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Action Deadline:	7/1/2023
Staff:	Nolan Clark - SC
Staff Report:	4/28/2023
Hearing Date:	5/11/2023

STAFF REPORT
CDP APPLICATION

Appeal Number:	**A-3-SCO-20-0027**
Applicants:	Bret and Carol Sisney
Project Location:	Four contiguous lots under common ownership on the blufftop above the beach and ocean and fronted by armoring structures at 4660 Opal Cliff Drive, just downcoast of the County's Privates Beach public beach accessway, in the unincorporated Opal Cliffs area of Santa Cruz County (APNs 033-132-05, 033-132-06, 033-132-13, and 033-132-14).
Project Description:	Demolition of an existing approximately 6,000 square-foot single-story residence and garage spanning all four lots; construction of a new two-story approximately 6,700 square-foot residence with an additional 1,500 square feet in two garages (i.e., an approximately 8,200 square-foot residential development in total), a 25-yard lap pool, and related development on the two middle lots, all reliant on a shoreline armoring structure for site and structural stability; merger of the two middle lots (APNs 033-132-05 and 033-132-13) into one lot (with the remaining two lots on either side (APNs 033-132-06 and 033-132-14) left vacant (other than 100 linear feet, cumulatively across both parcels, of 6-foot tall solid fencing between the public road and the blufftop edge), also fronted by the armoring.
Staff Recommendation:	Denial

SUMMARY OF STAFF RECOMMENDATION

The Applicants propose to: 1) demolish an existing, approximately 6,000 square-foot single-story residence and garage that span four separate, commonly-owned (by the Applicants) and contiguous lots; 2) merge the two center lots into one lot (leaving the

remaining property on either side vacant (other than 100 linear feet, cumulatively, of 6-foot tall solid fencing between the public road and the blufftop edge); 3) construct a new two-story, approximately 6,700 square-foot residence with approximately 1,500 square feet of garages (in a 654 square-foot attached garage and a separate 800 square-foot detached garage) for a total of about 8,200 square feet of residential development, located closer to the blufftop edge than the existing to-be-demolished residence; and 4) construct related residential development, including a 25-yard lap pool; all reliant on an armoring structure (located along the lower bluffs and on the beach fronting the site) for site and structural stability. On September 11, 2020, the Commission found that the County's approval of a CDP for the proposed project raised a substantial issue with numerous Santa Cruz County Local Coastal Program (LCP) and Coastal Act (public access) provisions. Specifically, the Commission found substantial issues in terms of the project's consistency with coastal hazards, public views/community character, and public access provisions, and took jurisdiction over the CDP application for the project at that time.

With respect to coastal hazards, the LCP requires that new blufftop development demonstrate site stability and structural integrity over a 100-year period by establishing a 100-year erosion setback from the blufftop edge, without consideration of shoreline armoring. Although the Applicants declined to supply such a setback determination (despite being identified as necessary by the Commission in connection with its finding that the appeal raised a substantial issue), Commission technical staff have reviewed the relevant information and developed such an assessment. Specifically, based on a review of historical erosion rates as may be affected by sea level rise over the course of the LCP-required 100-year period, and without consideration of the armoring that fronts the property (as required by the LCP), it is clear that the proposed project is sited significantly seaward of the 100-year erosion setback line, and site stability/structural integrity cannot be assured without relying on armoring, inconsistent with the LCP. And such incursion is not minor, rather the proposed development encroaches almost entirely seaward into the area that would be expected to erode over time.

In addition, violations of the Coastal Act and LCP exist on the subject property including, but not necessarily limited to, the unpermitted filling of a seacave in 2016.[1] The LCP prohibits CDP approval unless violations are resolved (including requiring resolution to protect and enhance coastal resources, and to restore the site to a condition as good or better than existed prior to the violations), and these violations are not proposed to be resolved in this case. As a result, the proposed project is also inconsistent with the LCP on this point, and the lack of violation resolution is a separate and distinct reason for denial in this case.

For these and other reasons described in this report, the proposed project is fundamentally inconsistent with the LCP, requiring its denial. Such a denial does not appear to staff to affect the Applicants' property rights in a manner that would constitute

[1] Such violations, which are described in detail in the 'Violations' portion of this report, are not addressed in this CDP application, and therefore they will remain on the subject property regardless of the Commission's action on this application. The Commission's enforcement division is aware of the violations, and will continue to consider options for future action to address them.

an unconstitutional taking, including because denial of the pending proposal would leave in place the current situation, in which the Applicants already enjoy an existing fairly large house that provides economically beneficial use of the property; and because the denial is the result of a straightforward application of regulations that were in effect when the Applicants purchased the property, including that a proposal for redevelopment of the site had the potential to raise substantial issues as was explained to the Applicants by staff prior to their purchase, so the denial would not deprive them of any reasonable investment-backed expectation of being able to develop the property as proposed. In addition, any takings claim would be premature, as there likely exist a myriad of alternative viable projects for the site that properly address LCP and Coastal Act requirements. If the Applicants want to continue to pursue a replacement residential project at this site, then they are welcome to apply to the County for a different CDP for an LCP and Coastal Act consistent project. If that is the case, staff strongly advises that the Applicants pursue a project that is located landward of the 100-year erosion line established without reliance on any shoreline armoring, that such CDP application address such armoring moving forward in a way that can better protect coastal resources (e.g., removal), and that all other applicable LCP and Coastal Act requirements be met.

In conclusion, staff recommends that the Commission deny a CDP for the proposed project. The motion is found on page 5 below.

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1. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **deny** a CDP for the proposed development. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in denial of the CDP and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

> ***Motion:*** *I move that the Commission* ***approve*** *Coastal Development Permit Number A-3-SCO-20-0027 for the development proposed by the applicants, and I recommend a* ***no*** *vote.*
>
> ***Resolution to Deny CDP:*** *The Commission hereby denies Coastal Development Permit Number A-3-SCO-20-0027 on the grounds that the development will not be in conformity with the Santa Cruz County Local Coastal Program. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

2. FINDINGS AND DECLARATIONS

A. Project Location and Background

The proposed project is located on an oceanfront blufftop property at 4660 Opal Cliff Drive in Santa Cruz County (see location maps and site area photos in **Exhibits 1** and **2**). This area is generally referred to as Opal Cliffs, but it is technically part of the larger unincorporated Live Oak beach area of Santa Cruz County located between the cities of Santa Cruz and Capitola. The Live Oak beach area is arguably the most popular coastal visitor destination in unincorporated Santa Cruz County, and heavily used for coastal recreational access pursuits. Opal Cliff Drive is about two-thirds of a mile long with the project site located in close proximity to the Capitola city limits. Opal Cliff Drive is also lined with an almost unbroken string of private residential developments between the road and the blufftop edge, which limits the public's ability to even see the ocean or shoreline, let alone access it. In fact, the only place where the public can access the shoreline from Opal Cliff Drive is at Opal Cliffs Park just upcoast of the subject site, where free beach access and a beach stairway are provided.[2] The next closest vertical accessways are located about a half-mile up and downcoast from the Park (at 41st Avenue upcoast[3] and Hooper Beach downcoast in Capitola[4]). There are a series of

[2] Opal Cliffs Park has only recently begun providing free public access for the general public (previously, a fee was required to enter the park and access the beach). The County, working in conjunction with Commission staff, the Opal Cliffs Recreation District (which has since disbanded), and the Santa Cruz County Parks Department, approved a CDP in 2021 that rectified long-standing coastal access violations by authorizing free public park and beach access, new signage indicating the public access offerings, and a replacement fence/gate (i.e., removing the wrought-iron gates) at Opal Cliffs Park. The beach below is still known as Privates or Key Beach in reference to its (albeit unpermitted) history.

[3] Via a stairway at the overlook and surf spot known as "The Hook".

[4] The Hooper Beach stairway is owned and maintained by the City of Capitola. The stairway has been periodically closed in the last few years due to varying sand elevations that leave a large gap between the

well-used surf breaks all along Opal Cliffs, including the surf break known as “Trees” that is just seaward of the subject property, and which is named for the trees that historically lined the bluff along the subject site, some of which still stand today.

The beaches accessed through Opal Cliffs Park (known locally as “Privates Beach” or “Key Beach”) are just in front and upcoast from the project site, and these beaches provide the only true sandy beach experience along Opal Cliffs during most tides. There is also a sandy pocket beach, sometimes referred to as Trees Beach, that is also located seaward of the subject property on its downcoast side, but it is mostly inaccessible to the public due to the armored promontory associated with this site (and another promontory at the base of Cliff Drive near Hooper Beach that blocks access from the other direction). Other beaches along Opal Cliffs are either mostly inaccessible, like Trees Beach, or submerged between the ocean and inland armoring otherwise during other than fairly low tides. Such beach context in this area (e.g., the limited access points and limited windows of availability to access the beach area seaward of Opal Cliff Drive) emphasizes the importance of the beaches associated with this site, and the importance of careful consideration of projects with a shoreline armoring component, like this one. In any event, and notwithstanding the limited area, the beaches and shoreline below the homes seaward of Opal Cliff Drive are heavily used by the public for tide-pooling, beach walks, fishing, and access to the ocean for surfing, paddle-boarding, etc., and Privates/Key Beach adjacent to this site provides for general sandy beach use in a larger sandy beach area.

The bluffs along Opal Cliffs are steep and approximately 60 feet tall, with roughly the lower third consisting of a rocky marine sedimentary base, and the upper two-thirds consisting of softer soil-like terrace deposits. Portions of the Opal Cliffs bluffs are armored, portions are unarmored, and there are other portions where only remnants of former armoring remain. Past Commission cases along this stretch of coast have also shown that the armoring is both permitted and unpermitted.

The bluff and beach fronting the subject site is armored with an approximately 290-foot-long vertical seawall,[5] three seacave plugs, and an upper bluff shotcrete retaining wall.[6] Such armoring spans all of the Applicants’ upcoast three lots, and a portion of the

bottom of the stairs and the beach, and/or the bottom-most section of the stairs being washed out during winter storms. The stairway is currently closed due to storm damage from January 2023.

[5] At the time of its original construction, portions of the seawall fell within State Lands (and the armoring is the subject of State Lands Commission Lease Number PRC 7971.1).

[6] The seawall and one of the seacave plugs were constructed in the mid-1990s pursuant to County-issued CDP 95-0621 in 1996 and Commission-issued CDP Waiver 3-97-034-DM in 1997 (where the Commission’s authorization applied to the footing and seacave plug in its retained jurisdiction). A second seacave plug from 2016 is located between the seawall and the first seacave plug (i.e., in a portion of the former/eroded bedrock promontory “point”). At least a portion of the second seacave plug is located in the Commission’s retained jurisdiction and is the subject of a Commission violation file and related litigation. Although the litigation was resolved via a 2018 settlement agreement between the Applicants and the Commission, the settlement did not resolve the alleged violation, which remains to this day (see ‘Violations’ section of this report for more information). Finally, in 2017 the County issued an emergency CDP (which was subsequently recognized by County-issued CDP 171261) for a third seacave plug (this time behind the vertical seawall) and the construction of a mid- and upper bluff shotcrete wall directly above the existing seawall.

downcoast-most lot, with the downcoast remainder of that lot unarmored. Historically, there was a natural bedrock promontory located just downcoast of the end of the seawall which formed a natural point, but the point has largely eroded and the seawall itself now forms the point here. The armoring at this site juts out approximately 100 feet further seaward relative to the general orientation of the bluffs along Opal Cliffs, which limits through-lateral beach access from Privates/Key Beach to Trees Beach, as well as to the nearby beaches of Capitola, except during the lowest of tides.[7] In other words, the Applicants' armoring essentially forms an artificial headland that occupies beach space and significantly limits lateral beach access at this location.

Again, see location maps and site area photos in **Exhibits 1 and 2.**

B. Project Description and History

The Applicants propose to: 1) demolish an existing approximately 6,000 square-foot single-story residence and garage that span four separate, commonly-owned (by the Applicants) and contiguous lots (under four separate APNs, APNs 033-132-05, 033-132-06, 033-132-13, and 033-132-14);[8] 2) merge the two center lots (APNs 033-132-05 and 033-132-13) into one lot, thereby creating a 34,978 square-foot lot for the new residence, and leaving only existing 6-foot tall solid fencing parallel to the street on the other portion of the property; 3) construct a new two-story approximately 6,700 square-foot residence with approximately 1,500 square feet of garages (in an attached 654 square-foot garage and a separate 800 square-foot detached garage) for a total of about 8,200 square feet of residential development,[9] located closer to the blufftop edge than the existing to-be-demolished residence; and 4) related residential development, including a 25-yard long and 4-feet deep lap pool. All of the proposed development would be reliant on the above-described shoreline armoring fronting the site for site and structural integrity and stability. See **Exhibit 3** for the proposed project plans.

Commission staff have been involved with this project from even before the Applicants acquired the property in 2016,[10] and as CDP applications were pending at the local

[7] Other than at Privates/Key Beach, access to the beach areas at the base of Opal Cliffs is generally limited to lower tides; however, the subject site, due in part to the presence of the seawall, which has largely disrupted natural erosion processes since its installation in the 1990s, has an even smaller window of accessibility, and prevents through-lateral access between Privates/Key Beach and Trees Beach (and further down to Hooper beach in Capitola) except during the lowest of tides, which are generally limited to only a few times per month.

[8] According to DataTree, APN 033-132-14 is owned by Carol Sisney, APN 033-132-06 is owned by Bret Sisney, and APNs 033-132-05 and 033-132-13 are owned by both Bret and Carol Sisney. As a result, all of the four lots are commonly owned by these Applicants.

[9] In addition, the project includes almost 500 square feet of sub-floor space to accommodate mechanical equipment. This space is generally only 2.5 feet tall, but there is also a utility area that is up to 6.5 feet tall on a slab. If it were counted towards total square footage, the proposed new residential development would be closer to 9,000 square feet in size.

[10] Including at least three meetings before the Applicants acquired the property between the Applicants, the Applicants' representatives (including the architect, geotechnical consultant, and geologist), and Commission staff to discuss issues and concerns related to a house replacement and the shoreline armoring. In such meetings, Commission staff was clear in informing the Applicants that a replacement

County level for a number of years, including for the two iterations of the proposed development that the Applicants have pursued, all the while voicing major concerns regarding the project's substantial Coastal Act and LCP conformance issues with respect to coastal hazards, public access and recreation, and public view protection.[11] The Applicants originally first applied for a CDP for a residential demolition and replacement project in 2018 (County CDP Application Number 181217).[12] In response to that application, Commission staff, through the regular process the County employs for receiving other agency comments on CDP applications, noted that, "[t]he proposed project raises significant [LCP] consistency issues that will need to be addressed," including the need to "modify the existing geologic hazards report to identify the 100-year bluff erosion line determined without any armoring (i.e., please identify the erosion rate at the site pre-armoring using historical data coupled with any available data related to current erosion rates for unarmored areas of Opal Cliff Drive)." These comments also noted that the proposed project appeared to raise LCP public view protection issues that would need to be considered. The project was not modified to address Commission staff's comments, and the County Zoning Administrator approved the project with conditions on May 3, 2019.[13] The County's approval was subsequently appealed to the Commission based on coastal hazards, public recreational access, public views, and community character contentions on June 6, 2019 (Appeal Number A-3-SCO-19-0036). However, before the Commission was able to review the appeal, the Applicants withdrew their application, nullifying their County CDP approval and the appeal, stating, "we believe doing so will also give our professional design consultants and the County a better opportunity to more thoroughly address the concerns raised [by] the Coastal Commission staff."

The Applicants then submitted a new CDP application to the County for the current project later in 2019 (County CDP Application Number 191246). Similar to the prior 2018 application, Commission staff again raised similar LCP and Coastal Act consistency issues related to coastal hazards, public views, and public recreational access (again, see comments in **Exhibit 4**). And again, the County Zoning Administrator approved the County CDP (on June 5, 2020) without modifications to address the LCP and Coastal Act consistency issues raised by Commission staff. That County CDP approval was then appealed to the Commission on July 6, 2020. On

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house could not rely on shoreline armoring and would need to be evaluated under the Coastal Act and the LCP.

[11] In addition to meeting with the Applicants prior to their acquisition of the property, and multiple other communications with the Applicants and/or their representatives after that, Commission staff submitted multiple letters to the County as the County was processing the CDP applications, where each such letter identified such issues and made recommendations to the County as to how to address same (see **Exhibit 4**).

[12] The 2018 proposed project was of a similar size and scope as the project now being considered under this CDP application, but it had minor differences (e.g., it was sited several feet seaward of the current proposal, the proposed detached garage was located closer to the residence, it included different landscaping, etc.).

[13] Prior to this approval, Commission staff further reiterated these concerns in a letter to the Zoning Administrator on May 2, 2019, to reinforce that the project raised substantial LCP consistency issues (again, see **Exhibit 4**).

September 11, 2020, the Commission found that the County's approval of a CDP for the project raised substantial LCP and Coastal Act consistency issues with respect to coastal hazards, public recreational access, public views, and community character, and the Commission took jurisdiction over the CDP application for the project. The Commission also determined that the County's record lacked important evidence, and directed the Applicants to provide such information to facilitate de novo review.[14] However, before the Commission was able to schedule or act on the de novo portion of the appeal, the Applicants sued the Commission (on December 29, 2020) in Santa Cruz County Superior Court in an attempt to avoid having to submit any new information requested by the Commission, and to compel the Commission to set a hearing date that suited the Applicants for such de novo review. Ultimately, that case was settled in early 2021 via a settlement agreement whereby the Applicants agreed to provide more limited information and the Commission would, at a regularly scheduled Commission public meeting in 2021, consider the application de novo. There have been three amendments to the settlement, the first two of which extended the deadline for the Applicants' submittal of information, and each of which also extended the Commission's deadline to consider the CDP application, which is currently July 1, 2023. Thus, the Commission has through the June 2023 Commission meeting to take a final action on this application.

Finally, as indicated above, there are violations at this site dating back to at least 2016 and the Applicants' knowing and intentional violation where they augmented the armoring structure without CDPs despite being advised by Commission staff numerous times prior to undertaking such development that it would require a CDP. Those violations remain to this day (see also "Violations" section of this report).

C. Coastal Development Permit Determination

The standard of review for this CDP application is the Santa Cruz County certified LCP and, because the project is located between the nearest public road and the sea, the Coastal Act public access and recreation provisions. LCP coastal hazards, public view and community compatibility, public access and recreation provisions, and Coastal Act public access and recreation provisions, are shown in **Exhibit 7**.

Coastal Hazards Background

The fundamental issue raised by this proposed project relates to coastal hazards and coastal hazards response as it applies to the subject site. The LCP includes a number of applicable coastal hazard provisions that are similar to the Coastal Act, and at their core are structured around ensuring that development can be sited and designed in such coastal hazard context where it can be safe from such hazards without a reliance on shoreline armoring, and as measured for an LCP-minimum of 100 years. These types of LCP provisions emanate from the Coastal Act, which recognizes that such armoring has significant adverse impacts on coastal resources, including leading to

[14] One such piece of evidence that was identified as missing was a geotechnical report that identified the required 100-year setback without reliance on shoreline armoring (including when evaluated based on the removal of the existing armoring fronting the site). Others included visual simulations of the proposed project as well as a variation of the project with residential development sited inland of the 100-year setback line so identified without armoring.

unavoidable such impacts on natural landforms, public recreational access, natural processes (which also significantly impacts public recreational access) and public views. As a result, the Act, like the LCP, is actually best understood as 'anti-armoring', where its resource protection policies essentially prohibit armoring as a general rule, including Section 30253 that makes clear that armoring is not allowed to protect new development when it would cause erosion or destruction of the site, or substantially alter natural landforms,[15] which is essentially always the case with armoring. The one, highly limited exception to that prohibition is provided by Section 30235, whereby armoring is only allowed "to protect existing structures…in danger from erosion" as applicable here.[16] Put another way, the Coastal Act and LCP should be understood to actually prohibit armoring at the most basic level, and then to allow that prohibited thing in only very limited circumstances as provided by Section 30235 and corresponding LCP provisions. When framed in this way, the limited Coastal Act and LCP allowances for shoreline armoring are best understood as an exception, variance, and nonconformity with respect to the Coastal Act/LCP coastal resource protection provisions.

In fact, the LCP establishes a framework for evaluating new development within areas subject to coastal hazards, requiring that the proposed development be sited and designed for stability and structural integrity without reliance on shoreline armoring as measured against at least a 100-year period. LUP Policy 6.2.12 requires that the 100-year minimum setback not take into consideration the effect of any proposed shoreline or coastal bluff protection measures. Furthering this point, LUP Policy 6.2.15 requires that hazards associated with developing in areas subject to bluff erosion be mitigated (meaning, in this case, that the development be protected against such hazards) through such means as setting the development back far enough from the blufftop edge to account for 100 years of erosion while ensuring site stability, and where such means are "not dependent on shoreline or coastal bluff protection structures."[17] IP Section 16.10.070(H) carries out these two policies, requiring that development be set back from the blufftop edge at least 25 feet or the distance necessary to provide a stable building site over the next 100 years, whichever is greater; that 100 years of site stability be demonstrated based on pre-development application conditions; and that the

[15] Section 30253 states, in applicable part, that "New development shall…Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area **or in any way require the construction of protective devices** that would substantially alter natural landforms along bluffs and cliffs" (emphasis added).

[16] Existing structures are understood as those which stood, and have not been significantly redeveloped as described in the Commission's implementing regulations, before the implementation of the Coastal Act on January 1, 1977.

[17] That policy also includes an exception to the armoring prohibition if adjacent parcels are already armored. While some have argued that that means that a lot between two armored lots could demonstrate required 100-year stability by using armoring itself, that is inaccurate, including as it would be inconsistent with the Coastal Act to introduce a new category of allowable armoring in an LCP that is not provided for in the law from which it derives its statutory authority (i.e., the Coastal Act), and applicable case law does not allow for such an outcome (see also discussion on this point that follows). In addition, as applicable to this case, although the property directly upcoast of the site is armored (APN 033-132-03), the downcoast neighboring property is not (APN 033-132-07). Thus, the project site is not located between two parcels that are both armored, and the exception fails on this basis alone were it to be applicable.

minimum setback cannot take into consideration the effect of any protection measures, such as shoreline protection structures.

It should be noted that some (including the Applicants in this case) have argued that the LCP specifically allows new development to utilize the protection afforded by an existing armoring device in determining appropriate setbacks. In support of this interpretation, they point to LUP Policy 6.2.12, which specifies that setbacks cannot be based on proposed shoreline protection measures, as well as IP Sections 16.10.070(H)(1)(a) and (c), which include language about evaluating setbacks based on "existing site conditions" and require that the reviewing body "not take into consideration the effect of any proposed protective measures…". The Applicants' reasoning then is that armoring that is existing (i.e., is not proposed since it is already an extant part of the landscape) is allowed to be countenanced when establishing appropriate setbacks. Such an interpretation is not new, and the Commission has evaluated and rejected this argument many times, including in the substantial issue determination for this project. The Commission disagrees that the LCP is best read in this manner.

First, one straightforward interpretation of the use of the word 'proposed' in relation to armoring is that an applicant is proposing to utilize armoring in the siting and design of new development, which is not permissible under the policy. Second, any interpretation of the LCP as allowing existing armoring in establishing appropriate setbacks does not account for the clear language of LUP Policy 6.2.15, which requires a demonstration that the hazards associated with any proposed development can be mitigated by means such as setbacks and that "mitigation of the potential hazard is not dependent on shoreline or coastal bluff protection structures…". Notably, this policy does not differentiate between existing or proposed armoring structures, thereby meaning that all shoreline protection measures, including those which are present at the building site prior to construction of any proposed development, are not to be used in establishing appropriate setbacks and coastal hazards mitigation strategies. Accordingly, it is clear that the overall intent of the LCP is to prevent new armoring and reliance on armoring. Third, in the context of these controlling LUP Policies (6.2.12 and 6.2.15), the requirement in IP Section 16.10.070(H)(1)(a) that applicants demonstrate the stability of the proposed development site in its "current, pre-development application condition" can only be reasonably interpreted as having been intended to prevent applicants from relying on proposed new armoring to establish the stability of the site, not as an invitation to rely on armoring that may already be present. Similarly, subdivision (H)(1)(c)'s requirement that setbacks be "based on the existing site conditions and shall not take into consideration the effect of any proposed protection measures" must be read such that the latter portion is a clarification of the former, so that the reference to "existing site conditions" is, again, a means of preventing reliance on new armoring, not an invitation to rely on any that may already be present. In sum, properly construed, the LCP does not provide for new development to utilize armoring, including for the purposes of establishing coastal hazard setbacks, and there is no conflict amongst LCP provisions on this issue.

But even if we were to read the terms 'existing' and 'proposed' in the generous fashion that the Applicants suggest, the LCP would then include two competing LUP policies, one that explicitly states that armoring cannot be relied on to establish setbacks (LUP

Policy 6.2.15) and one that does not (LUP Policy 6.2.12).[18] In evaluating that conflict, if it were to exist, it is also informative to review the LUP and IP provisions that identify when armoring is allowed, specifically LUP Policy 6.2.16 and IP Section 16.10.070(H)(3), both of which only allow armoring to "protect existing structures from a significant threat" and "vacant lots which through lack of protection threaten adjacent developed lots" in this residential context. Similarly, LCP provisions related to creating new lots and building sites in areas subject to coastal hazards, namely LUP Policy 6.2.17 and IP Section 16.10.070(H)(7)(b), "do not allow the creation of new building sites, lots, or parcels in areas subject to coastal hazards" and require that such lots do "not depend on or require shoreline protection structures," respectively, evincing an LCP intent that new development is simply not allowed armoring.

In sum, it is and has been clear to the Commission that these LCP provisions interact to prohibit the use of armoring to protect new development and vacant lots, and to limit allowable armoring to that required to protect existing endangered structures (in a residential context). And although the Applicants assert that the County does not agree that this is an accurate LCP interpretation, and instead believes that this is a novel or new application of the LCP, the Commission has repeatedly made these same findings in numerous shoreline cases in Santa Cruz County over the years.[19]

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[18] And in that evaluation, it is immaterial whether IP Section 16.10.070(H)(1)(c) says one or the other, as IP provisions are required to be consistent with the LUP, and LUP policies take precedence. This proposition is based on *McAllister v. Cal. Coastal Com'n* (2008) 169 Cal.App.4th 912, 930-932 (discussed further below), which held that: "Although local governments are responsible for drafting the 'precise content' of their local coastal programs, those subdivisions must, at a minimum, conform to and not conflict with the resource management standards and policies of the [Coastal] Act," and as such, any ambiguities must be interpreted as being consistent with the Coastal Act standards This legal point can be traced to Section 30512(c) of the Coastal Act, which requires that an LUP "meet the requirements of, and is in conformity with, the policies of Chapter 3." Given that Coastal Act Section 30513 contains an analogous requirement, requiring IPs to conform with, and be adequate to carry out, the provisions of a certified LUP, we can extend the *McAllister* rationale from interpreting LCPs to ensure conformity with the Coastal Act, to interpreting IPs so as to ensure conformity with the LUP.

It is also worth noting that the Coastal Act precedence over an LCP and an LUP precedence over an IP is further substantiated by the law regarding General Plans and zoning codes (the analogs to LUPs and IPs outside of the coastal zone, respectively). For example, as stated in *Napa Citizens for Honest Gov't v. Napa County Bd. Of Sup.* (2001) 91 Cal.App.4th 342, 389: "A zoning ordinance that is inconsistent with the general plan is invalid when passed and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan. The Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances. The tail does not wag the dog. The general plan is the charter to which the ordinance must conform."

Considering *McAllister* and *Napa Citizens*, with respect to the Coastal Act, it is much more reasonable to conclude that when a certified LUP provision conflicts with a certified IP provision, the certified LUP provision controls (and the conflicting IP provision must be brought into conformity with the certified LUP). In other words, any conflict or interpretation in the LUP gets resolved in the LUP, and that interpretation is then applied in the IP.

[19] See, for example, Coastal Commission denials for proposed armoring in Opal Cliffs, both on appeal from County decisions (e.g., appeals A-3-SCO-01-117 (Banman), A-3-SCO-01-118 (Black), and A-3-SCO-01-109 (Adams)), and in CDP applications to the Commission (3-02-060 (Medeiros)), and a proposed CDP application for a house that relied on 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

Further in order to resolve any alleged questions of LCP interpretation, including explicitly if an LCP policy is unclear as to its meaning, the LCP includes an interpretation provision.[20] Namely, the LUP states:

> *In any case in which the interpretation or application of an LCP policy is unclear, as that policy may relate to a particular development application or project, the application or interpretation of the policy which most clearly conforms to the relevant Coastal Act policy shall be utilized.*

Thus, the LCP directs that the Coastal Act is the final arbiter for any questions of the type the Applicants are alleging. The question here, in terms of the Coastal Act, involves the application of Coastal Act Sections 30235 and 30253, both of which apply to armoring. Specifically, Section 30235 only allows shoreline armoring that is inconsistent with other Chapter 3 policies where required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and only when the armoring's coastal resource impacts (related to coastal resource protection under 30235, but also under all other Chapter 3 provisions) are eliminated or mitigated. Section 30253 requires that new development be sited, designed, and built in a manner so as not to require shoreline armoring that would substantially alter natural landforms along the shoreline. In other words, the Coastal Act recognizes the impacts that accrue to armoring, and the Coastal Act clearly prohibits such armoring to protect new development, such as is being proposed here. Thus, to the extent that the LCP includes conflicting interpretations, they must be resolved in favor of the Coastal Act's stated policies. Thus, the subject armoring cannot be countenanced when developing the required LCP setback for the proposed project.

Finally, and amplifying that Coastal Act direction as it applies to this situation via the LCP's interpretation provision, courts have recognized that LCPs must, at a minimum, conform to and not conflict with the resource management standards and policies of the Coastal Act.[21] As the 6th District Court of Appeal stated in 2008 in a published decision in a case known as *McAllister*:[22]

> *Generally, "[w]e presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules." (Stone Street Capital, LLC v. California State Lottery Comm. (2008) 165 Cal.App.4th 109, 118)[.] The presumption applies as well to County legislation. Thus, we presume the County was aware that the Coastal Act established the minimum standards and policies for local coastal programs and knew that, in drafting its local coastal program, it was constrained to incorporate both*

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).

[20] LUP Chapter 1, Interpretation Section (LUP page 1-20).

[21] See *McAllister v. CCC* (2008) 169 Cal.App.4th 912, 930 n.9 ("A local coastal program need not be identical to the Coastal Act. As long as a local coastal program is not inconsistent with the Coastal Act, it can be more restrictive.") (internal citations omitted)

[22] *Id*, at 930-31.

> *development restrictions in section 30240(a). Accordingly, we assume that, as required, the County intended to and did incorporate those restrictions.*

Although the Court in *McAllister* was interpreting the environmentally sensitive habitat provisions of the Coastal Act, the same principles apply here. Coastal Act Sections 30235 and 30253 together state that new development may not rely on shoreline armoring, and thus the County's LCP must be interpreted to conform with these minimum standards set forth in the Coastal Act. Thus, to the extent that there still exists any question of interpretation of the policies at issue, they are further settled by the Court's decision in *McAllister*. Further, such a conclusion is also supported by the Commission's duty to protect public trust resources, and the Coastal Act requirement that the Act "shall be liberally construed to accomplish its purposes and objectives" (Section 30009), where, as described, the Act on this point protects these natural shoreline and beach resources and only allows for armoring as an exception under extremely narrow criteria. In addition, the purpose and structure of the Coastal Act support such an interpretation as well, as reflected in numerous policies of the Act. For example, not only does Section 30009 require a liberal interpretation to protect shoreline and beach resources, but Section 30007.5 also directs the Commission to resolve conflicts in a manner that is "most protective of significant coastal resources." Courts have relied on Section 30009 to find that exceptions to the Act's requirements must be read narrowly,[23] and have also found that the Act is designed to ensure "that state policies prevail over the concerns of a local government" making "the Commission, not the [local government], the final word on the interpretation of the LCP."[24,25]

To summarize, and bracketing whether there even is an internal inconsistency and/or a lack of clarity given that a plain reading of the LCP leads to a conclusion that the Applicants cannot propose to use armoring in establishing appropriate coastal hazards setbacks, the Commission finds it appropriate, given any potential inconsistency/lack of clarity, to defer to the most environmentally protective option, which in this case requires LUP Policies 6.2.12 and 6.2.15 to be read together to mean that the minimum setback from the bluff edge to ensure site stability over a 100-year period must be determined without considering the effects of <u>any and all</u> shoreline protection measures, whether they be proposed or extant at the building site prior to construction of any proposed development. In other words, the 100-year setback for new development must be determined as if the bluff at the site is not armored.

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[23] See, for example, *Citizens for a Better Eureka v. California Coastal Com.* (2011) 196 Cal.App.4th 1577, 1586-87 ("[i]n light of the legislative directive to construe the Act liberally...it is appropriate to construe the exceptions narrowly"", *quoting Capon v. Monopoly Game LLC* (2011) 193 Cal.App.4th 344, 355).

[24] See, for example, *Charles A. Pratt Const. v. California Coastal Commission* ((2008) 162 Cal.App.4th 1068, 1076, 1078.

[25] California law affords "great weight" to the Commission's interpretation of the statutes and regulations under which it operates (see, for example, *Ross v. California Coastal Commission* (2011) 199 Cal.App.4th 900, 922-23; and *Reddell v. California Coastal Commission* (2009) 180 Cal.App.4th 956, 965).

In sum, the Santa Cruz County LCP requires new development in areas subject to coastal hazards to be sited and designed to demonstrate site stability over a 100-year period without considering the effects of any extant or proposed shoreline armoring.

Coastal Hazards Analysis

The Applicants propose to demolish an existing approximately 6,000 square-foot single-story residence and garage that span four contiguous parcels under common ownership, merge the two center lots, and construct a new two-story 6,700 square-foot residence with approximately 1,500 square feet of garage space (with one attached garage and one detached garage), for a total of about 8,200 square feet. All new development would be constructed on the newly merged center lot seaward of the existing residence, and leaving only existing 6-foot tall solid fencing parallel to the street on the rest of the property.

As required by the LCP, a geological investigation was prepared to determine the 100-year site stability setback. In this case, the Applicants' Geologic Investigation[26] states that "[t]he position of the 100-year blufftop is predicated on the assumption that the seawall system will be maintained for the lifetime of the development," and accounts for erosion of the unarmored portions of the bluff based on an assumed 0.3 foot/year erosion rate,[27] which the Investigation estimated to be the average annual erosion rate for the years after 1997, when the armoring was installed. The Investigation does not use an estimated erosion rate based on periods when the armoring was not present (estimated by the Applicants' consultants to be 0.88 feet/year (measured from 1928 to 1996) or 0.98 feet/year (measured from 1950 to 1996)),[28] nor do they assume an analytic scenario where no armoring is present to develop the LCP-required setback, including as is required by the LCP as explained above. Rather, the Applicants' consultants relied on armoring to develop the setback line, and based their calculations on assumptions that the armoring would be "maintained," through improvements, enhancements, and/or augmentations to provide for its continued function.[29] And, in

[26] "Geologic Investigation" by Easton Geology dated January 25, 2017 and updated December 6, 2019. See **Exhibit 5**.

[27] In addition, the Geologic Investigation accounted for potential increases in erosion due to sea level rise by applying a 25%, or 1.25 times, multiplier. The Commission notes that the Commission's Sea Level Rise Policy Guidance (2018) anticipates between 4.1 feet of sea level rise in the low-risk aversion scenario (or a 1.5 times multiplier) and 8.2 feet of sea level rise in the medium-high risk aversion scenario (or a 2.9 times multiplier) by 2120. The Applicants' chosen multiplier is thus lower than even that recommended to be applied in a low-risk aversion scenario, and new homes such as this are actually recommended in the Guidance to be evaluated under the medium-high risk aversion scenario, where it is significantly lower.

[28] In addition, the Applicants' 100-year erosion setback line was established prior to an upper bluff failure in 2017 along the project site's upcoast-most parcel and the neighboring upcoast property (i.e., 4640 Opal Cliff Drive), and was not modified in the 2019 Geologic Investigation update to reflect this bluff failure.

[29] In fact, the Applicants' Geologic Investigation identifies that additional armoring augmentation is going to be required to continue to provide the protection needed for the new residence in the near term due to armoring deterioration, stating that "Portions of the seawall are undermined, and the recently constructed seawall plug lacks a reinforced footing and protective facing. However, we understand that plans to implement these essential maintenance items have been developed in accordance with the seawall maintenance agreement and permission to perform the maintenance is pending."

fact, the armoring is deteriorating and the bluff is continuing to erode in ways that are precipitating proposed armoring projects at the site, including the recent augmentation authorized by the County in 2018 (for upper bluff shotcrete and 27 cubic yards of fill behind the seawall), as well as an unfiled CDP application pending at the Commission for a new foundation/cut-off wall for the upcoast portion of the seawall.[30]

All told, the Applicants' analysis yielded 100-year setback distances ranging from 30 to 75 feet along the currently armored upcoast portion of the bluff fronting the proposed home site, and 47.5 feet for the unarmored downcoast portion of the bluff fronting the proposed home site (see **Exhibit 5**). Although the proposed house and pool[31] are ultimately sited inland of the setback line shown on the project plans (but seaward of the existing house setback by some 15 feet),[32] that setback was derived assuming the continued existence and maintenance of the armoring fronting the site. In other words, the new development proposed requires shoreline armoring to meet its LCP setback requirements, which, as explained above, is not allowed by the LCP.

At a minimum, the Applicants' Geologic Investigation did not evaluate the actual core LCP question, as described in detail in the discussion above, of where development could be sited to be safe from coastal hazards for 100 years without a reliance on armoring. And, as indicated above, the Commission noted as much in its substantial issue determination, directing the Applicants to submit an evaluation that provided the LCP-required 100-year erosion setback without reliance on the armoring fronting the site. The Applicants declined to do so. As a result, Commission technical staff reviewed the relevant information and developed such an assessment. Specifically, based on a review of historical erosion rates as may be affected by sea level rise over the course of the LCP-required 100-year period, and without consideration of the armoring that fronts the property (as required by the LCP), the Commission's Geologist, Dr. Joseph Street, identified several 100-year erosion setbacks (based on different analytic approaches)

[30] In CDP Application 3-18-0742, the Applicants proposed a new foundation/cutoff wall to prevent additional undercutting of the seawall. However, Commission staff has indicated to the Applicants that if the application were to be filed and if the Applicants were to pursue the proposed project, the only way staff could recommend approval of such a seawall augmentation is: (1) if the house constitutes an existing structure and in danger of erosion as understood relevant to Section 30235 (where the Applicants have not yet provided the information requested to conclude on such points; part of the reason that the application remains unfiled), and (2) if such an application can meet other Coastal Act tests, including ensuring removal of the armoring if the house were to be removed/replaced. As indicated, the application remains unfiled, and the Applicants have not indicated whether they intend to pursue or withdraw the application.

[31] The pool would be 75 feet long, 12 feet wide, and 4 feet deep, which also raises questions regarding conformance with the LCP's landform alteration policies (see additional discussion on this point subsequently in this report) and broader questions whether such excavation and subsurface development is appropriate on an eroding coastal blufftop under the LCP's coastal hazards policies that require new development to minimize risk and ensure structural stability. Similar questions also extend to the subterranean basement/mechanical equipment area.

[32] Note that the project plans show the setback line to be as close as 30 feet to the blufftop edge for the downcoast part of the site when the Applicants' Geological Investigation identified that it should be 47.5 feet, and that a portion of the prosed development is actually seaward of the 47.5 foot setback in this area. It is not clear what precipitates this discrepancy.

without countenancing the armoring; see **Exhibit 6**.[33] As seen in Dr. Street's analysis, all identified 100-year erosion setback lines are significantly landward of the Applicants' setback line, and almost all of the proposed development is actually seaward of Dr. Street's setback lines. To put it another way, the proposed project cannot ensure 100 years of site stability/structural integrity without armoring as required by the LCP. This is prohibited by the LCP.

In short, the Applicants propose a new residence in an area seaward of the LCP-required coastal erosion bluff setback line when that is not allowed by the LCP. For this reason, including as further explained above, the Commission finds that the project as proposed is not in conformance with the LCP's coastal hazards provisions and must be denied.

Other Coastal Resource Considerations

The project also raises a series of issues with LCP visual resource protection policies (again, see **Exhibit 7** for these policies). The LCP requires that public views and scenic character be protected and enhanced, and that new development be visually compatible with the surrounding area, including with respect to size, bulk, and design. Specifically, LUP Objective 5.10a requires public views to be identified, protected, and restored; and LUP Objective 5.10b requires that new development be appropriately sited, designed and constructed in order to ensure that public views are not adversely impacted. In addition, LUP Policy 5.10.6 requires that public ocean vistas be retained to the maximum extent feasible; LUP Policy 5.10.7 prohibits the placement of new permanent structures that would be visible from the beach (except where allowed on existing parcels of record, or for allowable shoreline armoring or public access provided it is compatible with the existing pattern of development, and if the shoreline armoring/access structures use natural materials). Finally, the LCP's required CDP findings require that development be visually compatible with the surrounding neighborhood; that structures emphasize a compatible community aesthetic as opposed to maximum-size/bulky designs; that varied architectural elements and landscaping be employed to further reduce impacts; and that development be sited and designed such that it does not block or significantly adversely impact public views or scenic character (see IP Section 13.20.130(B)).

There are two public views affected by the proposed project, namely the view available from Opal Cliff Drive and the view of the site from the beach/shoreline below. In terms of the former, public views of the ocean from Opal Cliff Drive overall are mostly non-existent due to the fact that there is essentially an unbroken stretch of homes between

[33] The methodology for determining this LCP-compliant 100-year erosion setback is described in detail in **Exhibit 6**, but in summary, Dr. Street applied historical erosion rates calculated based on site conditions before the construction of the original armoring structure in 1997 (and subsequent armoring since), and used the USGS CoSMoS tool applying a range of risk level projections for sea level rise (focusing mostly on the "low risk aversion" scenario, as a conservative evaluation of the project site which would still render a portion of the property developable while still consistent with LCP requirements for determining the 100-year bluff erosion setback). It should be noted that under typical sea level rise guidance, a "medium-high risk aversion" scenario is employed for residential development such as this, and the difference in risk between the "low risk" and "medium-high risk" scenarios would have to be accepted by the Applicants as an increased risk which they are willing to accept as a consequence of developing in an area subject to coastal hazards if the low risk scenario were to be applied.

the road and the ocean. At this site, the ocean view is already essentially blocked by the existing home and the 6-foot tall solid fencing parallel to the road on either side of it. The proposed new home would not appreciably change this ocean view dynamic, as it would continue to block the ocean view in a similar manner.[34] It would, however, introduce significantly more massing into that view as compared to the existing and more low-profile home (see **Exhibit 3** for site plans, proposed building elevations, and visual simulations of the proposed residence), but it would open up some 'air space' views above the fences at either end that may otherwise give some view respite from the unbroken stretch of homes. Although the new home would be significantly larger than most in the near vicinity,[35] the character of the Opal Cliff Drive corridor is driven by larger homes already. In short, the public view from Opal Cliff Drive would change, but it does not appear that the degree of public view degradation would significantly change.

In terms of the public view from the beach and shoreline below, that view on its inland side is currently encumbered by the same row of Opal Cliff homes and related development atop the blufftop. At the subject site, the current home is set back further than most, and there are some large trees seaward of it on the blufftop, helping to limit its visual impact as seen from the beach. The trees would remain, but the proposed new home would move some 15 feet closer to the blufftop edge, and it would be taller (with a second story), increasing the degree to which residential development at this site impacts public beach/shoreline views on their inland side.[36] One way of considering the effect of this impact is that it is not allowed in the first place because the proposed new home is located seaward of the area where residential development is allowed by LCP coastal hazards requirements, as described above, and more landward siting would better protect public beach views. In that sense, then, the proposed additional view degradation accrues to development that is prohibited for coastal hazards reasons, and thus is also prohibited for visual reasons as well. At the same time, the beach/shoreline view is dominated by views out towards the ocean, and again the degree of such an inland side impact as a change from the existing impact is not significant.[37] In fact, the new home would be sited at least 30 feet inland of the blufftop edge, which is more than some nearby sites, and truly the larger degree of view degradation is associated with the Applicants' armoring system as well as other armoring in the backshore

[34] The Applicants have suggested in the past that the project would be a net improvement for ocean views from Opal Cliff Drive because the existing home is spread across the site and the new home would have a more compact footprint in the middle of the site. That is true, but the new home would still be framed on both sides by 6-foot tall solid fencing facing the road, and thus the ocean view would continue to be blocked.

[35] For example, the four upcoast neighboring houses range in size from 2,500 to 5,700 square feet, and the four downcoast neighboring houses range in size from 1,250 to 4,300 square feet. At nearly 6,200 square feet with an additional 1,500 square feet of garages for a total of approximately 8,200 square feet in new development, the proposed project is significantly larger when compared to such nearby residential development.

[36] And a previously permitted (by the County) blufftop edge fence would remain, and it would continue to contribute to view impediments either way.

[37] Bracketing the fact that the proposed 75-foot long and 12-foot wide lap pool, which raises coastal hazard concerns as discussed above, would be a significant landform alteration atop the bluff, inconsistent with IP Section 13.20.130(D)(1). That said, the landform alteration itself would not be visible to the public.

environment, which has a far greater impact on the beach/shoreline view than does the residential milieu atop the bluffs.

As for the armoring at the site, it raises a whole host of public access and recreation concerns. In fact, although the Coastal Act and LCP both require that public recreational access be provided, protected, and ultimately opportunities for it maximized (again, see **Exhibit 7**), the armoring does none of those things, and in fact does quite the opposite. It is explicitly a required element of the project as the proposed replacement residence relies on such armoring – including ongoing maintenance and even augmentation[38] – to maintain safety and structural stability for the LCP's required 100-year timeframe. Such armoring currently occupies a space of some 2,500 square feet on the beach,[39] and it has and will continue to prevent the beach from naturally reforming and moving inland over time (the concept of passive erosion, and sometimes referred to as 'coastal squeeze' when this passive erosion is impeded by armoring[40]). In fact, using the erosion rates derived from the Applicants' reports (i.e., an average of 1.15 feet per year; see **Exhibit 6**), passive erosion associated with the armoring even in its current configuration displaces over 250 square feet of recreational space that would otherwise naturally be formed per year, which would translate to over 25,000 square feet (or over half an acre) of beach/shoreline recreational space that would be lost over the LCP identified 100 year period.[41] If one were to apply the Commission's typical real estate valuation mitigation framework to such beach/shoreline losses,[42] such impact (and thus the required degree of mitigation, were such mitigation to be applied) equates to nearly $150,000 per year and over $15 million over 100 years.[43] That is not even considering

[38] The seawall was originally constructed in the mid 1990s, and it has been significantly augmented since (with two seacave fills and an upper bluff shotcrete wall in just the last few years). In other words, the seawall is nearing the end of its anticipated useful life (which was identified as 40 to 60 years in the original geotechnical report for the structure), and it has already required substantial augmentation to prevent its failure. And more significant work and augmentation to the armoring is apparently needed in even the short term per the Applicants' Geologic Investigation, as discussed above.

[39] The armoring extends some 288 feet along the shore, and extends out from the bluff some 7 to 10 feet (or an average of 8.5 feet), leading to an encroachment area of nearly 2,500 square feet (288 x 8.5 = 2,448).

[40] See, for example: Kraus, Nicholas (1988) "Effects of Seawalls on the Beach: An Extended Literature Review", Journal of Coastal Research, Special Issue No. 4: 1-28; Kraus, Nicholas (1996) "Effects of Seawalls on the Beach: Part I An Updated Literature Review", Journal of Coastal Research, Vol.12: 691-701, pages 1-28; and Tait and Griggs (1990) "Beach Response to the Presence of a Seawall", Shore and Beach, 58, 11-28.

[41] Not based on the entire 288-foot length of the armoring, but rather based on a measurement of about 220 feet corresponding to its alongshore displacement. Applying Dr. Street's identified 1.15 feet per year erosion rate to the 220-foot alongshore length translates to 253 square feet lost per year, and 25,300 square feet lost over 100 years.

[42] In armoring mitigation situations, the Commission has applied a real estate valuation method based on the cost of property that could be purchased and allowed to erode and turn into beach naturally to offset the area that would be lost due armoring over time. In this case, recent property sales along the ocean side of Opal Cliff Drive (i.e., at 4190, 4330, 4420, 4610, and 4770 Opal Cliff Drive, for $2,135,000, $6,250,000, $7,000,000, $12,000,000, and $4,625,000, respectively) lead to an average per square foot property cost of $550 (Source: DataTree by First American).

[43] For passive erosion, the 253 square-foot of loss per year equates to $139,150 per year (253 square feet times $550 per square foot), or $13.9 million over 100 years. When combined with the same $550

the degree to which the armoring retains and would continue to retain sand generating materials in the bluff, which could easily add more than $2 million to that figure,[44] all of which is in today's dollars and would require multipliers over time as well. In short, the armoring is incredibly damaging to public recreational access to the beach and shoreline at this location, to the tune of nearly $18 million worth of impacts, or more, measured over time. As previously described, this impact also extends to an immensely popular location for surfing, beach access, and other beach and shoreline-related activities, and does not even account for the fact that in addition to all of that impact, the armoring effectively blocks access up and downcoast, where it is only during the most negative of low tides that the public can move laterally between Privates and Trees Beach, meaning that impact calculation would likely need a separate multiplier of sorts to account for same. Similarly, it may ultimately lead to the demise of the surfing break in the area as higher sea levels result in waves that do not catch/trip on offshore ocean bottom features, and instead break closer to the shore or not at all, and thus the surf break will be washed out, and the value/cost of this loss is not included in the above calculations either. In short, the armoring at the site is and will continue to be incredibly damaging to public recreational access.

Conclusion

For the above reasons, the proposed project cannot be found consistent with applicable Coastal Act and LCP provisions, and must be denied. Although the Commission could attempt to craft terms and conditions to modify the project in order to create a Coastal Act/LCP-consistent project, the Commission is under no obligation to do so.[45] In this case, the changes necessary would be substantial, significantly affecting the siting, size, and design of the residence and all related development, including potential modifications to avoid coastal resource impacts, and to minimize and mitigate for those that are unavoidable. In fact, at a core level, it appears that the portion of the property that could be residentially developed consistent with the LCP-required coastal hazard setback is fairly small and limited to the downcoast portion of the property (see **Exhibit 6**). It would therefore require a complete redesign of the project, and it would make no sense for the Commission to attempt to do that for the Applicants. If the Applicants want

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per square foot applied to the area of encroachment (i.e., 2,448 square feet, thus $550 times 2,448 equates to $1,346,400) as a one-time assessment (i.e., not yearly), the total is some $15.26 million over 100 years.

[44] Although the armoring covers a bluff area of approximately 5,760 square feet, the armoring impedes the erosion of some 18,144 square feet of bluff area all told. Applying the same 1.15 feet per year erosion rate, and an estimated sand content of 60% (where the Purisima (the lower two-thirds of the bluff) is roughly 45% beach sand and the terrace deposits (the upper one-third of the bluff) are roughly 85% beach sand) leads to a loss of some 464 cubic yards of sand material per year, or 46,400 cubic yards over 100 years. At $50 per cubic yard delivered (akin to recent estimated costs in other cases (e.g., CDPs 3-09-029 (Rusconi), 2-16-0784 (Mirada), and 3-23-0014 (Grossman)), the total over 100 years would be $2,320,000.

[45] This long-standing legal principle has been affirmed by multiple courts to directly apply to the Coastal Commission (see, for example, *LT-WR, L.L.C. v. California Coastal Comm'n* (2007) 152 Cal.App.4th 770, 801, citing *Bel Mar Estates v. California Coastal Commission* (1981), 115 Cal.App.3d 936, 942; *Reddell v. California Coastal Commission*, 180 Cal.App.4th 956, 180 Cal.Rptr.3d 383, 395 (2009), rev. denied (Mar. 24, 2010), citing LT-WR & Bel Mar; and *Kalnel Gardens, LLC v. City of Los Angeles* (2016) ("As the City points out, under Kalnel's reasoning the City was obligated to propose architectural design changes to the proposed project, a task beyond the reach of planning commissioners or City Council members.").

to continue to pursue a replacement residential project at this site, then they are welcome to apply to the County for a different CDP for a Coastal Act/LCP-consistent project.[46] If that is the case, then the Commission strongly advises that the Applicants pursue a project that is located landward of the 100-year erosion line without reliance on any shoreline armoring, that such CDP application address such armoring moving forward in a way that can better protect coastal resources (e.g., removal), that all other applicable LCP and Coastal Act requirements be met, and that all violations be appropriately addressed. Such a project would have the best chance at Coastal Act/LCP consistency, including were a subsequent County CDP approval to be appealed to the Commission again.

D. Violations

Violations of the Coastal Act and LCP exist on the subject property including, but not necessarily limited to, the unpermitted filling of a seacave in 2016, which the Applicants undertook despite being informed repeatedly by Coastal Commission staff (including before they purchased the property) that a CDP was required to authorize such work. The seacave plug has been in place since 2016, with impacts to coastal resources unmitigated and ongoing. Although unpermitted development has taken place prior to the Commission's consideration of this CDP application, such consideration has been based solely upon the application of applicable Coastal Act and LCP provisions to the proposed development.

In 1996, the County approved CDP No. 95-0621 for a seawall and a separate and distinct seacave plug located further downcoast, past a point of land that was to remain unarmored. In 1997 the Commission issued CDP Waiver No. 3-97-034-DM which authorized the portions of that project that were within the Commission's retained jurisdiction. Subsequent to that approved armoring project, the unarmored point of land eroded away, forming an additional seacave located in between the two armoring structures approved under the 1996/1997 authorizations. The unpermitted seacave fill that is the subject of the Commission's open violation file was placed within that new seacave in 2016 without a CDP. Importantly, the plans for the 1996/1997 project distinctly show that the area where the new seacave has since formed was to remain unarmored, and therefore this 2016 seacave fill cannot be considered part of that original 1996/1997 authorization.

The Applicants have claimed that a condition of the County's 1996 CDP that required a monitoring and maintenance program somehow not only envisioned that this unarmored section of bluff would be allowed armoring in the future but also authorized that work in advance. The Commission disagrees, including as that broad interpretation of a monitoring and maintenance condition could lead to unbridled expansion of armoring up

[46] This would also most ensure consistency with the normal CDP application consideration process because: 1) the Applicants could develop a project that best met their goals within the constraints of the site; 2) County staff would have an opportunity to review a redesigned project in the first instance; 3) Commission staff would have an opportunity to provide further comments on the redesigned project to the County to help ensure LCP consistency; 4) the local public, including those in the Opal Cliffs neighborhood, would have an opportunity to weigh in regarding the redesigned project; and 5) County decision makers could make a decision based on all of those factors, all as opposed to the Commission dictating a project that the Applicants have not indicated any interest in pursuing at the current juncture.

and down the coast, which is clearly not the intent of such conditions.[47] In fact, although many armoring structures have CDP requirements to properly maintain such armoring, including to address unforeseen impacts on the public, few such CDPs actually authorize such maintenance development, rather new CDP authorization is required for future such work. In addition, repair and maintenance projects by definition are activities designed to put something back to an approved configuration, and repair and maintenance does not extend to augmentation or modification to approved configurations. In fact, the two are very different and distinct activities. Here, this particular unpermitted seacave fill cannot qualify as 'maintenance' to the originally approved configuration as it is new armoring in an area that was not unarmored under the original authorization. Thus, even were maintenance development to be covered by the maintenance provisions of the original County CDP as asserted by the Applicants, which it cannot, this is not maintenance and would not be covered for that reason alone.

As a note, the previous owner of the property had applied to the Commission for a CDP to fill the same seacave in this area in 2009, and Commission staff advised the then property owner that such an application would not be approvable, since the seacave fill represented new armoring and the residence was well set back and not in danger from erosion, and thus did not meet the criteria required to approve new armoring structures. Instead, the Commission ultimately issued CDP Waiver No. 3-09-040-W to allow for stenciling on the seawall adjacent to the opening of the new seacave (to say "Danger Keep Out") to address potential public safety concerns by dissuading the public from entering into the cave. Commission staff also met with the Applicants' and/or their representatives multiple times (including in November 2015, December 2015, and January 2016) before they purchased the house (in March 2016) to explain this history and reiterate that a CDP would be required to legally place the proposed seacave fill, and, moreover, that such fill here would not be approvable under Coastal Act provisions since the house was not in danger. Nevertheless, Commission staff was informed in May of 2016 that the Applicants (who were then the owners of the property) intended to carry out the seacave fill work ostensibly under the authority of the recently recorded maintenance and monitoring program, and without applying for a CDP from the County or the Commission. Commission staff again reiterated the need for a CDP for the work and informed the Applicants that proceeding without a CDP would be a "knowing and intentional" violation of the Coastal Act and the County's LCP.

In response, the Applicants attempted to modify their fill plans to make the sea cave plug "float" above the mean high tide elevation in such a manner as to avoid the Commission's retained CDP jurisdiction, and ultimately proceeded with their plan. On May 11, 2016, Commission enforcement staff observed work underway and hand-delivered a Field Notice of Violation to the project superintendent, followed by a mailed Notice of Violation on May 19, 2016. This triggered a series of letters and emails back and forth, and ultimately the Applicants sued the Commission over the Notice of Violation. Despite the apparent efforts of the Applicants to avoid areas below the mean high tide elevation, the California State Lands Commission has since determined that

[47] And the Commission notes that the property owners were out of compliance with the 1996 CDP, as the monitoring and maintenance program was never recorded as was required by that permit. The Applicants actually recorded that document (finally coming into compliance with the 1996 CDP) in April of 2016, directly ahead of the unpermitted work they did in May of 2016.

the 2016 sea cave fill does, in fact, reach into state tidelands below the mean high tide elevation, and therefore into the Commission's retained CDP jurisdiction for at least this reason. The development therefore required a CDP from the Commission. And, as was communicated to the Applicants and their representatives' multiple times, any work done above the mean high tide elevation also required a CDP from the County, as it was not exempt from CDP requirements nor could it be considered "repair and maintenance" of the previously approved armoring, since this specific location was previously unarmored, and regardless, expansions of armoring cannot be considered repair and maintenance, and because the County's original CDP did not pre-authorize such development.

Because Commission staff determined that the findings could not be made to approve the seacave fill after-the-fact (as the residence remained unthreatened by the seacave) the Notice of Violation directed the Applicants to apply for a CDP to authorize removal of the unpermitted development and restoration of the affected area. To date, no application for removal and restoration has been received, and this CDP application does not propose to address this violation, and thus the unpermitted seacave plug has remained since 2016, with unmitigated coastal resource impacts ongoing.

Separately, the Commission and the Applicants settled the litigation over the Notice of Violation in 2018. As part of the settlement, the Commission retained the rights to pursue the 2016 violation but agreed that the case was not being treated as a high enforcement priority at that time (due to a number of factors including the Commission's lack of enforcement staff and the significant backload of open cases, and did not mean that the case and its resource impacts were deemed insignificant or unimportant) and that the Commission's enforcement staff did not anticipate pursuing it unless new or changed circumstances, including new unpermitted development, warranted revisiting that prioritization. In other words, the Applicants' litigation over the Commission's Notice of Violation, and the settlement of it, did not change anything with respect to the Commission's authorities applicable to the seacave violation or any other violations at the site, whether then known or not.

In 2020, the Applicants undertook additional development without a CDP on their property consisting of landscaping, replacement of a blufftop fence, and significant work to a blufftop edge gazebo (which was so extensive that it resulted in that structure being considered a new/replacement structure).[48] When the Applicants were informed that these were additional violations, they opted to apply to the County for an after-the-fact (ATF) CDP to authorize and retain the already installed fence and landscaping work, and they opted to include complete removal of the gazebo as part of their proposal. In 2023, the County approved a CDP for such development.[49]

[48] The Applicants obtained a building permit from the County for such development, but not the required CDP. The Applicants only obtained a CDP once they were informed by Commission staff that such work would require a CDP.

[49] The Applicants have also done a significant amount of remodeling-type development on the property with building permits (but not CDPs) in the 2020s (including some roof structural work, other roof work, interior modifications, and exterior improvements (including the aforementioned 6-foot tall solid fence along the street side of their property)). The County determined that such development did not require a

The LCP requires that violations of the Coastal Act/LCP be resolved as a condition of allowing CDP approval (see IP Section 13.20.170(C) in **Exhibit 7**). Specifically, these LCP 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 Applicants do not propose to resolve or otherwise even ameliorate the ongoing violations at the site. As a result, the LCP does not allow for approval of a CDP for the proposed project, and this is a separate and distinct reason for denial.[50]

The Applicant has not included any proposal for the resolution of the 2016 violations as part of the CDP application, so any action by the Commission will result in violations remaining on the property. The Commission's enforcement division will continue to consider options for future action to address the violations.

E. Takings

In addition to evaluating the proposed development for consistency with the certified LCP, the Commission must also evaluate the effect of a denial action with respect to takings jurisprudence. In part this is because in enacting the Coastal Act the Legislature anticipated that the application of coastal resource protections and development restrictions could deprive a property owner of the beneficial use of his or her land, thereby potentially resulting in an unconstitutional taking of private property without payment of just compensation, and responded to that possibility by precluding such actions. To avoid an unconstitutional taking, the Coastal Act provides a provision that allows a narrow exception to strict compliance with the Act's regulations based on constitutional takings considerations. Coastal Act Section 30010 provides:

> *The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

CDP because it was deemed exempt residential improvement and/or exempt repair and maintenance (as allowed by the Commission's implementing regulations and the LCP) as it did not trigger any of the exemptions' CDP requirements (under California Code of Regulations Sections 13250 and 13252, and LCP IP Sections 13.20.060 and 13.20.061). Commission staff was unable to complete a cumulative redevelopment assessment of the site for the time before 2020 and back to January 1977, but did review the 2020s era building permits, and that work alone did not trigger redevelopment (and thus the need for a CDP for that reason). Other improvements raise some different questions as to CDP status, and those are still being evaluated, but conclusions are not necessary for the Commission to make a decision on this CDP application.

[50] Note in any case that the Commission's review and action on this CDP does not constitute a waiver of any legal action with regard to the above-described violations (or any other violations), nor does it constitute an implied statement of the Commission's position regarding the legality of development undertaken on the subject site without a CDP, or of any other development.

Although the judiciary is the final arbiter on constitutional takings issues, the Coastal Act, as well as the State and Federal Constitutions, enable the Commission to assess whether its action might constitute a taking so that the Commission may take steps to avoid doing so. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the confidence that its actions are consistent with Section 30010 and constitutional takings jurisprudence. If the Commission determines that a denial based on the implementation of the development restrictions in the Coastal Act and/or LCP could constitute a taking, then the Commission could conversely find that application of Section 30010 would require it to approve some amount of development in order to avoid an uncompensated taking of private property. In this latter situation, the Commission could propose modifications to the development to minimize its Coastal Act/LCP inconsistencies while still allowing some reasonable amount of development.

In the remainder of this section, the Commission evaluates whether, for purposes of compliance with Section 30010, denial of the Applicants' proposed residential development could constitute a taking. As discussed further below, the Commission finds that under these circumstances, denial of the proposed project likely would not constitute a taking because the Applicants already enjoy substantial economic use of the property and because the Commission is not denying any and all possible development of the subject property, rather only the current proposal.

General Principles of Takings Law

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation*.*"[51] Similarly, Article 1, Section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation…has first been paid to, or into court for, the owner*.*" Despite the slightly different wordings, the two "takings clauses" are construed congruently in California, and California courts have analyzed takings claims under decisions of both state and federal courts (*San Remo Hotel v City and County of San Francisco* (2002) 27 Cal. 4th 643, 664).[52] Because Section 30010 is a statutory bar against an unconstitutional action, compliance with state and federal constitutional requirements concerning takings necessarily ensures compliance with Section 30010.

The Unites States Supreme Court has held that the taking clause of the Fifth Amendment proscribes more than just the direct appropriation of private property in the early 1920s (*Pennsylvania Coal*).[53] Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (*Yee v. City of Escondido* (1992) 503 U.S. 519, 522–23). The first category consists of those cases in which government

[51] The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R Co. v. Chicago* (1897) 166 U.S. 226, 239).

[52] Note that the "damaging private property" clause in the California Constitution is not relevant to the current analysis.

[53] See *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393, 415) stating "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

authorizes a physical occupation of property (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 426). The second category consists of those cases whereby government "merely" regulates the use of property, and considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole (*Yee,* 503 U.S. at 522–23). Moreover, a taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation.[54] Here, because the current development proposal does not involve physical occupation of the Applicants' property by the Commission, the Commission's actions are evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two circumstances in which a regulatory taking may occur. The first is the "categorical" formulation identified in *Lucas v. South Carolina Coastal Council* ((1992) 505 U.S. 1003, 1015)*.* In *Lucas,* the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved (*Id*. at 1015). The *Lucas* court suggested, however, that this category of cases is narrow, applicable only "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" (*Id.* at 1017–18 (*emphasis* in original); *Riverside Bayview Homes* (1985) 474 U.S. 121, 126 (regulatory takings occur only under "extreme circumstances"[55]).

In order to determine if a regular taking has occurred under the second circumstance, courts apply the multi-part, ad hoc test identified in *Penn Central Transportation Co.* v*. New York* ((1978) 438 U.S. 104, 124). This test generally requires at a minimum an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations (*Id*. at 124; *Ruckelshaus v. Monsanto Co.* (1984), 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island*, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur.[56]

However, before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, it must demonstrate that the taking claim is "ripe" for review. This means that the takings claimant must show that government has made a "final and authoritative" decision about the use of the property.[57] Likewise, a "final and authoritative determination" does not occur unless the applicant has first submitted a

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[54] See *Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S.470, 488–89, fn. 18.

[55] Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas,* 505 U.S. at 1029).

[56] *Palazzolo v. Rhode Island* (2003) 533 U.S. 606, 617, 632 (finding that under the *Lucas* categorical test, where property retained value following regulation, it did not constitute a taking but remanding for further consideration under *Penn Central*).

[57] See *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348.

development plan which was rejected and also sought a variance from regulatory requirements which was denied.[58] An applicant is excepted from the "final and authoritative determination" requirement if such an application would be an "idle and futile act" (*Id.* at 1454). Relying on U.S. Supreme Court precedent, the Ninth Circuit has acknowledged that at least one "meaningful application" must be made before the futility exception may apply, and "[a] 'meaningful application' does not include a request for exceedingly grandiose development" (*Id.* at 1455) (internal quotation marks omitted). Furthermore, the Ninth Circuit has suggested that rejection of a sufficient number of reapplications may be necessary to trigger the futility exception (*Id.* at 1454-55).

Denial of the Proposed Project Would Not Result in a Taking

Takings under Lucas

As analyzed above, application of the Coastal Act/LCP to the proposed project requires denial of the CDP application. Thus, it could be argued that these regulations result in an unconstitutional taking of the Applicants' private property.[59] However, based on the law and facts analyzed below, it is unlikely that such a denial of development on these facts would constitute an unconstitutional taking in this case, perhaps most importantly because the Applicants already enjoy an economically beneficial use of their property, notably a roughly 6,000 square-foot single-family residence and related development. Therefore, under the *Lucas* standard, denial of the Applicants' proposed project will not deny the owners of all economically viable use of the land since they already enjoy their current house.

Takings under Penn Central

In addition to the *Lucas* analysis, a court would also consider whether the CDP denial would constitute a taking under the ad hoc *Penn Central* inquiry. This inquiry generally requires an examination of factors including the character of the government action, the economic impact of the challenged regulation, and the extent of the regulation's interference with reasonable, investment-backed expectations. As an initial matter, it is important to bear in mind that the Commission is not denying all development potential here, but only the current proposal. Thus, nothing in the Commission's action should be construed as denying any possibility of redeveloping the site.

Reasonable Investment-Backed Expectations

To evaluate whether the Applicants had a "reasonable and investment-backed expectation" that a residence like the one proposed could be developed on the property requires that expectations be measured objectively in terms of what a reasonable person might conclude about the developability of a site, and to what degree that expectation was backed by any actual investment. In order to analyze this question, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed as proposed by the Applicants,

[58] See *Kinzli v. City of Santa Cruz*, (9th Cir. 1987) 818 F.2d 1449, 1453–54.

[59] Here, the four contiguous parcels under common ownership that are spanned by the existing residential development constitute the property at issue.

considering all the legal, regulatory, economic, physical, and other constraints that existed when the property was acquired.

Concerning whether Applicants have reasonable investment backed expectations, we first look to what a reasonable person might conclude about the developability of the site for the Applicants' proposed project. As stated above, Commission staff, on multiple occasions informed the Applicants about the limitations to development at this site, and in particular as it related to potential redevelopment and/or a replacement house and related issues regarding the shoreline armoring. In fact, Commission staff met with the Applicants and/or their representatives at least three times before the Applicants even purchased the property in 2016. The message to the Applicants then is the same as the CDP determination findings above; namely that a project of the sort proposed raises Coastal Act and LCP consistency issues. Thus, the Applicants had actual informed knowledge of the potential issues with development at this location even before they purchased the property, and thus a reasonable expectation that they would not be allowed to develop at this scale while still consistent with the Coastal Act/LCP (or, put another way, no reasonable expectation that they could). In addition, Commission staff has had multiple communications with the Applicants and/or their representatives since the time of purchase, and has consistently reiterated the same things (including through multiple comment letters; see **Exhibit 4**).

In addition, even without such first-hand knowledge borne out of information provided directly to these Applicants by Commission staff, the Applicants should have reasonably been aware that residential development on their property is located atop a 60-foot tall bluff fronted by the beach and the Pacific Ocean, and that such siting brings with it increased risks. In fact, from even before they purchased the site, and after, these Applicants have inquired about pursuing extraordinary armoring measures to reduce such risks, and have been informed by Commission staff (including as informed by conversations with even the previous property owners saying the same things) that the residence did not appear to qualify for such measures, and that a CDP would be recommended for denial if they were proposed.[60] In other words, the Applicants own actions indicate that they were aware of the types of coastal hazard concerns that affect development atop a tall ocean-fronting bluff. Put another way, the Applicants clearly have long been aware, since even before they purchased the property, that development at this site is subject to coastal hazards risks, and those risks could preclude such development. In other words, the site is not part of an inland residential subdivision unaffected by coastal hazards, rather it is at the shoreline interface where such risks are intensified, and it is clear that the Applicants were reasonably aware of the same.

And, even if the Applicants were to claim that none of the above reasonably informed their expectation, which seems impossible, they should also have been aware that the property is located in Santa Cruz County where there are rules governing proposed development, including in the LCP. Any person pursuing development under the LCP would reasonably be expected to do some due diligence and understand the ways in

[60] And, as described above, the Applicants installed at least some such measures without a CDP despite this advice.

which those rules may affect their proposal. And here, these Applicants have also been informed by a variety of technical and legal representatives familiar with pursuing development in the coastal zone in Santa Cruz County, who in the exercise of their fiduciary obligations would likewise have informed their clients of the issues that they might expect with a development proposal like this one, also leading to a conclusion that these Applicants should not have had a reasonable expectation that their proposal would be readily approvable.

In addition, the Applicants pursued a similar residential replacement project in 2018 before pursuing this one, and that project was also appealed to the Commission for similar reasons as this one. In that case, the Applicants withdrew their CDP application before the Commission could review the appeal, nullifying their County CDP approval and the appeal, stating, "we believe doing so will also give our professional design consultants and the County a better opportunity to more thoroughly address the concerns raised [by] the Coastal Commission staff." In other words, the Applicants were clearly informed, again, as to the fact that their proposal – that was similar to the current proposal – raised concerns before even applying for the CDP application that is the subject of this report. Thus, the Applicants were – again – clearly informed as to the issues associated with their proposed project and should not have derived a reasonable expectation that it could be approved.[61]

In short, the constraints affecting the site and the ways in which application of the Coastal Act and LCP in light of those constraints as applied to their proposed development, as has been described in this report, would have been reasonably known by these Applicants. Thus, on the first part of the first *Penn Central* test, these Applicants did not have a reasonable expectation to presume that they would be successful in obtaining a CDP for their proposed development.

As to the second part of the *Penn Central* test, namely the 'investment-backed' qualifier that is applied to any so identified reasonable expectations, their investment toward pursuing their proposed project is immaterial as they didn't have a reasonable expectation, and no amount of investment can cure that flaw. Even if there were to exist a reasonable expectation that a CDP would be approved to allow for their proposed project to be realized, the Applicants here have certainly invested in the property that is the subject of the application (by its initial purchase, remodeling and improvements over time, pursuit of CDPs, etc.), but they have not shared with the Commission the amount of investment towards the proposed project. And in fact, importantly, they paid some $5.5 million for the property in 2016, and it is likely that it is worth nearly $40 million today.[62] After seeing an increase in value of over $30 million since 2016 (an increase of nearly 700%), it would appear difficult for the Applicants to make a valid investment-

[61] That the Applicants did not significantly modify the subsequent proposal currently before the Commission accordingly is immaterial to the question of reasonable expectations.

[62] As detailed earlier, recent sales of oceanfront property along Opal Cliff Drive have averaged $550 per square-foot. The Applicants' property is 68,345 square feet, corresponding to an estimated value of over $37 million (i.e., $37.6 million) using that average sales figure. And that is not taking into account certain intangibles, like a permitted shoreline armoring structure, the largest (and deepest from the road to the blufftop) residential property of all ocean-fronting Opal Cliff Drive properties, and other such considerations.

backed expectation argument,[63] including because by almost any measure, investment-backed expectations have been met.

Economic Impact

The *Penn Central* analysis also requires an assessment of the economic impact of the regulatory action on an applicant's property. Although a property owner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished.[64] As detailed above, the property has only increased in value over time, and is estimated to be worth nearly $40 million today. Although it is possible that a denial might make the property less valuable to some, such as those also seeking to replace the house like these Applicants, it does not of itself diminish any value that exists today.[65] In fact, the Applicants will still have their roughly 6,000 square-foot home on a roughly 1.5 acre property overlooking the Monterey Bay in one of the most exclusive residential neighborhoods in all of Santa Cruz County. And they would be hard pressed to show the kind of significant diminution of value that would be necessary to prove a takings.[66]

Character of the Government Action

The final prong of the *Penn Central* test is the character of the government action. If the Commission were to deny the CDP application in this case for the reasons identified above, then the Commission advances a legitimate public interest to regulate proposed development pursuant to the LCP, which itself implements the Coastal Act, which requires that coastal resources are protected and requires new development minimize risks to life and property in hazardous areas. With the Coastal Act, and as extended to LCPs that implement the Act on the local level, the Legislature sought to protect coastal resources while allowing for orderly future development, provided it was consistent with the Act. In this case the LCP does not allow for development of the type proposed too close to a coastal blufftop edge above a public beach where its impacts on coastal resources would be considerable. In denying a CDP for such a project, the Commission's action would not be arbitrary or capricious, rather it would be rooted in fundamental Coastal Act and LCP goals, objectives, and requirements, all of which advance legitimate public interests and coastal resource protections relevant to this site.

[63] And any such investment-back expectations have been met with unusual speed, resolving the factor in *Penn Central* analysis that is most important to applicants, although the other factors also disfavor that a taking might occur.

[64] See *Tahoe-Sierra Pres. Council, Inc*., *supra*, (citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)); and *Rith Energy v. United States* ((Fed.Cir. 2001) 270 F.3d 1347 (applying *Penn Central*, court finds that diminution of property's value by 91% not a taking)).

[65] And the Applicants have not offered any evidence regarding structural or other habitability issues, and there is no sign that the County has any such concerns either, further evidencing the fact that the existing and continued use of the property is a reasonable and viable use.

[66] Again, see *Tahoe-Sierra Pres. Council* and *Rith Energy* cases. Moreover, the Commission is not denying the potential to redevelop the site, but only the specific proposal before it.

In other words, the character of the Commission's action strongly argues against a taking.

Therefore, under the *Penn Central* standard, denial of the Applicants' proposed project does not raise reasonable investment-backed expectation, economic impact, nor character of the government action issues, and would not lead to a takings for this reason either.

Takings Claim is Not Ripe

In addition, the California Court of Appeal for the Fourth District's reasoning in the *Pratt* case is also instructive here.[67] In that case, the court noted that the plaintiff "is not entitled to whatever project it desires" and "has yet to submit proposals that contemplate a reduction in the size, scope, configuration or density of the project" (Id. at 1082). In other words, the Court ultimately concluded that the applicant's takings claim was not ripe because there were other alternatives to the project that they had not yet pursued and on which they had not yet received a CDP action. The court's reasoning in *Pratt* is also reflective of the reasons why denial here would not constitute a taking because the Applicants have not exhausted all project alternatives, including ones that are LCP and Coastal Act compliant.

In fact, there is nothing to stop the Applicants from continuing to pursue a replacement residential project at this site through applying to the County for a different CDP for a Coastal Act/LCP-consistent project. If that is the case, then the Commission strongly advises that the Applicants pursue a project that is located landward of the 100-year erosion line without reliance on any shoreline armoring, that such CDP application address such armoring moving forward in a way that can better protect coastal resources (e.g., removal), that all other applicable LCP and Coastal Act requirements be met, and that all violations be appropriately addressed. Such a project would have the best chance at Coastal Act/LCP success, including were a subsequent County CDP approval to be appealed to the Commission again. Put another way, because this CDP denial is without prejudice, and because it certainly appears that there is an alternative project for which the County (or the Commission if on appeal) could approve a CDP, any takings claims now, which as discussed above are hardly compelling, are also speculative at best and simply not ripe, providing yet another reason that a takings is avoided here.

Conclusion

In sum, the Commission's decision to deny the CDP for the proposed development on the Coastal Act/LCP grounds articulated in the 'CDP Determination' component of this report is not likely to result in a court finding that that constitutes an unconstitutional taking. Although denial of the CDP for the proposed residential development at the subject site at this time is warranted and necessary, the Applicants continue to enjoy an economically beneficial use of the property, including an existing single-family

[67] *Charles A. Pratt Construction Co., Inc., v. California Coastal Commission* (2008) 162 Cal. App. 4th 1068.

residence, and have the opportunity to return to the County with a project that can be found consistent with all applicable LCP and Coastal Act policies.

F. California Environmental Quality Act (CEQA)

Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and 15042 (CEQA Guidelines) of Title 14 of the California Code of Regulations (14 CCR) state in applicable part:

> ***CEQA Guidelines (14 CCR) Section 15042.*** *Authority to Disapprove Projects. [Relevant Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*
>
> ***Public Resources Code (CEQA) Section 21080(b)(5).*** *Division Application and Nonapplication. …(b) This division does not apply to any of the following activities: …(5) Projects which a public agency rejects or disapproves.*
>
> ***CEQA Guidelines (14 CCR) Section 15270(a).*** *Projects Which are Disapproved. (a) CEQA does not apply to projects which a public agency rejects or disapproves.*

Section 13096(a) of the CEQA guidelines requires that a specific finding be made in conjunction with CDP applications about the consistency of the application with any applicable requirements of CEQA. This report has discussed the relevant coastal resource issues with the proposed project. All above findings are incorporated herein in their entirety by reference. As detailed in the findings above, the proposed project would have significant adverse effects on the environment as that term is understood in a CEQA context.

Pursuant to Section 15042 of the CEQA Guidelines "a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." Section 21080(b)(5) of CEQA, as implemented by Section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in this report, is necessary to avoid the significant effects on coastal resources that would occur if the project was approved as proposed. Accordingly, the Commission's denial of the project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.

3. APPENDICES

A. Substantive File Documents[68]

- Application File A-3-SCO-20-0027

[68] These documents are available for review from the Commission's Central Coast District office.

B. Staff Contact with Agencies and Groups

- Santa Cruz County Department of Community Development and Infrastructure
- Surfrider Foundation