staff formula equates that volume to 36.2 cubic yards. Of that 36.2 cubic yards, 11.8% was not accounted for by the sand loss mitigation fee paid in 2004. Consequently, 11.8% of 36.2 cubic yards or 4.3 cubic yards of beach quality sand should be mitigated for Phase I.

Similarly, and also at Commission staff's request, CSA, in addition, calculated l, based on its site-specific laboratory data, the projected beach quality sand loss associated with the Phase II development, that, using the Commission staff formula, equates to 165.9 cubic yards. Of that 165.9 cubic yards, 23.1% was not accounted for by the sand loss mitigation fee paid in 2004. Consequently, 23.1% of 165.9 cubic yards or 38.3 cubic yards of beach quality sand should be mitigated for Phase II.

Accordingly, CSA determined that the combined total projected beach quality sand loss volume from Phase I and Phase II that requires mitigation pursuant to Coastal Act Section 30235 is 42.6 cubic yards. CSA recommended that our client mitigate this potential (worst case) beach quality sand deprivation impact through providing for proportionate, sequential (Year 1, 5, 10, 15, and 20) *in situ* deposition of 42.6 cubic yards of beach quality sand on the back beach area of the property with monitoring and reporting as proposed in the Phase II CDP amendment. For effective beach quality sand supply mitigation, we further recommend that its implementation in Years 1, 5, 10, 15, and 20 be combined for both Phase I and Phase II mitigation for a combined rate of 8.6 cubic yards per mitigation year. At an estimated $40/cubic yard for delivered beach quality sand in Pismo Beach, the economic value of that mitigation beach quality sand would be $1,704 for each deposition, for a 20-year total of $8,520.

By contrast, Commission staff in its formulaic calculation assumes – without reference to laboratory analysis of site-specific beach quality sand particle size, generation data, or the relevant local shoreline sand supply mechanism from bluff erosion - that all sand which degradation of the sandstone and terrace materials at the site may generate, irrespective of its particle size and ability to persevere on the beach at 121 Indio or in the local segment of the littoral cell through even one lunar day's tidal cycle, constitutes sand that shoreline protection over the proposed 20 year life of the Phase I and Phase II projects should be required to mitigate. The Commission has neither adopted nor promulgated a regulation that authorizes this scheme, which therefore constitutes an underground regulation and is invalid. Staff calculates that volume to be 74.9 cubic yards of sand per year, or 1,722.44 cubic yards over 23 years, for a recommended mitigation fee requirement of $104,292.26, payable to the City.

8. The Commission Staff Report on Staff's "CDP application 3-23-0014" presents and erroneously analyzes a fictitious, non-existing, and improperly noticed CDP application, on which the Commission has no Coastal Act authority to act.[43] However, our client's applications for CDP amendments A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3 are supported by a detailed consistency analysis of the project in relation to the LCP and the Coastal Act's public access and recreation standards, which has been in the Commission's record on them since November 12, 2020 and serve, if the Commission so finds on the record of its proper proceedings, following fair hearing, as a basis for your making the findings required by case law**.** Our client on February 5, 2023 respectfully requested the Executive Director to consider that material in the course of preparing a staff report that accurately, fairly, and completely analyzes the actual project descriptions in the applications for CDP amendments A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3.

(a) Our client is not the applicant for "CDP application 3-23-0014", contrary to the false representation on the Item 18 staff report:[44]

(b) Our client has not made application to the Commission in 2023 for any CDP and no application form, submitted by an applicant with a property interest in APN 010-205-002, exists for "CDP application 3-23-0014".

(c) Our client has not signed, in 2023 or at any other time, any application for "CDP application 3-23-0014" attesting to its truth, completeness and accuracy, a requirement both of the Central Coast District CDP application form and Commission regulations (14 CCR § 13053.4(c)).

(d) As staff has admitted, there is no "CDP application 3-23-0014" in its files.[45]

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[43] The application number "3-23-0024" signifies, in sequence, the Central Coast District ("3"), the year the application was made ("23") and the serial application number ("0014").

[44] Item 18a Staff Report, at 1.

[45] Email from shown Item 18a author Ms. Katie Butler, a Central Coast staff supervisor, to Norbert Dall, February 6, 2023 ("other than our database file checklist and the current staff report materials that are linked on the agenda, the file for 3-23-0014 has no additional materials or documents other than those items that have been carried over and incorporated from your application submittals and all email exchanges between our staff and you (and the other project consultants and counsel). As the staff report notes and as Logan mentioned on Friday, the applications you have submitted have simply been renumbered and consolidated into one for processing purposes, and all of the materials you have submitted to date constitute the current file.")

(e) Our client has not authorized Commission staff to be his agent or representative in either his applications for CDP amendments A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3 or "CDP application 3-23-0014".

(f) Neither staff nor the Commission has the requisite real property interest, required by the Commission regulations (14 CCR § 13053.5(b)), to be able to present a CDP application to the Commission for review, full – including site-posted - public notice, hearing, and action.

(f) The Executive Director – acting through Central Coast District staff – prior to the *post hoc* staff report publication date (January 27, 2023, when all Coastal Act deadlines for Commission hearing and action on his two long-pending applications had passed, the Permit Streamlining Act (PSA) 180-day and 270-day deadline for Commission action had passed, and the PSA's 60-Day Notice deadline of February 18, 2023 for issuance by operation of law of CDP amendments A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3 was nearly at hand), has not made the filing determination, required by the Commission's regulations (14 CCR § 13056(b)), that the required permit application form and necessary attachments and exhibits for "CDP application 3-23-0014" have been found to be complete for processing, because there is none.

(g) The executive director has not prepared a written staff report for each of our client's two pending (staff-deemed filed) applications to amend CDP A-3-PSB-02-016, inconsistent with Commission regulation 14 CCR § 13057(a).

(h) The Item 18a staff report contains an illusory project description that comports neither with the project description in the applications for CDP amendments A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3, nor in the three emergency CDP's issued by Commission staff to our client in 2020-2021. In relevant principal parts, the recessed Phase I unreinforced sea cave infill buttress, located two to 27 feet to landward of the seaward edge in March, 2020 of the overhanging bluff, (2005) cutoff wall, and (2005 and subsequently maintained and repaired bluff shotcrete facing, is (1) not "on the beach", as the Item 18 staff report erroneously asserts[46] and even those CSA's site-specific project plans and sections, attached as exhibits to the staff report, show,[47] and (2) by CSA's expert, site-specific, analysis and design, cannot and does not function as a shoreline protective structure, but rather requires the separate and subsequent Phase II replacement cutoff wall, exterior to the infill, to protect it from direct, flanking, undercutting, and overcutting marine erosion. The staff-issued three emergency CDPs, in which the Commission concurred, and the emergency construction sequence and timelines for the infill document those facts.

[46] Item 18a staff report, at 1.

[47] Item 18 staff report exhibits 5 and 6.

Staff raised no objections to them when our client submitted daily monitoring reports and the 30-Day post-construction completion reports for the completed emergency work in 2020 and 2021-2022. The Phase II replacement cutoff wall is located, by design and implementation pursuant to emergency CDP G-3-21-0035, substantially in the alignment of the (2003) CDP-approved and (2005) authorized as-built cutoff wall, below the pre-March, 2020 overhanging bluff materials, and not "on the beach", not to seaward of the 18.6-year MHTL, and thus not in the Commission's retained regulatory jurisdiction (Coastal Act § 30519(b)). Similarly, the Phase II bluff shotcrete facing repairs, maintenance, and minor downcoast extension, bluff drains, downcoast 400 sf bluff restoration and stabilization are located variously between elevations 14-43 feet NAVD88, as staff report exhibit 5, page 2 of 2, shows, and thus not on the "beach".

(i) The Phase I and Phase II components are therefore subject to the substantive standards of the LCP (Coastal Act § 30604(b)) and the public access and recreation standards of the Coastal Act (§30604(c)), rather, as the staff report represents - in its blatant quest to abrogate and destroy our client's contractual and due process rights to implement CDP A-3-PSB-02-016 over its full term, well beyond 2040 (or 2043) – all Coastal Act Chapter 3 standards, with the controlling LCP standards being reduced to mere "guidance".

(j) The Item 18a staff report discloses that staff consolidate our client's applications for CDP amendments A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3 in extra-legal "CDP application 3-23-0014", (1) for its convenience, (2) to subject the Phase I infill buttress and the Phase II shoreline protective works to inapplicable regulatory controls, (3) to repeal our client's contractual development, completed mitigation, and repair/maintenance rights during the remaining nearly 50 year term of the CDP, and (4) to escape, *sub voce*, staff's own failures, and thus the Commission's, to comply with the filing determination and notice deadline in Commission regulations (14 CCR § 13XXX), the hearing and action deadlines of Coastal Act §§ 30621 and 30622, respectively, and the filing and action deadlines of the Permit Streamlining Act. Staff's consolidation is premised on the first part of the Commission regulation (14 CCR §13058) that "Where two or more applications are legally or factually related, the executive director may prepare a consolidated staff report. Either the commission or the executive director may consolidate a public hearing where such consolidation would facilitate or enhance the commission's ability to review the developments for consistency with the requirements of the Coastal Act." However, staff's consolidation effort fails. First, because there is no valid application before the Commission for "CDP application 3-23-0014". Second, the aforementioned emergency, site-specific expert geotechnical investigation, analysis and design required by the Commission's own application requirements, and the timelines imposed both by the pre- and post-construction regulatory requirements in the three emergency CDP and construction work day, labor, and material limitations necessitated our client's separate and sequential submittal of the applications for CDP amendments A-3-PSB-02-016-A2 and A-3-PSB-

02-016-A3 and rendered application for all proposed development unavailable and thus infeasible, within the terms of Commission regulation 14 CCR §13053.4(a).[48] Notably, at the point of Phase II CDP application submittal on November 12, 2020, or within the six months thereafter (before staff deemed the separate application to have been filed), Commission staff did not solicit or require our client to implement §13053.4(a) by amending it into the Phase I CDP application submitted on August 7, 2020. Neither the Coastal Act nor any Commission regulation authorize Commission staff, on its own motion, or the Commission to consolidate two separate CDP (here, amendment) applications, or to craft and process a own new CDP application by staff or the Commission to consolidate functionally related development.

(k) The City, in the serious exercise of its enforcement authority pursuant to the certified LCP, determined in 2005 that our client's work to repair and maintain the residence on the property did not involve any impacts during construction, or subsequently, to coastal resources, did not require a CDP for it, was permitted by applicable City building and other ministerial permits, and that the work was not performed in violation of the LCP.[49] Our client received no notice of alleged

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[48] "To the maximum extent feasible, functionally related developments to be performed by the same applicant shall be the subject of a single permit application."

[49] Letter from City of Pismo Beach Community Development Director Matthew Downing, AICP, to Ms. Ellie Oliver, California Coastal Commission, February 28, 2022, at 1. ["On January 22, 2022, the City of Pismo Beach sent you a letter in response to your January 14, 2022, letter notifying the City of Coastal Commission enforcement staff's renewed interested the above referenced matter. As stated in our letter, based on review of applicable records, it appears that our respective staffs addressed the issue in 2005, concluded there was no enforcement issue, and considered the matter closed. Nonetheless, because the property is located within the City's certified Local Coastal Program (LCP) permit jurisdiction, the City committed to reviewing the situation and providing a more definitive response to Coastal Commission enforcement staff. This letter serves as the City's response regarding this matter.

"The work associated with the alleged violation involved repair and maintenance of the central portion of the house at 121 Indio Drive and did not involve any impacts to coastal resources, either during construction or subsequently. As state previously, it appears that at the time of construction 17 years ago, it was understood by our respective staffs that the work did not amount to a "violation," and the matter was considered closed. We have reviewed the City's records and find that no additional information is present to change the City's position that this matter does not amount to a violation and has been appropriately closed.

"The City takes seriously its enforcement authority in implementing our LCP that the Coastal Commission certified, and therefore we are happy to provide this response to you. As you can imagine, as with any coastal city or county, our certified LCP and the delegated authority to the City under the Coastal Act would be meaningless if the City's past determinations, as here, were not treated as final and dispositive."]

violation from the Commission in relation to the repair and maintenance of the residence, or with regard to any other development on the property. As part of the application for CDP amendment A-3-PSB-02-016-A3, our client noted that erroneous development had occurred in the relatively small (20x20 foot) area of the unconsolidated marine terrace materials on the downcoast bluff, above the CDP-authorized (2005) cutoff wall and adjacent, and proposed to restore and stabilize this area consistent with the applicable LCP standard of review.[50] The Item 18a staff report concurs with CSA's site-specific analysis and (as further clarified) recommendation for minor slope restoration grading to correct an overhanging bluff condition, install three tiebacks and new sustainable bluff drains, retain six *in situ* soil nails in place, and protect these minimized measures against direct and flanking marine erosion by contoured, textured, and color-harmonized bluff shotcrete facing, consistent with the requirements of LCP Policy S-6. Neither the no project alternative or another alternative is available that would meet the necessary bluff stabilization and protection objectives of the Phase II project. Our client appreciates staff's concurrence in this Phase II component.

(l) The Item 18a staff report generalizes that shoreline protective devices have significant adverse impacts to public access and recreation,[51] but provides no site-specific analysis that the Phase I recessed sea cave infill (which by CSA's design and location is a buttress, rather than "shoreline armoring") or any of the Phase II development components will have any adverse effect on beach recreational access. As noted, none of the proposed development is on the beach. The infill is recessed below and to landward of the March, 2020 lower bluff material edge. The replacement cutoff wall, by its recurved location, adds a small amount of new accessible beach area to the public beach recreational access easement area for which our client dedicated an easement to the City in 2004. The bluff shotcrete facing, bluff drains, and downcoast bluff stabilization are located on private property, not accessible to the public, a minimum 14 feet above the back beach. The stabilization of the bluff against catastrophic collapse to the beach has, by the emergency work that has been completed and the relatively small amount of proposed additional work, protected the public's use of the beach, the public health and safety, and the quality of coastal waters. The shoreline squeeze" analysis in the Item 18a staff report also disclaims, without site-specific analysis or reference to authority -- and *sub voce* in relation to our client's constitutional right to protect his property consistent with the LCP -- that our client in 2004, in the context of the CDP contract between the Commission and him for the regulatory life of the CDP-approved shoreline protective works, fully mitigated their

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[50] The erroneous development, which apparently resulted from a misunderstanding of what the authorization and requirement in CDP Special Condition 1, at 17, for consistency with CSA's (2003) recommendations and plans entailed, has had no significant adverse effect coastal resources, but rather helped to protect the relatively unconsolidated slope terrace materials.

[51] At 60.

intercession to potential bluff retreat that otherwise might create, under the oceanic conditions premised by staff, a failed – and impermissibly Commission-taken (Coastal Act §30010) -- residence and public infrastructure atop, or that discharges to, an episodically awash Pismo Formation outcrop. The $1,287,905 mitigation fee that Special Condition 4 of the Item 18a staff report proposes the Commission extract from our client for offsite and public access and recreational projects somewhere else in the City, that would not mitigate any potential (locally very minor and cumulatively non-existent) Phase II project impacts at the site, lacks nexus and proportionality, and is therefore inconsistent with controlling law. Notably, the staff report's generalized examples of funding by the proposed mitigation fee variously do not now exist in operation, are not authorized by the LCP, or are infeasible due to lack of requisite available properties.

However, our client has committed, by his application for CDP amendment A-3-PSB-02-016 to *in situ* specified beach quality sand nourishment, as recommended by CSA, and clarifies that that commitment includes the quantifications set forth in CSA's supplemental memorandum "Geotechnical Response to California Coastal Commission Staff Report dated January 27, 2023, RE: Coastal Development Permit Application Number 3-23-0014 121 Indio Drive, Pismo Beach, California (APN 010-205-002), "dated February 6, 2023. Further, our client is open in the context of consultation with Commission staff, as requested previously and again on February 5, 2023, to discussion of (1) nourishing the beach plane on his property at the 5-year monitoring intervals with beach quality sand to bring the beach profile to the elevation identified in CSA's 2003 geotechnical report, to mitigate any quantified, site-specific loss of beach quality sand from any proposed new Phase II component (i.e., the 400 sf downcoast bluff stabilization) that was not previously mitigated in 2004, or (2) proportionate participation in the context of a City-wide or regional beach quality sand restoration (nourishment) project that includes the public agencies which presently substantially interrupt flow of beach quality sand to the Santa Maria River watershed and to the Santa Maria River littoral cell.

(m) Our client respectfully declines Special Condition 7 in the Item 18a staff report. Our client has a right, pursuant to the CDP and certified LCP, to maintain and repair the residence and other structures on the property without having to comply with staff's proposed onerous and LCP-inconsistent "redevelopment", "armoring modification", and "additional mitigation" requirements through a new CDP (based on the non-existent "CDP application 3-23-0014) that would repeal the contractual CDP to which the Commission is a party with our client.

(n) Exhibits to the Item 18a staff report are variously erroneous, incomplete, and misleading, and thereon deny our client a fair hearing on his applications for staff-filed CDP amendments A-3-PSB-02-016-A2 and CDP amendments A-3-PSB-02-016-A3, as follows:

First, on Exhibit 1, page 1, the Regional Location Map, the low resolution base aerial photographic image is undated, not time-stamped (in relation to shown water levels along the shoreline), not orthorectified, lacks a scale, and does not identify the project site for either the Phase I CDP amendment A-3-PSB-02-016-A2 sea cave infill or the separate Phase II CDP amendment A-3-PSB-02-016-A3 components. The project site by title and arrow points to the nearshore waters of San Luis Obispo Bay, which is not the project site. The shown street address is also not on the project site. The red balloon points to an indistinguishable and variously obscured area.

Second, on Exhibit 1, page 2, the first Project Location map, the low resolution base aerial photographic image is undated, not time-stamped (in relation to shown water levels along the shoreline), not orthorectified, lacks a scale, and does not identify the project site for either the Phase I CDP amendment A-3-PSB-02-016-A2 sea cave infill or the separate Phase II CDP amendment A-3-PSB-02-016-A3 components. The project site by title and arrow points to the nearshore waters of San Luis Obispo Bay, which is not the project site. The shown street address is also not on the project site. The red balloon points to the roof of the residence at 121 Indio Drive, which is not the site for development pursuant to either application.

Third. on Exhibit 1, page 3, the second Project Location map, the low resolution base aerial photographic image is undated, not time-stamped (in relation to shown water levels along the shoreline), not orthorectified, lacks a scale, and does not identify the project site for either the Phase I CDP amendment A-3-PSB-02-016-A2 sea cave infill or the separate Phase II CDP amendment A-3-PSB-02-016-A3 components. The project site by title and arrow points to our client's (2004) dedicated beach public recreational access easement area, which not the project site. The shown street address is for over 90% also not on the project site. The red balloon points to the roof of the residence at 121 Indio Drive, which is not the site for development pursuant to either application. This image shows that all but one of the residences between 99 Indio Drive and 201 Indio Drive, and the City Florin Street vista point ("Overlook"), are protected by one or more shoreline protective structure. The blue balloon obscures nearly all of the vista point, which our client's (2004) public access mitigation fee paid to develop.

Fourth, Exhibit 2, page 1, is a crudely constructed mosaic image of at least two and potentially three oblique frames, taken with a zoom lens, of ebbing high tide conditions in San Luis Obispo Bay that is not time-stamped (in relation to shown water levels along the shoreline), lacks a scale, and does not identify the project site for either the Phase I CDP amendment A-3-PSB-02-016-A2 sea cave infill or the separate Phase II CDP amendment A-3-PSB-02-016-A3 components. The project site by title and lower arrow points to our client's (2004) dedicated beach public recreational access easement area, which is not the project site for any structural development. The upper arrow points to the CDP-approved steps to the lower patio (not visible in this image), which are not the project site for any structural development. This image does

not depict the area of either the proposed Phase I sea cave infill (which in any case, as built under emergency conditions, is not visible or the proposed II project components. This image does depict the large overhanging block to the left and above the lower arrow, which overhang was removed during replacement cutoff wall construction to position it along the alignment of the CDP-authorized (2005) cutoff wall.

Fifth, Exhibit 3, pages 1 – 3, contain undisclosed excerpts from low altitude photographic imagery by the Department of Navigation and Ocean Development and its successor, the Department of Boating and Waterways, without photo acquisition dates or times (in relation to shown water levels along the shoreline), lack a scale, and do not identify the project site for either the Phase I CDP amendment A-3-PSB-02-016-A2 sea cave infill or the separate Phase II CDP amendment A-3-PSB-02-016-A3 components, but do erroneously identify the pre-Coastal Act residence at 121 Indio with an arrow and the notation “Grossman”. Our client did not own the property in 1972, 1979, or 1989.

Sixth, Exhibit 3, page 4, contains an undisclosed excerpt from low altitude oblique photographic imagery by the Adelmann’s first long distance coastal reconnaissance helicopter venture from 2002, which is an elite view perspective that is unavailable to most persons, is not time stamped (in relation to shown water levels along the shoreline), lacks a scale, has our client’s name superimposed on the roof of the residence that is not part of either the Phase I or Phase II project, does not show the Phase I or Phase II project component areas, and depicts the eroding, protected, and built City shoreline.

Seventh, Exhibit 3, page 5, contains an undisclosed excerpt from low altitude oblique photographic imagery by the Adelmann’s elite helicopter reconnaissance in 2004 that is unavailable to most persons, is not time stamped (in relation to shown water levels along the shoreline), lacks a scale, has our client’s name superimposed on the roof of the residence that is not part of either the Phase I or Phase II project, does not show the Phase I or Phase II project component areas, and depicts the eroding, protected, and built City shoreline. The Phase II shoreline protection authorized by the CDP on our client’s property has been built, while authorized upper bluff and bluff top vegetation restoration and patio work are underway.

Eighth, Exhibit 3, page 6, contains an undisclosed excerpt from low altitude oblique photographic imagery by the Adelmann’s elite helicopter reconnaissance in 2010 that is unavailable to most persons, is not time stamped (in relation to shown water levels and accreted masses of cut kelp along the shoreline), lacks a scale, has our client’s name superimposed on the roof of the residence that is not part of either the Phase I or Phase II project, does not show the Phase I or Phase II project component areas, and depicts the further eroding, protected, and built City shoreline. The Phase II shoreline protection authorized by the CDP on our client’s property is in place, locally with spalling; the (2005) authorized recurved cutoff wall is visible in a recessed

position below the overhanging bluff shotcrete facing, below and to the right of the downcoast knob on the property.

Ninth, Exhibit 3, page 7, contains an undisclosed excerpt from low altitude oblique photographic imagery by the Adelmann's elite helicopter reconnaissance in 2015 that is unavailable to most persons, is not time stamped (in relation to shown water levels and accreted masses of cut kelp along the shoreline), lacks a scale, has our client's name superimposed on the roof of the residence that is not part of either the Phase I or Phase II project, does not show the Phase I or Phase II project component areas, and depicts the further eroding, protected, and built City shoreline. The Phase II shoreline protection authorized by the CDP on our client's property is in place, locally with spalling; the (2005) authorized recurved cutoff wall is visible in a recessed position below the overhanging bluff shotcrete facing and Pismo Formation rock below and to the left of the downcoast knob of the property.

Tenth, Exhibit 3, page 8, contains an undisclosed excerpt from low altitude oblique photographic imagery by the Adelmann's elite helicopter reconnaissance in 2019 that is unavailable to most persons, is not time stamped (in relation to shown water levels and accreted masses of cut kelp along the shoreline), lacks a scale, has our client's name superimposed on the roof of the residence that is not part of either the Phase I or Phase II project, does not show the Phase I or Phase II project component areas, and depicts the further eroding, protected, and built City shoreline. The Phase II shoreline protection authorized by the CDP on our client's property is in place, locally with spalling; the (2005) authorized recurved cutoff wall is visible to the left and right of the of the downcoast knob of the property. Loss of beach profile during the diminished sand mobilization to the Santa Maria River littoral cell, regionally associated with the multi-decadal early 21st century drought, is apparent.

Eleventh, Exhibit 4, page 1, contains a reproduction of CSA's April, 2020 (Phase I) Site Topographic and Bluff Undercutting Plan sheet, mapped on a vertical drone image of winter beach plane (Match 23-24, 2020) conditions, with 2-foot topographic contours, depiction of the marine erosion-created sea cave perimeter (horizontal erosion area) and landward trending rock joint extension, and the position (in plan view) of the upper and lower wave cut edges of the sea cave mouth, and the superimposed as-built location of the (2005) as-built cutoff wall. The sheet was submitted by our client to Commission staff as part of CSA's Phase I geotechnical investigation report, Commission engineering and geological staff reviewed it, and concurred in CSA's site-specific analysis and finding that the sea cave endangered the bluff and residence at 121 Indio Drive with catastrophic collapse to the beach public recreational access easement located to seaward of the seaward bluff (Pismo Formation, bluff shotcrete facing) edge. This vertical aerial does not identify any human-accessible beach area below the overhanging bluff.

Twelfth, Exhibit 4, page 2, contains a reproduction of CSA's April, 2020 (Phase I) sections 1-1' through 5-5' in illustrative section view, the location of which sections are shown in plan view on Exh. 4, page 1. The sections depict the recent sea caving, overhanging bluff material, and *in situ* (2005) authorized cutoff wall, and Pismo Formation sandstone on the beach plane, but do not show the elevation of beach quality sand, pebbles, or cobbles in beach profile view.

Thirteenth, Exhibit 4, page 3, contains a reproduction of CSA's April, 2020 (Phase I) shotcrete, concrete, grout plan for infilling of the sea cave in plan view, where the infill is shown by hachures and a perimeter line that is recessed ± 2 feet (h) from the seaward edge of the (2005) authorized cutoff wall.

Fourteenth, Exhibit 4, page 4, contains a reproduction of CSA's April, 2020 (Phase I) illustrative sections 1-1' through 5-5', with CSA's recommended sea cave infill shown by red hachures and the approximate location of Phase II reinforced concrete cutoff wall restoration shown by dashed red vertical rectangles.

Fifteenth, Exhibit 5, page 1, contains a reproduction of CSA's March, 2022 (Phase II) 30-Day/Condition 10 Compliance Report as-built plan view, which shows the completed Phase I sea cave infill that was previously completed pursuant to issued emergency CDP's G-3-20-0025 and G-3-21-0023, in dark grey overlay, and the as-built location of the undulating (concave) Phase II replacement cutoff wall textured seaward facing in substantially the same location as the (2005) authorized cutoff wall, locally with shotcrete infill and residual Pismo Formation rock between the previously completed sea cave infill and the replacement cutoff wall alignment.

Sixteenth, Exhibit 5, page 2, contains a reproduction of CSA's March, 2022 (Phase II) 30-Day/Condition 10 Compliance Report as-built section view, which shows the completed Phase I sea cave infill that was previously completed pursuant to issued emergency CDP's G-3-20-0025 and G-3-21-0023, in dark grey overlay, the as-built replacement cutoff wall and shotcrete infill at its rear, and the replacement cutoff wall foundation keyway (excavated into Pismo Formation sandstone typically above the 18.6-year MHTL and below overhanging bluff material, in an area that constitutes neither tidelands below the MHTL or submerged lands). Encountered narrow and thin lenses of sand in the (2005) keyway alignment below the overhanging bluff material were typically associated with sub-parallel or oblique dips in Pismo Formation outcrops; rigorous monitoring during replacement cutoff wall construction resulted in a small (±5 sf) net gain of post-construction humanly accessible beach area on the property.

Seventeenth, Exhibit 6, page 1, contains a an annotated reproduction of CSA's Phase II Restoration Plan (October 13, 2020), in plan view, that was included in the Phase II CDP amendment application A-3-PSB-02-016-3, with an undisclosed contributor's highlighting of Phase II tieback, over-steepened bluff face restoration area (delimited by CSA with a magenta

line), dark black line restoration grading contours, emergency sea cave infill pursuant to G-3-12-0023 shown by black hachures, and the recurved replacement cutoff wall located to landward of the NAVD88 equivalent of elevation 4.62 feet MLLW and recessed and recurved from the (2005) downcoast cutoff wall segment for alignment in an eroded Pismo Formation outcrop along the downcoast property line.

Eighteenth, Exhibit 6, page 2, contains a reproduction of CSA's Phase II Restoration Plan (October 13, 2020), in typical section view, annotated with highlighting by an undisclosed contributor that identifies proposed Phase II bluff restoration and stabilization that remains to be completed in 2023 and the recessed emergency sea cave infilling (2020, 2021) and replacement cutoff wall construction below overhanging bluff materials (2021-2022) that were completed pursuant to Commission staff-issued emergency CDP's G-3-20-0023, G-3-21-0025, and G-3-21-0035.

Nineteenth, Exhibit 7, page 1, contains a reproduction of CSA's revised Drawing No. 4 (February, 2022), which is not part of either the Phase I CDP amendment application A-3-PSB-02-016-A2 or Phase II CDP amendment application A-3-PSB-02-016-A3, but rather a CSA representation of its recommendation, following accelerated sea cave erosion in a heavily fractured area of Pismo Formation, with overlying relative unconsolidated Terrace Materials, along the downcoast property line, easterly (landward) of the proposed Phase II development. An unidentified contributor has circled and denoted the area that CSA recommended for a 4th emergency CDP in February, 2022; Commission staff erroneously includes it in the discursive project description contained in the Item 18a staff report for imaginary "CDP application 3-23-0014".

Twentieth, Exhibit 8, page 1, contains an excerpted (clipped along the bottom by an undisclosed contributor) reproduction of an undated CSA plan view drawing that locates the (2005) authorized sea cave infill, downcoast cutoff wall, and the approximate location of nine drilled soil nails in overlaying relatively unconsolidated Terrace Materials above the cutoff wall; the notation "Figure 1, Existing Conditions Plan" indicates that it may have been part of a CDP amendment application that Commission staff, after consultation, declined to accept for filing and therefore was not processed until Commission staff deemed the post-construction application for bluff slope restoration and stabilization in this area filed in May, 2021, with clarification on recommendation by CSA that the remaining *in situ* six soil nails be retained in the context of the proposed Phase II 400 sf bluff slope restoration.

Twentyfirst, Exhibit 8, page 2, contains an excerpted reproduction of a CSA section F-F' that shows the (2005) authorized downcoast sea cave infill, soil nails, and the Commission staff authorized sea grass planter box near elevation 16 feet (no datum) that was subsequently destroyed by wave runup.

Twentysecond, Exhibit 9, page 1, contains a reproduction from the DA emergency CDP G-3-21-0035 30-Day Report, dated March 25, 2022, with photographic imagery of newly completed (that day) (February 3, 2022) area segments of the reduced height, recurved, textured, and Commission staff-approved reference bluff color harmonized replacement cutoff wall, before the color infused shotcrete had cured for a minimum 28 days, and locally with light color mineral effervescence, exfiltrating groundwater on the downcoast end of the replacement cutoff wall, from the contact of the overlaying relatively unconsolidated Terrace Materials on the fractured Pismo Formation sandstone, the prograding sea cave along the downcoast property line, and a thin layer of *in* situ and adjacent beach quality sand. The illustration documents the substantial conformance of the as-built replacement cutoff with the proposed Phase II application for CDP amendment A-3-PSB-02-016-A3 and emergency CDP G-3-21-0035.

Twentythird, Exhibit 9, page 2, contains a reproduction from the DA emergency CDP G-3-21-0035 30-Day Report, dated March 25, 2022, with DA-annotated photographic imagery (February 3, 2022) of the as-built recurved, concave facing, textured emergency post-construction replacement cutoff wall groundwater exfiltration, incipient mineral effervescence, heat differentiated surface drying, and locally coarse beach quality sand accretion conditions. The illustration documents the substantial conformance of the as-built replacement cutoff with the proposed Phase II application for CDP amendment A-3-PSB-02-016-A3 and emergency CDP G-3-21-0035.

Twentyfourth, Exhibit 9, page 3, page 2, contains a reproduction from the DA emergency CDP G-3-21-0035 30-Day Report, dated March 25, 2022, with DA-annotated photographic imagery (February 3, 2022) of details of the recurved, concave, textured, heat differentiated drying replacement cutoff wall, locally with exfiltrating groundwater, mineral effervescence, and locally coarse beach quality sand accretion conditions. The image on the lower right illustrates the view of the shallow beach quality sand—accreted Florin Street Cove in the lower foreground during approaching flood tide, the wave spray-wetted replacement cutoff wall at notation 38, the inaccessible lateral public accessway during this stage of the tide downcoast to the sandstone platform off South Palisades Park, and at 47, the dunes of Pismo State Beach.
The illustration documents the substantial conformance of the as-built replacement cutoff with the proposed Phase II application for CDP amendment A-3-PSB-02-016-A3 and emergency CDP G-3-21-0035.

Twentyfifth, Exhibit 10, page 1, contains a constricted, hence incomplete and misleading, image by unidentified “staff” of a part of the (2005) City-permitted maintenance and repair work on our client’s residence, which involved less than 50% of the structure, with an erroneous and pejorative caption that Commission staff in the Item 18a staff report on discussion disclaims. The repair and maintenance work did not constitute “unpermitted demolition and construction” and the designed LCP City official (Community Development Diretor) determined, on substantial

evidence in submitted plans, that the work did not rise to the threshold that would otherwise require a CDP.

Twentysixth, Exhibit 10, page 2, contains a second constricted, hence incomplete and misleading, image by unidentified "staff" of a part of the (2005) City-permitted maintenance and repair work on our client's residence, which involved less than 50% of the structure, with an erroneous and pejorative caption that Commission staff in the Item 18a staff report on discussion disclaims. The repair and maintenance work did not constitute "unpermitted demolition and construction". The repair and maintenance work did not constitute "unpermitted demolition and construction" and the designed LCP City official (Community Development Diretor) determined, on substantial evidence in submitted plans, that the work did not rise to the threshold that would otherwise require a CDP. Dall & Associates submitted this data to Commission professional staff in the Santa Cruz office, which at no time wrote to our client to allege that the repair and maintenance work was a violation of the applicable standards for review.

Twentyseventh, Exhibit 11, page 1, contains the detailed, site specific Structural Calculations and Elevations, Repair and Maintenance of Single-Family Home, 121 Indio Drive, Pismo Beach (Grossman) by LGA/Leonard Grant, Architect, and Stephanie Dall, Partner, Dall & Associates, that contains their respective independent measurement data for the (2005) City-permitted maintenance and repair work on our client's residence, which documents that the work did not rise to the 50% threshold at which a CDP for it would have been required according to the applicable determination standards. The repair and maintenance work did not constitute "unpermitted demolition and construction" and the designed LCP City official (Community Development Diretor) determined, on substantial evidence in submitted plans, that the work did not rise to the threshold that would otherwise require a CDP. Dall & Associates submitted this data to Commission professional staff in the Santa Cruz office, which at no time wrote to our client to allege that the repair and maintenance work was a violation of the applicable standards for review.

9. Request. Our client respectfully requests Executive Director Huckelbridge and Commissioners, as applicable, to:

(a) Meet and confer, through the Executive Director's designee, at the earliest practicable time prior to February 10, 2023, with our client's representatives to discuss and with the purpose to resolve all outstanding issues that relate to issuance of our client's and staff's deemed filed two necessarily separate CDP amendment applications A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3.

(b) Notice and schedule an emergency Commission meeting, for good cause, on Friday, February 10, 2023 hearing and action by the Commission on our client's and staff's deemed filed two applications A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3, as clarified in (a), above, including, as applicable, with provision for double-joined amendment application by our client of the CDP that implements (a), for Commission consideration at a proximate upcoming meeting.

Such hearing on the two CDP amendment applications may be consolidated, consistent with the regulation, provided that it affords a fair hearing.

Action on each CDP amendment application must be separate, consistent with the regulation.

(c) Notice and schedule, no less than 10 days before the ultimate PSA deadline, February 18, 2023, a hearing and action by the Commission on our client's and staff's deemed filed two applications A-3-PSB-02-016-A2 and A-3-PSB-02-016-A3.

Such hearing on the two CDP amendment applications may be consolidated, consistent with the regulation, provided that it affords a fair hearing.

Action on each CDP amendment application must be separate, consistent with the regulation.

(d) Withdraw unauthorized, incomplete, inaccurate, improperly conflated, and improperly noticed (for lack of required posting at the project site at the time of staff's intake for) "CDP application 3-23-0014" from the Commission meeting agenda for Friday, February 10, 2023.

(e) In the alternative, promptly issue our client the two long-pending amendment application A-3-PSB-02-016-A2 and CDP amendment A-3-PSB-02-016-A3, as deemed issued by operation of law, with our client's commitment to submit a further CDP amendment application within a mutually agreed time CDP that implements (a), for Commission consideration at a proximate upcoming meeting.

(d) Produce to the undersigned and our client's counsel a true and complete copy of all documents in the possession or control of the Commission that are responsive to our PRAR therefore of February 1, 2023, as further clarified to Commission staff counsel Logan Tillema by telephone on February 3, 2023, and by electronic mail on February 6, 2023.

Our client's team continues to stand ready to work cooperatively with staff to resolve any
For over 20 years, our client and we have worked cooperatively with Commission regulatory staff, technical staff, and legal counsel to implement our client's constitutional right to protect his residence, consistent with the applicable (delegated) requirements of the certified City LCP and the Coastal Act.

Sincerely yours,

DALL & ASSOCIATES
By:

Norbert H. Dall *Stephanie D. Dall*

_____ _____

Norbert H. Dall Stephanie D. Dall

202352.223.912

c: Client
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COTTON, SHIRES AND ASSOCIATES, INC.
CONSULTING ENGINEERS AND GEOLOGISTS

February 7, 2023
E0222M

Mr. Gary Grossman
121 Indio Drive
Pismo Beach, California 93449

SUBJECT: **Geotechnical Response to California Coastal Commission Staff Report dated January 27, 2023**
RE: Coastal Development Permit Application Number 3-23-0014
121 Indio Drive, Pismo Beach, California
(APN 010-205-002)

Dear Mr. Grossman:

At your request, we reviewed the findings, declarations, exhibits, and recommendations relating to geotechnical issues at 121 Indio Drive, Pismo Beach (APN 010-205-002) presented in the California Coastal Commission staff report, dated January 27, 2023, for a Coastal Development Permit Application Number 3-23-0014. While the recent submittal of the staff report did not allow for sufficient time to conduct a detailed review and analysis of their findings, we are responding to some of the relevant portions of the staff report in the following sections of this letter by providing a summary of our background and experience associated with your property, our comments on various aspects of the staff report, and our conclusions.

Introduction/Background

The geotechnical engineers and engineering geologists at CSA are very familiar with the site-specific geological/geotechnical conditions, trends, and history of the site, having:

(a) in 2002-2003 surveyed, inspected, mapped, and analyzed it, prepared detailed alternatives analysis for site stabilization against marine erosion, and recommended a suite of local coastal program (LCP)-consistent mitigation measures to protect the house and bluff, and the safety of the public that uses the adjacent beach area for recreation, against catastrophic bluff failure during the 75-year term of the recommended shoreline protective works;

(b) drilled, logged, sampled and tested five exploratory borings, one in Florin Street, three on 125 Indio Drive and one on 121 Indio Drive;

(c) prepared our detailed, site-specific Geotechnical Investigation Potential Seacliff Hazards for 121 and 125 Indio Drive and Florin Street Cul-de-Sac Report (2003, 35 pages and Appendices A through C, which the Coastal Commission's approval of the conformed project description in CDP A-3-PSB-02-016 (2003) made mandatory project standards for the contoured cutoff wall, reconstructed bluff shotcrete facing, drainage, and associated development, monitoring and reporting for repairs, maintenance, and adaptive management at the site;

(d) conducted further site-specific geotechnical investigations and prepared the detailed, site-specific, conformed Drawings (plans, sections, elevations, detailed component depictions) and Specifications (2003-2004) to implement the CDP and obtained Coastal Commission and City approval of them and issuance of the respective CDP and Building Permit;

(e) monitored and inspected third party contractor construction of the contoured cutoff wall (the keyway of which in part extended to an elevation below 4.5 feet MLLW), reconstructed bluff shotcrete facing, drainage, and associated development (2004-2005);

(f) prepared the completed development As-Built Plans (2005), including for sea cave infilling and the downcoast extension of the cutoff wall that were necessitated by further marine erosion of the bluff, for delegated Coastal Commission staff review and approval, which it granted in 2005);

(g) reviewed the 2009, 2013, and 2018 site monitoring reports by GeoSoils, Inc., correspondence regarding them with Coastal Commission staff, and its specified (limited) approvals of recommended repair and maintenance of shoreline protective works at the site (2020);

(h) observed, mapped, and analyzed emergency conditions of the marine erosion-undercut and destabilized bluff site, and adjacent marine eroded beach plane, during March-April, 2020;

(i) conducted additional site analysis; consulted with Coastal Commission geological, engineering, and regulatory staff; and prepared site-specific supplemental geotechnical investigation memoranda, with recommendations for the necessarily phased (sequential) repair, maintenance, and restoration of the shoreline protective works at the site, to prevent the catastrophic collapse of the bluff and house onto the dedicated public access beach area, consisting of Phase I (sea cave infill) and Phase II (replacement cutoff wall,

unconsolidated bluff Terrace Materials slope restoration and stabilization, bluff drainage restoration/enhancement, associated site-specific mitigation measures including laboratory-based beach quality sand nourishment (Phase I: Maintenance/Repair/ Restoration – Phase I Geotechnical Investigation Report, dated March 31,2020, with Update dated April 6, 2020 and Phase II: Maintenance/Repair/ Restoration – Phase II Geotechnical Investigation Report, dated May 14, 2020;

(j) worked with Client's other consultants for preparation of the Phase I application package to Coastal Commission to amend CDP A-3-PSB-02-016, transmitted on August 7, 2020, to which Commission staff assigned application number CDP A-3-PSB-02-016-A2;

(k) conducted further site analysis and prepared the Phase II supplemental geotechnical report for the application package to Coastal Commission to amend CDP A-3-PSB-02-016, transmitted on November 12, 2020, to which Commission staff assigned application number CDP A-3-PSB-02-016-A3 (Maintenance/Repair/Restoration/Protection - Phase II Supplemental Geotechnical Investigation Report**,** 121 Indio Drive Coastal Bluff Erosion and Under-Cutting**,** Pismo Beach, California, (APN 010-205-002) dated October 13, 2020);

(l) conducted further site emergency conditions analysis and prepared additional supplemental site-specific geotechnical reports that served as the Coastal Commission bases for the requested issuance of emergency CDPs G-3-20-25 (emergency sea cave infill, 2020) G-3-21-23 (revised downcoast sea cave infill, 2021), and G-3-21-35 (replacement cutoff wall, 2021 (Phase II Supplemental Geotechnical Investigation Report Update: Recommendation to Immediately Mitigate Recent Emergency Conditions Phase II Maintenance/Repair/ Restoration, Bluff and Phase I Sea Cave Infill Direct and Flanking Marine Erosion, 121 Indio Drive, Pismo Beach, California (APN 010-205-002), dated May 18, 2021);

(m) performed site inspections and monitoring of emergency sea cave infill and replacement cutoff wall construction (2020, 2021, 2022), and prepared post-construction geotechnical monitoring reports for transmittal to Coastal Commission (2020, 2021, 2022: Maintenance/Repair/Restoration Memorandum Phase I As-Built Geotechnical Investigation**,** RE: 121 Indio Drive Coastal Bluff Erosion and Under-Cutting Pismo Beach, California (APN 010-205-002), dated August 5, 2020; and

(n) performed additional site investigation and quantitative site-specific analysis of beach quality sand mobilization in association with, and as a result of, the Phase I and Phase II development components, and prepared the Calculation of Projected Volumes of Beach Quality Sand Production During 20 Years at 121 Indio Drive Without Phase I and Phase II Development California Coastal Commission Staff Letters, dated September 10, 2020, October 23, 2020 and December 14, 2020, Regarding Pending Applications for Phase I and Phase II Amendments to Coastal Development Permit A- 3-PSB- 02-016, 121 Indio Drive,

Pismo Beach, California (APN 010-205-002), report by Cotton, Shires and Associates, Inc., dated February17, 2021.

Sea Cave and Beach Plane

During and following the seawall and associated components construction in 2004/2005, CSA documented the as-built conditions in a set of as-built drawings and specifications entitled "Bluff Restoration and Shore Protection Project, 121 and 125 Indio Drive and Florin Street Cul-De-Sac, Pismo Beach, California", dated April 8, 2005. Elevation A-A' on Drawing No. C-7, Sheet 7 of 11 of those drawings shows the as-built surveyed bottom of the shotcrete cutoff on 121 Indio Drive property to extend to a depth of as deep as Elevation 4.5 feet (above MLLW Datum), which was below the MHTL elevation of 4.68 feet (MLLW Datum) at the time, and is below the MHTL of 4.62 feet (MLLW Datum) currently (the MHTL of course being the average of all high/higher high tides during the most recent 18.6-year epoch).

Maintenance Versus New Project

The Coastal Commission staff report attempts to make the argument that the Phase II project is a new project rather than maintenance of the project approved in the 2003 CDP. The length of the 2005 as-built CDP-approved cutoff and return walls on 121 Indio Drive property are approximately 114 feet long. The ECDP-approved Phase II maintenance involved replacement of 84 feet of 2005 as-built CDP-approved cutoff wall and we are now proposing to extend that by an additional length of 13 feet (13 feet is only 11% of the 2005 as-built CDP-approved cutoff and return walls on 121 Indio Drive and 15% of the ECDP-approved 84 feet replacement length). The additional bluff shotcrete facing area of 400 square feet is only about 20% of the 2005 as-built CDP-approved roughly 1,780 square feet of the approved bluff shotcrete facing). The typical construction percentage to require designation as a new project in the construction world is greater than 50% of the original structure. Overall, the Phase II maintenance work is less than 20% of the 2005 as-built CDP-approved cutoff wall and bluff shotcrete facing project on 121 Indio Drive and the additional 13 feet of return wall is only 15% of the ECDP-approved Phase II project. Thus, in our professional opinion, the entire Phase II project should fall under the designation of maintenance of an existing approved structure rather than an entirely new project.

Beach Quality Sand Calculations

We have reviewed the beach sand mitigation formulaic exercise in staff report Exhibit 12 and the staff report findings/declarations in light of CSA's laboratory analysis

of the beach quality sand components in the Tmp and Qt at the site, and in relation to CSA's findings.

A key point that should be considered with respect to beach sand is that the finer sand particle sizes in the Qt and Tmp quickly degrade when mobilized by erosion to very fine sand/silt that the following high/higher high tides in turn transport rapidly offshore of the beach plane and, because of their size, do not subsequently remobilize back to the beach plane at 121 Indio Drive or any other beach in the littoral cell.

In our analysis, we also take into consideration the mitigation fee paid in 2004 pursuant to Special Condition 8 of CDP A-3-PSB-02-016 (CDP) for, in relevant part, sand supply loss from the cutoff wall and bluff shotcrete facing authorized by the CDP over the 75-year economic life (to ≥ 2078) of the approved development.

Coastal Commission staff's analysis claims that protective armoring of the bluff misleads CSA's analysis of the rate of bluff retreat, but the 2020 top of the retreated bluff is similar in location in areas where there was no protected portion of the bluff, consequently it does not appear that the impact of existing armoring skewed the CSA analysis. CSA's calculations (using a retreat rate of 0.54 feet per year and factoring in the already mitigated portion) indicate 4.3 cubic yards of beach quality sand would be lost as a result of the Phase I shotcrete infill and 38.3 cubic yards of beach quality sand would be lost as a result of the additional Phase II cutoff wall for a total of 42.6 cubic yards of beach quality sand. If you were to use the inflated retreat rate of 1 foot per year as Coastal Commission staff suggests, these values would increase to 8.0 cubic yards for Phase I and 70.9 cubic yards for Phase II for a total of 78.9 cubic yards of beach quality sand.

As-Built Phase II Conditions

CSA analyzed the as-built sea cave infill and replacement cutoff wall and found that it substantially conformed with (a) the respective emergency CDPs issued by the Coastal Commission, (b) CSA's respective supplemental geotechnical reports regarding the sea cave infill and replacement cutoff wall, and (c) CSA's respective Drawings and Specifications for them. Analysis of the footprint of the Phase II work revealed a small (on the order of 5 square feet) net increase in the beach area as a result of the completed project.

Regarding the 400 square feet of shotcrete and nine soil nails constructed in 2005, one of the nine soil nails is no longer present, two of the nine soil nails are exposed and are proposed to be removed, and over one fourth of the shotcrete is currently unsupported and is to be removed and replaced as part of the clarified proposed project. It would likely

do more harm than good to the stability of the bluff to try to remove the remaining six soil nails.

While downcutting in recent years of the back beach plane on 121 Indio Drive has brought the Pismo Formation surface to near or at the visible base of the steep Pismo Formation bluff over a portion of where the Phase II replacement cutoff wall was constructed, it and the Phase I sea cave were constructed to landward of the 18.6-year MHTL and all other proposed Phase II components by design and location will also be constructed upland of the MHTL.

Project Benefits

Monitoring by CSA of the as-built sea cave infill and replacement cutoff wall in September, 2022, and in January, 2023, indicated that they have functioned as designed and approved to protect the bluff, house, and the health and safety of the recreational public on the beach adjacent to the bluff.

Catastrophic collapse of the bluff, house, protective works, and other appurtenances at 121 Indio Drive to the beach plane would also likely close all or substantial parts of the beach to public use for an extended period of time before it could be cleaned up and/or marine processes carried components offshore with potential to adversely impact the nearshore marine environment in San Luis Bay.

Conclusions

It is our opinion that the Phase I shotcrete infill and Phase II cutoff wall installation represent an addition of less than 10% of the CDP-approved seawall and therefore do not constitute a "new project", but rather maintenance of the existing CDP-approved facility. Furthermore, the amount of beach quality sand that would be lost by construction of the ECDP-approved and proposed CDP-approved maintenance components is vastly less than that calculated by Coastal Commission staff. A majority of the sand loss was already compensated for as part of the 2003 approved project and we stand by our calculations that 42.6 cubic yards of beach quality sand would be lost as a result of the Phase I and II maintenance project.

Limitations

Our services consist of professional opinions and recommendations made in accordance with generally accepted engineering geology and geotechnical engineering principles and practices. No warranty, expressed or implied, of merchantability or fitness,

is made or intended in connection with our work, by the proposal for consulting or other services, or by the furnishing of oral or written reports or findings.

We appreciate the opportunity to provide our professional services to you. If you have any questions regarding this report, or need additional information, please contact us.

Very truly yours,

COTTON, SHIRES AND ASSOCIATES, INC.

Patrick O. Shires
Senior Principal Geotechnical Engineer
GE 770

John M. Wallace
Principal Engineering Geologist
CEG 1923

POS:JW:st

Attachment: References

REFERENCES

Geotechnical Investigation Potential Seacliff Hazards, 121 and 125 Indio Drive and Florin Street Cul-De-Sac, Pismo Beach, California, report by Cotton, Shires and Associates, Inc., dated January 2003;

Skelly Engineering, Coastal Hazard Study, 121 & 125 Indio Drive, Florin Street Cul-de-Sac, Pismo Beach, CA, dated February 2003;

California Coastal Commission, Coastal Development Permit A-3-PSB-02-016, approved with conditions, August 6, 2003;

Drawings and Specifications, Bluff Restoration and Shore Protection Project, 121 and 125 Indio Drive and Florin Street Cul-De-Sac, Pismo Beach, California, plans by Cotton, Shires and Associates, Inc., dated September 18, 2003, with revisions dated October 27, 2003;

As-Built Drawings and Specifications, Bluff Restoration and Shore Protection Project, 121 and 125 Indio Drive and Florin Street Cul-De-Sac, Pismo Beach, California, plans by Cotton, Shires and Associates, Inc., dated April 8, 2005, approved by Coastal Commission staff;

GeoSoils, Inc., 2009 Monitoring Report for Seawall, Storm Water Outfall, and Reconstructed Bluff Face Per Coastal Commission Permit A-3-PSB-02-016, dated July 21, 2009;

GeoSoils, Inc., 2013 Monitoring Report for Seawall, Storm Water Outfall, and Reconstructed Bluff Face Per Coastal Commission Permit A-3-PSB-02-016, dated June 25, 2013;

GeoSoils, Inc., 2018 Monitoring Report for Seawall, Storm Water Outfall, and Reconstructed Bluff Face Per Coastal Commission Permit A-3-PSB-02-016, dated May 25, 2018;

Maintenance/Repair/Restoration – Phase I Geotechnical Investigation Report Update, 121 Indio Drive Coastal Bluff Under-Cutting, Pismo Beach, California (APN 010-205-002), report by Cotton, Shires and Associates, Inc., dated April 6, 2020;

California Coastal Commission, Application by Gary Grossman TRE for Emergency Permit, 121 Indio Drive, Pismo Beach, Phase I Immediate Action Plan, with Exhibit A and Attachments 1-4, dated April 7, 2020;

California Coastal Commission, Emergency CDP G-3-20-0025, issued April 10, 2020;

Phase I Maintenance/ Repair/Restoration – Phase I Special Condition 10 Checklist, by Cotton, Shires & Associates, Inc., dated May 28, 2020; and

ECDP G-3-20-0025, 30-Day Report, with Exhibits 1-4, by Dall & Associates, dated May 29, 2020.