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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: Additional hearing materials for Th12a
CDP Number A-3-SCO-20-0027 (Sisney, Santa Cruz Co.)**

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

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MAY 10 2023

**CALIFORNIA
COASTAL COMMISSION
CENTRAL COAST AREA**

VIA EMAIL ONLY (DONNE.BROWNSEY@COASTAL.CA.GOV)

California Coastal Commission
ATTN: Donne Brownsey, Chair
455 Market Street, Suite 300
San Francisco, CA 94105

Re: Response to Staff Report - CDP Application; Appeal No. A-3-SCO-20-0027
(Th12a); 4660 Opal Cliff Drive, Santa Cruz (Sisney)
Our File: 34585.32995

Dear Coastal Commissioners:

On behalf of the project applicants (collectively, the “Sisneys”),¹ this letter includes a brief response to the above referenced Coastal Commission (“Commission”) staff report published April 28, 2023 (“Report”) in support of Commission staff’s recommended denial of the proposed single-family residential redevelopment project (“Project”) on the above-referenced real property (“Property”) located in Santa Cruz County (“County”). This response supplements the previously submitted written communications and other documents in the administrative record relating to the Project and Property, including but not limited to the following, all of which is incorporated herein by this reference:

1. Settlement Agreement dated April 13, 2018;
2. Letter from Derric Oliver to Commission staff dated June 23, 2020;
3. Letter from Derric Oliver to the Commission dated September 4, 2020;
4. Letter from Bret Sisney to the Commission dated September 4, 2020; and
5. Sisney (applicant) response to Appeal No. A-3-SCO-20-0027, substantial issue hearing, September 11, 2020.

¹ In the Report, 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.

In the 33-page Report, Commission staff explains that the “fundamental issue” concerning the Project “relates to coastal hazards” and, more specifically, whether the Sisneys, pursuant to the County’s certified local coastal program (“LCP”)—including County LUP policies 6.2.12 and 6.2.15, and County CIP section 16.10.070(H)(1)—are entitled to rely on the legally established existing shoreline armoring at the base of the bluff of the Property (collectively, “Armoring”) in calculating the 100-year geologic hazards setback for the Project. In the Report, Commission staff also relies upon and discusses at length purported “violations of the Coastal Act and LCP” on the Property—“including, but not necessarily limited to, the unpermitted filling of a seacave in 2016” (“2016 Maintenance Work”)—as “a separate and distinct reason for denial” of the Project. These two issues are briefly discussed here.²

A. Coastal Hazards: the LCP unambiguously entitles the Sisneys to rely on the Armoring in calculating the Project’s 100-year geologic hazards setback.

In the Report, Commission staff go to great lengths to contort the plain meaning of relevant County LCP provisions in an attempt to manufacture ambiguities and thereby trigger Coastal Act provisions most helpful to staff’s “managed retreat” goals. For numerous reasons, Commission staff’s misinterpretation of these unambiguous LCP provisions is not well-taken and, if relied upon by the Commission to deny the Project, will constitute, among other things, an abuse of the Commission’s discretion.

1. Commission staff ignore basic principles of statutory construction

As in the Casa Mira Homeowners Association matter,³ Commission staff’s recommended interpretation of the LCP ignores important, well-established rules of statutory interpretation, including: (1) give words their ordinary and usual meaning (e.g., “existing” means “existing” and “proposed” means “proposed”); (2) harmonize the various provisions; (3) do not ignore or otherwise render words null or surplusage (e.g., “existing conditions” and “proposed”); and (4) avoid absurd results (e.g., “existing site conditions” actually means “existing at some point a long time ago” and “proposed” means “existing” or “any”). Still, Commission staff argues, “the Commission has repeatedly made these same [LCP interpretation arguments].” However, fortunately, a legally unsupportable position doesn’t become otherwise by mere repetition.

2. Commission staff’s current position contradicts precedent

In addition to violating basic rules of statutory construction, Commission staff’s recommended interpretations also contradict the Commission’s own interpretation and application of these same LCP provisions in recently reviewing and ultimately approving (or not appealing)

² The Report includes some discussion of the County LCP’s visual resource protection policies (e.g., public views, scenic character, and community aesthetic). However, Commission staff concludes that the Project’s potential impacts in that regard would not be significant, thereby implying that visual resources are not a basis for Commission staff’s recommended denial of the Project. As such, the Sisneys will not further address those issues.

³ See, e.g., San Mateo County Superior Court Case No. 19CIV04677.

similar residential projects nearby, including on Opal Cliffs Drive, basing the 100-year geologic hazards setback in reliance on shoreline armoring (i.e., “based on existing conditions”), including:

- a. 4610 Opal Cliff Drive (Laing): 920585, 3-07-031, 050786, 070315, 090111;
- b. 4480 Opal Cliff Drive (Novak): 3-11-034, 111122, 111104;
- c. 4640 Opal Cliff Drive (Krach): 920508, 03-07-031, 193322;
- d. 2866 South Palisades (Laub): 3-07-047, 141069, 151191; and
- e. 2864 South Palisades (Lowe): 3-83-166, 141017, 181581.

Curiously, the projects cited by Commission staff in Report footnote 19 as purported support for denying the Project are inapposite, as those projects concerned “Commission denials for proposed armoring.” (Emphasis added). By contrast, as Commission staff is well aware, the Project implicates “existing” (not “proposed”) Armoring.

Beyond that, the Commission is an agency within California’s executive branch, *not* the legislative branch. As such, the Commission’s jurisdiction is limited to equally applying the law, not making it. If the Commission were to take a position with the Project inconsistent with these similar projects subject to the same County LCP, it would do so in violation of the Equal Protection Clause and separation of powers principles, at a minimum.

3. Commission staff’s “public access” arguments contradict the evidence

In the Report, Commission staff contends the Armoring “raises a whole host of public access and recreation concerns.” However, those “concerns” have been thoroughly and repeatedly addressed and debunked, based on the substantial amounts of evidence in the record. Once again, for example, as explained by the County in 1996, *prior to the Armoring’s existence*:

“Lateral beach access [fronting the Property] occurs only during periods of low tides. The proposed [Armoring] does not significantly interfere with lateral beach access” and “will not interfere with public access to the beach, ocean, or other nearby body of water. Existing vertical beach access exists approximately 780 feet west of the [Property].”

The Commission concurred and issued a de minimis waiver (3-97-034-DM) on the express rationale, “Proposed development [i.e., the existing Armoring] involves no potential for any adverse effect, either individually or cumulatively, on coastal resources and it is consistent with the policies of the Coastal Act...”

B. 2016 Maintenance Work: By relying on purported violations relating to the 2016 Maintenance Work, the Commission materially breaches the parties’ 2018 Settlement Agreement.

In the Settlement Agreement, dated April 13, 2018, between the Commission and the Sisneys, the Commission agreed not to rely on the 2016 Maintenance Work as a basis to object to the Project. But for that provision in the Settlement Agreement, the Sisneys would not have entered

into the 2018 Settlement Agreement, dropped their then-pending action against the Commission in Santa Cruz County Superior Court, or proceeded with the 2018 or 2019 Project-related applications. Said another way, in reasonable reliance on the Commission's promise, the Sisneys expended significant amounts of time and money to pursue and shepherd the Project through the County's required permitting process.

Much to the Sisneys' dismay, Commission staff dedicate four pages in the Report (pages 21-24) to arguing the Project should be denied because of the County-approved and -permitted 2016 Maintenance Work. As such, the Commission is in material breach of the Settlement Agreement and the Sisneys have and will continue to suffer damages as a result.

* * * * *

For the reasons set forth above, and as further detailed in the written correspondence and other documents in the administrative record, the Commission should approve the Project as properly approved by the County, consistent with the LCP.

Very truly yours,

FENTON & KELLER
A Professional Corporation



Derric G. Oliver

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