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W18a

Prepared March 7, 2023 for March 8, 2023 Hearing

To: Commissioners and Interested Persons

From: Kevin Kahn, Central Coast District Manager
Nolan Clark, Coastal Planner

Subject: STAFF REPORT ADDENDUM for W18a
Appeal Number A-3-SCO-23-0003 (Cauwels Armoring/Drainage Infrastructure)

The purpose of this addendum is to respond to the materials submitted by the Applicants' representative, Ira James Harris (dated February 28, 2023, and located in the correspondence package for this item), after the staff report for the above-referenced appeal was published on February 24, 2023. Specifically, Mr. Harris makes a series of claims and assertions regarding the nature and scope of the development that is the subject of the appeal, as well as regarding current and open violations on the Applicants' property. Staff herein provides some additional clarification for the staff recommendation on these points, which is added to the staff report as a "Response to Comments" section (see below). Importantly, these clarifications do not modify staff's recommendation, which remains a recommendation that the Commission determine that the County's approval of a coastal development permit (CDP) for the project raises substantial LCP and Coastal Act conformance issues in light of the appeal contentions.

Add the following "Response to Comments" section to the staff report as new section 7 following section 6 at the bottom of staff report page 18:

7. Response to Comments

The Applicants' representative, Ira James Harris, submitted comments on behalf of the Applicants in a letter dated February 28, 2023. In that letter, Mr. Harris makes a series of claims and assertions regarding the nature and scope of the development that is the subject of this appeal, as well as regarding current and open violations on the Applicants' property. Most notably, Mr. Harris asserts that the development approved by the County's CDP is emergency "like-kind" repair, that the County made the requisite findings to approve the CDP, and that there are no open violations on the Applicants' property. Each of these issues is addressed in the findings above in this report, but further clarification is provided below.

A. "Like-Kind" Repair Assertions and County CDP Findings

The Applicants' representative asserts that the project site had an existing drain and drainpipe extending down along the edge of the road from the blufftop, with a curb and chain link fence since the 1950s and, because of this, that: 1) the County-approved slope armoring and drainage infrastructure are emergency "like-kind" repairs of this existing drainage system, curb, and chain link fence; and 2) the County properly considered and made findings on the health and safety, visual resource and natural landform, and public access and recreation concerns associated with this project.

With respect to the first point, even if the development in question was simply a "like-kind" repair, as asserted by the Applicants' representative, which it is not,[1] all LCP-required criteria and analyses must still be met and/or performed, and they were not properly included in the County's review of this CDP, as discussed in the preceding findings. For example, as discussed in the Shoreline Armoring section of this report (pages 11-12), the appeals contend that the County approved shoreline armoring (including the drainage infrastructure) that does not meet the criteria for allowing shoreline armoring and was not properly analyzed for physically or economically feasible alternatives (such as non-structural alternatives, minor road reconfiguration, or the no-project alternative), as required by the LCP.

The Applicants' representative further claims that IP Section 13.20.040 and CEQA Sections 15260, 15269 and 15785 provide for "exemptions"; however, it is not clear what exactly is being claimed to be exempt, and from what it is being claimed to be exempt from. For appeals to the Coastal Commission of a County-approved CDP, the standard of review is the development's consistency with the County's LCP and the Coastal Act's public access provisions. Accordingly, the claimed CEQA exemptions are not relevant in a substantial issue context, but a response to the Applicants' representative's claim regarding IP Section 13.20.040 is appropriate.[2] First, IP Section 13.20.040 is the "Definitions" section of Chapter 13.20 "Coastal Zone Regulations" and provides no definition, designation, or otherwise any provision regarding exemptions as they apply to CDPs, therefore rendering the Applicants' representative's first point irrelevant.

Instead, and only for the sake of elaboration and clarification, IP Sections 13.20.060 through 13.20.066 set forth the various instances in which proposed development may be exempt from CDP requirements. Although it is not the basis of any appeal contention, this project is not exempt from CDP requirements including because of its location on a coastal bluff. In fact, by virtue of granting an emergency CDP and the

[1] The Applicants' representative appears to acknowledge this point when he acknowledges that the various elements were actually replaced, stating "the slide repair was truly an emergency "like-kind" repair as it **replaced** the existing hazardous slope, drain and drainage pipe" (emphasis added). Replacement is not the same as repair under the Coastal Act and the LCP. In fact, CCR Section 13252 identifies a 50% threshold for when a project is not considered repair (or maintenance), but rather is considered a replacement structure that must be considered anew under the relevant LCP (and Coastal Act as applicable) provisions.

[2] For context and clarification, the Implementation Plan, or IP, portion of Santa Cruz County's LCP is comprised of sections of the Santa Cruz County Code which have been certified by the Coastal Commission to serve, when taken together, as the Implementation Plan (see Santa Cruz County Code Section 13.03.050 "Local Coastal Program adoption").

required follow-up CDP, which is the subject of this appeal, the County effectively determined that this project was not eligible for any such exemptions.

Instead, the appeals contend, among other things, that the legal and factual basis for the County's decision raises issues in terms of consistency with the County's certified LCP, which addresses Mr. Harris' second claim that the County properly considered and made findings on the health and safety, visual resource and natural landform, and public access and recreation concerns associated with this project. To all of these points, and as indicated in the preceding findings, the Commission continues to determine, in concurrence with the appeal contentions, that the County-approved project: 1) was not properly analyzed as shoreline armoring, despite it qualifying as such under the LCP and it presenting the types of impacts associated with same; 2) was not properly analyzed for the effects of collecting and directing urban runoff to the sandy beach and nearby lagoon as is required by the LCP; 2) was not properly evaluated for, nor appropriately found to conform to, LCP provisions protecting natural landforms and public views by approving the installation of decidedly unnatural armoring and drainage infrastructure; and 3) will have an adverse impact on public access, in an LCP-designated neighborhood beach accessway,[3] in that the County did not evaluate the project's impact on public access (as is required for armoring project by the LCP) and that the County's action results in an unpermitted but extant chain link fence at the top of the coastal bluff.[4]

Finally, the Applicants' representative is making specific claims in terms of the nature of the development at this site (for example, that it is "like-kind") and whether necessary CDP findings can be made. In doing so he misses the point of the substantial issue determination phase of the appeal, where the question is not whether a CDP can be approved, rather it is a question as to whether the County's action raises substantial issues in terms of the project's LCP and Coastal Act consistency, where the Commission's regulations actually presume substantial issue[5] (see also Appeal Procedures section above). In other words, the Commission in this substantial issue determination phase of the appeal is not charged with drawing CDP conclusions regarding LCP/Coastal Act consistency for the project, rather the Commission is charged with evaluating whether the County's approval of the project raises issues in terms of such consistency. As such, the Applicants' representative's assertions in this regard are better answered during the de novo review portion of the appeal, when the Commission would be tasked with making LCP/Coastal Act consistency determinations.

B. Violations

The Applicants' representative asserts that there are no open violations on the Applicants' property. The Commission disagrees, and the reasons for this are discussed in detail in the Violations section of this report (see pages 15-17). The various efforts to

[3] See LUP Policy 7.7.18 in Exhibit 5.

[4] See prior Substantial Issue Determination findings starting on page above.

[5] CCR Section 13115(b) indicates that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." In other words, substantial issues are presumed for the Commission to not find substantial issue, it would have to determine that there are no issues.

block public access along the bluff in question have yet to be resolved, and barbed wire, wooden fencing, thorny brambles, "No Trespassing Signs", and the now unpermitted and new chain link fence at the top of the bluff remain. Mr. Harris cites the declaration of Dawna Sutton (Exhibit 3, pages 113-116) as evidence that at least some of the impediments to access were installed prior to passage of the Coastal Act. However, this declaration referred only to a locked and gated, chain link, barbed wire fence at the top of the bluff, but does not include the wooden fencing, thorny brambles, "No Trespassing Signs", and alleged security guards all used to further block access.[6,7]

In further support of his claim that no violations on exist on the property, in point 2.a at the bottom of page 1 of his letter, Mr. Harris alleges that a violation case numbered "V-3-81-005" involving 61 Geoffroy Drive was resolved through a dedication made by Leo Raiche. It should be made clear that no 61 Geoffroy exists as is referenced in Mr. Harris's claim, and that Coastal Commission records show that no violation case exists with the file number V-3-81-005. This may be an erroneous reference to the Offer to Dedicate (OTD) a public access easement required by a condition of CDP amendment number 3-81-055-A1, which was issued to Leo Raiche in 1987. That 1987 requirement, related to the property at 60 Geoffroy, requiring the recordation an OTD for a public access easement over the sandy beach portion of the Raiches' property, in no way resolves the violations described above, for a number of reasons including: 1) that condition was required to protect the clearly widely used sandy beach portion of their property, which was a common condition for blufftop development at that time, as explained in the staff report for 3-81-55-A1, and in no way purported to mitigate for any loss of the access trail down the bluff; 2) the blufftop fence/gate at the end of Geoffory Drive exists and existed at 70 Geoffroy Drive, not 60 Geoffroy Drive, and therefore the violation was not resolved by the OTD; and 3) the 1986 OTD was recorded many years

[6] See Exhibit 6, "Declaration of Eugene Shklar", wherein Mr. Shklar admits the unpermitted installation of these elements of development.

[7] Even with respect to these items, the Sutton declaration is only one piece of evidence, and the claim that the existing fence is the same as the one described in Ms. Sutton's declaration is belied by three types of competing evidence. First, it may or may not be true that a fence existing prior to 1977 at the blufftop here, but such a fence would have been over 40 years old by the time of the 2020 emergency work when it was apparently removed. Structures, like fences, on blufftop locations like this are regularly subjected to harsh coastal elements, and it is not uncommon for them to require significant repair/replacement, whether in one project or a series of projects, over the course of decades (here over four decades). And the appearance and general condition of the fence raises doubts that the fence at the top of the bluff that was removed in 2020 is the same as the one allegedly installed before the effective date of the Coastal Act. If the fence was actually modified over time, given the blufftop location, it would have required a CDP, and no such CDPs exist. Thus, if the fence in question did exist pre-1977, and had been modified without CDPs, it would still have been a violation. Second, removal and replacement of a fence at that location, such as the removal and replacement that occurred during the 2020 emergency work, requires a CDP, and no such CDP authorization exists for a fence in this location. In other words, any pre-Coastal Act status that may have accrued for a fence at this location, as alleged, was severed in 2020. The now extant fence is a replacement fence installed in 2020, for which there are no CDPs, and thus is unpermitted. And third, a dozen or so members of the public have reported that they used the historic path down the bluff in the 1970s and 1980s, unimpeded by any fence. If that is true, either the fence and gate were not present continuously during that time, or the gate was not closed or locked. Locking a gate that the public has historically used for coastal access is a "change in the intensity of use" and therefore constitutes "development" under the Coastal Act and the County's LCP, and therefore requires a CDP. See *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238.

before unpermitted development took place in 2001, described below, and therefore could not somehow resolve the violations relating to unpermitted development that was yet to occur.

Mr. Harris may be referring to a later violation case, from 2001, relating to a variety of development undertaken without CDPs, including but not necessarily limited to: the erection of a blufftop fence and gate in approximately the same location as the currently extant blufftop fence, the planting of thorny vegetation, the erection of a base-of-bluff wooden fence/gate, the installation of barbed wire along the various fences, the erection of prohibitive signage, and the hiring of security guards, all designed to prevent the public from using the historic bluff trail. Much of this work, including the hiring of the security guards, was carried out by Mr. Shklar, the former owner of 70 Geoffroy, in 2001, without any of the required CDPs and per his own declaration.

At the top of page 2 of his letter, Mr. Harris alleges that a writ of mandamus and quieting of title from the case *Fowler Packing Co., et al., v. County of Santa Cruz, et al.*, Santa Cruz County Superior Court Case No. 19CV00673 (hereinafter, the "Vehicular Fence Litigation") resolved certain violations related to a violation case numbered "V-3-81-055". According to Coastal Commission records, no violation case exists with that file number, and instead Mr. Harris may again be referring to the violations identified in 2001. However, the Vehicular Fence Litigation did not address any of the violations identified in 2001 and that are relevant in this appeal. Even setting aside the fact that no actual writ was ever issued in that case (Mr. Harris cites to an "Order Granting Petitioners Writ," not an actual writ) and that the Commission was specifically removed as a party to the quiet title cause of action in that litigation, the Order to which Mr. Harris cites specifically addressed only three issues: (1) the Commission's ability to demand retraction of a purported "Development Permit" for a vehicular fence built across the road further downcoast from the appeal site (which the Commission has never demanded be retracted, and which is not at issue in this appeal in any case); (2) the Commission's ability to demand that the plaintiffs obtain a CDP for that same vehicular fence and related improvements, which, again, are not at issue here; and (3) the Commission's ability to threaten to impose civil administrative penalties if the petitioners did not remove that vehicular "gate and fence." Thus, the Vehicular Fence Litigation did not address, much less resolve,[8] any purported violations, though it is unclear to which violation case Mr. Harris is referring.

In point 2.b of his letter, Mr. Harris alleges that the writ and judgment in the Vehicular Fence Litigation resolved certain other violations, which he summarizes in a parenthetical as "the vehicular and pedestrian gate and signage." However, the status of the vehicular and pedestrian gate and related signage is irrelevant to this case, and to the extent he means to allege that the outcome of the Vehicular Fence Litigation

[8] Although it is not critical to the point made in the body (because, for the reasons listed above, the Vehicular Fence Litigation is inapposite), we also note that that litigation has not come to final resolution , as it is currently on appeal, and although the plaintiffs sought to have the appeal dismissed, the Court of Appeal has declined their request to do so, at least for the time being.

resolved any of the violations that truly are at issue in this case, any such claim is inaccurate, as is explained above.

Finally, Mr. Harris refers to the outcome of the Vehicular Fence Litigation at the end of his paragraph 2.c. However, the relevance of the litigation in that paragraph is unclear, as he cites to it in connection with a factual claim that was never addressed in the litigation, regarding who hired a security guard and for what purpose.[9]

In sum, nothing in the letter submitted by Mr. Harris calls into question the presence of the violations discussed in this report. Those violations may serve as an unlawful impediment to public access. The appeals contend that the County's decision and action did not fully realize the mandate from the California Constitution, the Coastal Act, and its own LCP to maximize access in a location specifically designated as a neighborhood access point to the beach. Additionally, the appeals contend that the County-approved project was undertaken with open and unresolved violations at and near the project site, which were not properly address prior to, or as a condition of, the issuance of the CDP for the project, as is required by the LCP. In short, there continue to exist violations of the Coastal Act and the LCP at and near the project site that have yet to be resolved, as is required prior to, or as a condition of, the approval of development, and thus, the County's approval raises substantial LCP conformance issues for this reason as well.

[9] For the record, the security guard incident that is part of the Commission's violations file for this property occurred on June 9th and 10th in 2001, explicitly to prevent the public from using the access path in conjunction with other unpermitted development at this site carried out by Mr. Shklar, per his declaration (see Exhibit 6).