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Staff: Nolan Clark - SC
Staff Report: 2/24/2023
Hearing Date: 3/8/2023

STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION

Appeal Number: A-3-SCO-23-0003

Applicants: Mark and Suzanne Cauwels

Appellants: Commissioners Escalante and Hart, Thomas Mader

Local Government: Santa Cruz County

Local Decision: County coastal development permit (CDP) application number 201302 approved by the Santa Cruz County Planning Commission on December 14, 2022.

Project Location: Bluff area above the Black's Point Beach portion of Twin Lakes State Beach fronting Geoffroy Drive opposite the house at 70 Geoffroy Drive (APN 028-143-35) within the unincorporated Live Oak area of Santa Cruz County.

Project Description: Authorize retention of slope stabilization, drainage infrastructure, and related development in the bluff area (previously temporarily authorized under County emergency CDP number 20227).

Staff Recommendation: Substantial Issue Exists

IMPORTANT HEARING PROCEDURE NOTE

Please note that at the hearing for this item the Commission will not take testimony from the public on staff's substantial issue recommendation unless at least three Commissioners request it. Commissioners may ask questions of the Applicant, aggrieved persons (i.e., generally persons who participated in some way in the local permitting process), the Attorney General, the Executive Director, and their proxies/representatives prior to determining whether or not to take such testimony. If the Commission does decide to take such testimony, then it is generally limited to three

minutes total per side (although the Commission's Chair has the discretion to modify these time limits). Only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing. Other interested parties may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP) application and will then review that application *de novo* at a future Commission meeting, at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

SUMMARY OF STAFF RECOMMENDATION

Santa Cruz County approved a CDP that provided after-the-fact authorization for a series of drainage and bluff stabilization measures that had temporarily been installed (pursuant to a County Emergency CDP (ECDP)) in the bluff above the Black's Point Beach portion of Twin Lakes State Beach, including excavating the bluff slope and installing a concrete foundation into the lower bluff, drainage infrastructure (collecting street surface runoff and directing it to the base of the bluff and onto the beach below) on and through the bluff, fill and geogrid mats along the bluff face, erosion control blankets/vegetation on the bluff face, repaving the portion of the road above the bluff work, and installing a chain link fence at the blufftop edge. The County CDP approved retention of all of the temporary ECDP development other than the chain link fence, rendering it unpermitted (yet still extant as of the publication of this report). The project site is fronts on Geoffroy Drive opposite the house at 70 Geoffroy Drive in the unincorporated Live Oak area of Santa Cruz County.

The appeals contend that the County-approved CDP raises consistency issues with the Santa Cruz County Local Coastal Program (LCP) and the public access provisions of the Coastal Act because: 1) the development constitutes shoreline armoring and it is not clear that such armoring is allowable based on the circumstances that apply (and associated coastal resource impacts were not properly addressed if allowable); 2) the development imposes decidedly unnatural private armoring and drainage infrastructure into the bluff and bluff face at a highly visible location in the public viewshed, especially as seen from the State Beach, and these natural landform alterations and visual impacts were not properly analyzed; 3) the development would collect surface runoff from a paved vehicular use area and direct it down the bluff to the sandy beach and adjacent Bonita Lagoon below, and potential water quality and environmentally sensitive habitat area (ESHA) issues and impacts were not properly analyzed; 4) the development is located in the same bluff area where there is evidence of past public beach access use (and in a location explicitly designated by the LCP for beach access), where the development would impede any such access (including the currently extant yet unpermitted chain link fence); and 5) there are open and active violations related to unpermitted development at the site, even pre-dating the above-mentioned recent chain link fence (including for fencing, barbed wire, restrictive signs, security guards, etc.), and the LCP prohibits CDP approval unless such violations are resolved, and here they are not.

In terms of armoring, the LCP defines shoreline protection structures as “any structure or material, including but not limited to riprap or a seawall, placed in an area where coastal processes operate.” The approved development is a structure built into, along, and on top of a coastal bluff, where coastal processes clearly operate, and thus it qualifies as shoreline armoring. The LCP only allows shoreline armoring in very narrow circumstances (and in a manner similar to the Coastal Act), including requiring that there be an existing endangered structure that requires the armoring in question in order to be protected (i.e., there are no less environmentally damaging feasible alternatives), and that all coastal resource impacts, especially on the beach and shoreline, are required to be avoided as much as possible, and unavoidable impacts mitigated. Here, the County did not evaluate any of these armoring criteria, and it does not appear that the development proposed could meet such tests in any case. For example, it is not even clear that a qualifying ‘existing structure’ exists, and even if it did, whether it was in danger, and even if it was, whether there were other alternatives available to protect same with fewer coastal resource impacts (including potential non-structural alternatives such as the no-project alternative, bluff revegetation, or minor road reconfiguration). In addition, the County did not evaluate armoring impacts (e.g., the effect of the armoring on natural processes, beach retention and formation, etc.) nor identify any required mitigations. All of these points raise LCP consistency questions.

With respect to natural landforms and public views, the LCP requires that these resources be protected and enhanced, that development be visually compatible with the surrounding area, and specifically prohibits development that would be visible from beaches unless it is consistent with the pattern of development. Here, the development essentially ‘scooped out’ the natural bluff landform and inserted fairly significant concrete and industrial pipe infrastructure in its place, which is hard to consider a minimization of landform alteration nor consistent with the pattern of development. In addition, portions of the completed development are highly visible from the beach at Black’s Point Beach, and in other public views, including State Parks’ blufftop overlooks looking towards the Monterey Bay. As built, the project introduces unnatural concrete into the base of the bluff, as well as geogrid mats and erosion control blankets that are not visually compatible with the natural character of the bluff face. Moreover, a 12-inch diameter industrial drainpipe now extrudes from the bluff face and lies along it, where surface runoff emanating from the pipe is also visible when flowing from Geoffroy Drive to the beach below, which also detracts from the public view and the natural landform. While not permitted, the existing unpermitted fence, barbed wire, and restrictive signage also impose unsightly and unnatural conditions at this location. These issues, too, raise additional LCP consistency issues.

In terms of ESHA, the LCP requires development to be properly analyzed for potential negative ESHA impacts, and specifically identifies the need to address urban runoff as a source of pollution. Bonita Lagoon is located in the back beach area at the State Beach, closely adjacent to where the Applicants’ drainage pipe and its effluent extend, and both the Lagoon and the beach qualify under the LCP as ESHA. Urban runoff, particularly emanating from vehicular use and residential areas such as is the case here, is known to contain a wide range of pollutants, including nutrients, sediments, trash and debris, heavy metals, pathogens, petroleum hydrocarbons, and synthetic organics such as herbicides, rodenticides, and pesticides. The County did not evaluate

to what extent the runoff in question was allowed to be directed to a sandy beach, nor its potential for adverse impacts to the beach, ocean, and ESHA, raising additional LCP consistency questions.

In terms of public access and recreation, the LCP and Coastal Act require that access and recreation opportunities be protected, provided, and maximized, and the LCP explicitly calls out the project area as a beach accessway. Despite these requirements, the County did not evaluate the project's impacts on public access and recreation. And, as described above, the development is sited directly in the same location where there is evidence that the public has accessed the beach, and it is sited and designed in a way that would block the ability of the public to do so again, including due to the unpermitted chain link fence. Separate from that issue, the aforementioned urban runoff pollutants have the potential to degrade public access and recreation on the beach below the site as well. These issues raise both LCP and Coastal Act public access and recreation questions.

Finally, the LCP explicitly prohibits CDP approval unless any existing violations are resolved as part of such action. Here, violations of the Coastal Act and LCP exist on the subject property including, but not necessarily limited to, the erection of a fence at the blufftop edge and a locked blufftop edge gate; the installation of barbed wire and restrictive signage purporting to prohibit public access; the planting of spiky bluff-area vegetation; and the use of security guards; all designed to block and deter public access between Geoffroy Drive and Twin Lakes State Beach below, and all without a CDP. The County's action did not resolve any of these violations, and thus the LCP does not allow for the County to approve a CDP for the project. This too raises LCP consistency questions.

In short, the appeals raise a series of significant questions as to whether the County's approval authorized development that is consistent with the LCP and the public access provisions of the Coastal Act, where it appears clear that the answer is that it did not. At the least, the County's action raises substantial issues with respect to such consistency, and it warrants the Commission taking jurisdiction over the CDP application in this case. Therefore, staff recommends that the Commission find that the appeal raises substantial LCP and Coastal Act conformance issues, and that the Commission take jurisdiction over the CDP application for the proposed project. If the Commission does so, then the de novo portion of the appeal hearing on the merits of the CDP application would be scheduled for a future Commission meeting. The motion and resolution to effect this recommendation are found on page 6.

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EXHIBITS

- Exhibit 1 – Project Site Maps
- Exhibit 2 – Project Site Images
- Exhibit 3 – County’s Final Local Action Notice
- Exhibit 4 – Appeal of County’s CDP Decision
- Exhibit 5 – Applicable Coastal Act and LCP Provisions
- Exhibit 6 – Declaration of Eugene Shklar

CORRESPONDENCE

1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeals were filed. A finding of substantial issue would bring the CDP application for the proposed project under the jurisdiction of the Commission for de novo review and action. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in the future de novo review on the CDP application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by affirmative vote of a majority of the Commissioners present.

Motion: *I move that the Commission determine that Appeal Number A-3-SCO-23-0003 raises no substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act, and I recommend a **no** vote.*

Resolution to Find Substantial Issue: *The Commission hereby finds that Appeal Number A-3-SCO-23-0003 presents a substantial issue with respect to the grounds on which the appeals have been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access policies of the Coastal Act.*

2. FINDINGS AND DECLARATIONS

A. Project Location

The County-approved project is located at the bluff edge and in the bluff above the Black's Point Beach portion of Twin Lakes State Beach, fronting Geoffroy Drive opposite the home at 70 Geoffroy Drive (APN 028-143-35) in the unincorporated Live Oak area of Santa Cruz County. The Live Oak coastal area is a primarily residential segment of coastline between the cities of Santa Cruz and Capitola that is well known for excellent public access opportunities for Live Oak locals, Santa Cruz County residents, and visitors to the area. Sandy beaches, tide pools, scenic blufftops, and coastal lagoons can all be found along the Live Oak shoreline, enabling a wide range of recreational experiences, such as walking, biking, swimming, surfing, fishing, wildlife viewing, and more. In addition to the shoreline, the greater Live Oak area serves as an important commercial focal point in Santa Cruz County with local retail businesses, restaurants, and lodging that together provide locals and guests alike with a unique coast-going experience.

Black's Point Beach makes up the downcoast end of Twin Lakes State Beach, and it is an extremely popular beach with significant public use. Black Point¹ itself extends out into the ocean, helping to frame the beach in that regard, and a promontory of sorts extends upcoast from the point that includes a number of blufftop homes, including the

¹ So named historically by mariners as the point was seen as darker from the ocean compared to surrounding landforms, and it was used as a known wayfinding tool from the sea.

Applicants', atop the promontory and accessed via the upcoast end of Geoffroy Drive.² As a result, the sandy beach essentially 'wraps around' the promontory, where the bluff area in question is above the back beach area, and just seaward of Bonita Lagoon. The end of Geoffroy Drive above the project site is explicitly called out as a beach accessway in the LCP.³ The bluff area in question is located in an area designated Existing Parks, Recreation and Open Space (O-R) in the LUP, and zoned Parks, Recreation, and Open Space (PR) by the IP.

See **Exhibit 1** for a location map and see **Exhibit 2** for site area photos.

B. Project Background, Description, and County Approval

The project site is the location of a longstanding dispute over alleged violations that have been tracked by the Commission's enforcement unit for roughly three decades, emanating from the fact that there is evidence that the public historically used the upcoast end of Geoffroy Drive and the bluff area in question as a means of access from the beach at Black's Point to Geoffroy Drive and on to the beach at Sunny Cove (just downcoast), and vice versa, and the fact that over the years, various forms of development have occurred, without Coastal Act/LCP authorization, along the bluff edge and the surrounding area, impeding that use. Specifically, in the mid-1990s Commission staff became aware that a blufftop edge fence, gate, and "No Trespassing" signs had been installed at this location, blocking the ability of the public to access the beach in that way.⁴ Subsequently, additional barbed wire was installed at the top and bottom of the bluff, a wooden fence was installed at the base of the bluff, blackberry brambles were planted on the bluff face, restrictive (to public access) signs were installed, and a security guard was employed, all without CDPs and all as a means to deter the public from accessing the area in the way it had prior to the unpermitted development. Despite repeated requests from Commission staff to the property owners to remove all such unpermitted development, it was not removed, and the area has not been available for the public to use it as it had in the past before the unpermitted development was installed. Over time, the bluff slope trail where access had historically been possible grew over with brambles and was no longer easily accessible (see photos in Exhibit 2). None of these violations have been resolved, and they continue to be tracked by Commission enforcement staff (see Violation finding below for more information).

During the 2019-2020 winter, the bluff slope where evidence suggests the public had historically gained access to the beach experienced sloughing and slumping, resulting in an estimated 10-foot headscarp and extending roughly 20 feet from the bluff edge. Subsequently the Applicants applied to the County for an ECDP to address the bluff sloughing and slumping, and the County issued ECDP number 20227 on June 24, 2020, to temporarily authorize the measures. Specifically, the County authorized

² Where this upcoast end of Geoffroy Drive accessing the group of homes appears to not be part of the County's right-of-way.

³ See LUP Policy 7.7.18 in Exhibit 5.

⁴ Other than those with a key to the gate, presumably the then homeowners located atop the promontory, but not the general public.

excavation of the bluff area and installation of a concrete foundation and two-foot keyway in the lower portion of the bluff, drainage pipes extending from the top of the bluff to the beach and through the foundation/keyway, fill (approximately fifty cubic yards of site-derived marine terrace deposits and Purisima sandstone from the excavation), geogrid mats⁵ along the bluff face, erosion control mats⁶ and vegetation on the bluff face, repaving the portion of the road above the bluff work, and installing a chain link fence along some 30 linear feet along the top of the bluff at the blufftop edge. The Applicants thereafter completed the temporary development authorized by the County ECDP.

Subsequently, the Applicants applied for a follow-up regular CDP⁷ from the County (CDP application number 201302) on September 21, 2020, requesting recognition of all above-described development.⁸ The CDP application was heard by the County Zoning Administrator on October 21, 2022, but the Zoning Administrator declined to take action, citing the significant issues at play with the project, especially in terms of the violation and public access related issues, and deferred CDP consideration to the County Planning Commission. Ultimately, the County Planning Commission approved the CDP for such development on December 14, 2022, but explicitly did not authorize recognition of the chain link fence at the blufftop edge, rendering it unpermitted (yet still extant as of today). The County's Final Local CDP Action Notice was received in the Coastal Commission's Central Coast District Office on January 4, 2023 (see **Exhibit 3**). The Coastal Commission's ten-working-day appeal period for this action began on January 5, 2023, and concluded at 5pm on January 19, 2023. Two valid appeals were received during the appeal period (see **Exhibit 4**).

C. Appeal Procedures

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no

⁵ Heavy-duty plastic mats arranged in a cell pattern, where the cells are then filled with soil or other materials, that are designed to stabilize slopes.

⁶ Typically, jute or similar material in 'blankets' that help to hold soil and stabilize plantings.

⁷ ECDPs only authorize development temporarily and are intended to provide for the least amount of temporary development to abate the identified emergency. In other words, ECDPs are not granted based on a thorough evaluation of Coastal Act and LCP consistency for the authorized temporary development, although of course those kinds of questions are considered as time allows, but rather are by their very nature designed to be temporary authorizations for temporary work that can abate an emergency and allow time for a regular CDP to be considered that can be evaluated against all applicable Coastal Act and LCP provisions. As such, temporary ECDP development enjoys no particular Coastal Act/LCP consistency status, and the fact that it was initially authorized by ECDP doesn't mean that it can or will be authorized by a regular CDP when evaluated against the Coastal Act/LCP. Put another way, it is temporary development that is undertaken at an applicant's own risk, including as it may not be approved by the required follow up CDP, and may need to ultimately be removed and the area restored if that is the case.

⁸ See pages 44-50 of Exhibit 3 for letters from Commission staff to the County regarding the CDP application.

beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. This County CDP decision is appealable to the Commission because the project site is located between the first public road and the sea, within 300 feet of the inland extent of the beach and the seaward face of the coastal bluff, within an area that constitutes a sensitive coastal resource area under the LCP, and because it is not the principal permitted use in the applicable Parks, Recreation, and Open Space (PR) zoning district under the LCP.

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP and/or to Coastal Act public access provisions. For appeals of a CDP denial, where allowed (i.e., only allowed in extremely limited circumstances – see description of appealable actions, above), the grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions.

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the "substantial issue" phase of an appeal. The Commission is required to begin its hearing on an appeal, addressing at least the substantial issue question, within 49-working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline.

The Coastal Act and the Commission's implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.⁹ At this stage, the Commission may only consider issues brought up by the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the

⁹ The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (California Code of Regulations, Title 14, Section 13115(b)). Section 13115(c) of the Commission regulations provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a significant issue: (1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and the Coastal Act's public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

former recommendation, the Commission will not take public testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it, and, unless the Commissioners vote that the appeal raises no substantial issue, a substantial issue is automatically found. In both cases, when the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, aggrieved persons, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

If, following testimony and a public hearing, the Commission determines that the appeal does not raise a substantial issue, then the first step is the only step, and the local government's CDP decision stands. However, if the Commission finds a substantial issue, the Commission takes jurisdiction over the underlying CDP application for the proposed project and conducts a *de novo* review of the underlying CDP application as the second step.

In the second phase of the appeal, the Commission must determine whether the proposed development is consistent with the applicable LCP (and in certain circumstances the Coastal Act's public access and recreation provisions). This step is often referred to as the "de novo" review phase of an appeal, and it entails reviewing the proposed project in total and with no deference to the local government's findings. There is no legal deadline for the Commission to act on the *de novo* phase of an appeal. Staff will make a CDP decision recommendation to the Commission, and the Commission will conduct a public hearing to decide whether to approve, approve with conditions, or deny the subject CDP. Any person may testify during the *de novo* phase of an appeal hearing (if applicable).

D. Summary of Appeal Contentions

The two appeals overall contend that the County-approved CDP raises consistency issues with the LCP and the public access provisions of the Coastal Act because: 1) the development constitutes shoreline armoring and it is not clear that such armoring is allowable based on the circumstances that apply (and associated coastal resource impacts were not properly addressed if allowable); 2) the development imposes decidedly unnatural private armoring and drainage infrastructure into the bluff face at a highly visible location in the public viewshed, especially as seen from the State Beach, and these natural landform alterations and visual impacts were not properly analyzed; 3) the development would collect surface runoff from a paved vehicular use area and direct it down the bluff to the sandy beach and adjacent Bonita Lagoon below, and potential water quality and ESHA issues and impacts were not properly analyzed; 4) the development is located in the same bluff area where there is evidence of past public beach access use (and in a location explicitly designated by the LCP for beach access), where the development would impede any such access (including the currently extant yet unpermitted chain link fence); and 5) there are open and active enforcement cases related to unpermitted development at the site (including for fencing, barbed wire, restrictive signs, security guards, etc.), and the LCP prohibits CDP approval unless such violations are resolved, and here they are not. See **Exhibit 4** for the full appeal documents.

E. Substantial Issue Determination

1. Shoreline Armoring

The appeals contend that the County-approved project is inconsistent with the shoreline armoring provisions of the LCP, in that the armoring does not meet the criteria for allowing shoreline armoring and, even if it did, the project includes no mitigations for such armoring's impacts. The LCP defines shoreline protection structures as "any structure or material, including but not limited to riprap or a seawall, placed in an area where coastal processes operate."¹⁰ The approved development is a structure built into, along, and on top of a coastal bluff, where coastal processes clearly operate, and thus it qualifies as shoreline armoring.

The LCP allows shoreline armoring only in a very narrow set of circumstances (and in a manner similar to the Coastal Act), and LCP shoreline armoring provisions (see **Exhibit 5**) require that such armoring measures be limited to "protect existing structures from a significant threat" (LUP Policy 6.2.16). In this case, the Applicants sought to armor the bluff face in order to protect the end of the Geoffroy Drive; however, the County did not evaluate whether the edge of the pavement that serves as the end of Geoffroy Drive (across the road and driveway from the Applicants' private residence) qualifies as an 'existing structure' for purposes of considering armoring in the first place (e.g., whether it existed in this form prior to 1977 and has not been redeveloped/replaced since). Even if it could be shown to be an existing structure for armoring consideration purposes, the County did not evaluate to what extent it was in danger "from a significant threat". The slope sloughing and slumping that precipitated the project appears to have led to minor damage to the edge of the roadway according to project plans, but it did not appear to have significantly affected road use, or vehicular ingress/egress. In short, it is not clear that the existing structure (if it were to qualify) was in danger from a significant threat.

If it were to be shown that there was an existing structure for armoring consideration purposes, and it were to be shown that it was in danger from a significant threat requiring its protection, the LCP also requires that all proposed shoreline armoring undergo a "thorough analysis of all reasonable alternatives" and that armoring "on the bluff and beach shall only be permitted where nonstructural measures...are infeasible from an engineering standpoint or are not economically viable" (IP Section 16.10.070(H)(3)(c)). In processing this application, neither the Applicant nor the County conducted an alternatives analysis as is required. In fact, the County did not evaluate any such alternatives, including potential non-structural alternatives (such as the no-project alternative, bluff revegetation, or minor road reconfiguration). In short, the County did not evaluate whether there were other alternatives available to protect an existing in structure subject to a significant threat (if one could be shown to so qualify) with less coastal resource impacts, such as non-structural options. In addition, the County did not evaluate armoring impacts (e.g., the effect of the armoring on natural processes, beach retention and formation, etc.) nor identify any required mitigations.

¹⁰ See IP Section 16.10.040(59) in Exhibit 5.

For these reasons, the County's approval of a CDP for the project raises a substantial LCP conformance issue with respect to shoreline armoring and addressing its attendant impacts.

2. Natural Landforms and Public Views

The appeals contend that the County-approved project was not evaluated for, nor appropriately found to conform to, LCP provisions protecting natural landforms and public views. Rather, that the project installs decidedly unnatural private armoring and drainage infrastructure into a natural bluff landform and a highly scenic public beach area, and in an area designated Existing Parks, Recreation and Open Space (O-R) and Parks, Recreation, and Open Space (PR) by the LCP. The LCP includes several provisions that serve to protect visual resources (LUP Objective 5.10a); to ensure development is designed to minimize adverse impacts upon visual resources (LUP Objective 5.10b); and to require that projects be evaluated against and designed to be consistent with the context of their environment (LUP Policy 5.10.2). Furthermore, the LCP "prohibits the placement of new permanent structures which would be visible from a public beach" and requires that shoreline protection "use natural materials and finishes to blend with the character of the area and integrate with the landform" (LUP Policy 5.10.7) and that all development be visually compatible with its surroundings, designed so that it does not negatively impact significant views and scenic character, and sited and designed to "fit the physical setting carefully so that its presence is subordinate to the natural character of the site, including through appropriately maintaining natural features, such as prominent natural landforms (IP Section 13.20.130). The LCP also explicitly states that development in O-R can only be approved if it is consistent with natural and scenic resource protection (LUP Policy 7.10.5), and that the objectives of the PR designation are "to preserve the County's undevelopable lands and public park lands as open space; and to protect open space," to apply development standards in a way that preserves open space, and "to designate and to preserve, through careful and limited development and use, those lands designated on the General Plan which are not appropriate for development" (IP Section 13.10.351).

These natural landform and public view protection provisions are particularly important in this case considering that the site is prominent in the State Beach viewshed, a beach that is a very popular visitor destination. In addition, the project site is located on a portion of the bluff promontory that also puts it in view from the beach while looking towards and taking in the Monterey Bay. Here, the approved development essentially 'scooped out' the natural bluff landform, and inserted concrete and industrial pipe infrastructure in its place, which is hard to consider as a minimization of landform alteration. In addition, the armoring introduces unnatural concrete and fill into the bluff face, as well as geogrid mats and erosion control blankets that are not visually compatible with the natural character of the bluff face. Moreover, a 12-inch diameter industrial drainpipe now extrudes from the bluff face, where surface runoff emanating from the pipe is also visible when flowing from Geoffroy Drive to the beach below, which also detracts from the public view and the natural landform (see **Exhibit 2** for site and project photos). Aesthetically, the County-approved development does not blend with the natural character of the beach and bluff area or integrate with the natural landform,

but instead stands out on the bluff face and is perceived as visual interruptions in relation to natural features. And it also doesn't protect natural and scenic resources as is required by the LCP for CDP approval at sites in O-R, nor does it preserve the area as open space or recognize that the LCP designates PR sites, like this (and explicitly "coastal bluffs and beaches" and "coastal lagoons") as areas that are to be preserved and that are inappropriate for development.

Further, the unpermitted 42-inch chain link fence at the top of the bluff and other unpermitted development at the site (which are discussed in more detail below but includes unsightly and potentially dangerous barbed wire, invasive thorny blackberry bushes, and unnatural wooden fencing at the base of the bluff) constitute highly unnatural, permanent structures that are not subordinate to the natural bluff and beach environs as required, nor do they harmonize with the character of the area or protect the public's viewshed (again, see **Exhibit 2**).

For these reasons, the County's approval of a CDP for the project raises a substantial LCP conformance issue with respect to protecting natural landforms and public views.

3. ESHA

The appeals contend that the County-approved project does not conform to LCP provisions protecting water quality and environmentally sensitive habitat areas (ESHA) because of the installation of a drainage system that will collect surface runoff from a paved vehicular area and direct it to the beach, and ultimately to adjacent Bonita Lagoon and/or the Pacific Ocean. The LCP defines both sandy beaches and lagoons as ESHA (IP Section 16.32.040) and requires that no development shall be allowed in these areas if the associated adverse water quality impacts cannot be mitigated (LUP Policy 5.7.1 and IP Section 16.32.090). Other LCP provisions prohibit activities that could adversely impact sensitive habitats of the Monterey Bay National Marine Sanctuary offshore, identify urban runoff as a "main source of concern" to habitats and other protected areas (LUP Policy 5.4.1), require that proposed development be reviewed for its potential to contribute polluted water via surface and other runoff, and require that projects use best management practices to address such potential pollutants (LUP Policy 5.4.14).

Urban runoff, particularly emanating from vehicular use and residential areas such as is the case here, is known to contain a wide range of pollutants, including nutrients, sediments, trash and debris, heavy metals, pathogens, petroleum hydrocarbons, and synthetic organics such as herbicides, rodenticides, and pesticides.¹¹ The County did not evaluate to what extent the runoff in question was allowed to be directed to a sandy beach, nor its potential for adverse impacts both to the beach and to ESHA. And the

¹¹ Pollutants of concern found in urban runoff include, but are not limited to: sediments; nutrients (nitrogen, phosphorous, etc.); pathogens (bacteria, viruses, etc.); oxygen demanding substances (plant debris, animal wastes, etc.); petroleum hydrocarbons (oil, grease, solvents, etc.); heavy metals (lead, zinc, cadmium, copper, etc.); toxic pollutants; floatables (litter, yard wastes, etc.); synthetic organics (pesticides, herbicides, PCBs, etc.); and physical changed parameters (freshwater, salinity, temperature, dissolved oxygen, etc.).

County did not condition the project in any way to address the potential for beach, ocean, or Bonita Lagoon degradation.

For these reasons, the County's approval of a CDP for the project raises a substantial LCP conformance issue with respect to protecting water quality, beaches, and ESHA.

4. Public Access and Recreation

The appeals contend that the County-approved project will have an adverse impact on public access, which is inconsistent with the public access provisions of the Coastal Act and the certified LCP. The California Constitution mandates the protection and enhancement of public access to along California's coastline. The Coastal Act strengthens these protections by mandating not only the protection and enhancement of public recreation and access but the maximization of such opportunities (see Coastal Act Section 30210 in **Exhibit 5**). The County's LCP also provides extensive protections for public beach access and recreation (LUP Policy 7.7.10), such as encouraging pedestrian enjoyment of ocean areas by the development of vista points, overlooks, and facilities for pedestrian access to the beaches (LUP Policy 7.7.1); establishing a system of connections between beaches (LUP Policy 7.7.6); and protecting existing beach access (LUP Policy 7.7.10). Other relevant Coastal Act provisions, from which the certified LCP draws its authority, similarly serve to require protection, enhancement, and maximization of public recreational access opportunities to the coast. Additionally, the LCP requires that shoreline armoring shall not reduce or restrict public beach access.¹² Importantly, the County LCP specifically designates the end of Geoffroy Drive as part of "a system of neighborhood access points appropriate for access by local residents" (LUP Policy 7.7.18).

Despite these requirements, the County did not evaluate the project's impacts on public access. For example, although the LCP requires that any approved shoreline armoring structure avoid impacts to public access and recreation, and that it mitigate for those that are unavoidable, no potential impacts were evaluated, identified, nor mitigated in the County's approval. And this, despite the fact that armoring as a general rule has significant adverse impacts on public recreational access and natural processes (which also significantly impacts public recreational access),¹³ and thus a Coastal Act and LCP exploration of such issues is essentially mandatory when armoring is considered.

Here, too, there is other compelling public access and recreation context that would suggest a Coastal Act/LCP evaluation is warranted. In particular, the project is located in an area designated for access by the LCP, which by itself requires an evaluation of the manner in which the project affects such access. In addition, the project is located at the exact location where there is evidence that the public has historically accessed the beach, at least prior to a series of unpermitted obstructions to such access going back

¹² See LUP Policy 6.2.16 that prohibits armoring from reducing or restricting public beach access, and IP Section 16.10.070(H)(3)(e) that requires the same as a condition of armoring approval.

¹³ See, for example, Commission findings in LCP-3-MRB-21-0047-1 (Morro Bay Land Use Plan Update), and CDPs A-3-SCO-07-095/3-07-019 3-07-019 (Pleasure Point seawall), 3-09-025 (Pebble Beach Company Beach Club seawall), 3-09-042 (O'Neill seawall), 2-10-039 (Lands End seawall), 3-14-0488 (Iceplant LLC seawall), and 2-17-0702 (Sharp Park golf course).

nearly three decades (see additional discussion on this point in the Violation section subsequently). Despite this context, the County's approval lacks adequate analysis of such public access and recreation issues.

In addition, the manner in which the project was approved did not condition for the removal of the unpermitted 42-inch tall black vinyl-coated chain link fence at the top of the bluff that the Applicants recently installed under the ECDP. Instead, although the Planning Commission explicitly made clear that its CDP approval did not extend to such fence, the County decision does not address fence removal. At a minimum, the County's approval results in an unpermitted but extant chain link fence atop the coastal bluff, and it is hard to imagine a scenario where such fence could be found Coastal Act and LCP consistent with respect to public access and recreation given the circumstances.

For these reasons, the County's approval of a CDP for the project raises a substantial Coastal Act and LCP issue with respect to protecting, providing, and maximizing public access and recreation opportunities.

5. Violations

Violations of the Coastal Act and LCP exist at and near the project site including, but not necessarily limited to, the erection of a fence at the blufftop edge and a locked blufftop edge gate; the installation of barbed wire and restrictive signage purporting to prohibit public access; the planting of spiky bluff-area vegetation; construction of a wooden fence near the bottom of the bluff; and the use of security guards; all designed to block and deter public access between Geoffroy Drive and Twin Lakes State Beach below, and all without a CDP.

In fact, the project site is the location of a longstanding violation that has been tracked by the Commission's enforcement unit for roughly three decades, emanating from the fact that there is evidence that the public historically used the upcoast end of Geoffroy Drive and the bluff area in question as a means of access from the beach at Black's Point to Geoffroy Drive and on to the beach at Sunny Cove (just downcoast), and vice versa, and the fact that over the years, various forms of development have occurred, without Coastal Act/LCP authorization, along the bluff edge and the surrounding area, impeding that use. Specifically, in the mid-1990s, Commission staff became aware that a blufftop edge fence, gate, and "No Trespassing" signs had been installed at this location, blocking the ability of the public to access the beach in that way.¹⁴ Subsequently, a prior property owner of the Applicants' property, Eugene Shklar, installed barbed wire at the top of the bluff, a wooden fence with barbed wire at the base of the bluff, five restrictive signs deterring access to the area, and blackberry bushes on the bluff face, and hired a security guard, all without CDPs and all as a means to deter the public from accessing the area in the way it had prior to the unpermitted development.¹⁵ Despite repeated requests from Commission staff to the property

¹⁴ Other than those with a key to the gate, presumably the then homeowners located atop the promontory, but not the general public.

¹⁵ Mr. Shklar expressly admitted as much in a declaration that he provided to Santa Cruz County Superior Court in relation to litigation associated with a vehicular gate that had been installed that blocked public

owners to remove all such unpermitted development, it was not removed, and the area has not been available for the public to use it as it had in the past before the unpermitted development was installed. Over time, the bluff slope trail where access had historically been possible grew over with brambles and was no longer easily accessible (see photos in Exhibit 2). None of these violations have been resolved, and they continue to be tracked by the Commission as violations.

Relatedly, there has also been other recent development that has affected access to the end of Geoffroy Drive.¹⁶ Specifically, in 2016 a vehicular fence and gate was installed without a CDP across Geoffroy Drive just downcoast of 100 Geoffroy Drive, thus blocking access to that portion of Geoffroy Drive on the promontory above the beach on which the last five houses on Geoffroy Drive, including the Applicants', sit. And thus also blocking public access (other than presumably access for the residents to homes upcoast of the fence/gate, such as the Applicants) to the location of the project site and above-described violations.¹⁷

On April 11, 2018, Commission enforcement staff sent a letter to the County and the applicable Homeowners Association's (HOA) representative, notifying them of violations, and offering to assist and coordinate with the County to resolve them. There has since been much correspondence between Commission staff and the HOA's representative on the issues in the years since, much of it focused on the vehicular fence and gate, but also discussing the other violations, including suggestions made by Commission staff regarding options to resolve those violations by either removing them or seeking a CDP to retain them. In 2020, when the work was done under the County-issued ECDP, a new 42-inch-tall black vinyl-coated chain link fence was also installed at the blufftop edge. The recent County-approved project neither authorized that fence replacement nor required the removal of the fence at that location, and it did not address the other violations described herein. Therefore, such violations remain unresolved, and the Commission's enforcement division continues to consider options for future action to address them.¹⁸

access to the end of Geoffroy Drive (see below, and see "Declaration of Eugene Shklar" attached as Exhibit 6).

¹⁶ This development is summarized here for informational purposes, but it is not located on the Applicants' property, and it is not within the scope of this appeal.

¹⁷ The vehicular fence and gate have been the subject of litigation (*Fowler Packing Co., et al. v. County of Santa Cruz, et al.*, Santa Cruz County Superior Court Case No. 19CV00673). As a result of that litigation, which is still pending, at this time the vehicular fence and gate are not part of the Commission's active violation file for this site, and nothing in these findings constitutes: (a) a demand that the local permits issued by the County for that development be retracted, (b) a demand that the parties responsible for that development obtain a CDP for it, or (c) a threat to impose civil administrative penalties for the failure to remove that development. The Commission is actively pursuing an appeal of the Superior Court decision in that case, but is not currently actively pursuing enforcement activities related to the vehicular fence and gate.

¹⁸ In any case, and to be clear, Commission review and action on this appealed County CDP action does not constitute a waiver of any legal action with regard to the alleged violations (or any other violations), nor does it constitute an implied statement of the Commission's position regarding the legality of the development undertaken on the subject site without a CDP, or of any other development, except as otherwise expressed herein. And although development has taken place prior to submission of this CDP

That is important because the LCP includes provisions that address violations of the Coastal Act/LCP, specifically in the case of proposed development at a site on which there are existing unresolved violations (see IP Section 13.20.170(C) in Exhibit 5). These provisions require that development can only be approved and allowed if the CDP approval resolves all violations relating to the site, and the resolution protects and enhances coastal resources, and restores the site to a condition as good or better than existed prior to the violations. The County's approval does not resolve or otherwise even ameliorate these ongoing violations at the site, including as the Applicants did not seek and the County did not require resolution of the aforementioned violations. As a result, the LCP does not allow for the County to approve a CDP for the project.

For these reasons, the County's approval of a CDP for the project raises a substantial LCP issue with respect to required resolution of violations.

6. Conclusion

When considering a project that has been appealed to it, the Commission must first determine whether the project approval raises a substantial issue of Coastal Act public access and LCP conformity, such that the Commission should assert jurisdiction over the CDP application for such development and conduct its own *de novo* review thereof. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP and/or Coastal Act conformance. Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a substantial issue: 1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP; 2) the extent and scope of the development as approved or denied by the local government; 3) the significance of the coastal resources affected by the decision; 4) the precedential value of the local government's decision for future interpretations of its LCP; and 5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may find substantial issues for other reasons. In this case, these five factors, considered together, support a conclusion that the County's approval of CDP for this project does raise substantial LCP conformance issues.

There are several key issues with the factual and legal support for the County's decision with respect to LCP and Coastal Act consistency. As discussed above in the prior five sections, the LCP (and Coastal Act where applicable) evaluations were essentially missing in the County's approval, and where discussed did not adequately address requirements. As a result, a project was approved in a bluff above a state beach for which there is a lack of factual and legal support to demonstrate that that project can even be found LCP and Coastal Act consistent in terms of allowing armoring; protecting natural landforms and public views; protecting water quality, beaches, and ESHA; protecting, providing, and maximizing public access and recreation opportunities; and

application to the County, prior to the County's approval, and prior to that County approval being appealed to the Commission, consideration of this appeal by the Commission to date has been based solely upon whether the appeal contentions raise a substantial issue with respect to the grounds on which the appeals were filed.

resolving violations as LCP required. The first factor weighs heavily towards substantial issue.

Regarding the second and third factors (related to the extent and scope of development, and to the significance of the coastal resources involved) although the project is relatively small, it affects significant coastal resources, including natural landforms, natural bluffs, State Beaches, important public views, ESHA, and public recreational access opportunities, among others. In addition, the County's approval did not clearly evaluate and address potential impacts to such significant coastal resources in the manners required by the Coastal Act and the LCP. For example, the public's access to the beach remains one of the Commission's greatest priorities, and the site is within a highly scenic viewshed. Projects, like this one, that do not adequately address adverse effects on public access, impose unnatural infrastructure on scenic landforms, and potentially harm water quality and ESHA, pose significant coastal resource issues, and the second and third factors also point to substantial issue.

With respect to the precedential value of the County's decision for future interpretations of its LCP, the LCP clearly protects public recreational access, natural landforms and visual resources, natural shoreline processes, and water quality and ESHA, and requires the resolution of prior violations at a site before embarking on new development. By not adhering to these provisions, the County risks not adequately measuring its decisions in the context of its certified LCP and, by extension, the Coastal Act. All of which points to a decision like this setting adverse precedent that could have significant coastal resource implications in the future, also weighing towards a substantial issue.

And finally, as to whether the appeal raises only local issues as opposed to regional or statewide issues, the issues at play in this appeal are important statewide issues in terms of allowing armoring; protecting natural landforms and public views; protecting water quality, beaches, and ESHA; protecting, providing, and maximizing public access and recreation opportunities; and resolving violations when LCPs require as much in CDP contexts. Such concerns are highlighted when the project in question affects a significant public beach, and here a very popular State Parks' public beach, where impacts from the private project accrue solely to the public. Thus, the five substantial issue factors, individually and on the whole, support a finding of substantial issue as to conformity with the Coastal Act and the certified LCP.

For the reasons stated herein, the Commission finds that a substantial issue exists with respect to the County-approved project's conformance with the Coastal Act and the certified Santa Cruz County LCP and takes jurisdiction over the CDP application for the proposed project.

3. APPENDICES

A. Substantive File Documents¹⁹

- File for Coastal Development Permit Appeal Number A-3-SCO-23-0003

B. Staff Contact with Agencies and Groups

- Santa Cruz County Community Development and Infrastructure Department

¹⁹ These documents are available for review in the Commission's Central Coast District office.