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Th12a

Prepared May 10, 2023, for May 11, 2023 Hearing

To: Commissioners and Interested Persons

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

**Subject: STAFF REPORT ADDENDUM for Th12a
CDP Application A-3-SCO-20-0027 (Sisney, Santa Cruz Co.)**

The purpose of this addendum is to respond to the materials submitted by the Applicants' representative (dated May 9, 2023 and received by the Commission on May 10, 2023, located in the correspondence package for this item) after the staff report was distributed on April 28, 2023. Specifically, the Applicants' representative makes a series of claims and assertions regarding the Commission's interpretation of LCP and Coastal Act coastal hazards provisions, the April 13, 2018 settlement agreement between the Commission and the Applicant, as well as other issues, and staff herein provides a response to these claims and assertions. Such clarification does not modify the staff recommendation, which is still a recommendation that the Commission deny the CDP application, but staff does hereby slightly update its recommended Commission findings to include the responses provided herein.

Most notably, the Applicants' representative asserts that the Commission breaches the April 13, 2018 settlement agreement between the Commission and the Applicants by stating that a distinct reason for denial is an ongoing and unresolved 2016 violation wherein the Applicants filled a seacave without a CDP.¹ The Applicants' representative also disagrees with the Commission's interpretations of LCP and Coastal Act coastal hazards provisions, stating the Commission staff have "ignore[d] basic principles of statutory construction," and have "contradicted precedent." Further, the Applicants' representative characterizes the ownership of the four lots that constitute the subject property contrary to the characterization provided in the staff report and contends that a footnote in the staff report incorrectly references applications similar to the subject application. In addition, the Applicants' representative asserts that County and Commission statements from 1996 should dictate how armoring should be understood indefinitely, including now in 2023. Each of these issues is addressed in the staff report, but further clarification is provided below.

¹ This violation and settlement agreement are described in detail in the "Violations" section of the staff report.

1. CDP denial on the basis of the 2016 violations is not a breach of the April 13, 2018 settlement agreement

The Applicants' representative cites to the April 13, 2018 settlement agreement, itself emanating from the Applicants' litigation against the Commission's notice of violation in 2016 (see staff report pages 21 – 24 for more information), claiming that the agreement says the Commission would not rely on the "2016 Maintenance Work as a basis to object to the Project."² Yet, the actual language from the settlement agreement says no such thing, and the Applicants' representative does not cite any specific language in the settlement agreement to support such a broad prohibition. The closest language from the settlement is from Section 2.3 where it states that Commission staff "will not recommend an appeal of any Santa Cruz County CDP decision approving any single-family residential development project on real property owned by the Sisneys on the basis of the alleged violations." Commission staff did not recommend this appeal because of the violations, so there is no violation of that provision. Nor did the Commission use violations as a basis for finding the appeal to raise substantial issues (even though it would not have been a violation of the agreement had the Commission done so). Furthermore, this is no longer an appeal. This is a de novo review of a CDP application by the Commission, and there is no provision of the agreement that states that the Commission may not use the violations as a basis for a CDP action. In fact, Section 2.3 goes on to state that staff "retains discretion to advise the County during any local CDP process regarding real property owned by the Sisneys as regards [Coastal Act and LCP] consistency issues, including advising that any such project be evaluated as if the 2016 Work was not present." While this section is not directly applicable, it is evidence that the earlier part of that section 2.3 was never intended to preclude the Commission from taking the violations into account in its recommendations or suggestions for how to handle this application. Finally, the agreement states (in Section 2.2) that "The Commission does not waive any rights it has to pursue the Sisneys for violations of the California Coastal Act." In short, the Applicants' representative is just plain wrong, and there has been no breach of the agreement with Commission staff's recommendation, nor will there be a breach if the Commission denies the project, including on the basis of the violations.

2. Commission staff's interpretation and application of LCP and Coastal Act coastal hazards provisions is robust and is consistent with Commission precedent

The Applicants' representative's letter states that the "the LCP unambiguously entitles the [Applicants] to rely on the Armoring in calculating the Project's 100-year geologic hazards setback" and therefore that staff is misinterpreting the LCP in requiring the project to be set back without countenancing such existing armoring. The findings proposed on pages 9 through 15 of the April 28th staff report walk through the various LCP provisions that govern shoreline armoring and new development, including describing the various other interpretations proffered by the Applicants and explaining the rationale for why their interpretation (i.e., that new development can rely on existing or proposed armoring) is not consistent with either the LCP or the Coastal Act from which the LCP derives its authority. Staff reiterates those same points here, including

² Although, as this quote indicates, the Applicants characterize the work in question as 'maintenance work,' such work was neither maintenance nor permitted (again, see staff report pages 21 – 24).

that the LCP clearly states the requirement that in areas subject to bluff erosion, there must be a demonstration that the hazards associated with such erosion can be mitigated and that that “mitigation of the potential hazard is not dependent on shoreline or coastal bluff protection structures...” (LUP Policy 6.2.15). The Applicants’ assertion that Commission staff’s interpretation of these policies “ignore[s] basic principles of statutory construction” is only supported if one offers one possible interpretation of any given single provision. This assertion ignores other canons of statutory interpretation, including that language should be interpreted in the context, and the necessary holistic and robust interpretation of a number of LCP and Coastal Act provisions that together provide the regulatory framework described in the staff report, including as informed by relevant jurisprudence. And also as specified in the staff report (see page 12), this interpretation is not new, but rather has been the Commission’s analytic framework for evaluating coastal bluff/shoreline development³, including in the Commission’s adopted Substantial Issue findings when it took jurisdiction over this very project in 2020.

Further, the Applicants’ representative asserts that “Commission staff’s current position contradicts precedent” and references a number of County and Commission permits associated with nearby properties. First, each of the Commission permits listed in the Applicants’ representative’s letter (3-07-031 (Laing), 3-11-034 (Novak), 3-07-031 (Krach), 3-07-047 (Atre), and 3-83-166 (Lowe)) was for the construction or maintenance of armoring structures and are thus irrelevant here. As for the County permits listed, while it may or may not be true that any 100-year erosion setback determined for the proposed work approved in these County decisions was reliant on armoring, which Commission staff are unable to fully ascertain given that the Applicants’ representative’s letter arrived one-day before the hearing and the same day as this addendum, the position taken by the County in the past is not dispositive here. Moreover, in a number of these cases, Commission staff commented at the local level on this issue, stating that such a setback should not be reliant on armoring.⁴ Commission staff reiterate here that these such bases for appeal and denial are not new, and the Commission has consistently applied this framework in guiding CDP application review and in its own actions over the years.

3. Correction to Footnote 19 in the staff report

The Applicants’ representative claims that the projects cited in footnote 19 of the staff report⁵ are inapposite because these were applications for proposed armoring structures. While it is true that these projects were for proposed armoring structures, the Commission in each of these cases drew similar LCP conclusions as it relates to allowing armoring. In addition, footnote 19 also references CDP Application 3-03-035

³ The Applicant’s attorney also states that “a legally unsupportable position doesn’t become otherwise by mere repetition.” While that may be true, the Commission has never found the position it takes here regarding LCP interpretation to be unsupportable. To the contrary, it has consistently found it to be the correct interpretation since for decades, for the reasons stated in the staff report.

⁴ For example, Commission staff consistently made such comments on the local approval of a residential demolition and reconstruction at 2866 S. Palisades Avenue (Laub).

⁵ Though not directly stated, it is assumed that the Applicants’ representative is specifically referring to appeals A-3-SCO-01-117 (Banman), A-3-SCO-01-118 (Black), and A-3-SCO-01-109 (Adams), and CDP application 3-02-060 (Medeiros) to the Commission.

(Williams), where Commission staff recommended denial and the application was subsequently withdrawn before the Commission hearing, as well as the Commission's denial of the County's Coastal Hazards Update in October 2022 (LCP-3-SCO-20-0066-2). Staff recommends footnote 19 be corrected to read:

“See, for example, the appeal of a County-approved project for an addition to a house that relied on existing armoring for its 100-year erosion setback (A-3-SCO-22-0033 (Hoyle)), and a proposed CDP application for a house that relied on existing armoring for protection recommended for denial for that reason that was withdrawn just prior to Commission action (3-03-035 (Williams)) just upcoast of Opal Cliffs. See also, most recently, the Commission's adopted findings for the denial of the County's Coastal Hazards Update in October 2022 (LCP-3-SCO-20-0066-2).”

4. The ownership of the subject four lots is effectively common

The Applicants' representative asserts that “Commission staff erroneously indicates that the Property is ‘under common ownership.’ The owners of the four parcels (from north to south) are: (1) APN 033-132-06: Bret Sisney, individually as his separate property; (2) APNs 033-132-05 and -013: Bret Sisney and Carol Reding Sisney, Co-Trustees of the Sisney Living Trust dated August 11, 2009; (3) APN 033-132-14: Carol Reding Sisney, individually as her separate property.” Commission staff disagrees with this characterization and the effect it may have, most basically because although the subject parcels are technically titled to either Bret Sisney, Carol Reding Sisney, or both Bret Sisney and Carol Reding Sisney together, the Applicants share common economic interest in the subject property, including by jointly owning and occupying the residence which spans all four lots that constitute the subject property.

5. Statements made 1996 do not dictate the manner in which armoring impacts are to be understood indefinitely

The Applicants' representative claims that Commission staff's public access analysis “contradict the evidence” and points to findings made by the County in 1996 in approving the seawall which fronts the subject property, which state that the proposed armoring would not significantly interfere with lateral beach access, and similar findings of the Commission at that time. Commission staff notes that such findings were made nearly thirty years ago, and that such prior findings do not and cannot eliminate the armoring concerns that are stated in the staff report. Not only are they specific to the applications to which they were attached, and those applications only (and not this one), but our understanding of the ways in which coastal armoring impacts coastal resources, including specifically public access, public views, and natural erosion processes, have evolved in that time. Now more than ever beaches along the California Coastline, and especially in the Opal Cliffs area of Santa Cruz County, are adversely affected by such armoring, and the results of sea level rise and coastal squeeze are clearly observed. As in any policy making and land-use planning process, context and understandings can change, especially over multiple decades. And here, Commission staff identify concerns in the staff report based on what is proposed, namely a new house that would rely on armoring when that is not allowed by the LCP, and the Applicants' own consultants indications that to be able to maintain stability and safety for that home for the LCP

required time frame will require ongoing maintenance and even augmentation of the armoring in question. Commission staff stands by the analysis in the staff report.

6. In sum, the assertions and claims made by the Applicants' representative do not change staff's recommendation, which continues to be denial

As described above and more fully detailed in the staff report for this CDP application, staff continues to recommend denial of the CDP application for the proposed project.