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Filed:	7/14/2024
Action Deadline:	1/10/2025
Staff:	Maura Sicilensky - SC
Staff Report:	11/22/2024
Hearing Date:	12/11/2024

STAFF REPORT
CDP APPLICATION

Application Number:	**3-20-0222**
Applicant:	The 300, LLC
Project Location:	A vacant industrial building (formerly a cannery) on the seaward side of Cannery Row and partially within and over coastal waters and the sandy beach at 300 Cannery Row in the City of Monterey, Monterey County (APN 001-031-003-000)
Project Description:	Redevelopment of an existing vacant building to accommodate new residential and commercial units through a series of exterior and interior alterations (including structural changes to the foundation, walls, floors, and roof) to result in eight residential units, four coastal commercial units, two standard commercial units, and a public access viewing deck
Staff Recommendation:	Denial

SUMMARY OF STAFF RECOMMENDATION

The Applicant proposes to convert a vacant former industrial building on Cannery Row to a mixed-use development consisting of eight residential units and six commercial units. The proposed project would completely redevelop the building through a series of exterior and interior alterations (including significant structural changes to the foundation, walls, floors, and roof). And although the Applicant suggests that the proposed project is simply repair and maintenance that does not rise to the level of redevelopment (also called replacement), and that it should be evaluated as a repair and maintenance project, staff does not agree. First, from a structural perspective, the project proposes to structurally alter more than 50% of at least the foundation and the

floors, each of which alone and cumulatively exceed the threshold for what constitutes repair and maintenance under the Coastal Act and its implementing regulations. As a result, the proposed project is required to be evaluated as a replacement structure required to meet all Coastal Act tests (i.e., as if it were a new proposed building and related development on an undeveloped site). And second, the project proposes entirely new and different uses as compared to the existing non-use (i.e., a building that has been essentially unused for several decades) as well as compared to the long-ago abandoned cannery use (that ceased in the 1950s). As such, the project proposes new uses where those uses themselves constitute new development, and which independently require the proposed project to be analyzed as new development against the Coastal Act. Thus for both reasons (and either reason alone), the proposed project is considered a replacement structure, where that structure must be evaluated as if brand new development against all applicable Coastal Act provisions (oftentimes referred to by the Commission as when a structure is redeveloped).

The proposed project is located along Cannery Row in Monterey, a former sardine processing waterfront area made famous by John Steinbeck in his 1940s-era book of the same name, and the current heart of the City's tourist economy, where many former canneries of that prior era have been repurposed into the distinctive Cannery Row that we know of today. The area features a world-famous visitor-serving commercial area, including a broad range of specialty and general commercial, service, recreational, and public and semipublic uses, including hotels, restaurants, and shops. The area also includes coastal-dependent facilities, including for marine research and education, at the Monterey Bay Aquarium (located within the former Hovden Cannery on the far downcoast edge at the border with the City of Pacific Grove) and Stanford University's Hopkins Marine Station just downcoast from there. While the buildings along the seaward side of Cannery Row are currently used exclusively for aquarium and visitor-serving commercial purposes, the inland side of the street accommodates a mix of uses, including aquarium, visitor-serving commercial, office, and residential uses.

The roughly 7,000 square-foot project site is located on the seaward side of Cannery Row near its upcoast end, and consists entirely of the former Aeneas Sardine Packing Company Cannery structure, a starkly rectangular concrete structure built in 1945, where the cannery functions ceased in the 1950s, and where the building has been essentially mostly vacant for decades. The concrete box of a building spans the entire site, extending from the Cannery Row right-of-way over the bluff down onto Aeneas Beach and into/over the Monterey Bay itself, which means it also extends into/over the Monterey Bay National Marine Sanctuary, the largest of 17 federally designated sanctuaries in the United States. The Applicant currently owns in fee title only the inland third of the site nearest Cannery Row, and the Applicant agrees that the seaward third of the site is public trust lands, but the area between those two thirds is disputed (but to staff appears to likely be public trust lands, too).[1,2] In any case, the project site is thus

[1] That dispute will not be solved before the Commission's hearing on the item, and the State Lands Commission indicates it make take years.

[2] Put another way, the property ownership question has not been resolved at this time, and the Applicant does not have proper legal authority to perform development on property it does not currently own. Without a legally verified property owner for at least the middle one-third of this property area, approving

located partially over public trust lands granted to the City of Monterey by the State of California. The City does not have a certified LCP, and thus the standard of review for the proposed project is Chapter 3 of the Coastal Act.

The proposed project is inconsistent with Coastal Act coastal policies related to resource protection and coastal hazards siting and design. The project proposes a significant new residential and commercial development on a bluff and beach and partially into/over coastal waters, all in an inherently hazard-prone area, where such risks are proposed to be abated by the building's overall structural composition itself. Put another way, the proposed structure itself acts as shoreline armoring, where its exterior concrete walls that extend into the bluff, beach, and ocean are described by the Applicant's materials as both an existing seawall and a shoreline armoring system, and the proposed project only seeks to augment the foundation of the building through pillars to extend it even deeper. This is a unique situation where both the existing and proposed concrete structures function as a building and a shoreline protective device. And the project as proposed appears not only infeasible but physically impossible without using that proposed armoring aspect of the project to maintain safety and structural integrity.[3] In fact, the Applicant's analysis identified that while today about one-third of the building is located within coastal waters, in 50-75 years about two-thirds of the structure would be expected to be located in that area, which is only possible with the use of armoring to abate very real flooding and other coastal hazard threats.

Thus, the proposed project does not propose to minimize coastal hazard risks via setting back from such hazards, as is typical for proposed new development along the California coast, but rather via the use of shoreline armoring, which is not allowed by the Coastal Act. And the project accommodates significant residential and commercial development (all told some 22,000 gross square feet), including eight market rate residential units on and over the bluff and beach (and potentially ocean) when there are no such residential units on the seaward side of Cannery Row, both oversubscribing the site and placing it seaward of the type of coastal hazards setback the Commission might typically require (e.g., from the blufftop edge), and only being able to do so with shoreline armoring. None of which is Coastal Act consistent, and all of which requires denial of the CDP application for this project, including because the project proposes shoreline armoring to protect it against coastal hazards when Section 30253 prohibits new development from using such armoring, and because the project proposes residential and commercial uses over coastal waters when neither are allowed by Section 30233. And the project is designed to accommodate development over/on the bluff, beach, and ocean, which raises a host of related coastal resource concerns (regarding protection of public beaches, public access, public views, public trust, natural

development or significant use changes on this parcel, as are proposed, would conflict with Coastal Act requirements which mandate clear title or right to occupy land as a precondition for permitting.

[3] In fact, the proposed building sits inundated in the ocean itself, subject to daily wave attack and tidal cycles, as well as subject to more severe episodic and storm events, and the Applicant's geotechnical report states that "Without the existing structure acting as a shoreline armoring system at the project site, erosion and instability hazards of the bluff top terrace deposit materials are considered to be high behind the building."

landforms, and marine resources) that are also Coastal Act inconsistent.[4] Finally, the project also cannot be served by an adequate water supply (including due to a moratorium on new water connections by the State Water Resources Control Board related to its Carmel River Cease and Desist Order), and water to supply the development would be expected to lead to impermissible coastal resource impacts at nearby water sources, including the Carmel River, which is also independently a cause for denial.

In sum, the proposed project is inconsistent with a host of Coastal Act provisions addressing core coastal resource concerns, and the Coastal Act directs denial. Staff identified these concerns to this Applicant when staff first became aware of the proposed project around 2018, informing the Applicant at that time (and since) that the project was not approvable under the Coastal Act. The Applicant has nevertheless pursued the proposed project. And finally, staff clearly understands and appreciates the vital need to increase housing opportunities in the State overall and the coastal zone specifically, and seeks to facilitate such housing in areas that can support it without significant adverse coastal resource impacts, including where staff and the Commission have done so in the City of Monterey (including authorizing six residential units on the inland side of Cannery Row in just the past year). This project, however, is not such a project, and would result in significant coastal resource impairment and fundamental Coastal Act inconsistencies. Thus, staff recommends that the Commission deny a CDP for the proposed project. The motion necessary to implement the staff recommendation can be found on page 6.

[4] And none of which can be negated by the Coastal Act 30235 ‘override’ that applies in limited circumstances to allow for coastal armoring notwithstanding such Coastal Act inconsistencies, both because the proposed project is evaluated as a new development, as described above (and does not constitute an “existing structure” for Section 30235 purposes in any case), and because new development is not allowed armoring per Section 30253.

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1. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit 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 3-20-0222 for the development proposed by the applicant, and I recommend a no vote.*
>
> ***Resolution to Deny CDP:*** *The Commission hereby denies Coastal Development Permit Number 3-20-0222 on grounds that the development would not be in conformity with Chapter 3 of the Coastal Act. 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. Standard of Review

The proposed project site is located entirely within the coastal zone as well as partially on tidelands. The City of Monterey does not have a certified LCP, so all development in the coastal zone of Monterey is reviewed by the Coastal Commission. Thus, the standard of review for this CDP application is Chapter 3 of the Coastal Act.

B. Project Location

The proposed project is located along Cannery Row in Monterey (see **Exhibit 1**), a former sardine processing waterfront area made famous by John Steinbeck in this 1940s-era book of the same name, and the current heart of the City's tourist economy, where many former canneries of that prior era have been repurposed into the distinctive Cannery Row that we know of today. The area features a world-famous visitor-serving commercial area, including a broad range of specialty and general commercial, service, recreational, and public and semipublic uses, including hotels, restaurants, and shops. The area also includes coastal-dependent facilities, including for marine research and education, at the Monterey Bay Aquarium (located within the former Hovden Cannery on the far downcoast edge at the border with the City of Pacific Grove) and Stanford University's Hopkins Marine Station just downcoast from there. While the buildings along the seaward side of Cannery Row are currently used exclusively for aquarium and visitor-serving commercial purposes, the inland side of the street accommodates a mix of uses, including aquarium, visitor-serving commercial, office, and residential uses.

The roughly 7,000 square-foot project site[5] is located on the seaward side of Cannery Row near its upcoast end, adjacent to a public plaza on its downcoast side that provides

[5] Although project plans indicate that the total site area (which is completely covered by the existing building) equals 7,055 square feet, the project plans also indicate that the existing structure's site

vertical access down to the public sandy beach (Aeneas Beach) and the ocean, and that connects with a lateral public accessway fronting the adjacent Monterey Plaza Hotel. The site is completely occupied by the former Aeneas Sardine Packing Company Cannery structure, a starkly rectangular concrete structure built in 1945,[6] where the cannery functions ceased in the 1950s, and where the building has been essentially mostly vacant for decades. The concrete box of a building spans the entire site, extending from the Cannery Row right-of-way over the bluff down onto Aeneas Beach and into/over the Monterey Bay itself, which means it also extends into/over the Monterey Bay National Marine Sanctuary, the largest of 17 federally designated sanctuaries in the United States. The top of the structure is at approximately +67 feet NAVD88[7] and the base of the structure extends to at least -0.5 feet NAVD88 (or about 3.5 feet below mean sea level).[8] See project area photos in **Exhibit 2**.

The project site is only partially owned by the Applicant, where the Applicant's fee-title ownership only covers the landward-most third of the site (called out in Monterey County Assessor's Records as APN 001-031-003) (see page 1 of **Exhibit 3**). The seaward-most third of the site falls within identified state tidelands, which have been granted to the City of Monterey by the State of California, and where any private use or development must obtain a lease from the City for uses consistent with the public trust. The middle third of the site falls within what the Applicant's plans refer to as the "gap area," where property ownership is currently unclear, but for which available evidence suggests that it, too, may be state tidelands. These issues are discussed more fully in the property ownership section of this report below.

C. Project Description

The Applicant proposes to convert and adaptively reuse/redevelop the existing three-story plus partial basement structure into a five-story mixed-use building consisting of: eight one- and two-bedroom market rate residential units; two commercial retail spaces; four coastal commercial spaces; an interior courtyard and a roof terrace; and a publicly-accessible almost 400 square-foot concrete "coastal viewing area" deck on the seaward side of the first floor (that would cantilever out even further over the water than the current edge of the building and incorporate a wave deflector). The project would include full interior demolition and reconfiguration and would include a new extension at the top of the building, all to provide for the two additional floors (including converting the existing basement into a fully-developed first story of the building). The project would also include new windows for each floor (including where none exist currently along the north and west elevations), all while aiming to maintain the stripped down and plain concrete aesthetic of the exterior of the building. The project would also include

coverage is 7,232.5 square feet, or 177.5 additional square feet, although it is not clear nor indicated on the plans where the additional 177.5 square feet is located.

[6] The structure is listed on the California Register of Historical Resources and the National Register of Historic Places.

[7] NAVD88 stands for the North American Vertical Datum of 1988, which is the official vertical control datum in the United States. Since mean sea level is about 3 feet above 0 NAVD88 in this area, the top of the building is about 64 feet above mean sea level.

[8] In addition, a 48-inch diameter City storm drain lies both below and within the basement area of the structure, extending along the length of the north side of the structure from the road to the Bay.

extensive structural repairs and additions to the existing foundation, which project plans identify as a seawall. Additionally, public access to the seaward coastal viewing area deck would be provided through a six-foot wide corridor within the building on the first floor that would connect from the public sidewalk to the deck.

Upon completion of construction, the portion of the building that falls on currently identified public trust land (the seaward most one-third of the site) would feature four coastal-commercial lease areas, defined as uses consistent with the Public Trust Doctrine (i.e., water-related commerce, navigation, or fisheries; Trust-consistent recreational and commercial uses that serve visitors to the waterfront for recreational enjoyment, such as restaurants, waterfront visitor serving retail, and maritime recreation may also be appropriate for these spaces). The two retail spaces and eight residential units would be located between the coastal-commercial lease areas and Cannery Row, occupying both the "gap area" where ownership has not been clearly established as well as the Applicant's property nearest Cannery Row itself.

See **Exhibit 3** for the proposed project plans.

D. Redevelopment/New Development Determination

Oftentimes it is clear when applicants are proposing new development, and where that new development needs to be understood and evaluated against all applicable Coastal Act provisions (e.g., a new residence on a vacant lot, complete demolition on an old residence and construction of a new residence, a new addition to an existing residence, etc.). However, when an applicant proposes what are more aptly described as renovations, where existing portions of structures are retained but modified in various ways, such development may qualify as repair and maintenance, where only the method of repair and maintenance is evaluated for Coastal Act conformance, and where such evaluation does not extend to an evaluation of the object of such repair and maintenance.[9] However, when such modifications to a structure are significant, they no longer constitute repair and maintenance, and are instead understood as modifying the structure to such a degree that it is considered a replacement structure, where that structure must be evaluated as if brand new development against all applicable Coastal Act provisions, oftentimes referred to by the Commission as when a structure is redeveloped.[10]

[9] As embodied in Coastal Act Section 30610(d) and CCR Section 13252(b).

[10] CCR Section 13252(b) specifically states that replacement of 50% or more of a structure is not repair and maintenance under Coastal Act Section 30610(d) but instead constitutes a replacement structure that must be evaluated for Coastal Act compliance purposes. In applying Section 13252(b)'s 50% criteria, the Commission has, in the past, found that a structure will be considered a replacement structure (also referred to as redevelopment) if at least one of the following takes place: 1) 50% or more of the major structural components (i.e., including exterior walls, floor, roof structure, or foundation, where alterations are not additive between individual structural components) are altered; 2) there is a 50% or more increase in gross floor area; 3) alteration of less than 50% of a major structural component results in cumulative alterations exceeding 50% or more of that major structural component (taking into account previous replacement work undertaken since January 1, 1977); and 4) a less than a 50% increase in floor area where the alteration would result in a cumulative addition of 50% or more of the floor area, taking into account previous additions to the structure since January 1, 1977 (see, for example, LCP amendments LCP-2-MAR-13-0224-1 Part A and LCP-3-MRB-21-0047-1, and CDPs 3-16-0345 (Honjo armoring), A-3-

Thus, a critical first step in applications like this that propose modifications to the structure in question, but retention of portions of it otherwise, is to determine whether or not the project is repair and maintenance, or it has tipped the threshold to become a replacement structure, or redevelopment. Although the Applicant in this case claims that the proposed project should be considered repair and maintenance, it is clear that this is not the case.

Specifically, new foundation elements include 20 new three-foot by three-foot square pillars under the perimeter foundation (totaling 180 square feet), 11 new three-foot by nine-foot eight inch diameter pillars under the perimeter foundation where the City storm drain exists (totaling 319 square feet), and seven new sections of deepened foundation walls at the interior pedestal foundation (totaling 112 square feet), all of which would be connected to the existing foundation but which would extend deeper (to an unknown depth) below the site and occupy a footprint of about 611 square feet. According to the application materials, this design would eventually allow seawater to flow under the building footprint when lower vertical wall components of the present foundation further deteriorate, with the idea being that tidal waters and wave runup would flow through the new pedestals and under the lowest floor of the building, where the application notes that this would result in the area under the building within the tidal zone being eventually "restored as coastal habitat," although no such restoration is actually proposed.[11]

Although the Applicant characterizes such foundation work as a simple addition of new pillars and new subsurface foundation walls that should be considered 'repair and maintenance,' such framing is entirely inaccurate for three primary reasons. First, all of those new elements are structural, and all of those new elements would be structurally tied to the existing foundation, which means that what the Applicant actually proposes is a new, augmented, and more robust foundation, which is by definition a replacement structure and not repair and maintenance.[12] Second, and even if that were not true, all of these new foundation elements constitute new development that is required to be found consistent with all applicable Coastal Act provisions. And third, and even if the preceding did not already suggest that the foundation work exceeds the repair and maintenance threshold, although the Applicant suggests that only 600 square feet or so of the foundation would be altered in terms of the square footage that it occupies, and thus constitutes a 48.5% alteration (or less than 50% alteration), that is an improper way

SCO-07-095/3-07-019 3-07-019 (Pleasure Point seawall), 3-09-025 (Pebble Beach Company Beach Club seawall), 3-09-042 (O'Neill seawall), 2-10-039 (Lands End seawall), 3-14-0488 (Iceplant LLC seawall), 2-17-0702 (Sharp Park Golf Course revetment), 3-18-0720 (Candau Armoring), 3-20-0166 (Wavefarer Partners LLC Armoring), 3-22-0440 (Casanova Armoring), and 3-22-1027 (Hofmann Seawall)).

[11] In addition, given that the lowest part of the foundation is currently at -0.5 feet NAVD88, or about 3½ feet below mean sea level, and with sea levels rising, it is not clear how there would be anything other than fully inundated and underwater ocean areas below the proposed structure for the most part.

[12] By definition, and per the Commission's longtime practice, repair and maintenance is limited to putting the object of the repair and maintenance back into its prior state, and it does not extend to changing/augmenting the object of such work. And in some cases, even putting the object of such work back to its prior state does not constitute repair and maintenance, such as when 50% or more of the materials have changed by such work (per the Commission's implementing regulations at Title 14 of California Code of Regulations (CCR) Section 13252(b)).

of evaluating foundation changes such as those proposed. The reality is that the proposed additional elements are intended to support the entire foundation, including as the rest of it deteriorates, and thus are actually structurally altering essentially 100% of the foundation in that way (and certainly more than 50% at any rate).

With respect to the building's interior, the Applicant proposes both structural floor "modifications" and structural floor "additions." Floor modifications are described by the Applicant's proposed project plans as altering the level of the existing floor area through raising or lowering the elevation, while floor additions are described as adding of new floors. The proposed plans estimate that 49.98% of the project's floors would be "modified," and another 47.6% of floors would be added. However, "floor modifications" is just another way of saying the floors would be removed and would be replaced by new floors, while floor additions are exactly that, new floors where none currently exist. Using the Applicant's estimated floor percentages, that means that nearly 100% of the project floors would be new floors, well over the 50% threshold.

The alterations to the exterior walls would include both modified openings and additions. The modified openings are estimated to affect 12.9% of the existing walls surface area, while additions (to create the proposed fifth story) would encompass another 8.9% of the final total exterior wall area (and where additions, much like the foundation additions, all constitute new development that is required to be found consistent with all applicable Coastal Act provisions even if the alteration to existing components do not exceed 50%). And at least 50% of the roof would be altered, and a new roof segment constructed (where the same evaluation applies).

Thus, the proposed project does not constitute repair and maintenance of the existing building structure at the site, but rather a replacement structure that must meet all Coastal Act tests (i.e., as if it were a new proposed building and related development on an undeveloped site). In addition, the project proposes entirely new and different uses as compared the existing non-use (i.e., a building that has been unused for many years) as well as compared to the long-ago abandoned cannery use (that ceased operation in the 1950s). As such, the project proposes new uses where those uses themselves constitute new development, and which independently require the proposed project to be analyzed as new development against the Coastal Act.

E. Property Ownership

The Commission's regulations require that applications for CDPs demonstrate that an applicant has a legal interest in all of the property where work is proposed, where, at a minimum, a CDP application requires:[13]

> *A description and documentation of the applicant's legal interest in all the property upon which work would be performed, if the application were approved, e.g., ownership, leasehold, enforceable option, authority to acquire the specific property by eminent domain, and, if a business entity, proof of the applicant's authority to conduct business in California. The application shall also include proof that all holders or owners of any interests of record in the affected property*

[13] See 14 CCR Section 13053.5(b).

have been notified in writing of the permit application and each invited to join as a co-applicant.

According to the Applicant, the existing structure on the site is privately owned by the Applicant, but ownership of the land below it is essentially bifurcated into three parts: the seaward one-third over currently designated state public tidelands held in trust by the City of Monterey, a landward one-third that comprises APN 001-031-003 and is owned by the Applicant, and a middle one-third "gap area" with unknown ownership status and no assigned APN (see page 1 of **Exhibit 3** for a graphic depiction). The Applicant indicates that it intends to acquire ownership of the "gap area" via a quiet title action, but it does not currently own such land. In addition, the Applicant indicates that it intends to acquire a lease over the currently designated public tidelands on the seaward-most third of the site, but it does not currently have such a lease (although the City has indicated that it would grant such a lease for the proposed project in that area). Thus, it does not appear that the Applicant currently has the type of ownership interest that is necessary to even pursue a CDP application for the proposed project in this case.

It is the Applicant's position that the seaward property boundary essentially fluctuates with the mean high tide, and thus it is a simple 'fix' to correct the parcel map to match up with the mean high tide line boundary, which in the Applicant's view would mean that the gap area is actually part of the Applicant's property. However, numerous issues exist with the Applicant's assertions to this effect. First, it appears that, at a minimum, the Applicant's mean high tide survey is out of date. The survey provided on project materials is from 1972, over 50 years ago. It therefore does not accurately represent the current mean high tide line, including because 50 years of ocean forces and sea level rise has modified site conditions and tidal boundaries, and importantly given the fact that the mean high tide elevation (and thus the mean high tide line) is based upon an evaluation of 19-year duration tidal epochs, where the current mean high tide elevation is based upon the 1983-2001 epoch,[14] where a 1972 representation by definition is based on the epoch prior to that. As a result, the Applicant's estimate of the location of the mean high tide line is inaccurate.

Second, the provided survey was also not an official determination from the State Lands Commission (SLC), meaning that it is both non-binding and unofficial. And third, the parcel map that currently exists for APN 001-031-003 (see **Exhibit 4**) follows a natural undulating contour of the shoreline on its seaward side, which is likely evidence that the original subdivision and/or parcel creation for this site was only for dry land above the bluff and waterline. It therefore appears that the portion of the site/building seaward of the defined boundaries of APN 001-031-003 would most likely be public trust land.

Despite the Applicant's claims that it could unilaterally resolve these property ownership issues via updated mean high tide line surveying and/or via some sort of quiet title action to acquire the gap area, SLC staff informed Commission staff that the

[14] NOAA's National Ocean Service is currently in the process of reviewing and analyzing data to generate revised datums, where the expected release date is after 2026 (see https://tidesandcurrents.noaa.gov/datum-updates/ntde/).

determination of the boundary line in a case such as this that involves known and potential public trust land is a process that SLC is required to be a party to pursuant to Public Resources Code 6308.[15] And SLC staff stated in October 2024 that they had not been contacted by the Applicant regarding such a process. Additionally, SLC staff stated that property boundary determinations like this typically entail a lengthy process which involves detailed review of all applicable historical maps of the shoreline and other documentation. In other words, the determination would not be made solely using the present mean high tide line as the Applicant suggests. According to SLC staff, if the land was found to be private, the Applicant and SLC could then proceed with either a quiet title, land exchange, or boundary line agreement.

In any event, at a minimum, the property ownership question has not been solved or addressed at this time. Based on the Commission's understanding at this time, it is highly probable that the "gap" area is public trust land. In areas of ambiguous ownership between the mapped leased tidelands and mapped property boundary, SLC staff opined that they could have jurisdiction or at least a potential interest in obtaining jurisdiction. Without a clear title, there is a substantial likelihood that this portion of the property is public trust land, which would affirmatively preclude the type of private development that is currently proposed. The Applicant plans to allow residential units on this portion of the property; however, if the land is determined to be public, the allowable uses under the Public Trust Doctrine are limited to water-related commerce, navigation, or fisheries.[16] This concept is further embedded in Coastal Act Section 30233's provisions for diking, filling, or dredging, dictating the allowable uses over coastal waters, which include things such as coastal-dependent industry, public recreational access, and aquaculture. Residential uses are not one of the allowed uses (see additional discussion on this topic subsequently). Because this question about property ownership is so fundamental in this case (given that the issue is not about private property boundaries under the same zoning designation, but rather the boundary between public and private lands and where public trust uses are solely allowed versus not), the Commission is not in a position to determine which uses are allowed on the gap area, and realistically on the portions of the property that may be public trust areas, which appears to be most of the property.

In sum, the property ownership question has not been resolved at this time, and thus the Applicant does not have proper legal authority to perform development on property it does not currently own.

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[15] PRC Code 6308 states "If an action or proceeding is commenced by or against a county, city, or other political subdivision or agency of the state involving the title to or the boundaries of tidelands or submerged lands that have been or may hereafter be granted to it in trust by the Legislature, the State of California shall be joined as a necessary party defendant in the action or proceeding. Service of summons shall be made upon the Chair of the State Lands Commission and upon the Attorney General, and the Attorney General shall represent the state in all the actions or proceedings. If judgment is given against the state in the action or proceeding, costs shall not be recovered from the state."

[16] In the past, projects that were predominantly and/or nearly all public access, but included some visitor-serving commercial uses, such as public wharves in certain cases, have been found to meet these requirements because the public access components of the projects are essentially the overwhelming majority of the project. None of these provisions apply here.

F. CDP Determination

1. Coastal Hazards

Applicable Coastal Act Provisions and Background

Perhaps the most fundamental issue raised by the proposed project relates to coastal hazards and coastal hazards response as it applies to the subject site. The site is located seaward of Cannery Row and is partially submerged in the Monterey Bay and on the bluff and beach, in an area clearly subject to significant coastal hazards threats, including from storms, waves, coastal flooding, as well as episodic and longer-term coastal erosion, all as exacerbated by sea level rise. The primary applicable Coastal Act provision dictates that new development at such a location on the immediate shoreline must be sited and designed only where it can be safe from coastal hazards without a reliance on protective devices. Specifically, Section 30253 states:

> *New development shall do all of the following: (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard. (b) 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…*

As indicated earlier, the proposed project constitutes a replacement structure, or redevelopment, which requires the whole project to be evaluated against and found consistent with all applicable Coastal Act provisions, including Section 30253's requirement to safely site development without protective devices that would substantially alter natural landforms along bluffs and cliffs, which is essentially always the case with armoring.[17] The Coastal Act recognizes that such devices, or shoreline armoring, have significant adverse impacts on coastal resources, including leading to unavoidable impacts on natural landforms, public recreational access, natural processes (which also significantly impacts public recreational access) and public views.[18] As a result, the Act is best understood as 'anti-armoring,' where its resource protection policies typically prohibit armoring. The highly limited exceptions to that prohibition are provided by Section 30235, which states in applicable part as follows:

> *Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. …*

[17] See, for example, Commission findings in LCP amendments LCP-3-SCO-20-0066-2 (Santa Cruz County Hazards Update) and LCP-3-MRB-21-0047-1 (Morro Bay Land Use Plan Update), and in CDPs A-3-SCO-07-095/3-07-019 3-07-019 (Pleasure Point Seawall), 3-09-025 (Pebble Beach Company Beach Club Seawall), 3-09-042 (O'Neill Seawall), 2-10-039 (Lands End Seawall), 3-14-0488 (Iceplant LLC Seawall, 3-16-0446 (Rockview Seawall), 2-17-0702 (Sharp Park Golf Course), 3-18-0720 (Candau Armoring), 3-20-0166 (Wavefarer Partners LLC Armoring), and 3-22-0440 (Casanova Armoring).

[18] Ibid.

Under Section 30235, armoring is only allowed "when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion."[19] The Coastal Act thus generally prohibits armoring, unless it is required to be allowed by Section 30235.

Since projects that constitute new development or redevelopment are not entitled to armoring, the Commission determines consistency with the Section 30253 requirement to minimize risks and assure stability and structural integrity through a number of ways. In locations subject to coastal hazards, the Commission typically establishes a timeframe within which the new development must be found to be safe from hazards threats. This timeframe typically matches the expected lifespan of the development itself before it requires major structural upgrades, which obviously can vary based on a number of factors, but generally ranges from 50 to 100 years, for an average of 75 years. This construct has been incorporated into most LCPs in one form or another statewide in the form of policies or implementing regulations that dictate that new oceanfront or blufftop development must be set back without reliance on shoreline armoring for at least a certain time period and/or a certain physical distance from the bluff edge. Absent certified LCP policies or implementing regulations (as is the case in the City of Monterey), the Commission requires CDP applications for projects at such locations to include coastal engineering and geotechnical reports that evaluate the site-specific conditions to aid in the determination of an appropriate setback.

Finally, not only is new/redeveloped development not entitled to armoring, but it also cannot utilize the protection afforded by an existing armoring device, including as part of the determination of appropriate setbacks. Some have argued that the use of the term "require the construction of" in Section 30253 means that Sections 30253's provisions in that sense only apply prospectively to the future construction of armoring, and do not extend to armoring that may exist at the time that proposed development is being pursued, and thus that such proposed development can rely on such armoring notwithstanding it may may lead to the types of prohibited impacts. However, such an interpretation ignores the qualifying language that proceeds such text, which states that the development cannot "in any way" require armoring construction. Proposed development attempting to rely on existing armoring is still dependent on that armoring having been constructed, which falls under the rubric of "in any way" requiring the

[19] Existing structures are understood as those which existed since before the implementation of the Coastal Act on January 1, 1977, and have not been significantly modified to the point of being considered new/redeveloped as described in the Commission's implementing regulations. This interpretation has been described in the Commission's adopted 2015 Sea Level Rise Policy Guidance. In other words, Section 30235's directive to permit shoreline armoring for structures in certain circumstances applies to development that lawfully existed as of January 1, 1977, and that has not subsequently been redeveloped (i.e., where changes to it since 1977 have been extensive enough that it is considered a replacement structure required to conform to applicable Coastal Act and LCP provisions). This interpretation is the most reasonable way to construe and harmonize Sections 30235 and 30253, which together evince a broad legislative intent to allow armoring for development that existed when the Coastal Act was passed, when such development is in danger from erosion, but to avoid such armoring for development constructed consistent with the Act, which does not allow shoreline altering armoring. This interpretation, which narrowly allows protection for development that predates the Coastal Act, is also supported by the Commission's duty to protect public trust resources and interpret the Coastal Act in a liberal manner to accomplish its purposes.

construction of armoring to protect it. That such construction may have been constructed before the proposed development is being considered is immaterial to Section 30253's application for that reason (and such conclusion is bolstered by the Section 30009 requirement to liberally construe the Act to protect coastal resources). In addition, if new development relies on armoring that is already present, it will also have to rely on the continued upkeep, expansion, or eventual rebuilding of that armoring. If the armoring needs to be expanded or rebuilt, then the new development would be relying on the construction of new armoring, in violation of Section 30253.[20]

In sum, 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. 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 (i.e., not new or redeveloped ones) 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. 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.

Consistency Analysis

The proposed project is inconsistent with the Coastal Act coastal hazards policies described above. First, the project consists of a significant new residential and commercial development on a bluff and beach, and partially over coastal waters, and it is thus located in an inherently hazard-prone area. These risks are proposed to be abated by the structure's proposed shoreline armoring, which in this case are the vertical components of the foundation and lower floors, as well as the augmented foundation overall. In fact, the exterior concrete walls of the existing structure are described in both the project plans and in the Applicant's geotechnical report prepared for the project[21] as both an existing seawall and shoreline armoring system. This is a rather unique situation where both the existing and proposed replacement concrete structures function both as a building and a shoreline protective device. And the project as proposed appears not only infeasible but physically impossible without using that proposed armoring aspect of the project to maintain safety and structural integrity. The existing structure sits inundated in the ocean itself, subject to daily wave attack and tidal cycles, as well as subject to more severe episodic and storm events, and the proposed building would be sited in the same area. The Applicant's geotechnical report states that:

> *Without the existing structure acting as a shoreline armoring system at the project site, erosion and instability hazards of the bluff top terrace deposit*

[20] Furthermore, Section 30270 requires the Commission to "take into account the effects of sea level rise in coastal resources planning and management policies and activities in order to identify, assess, and, to the extent feasible, avoid and mitigate the adverse effects of sea level rise."

[21] See *Geotechnical and Coastal Engineering Investigation, 300 Cannery Row, Monterey, California,* prepared by Haro, Kasunich and Associates, Inc. (HKA), November 2020.

materials are considered to be high behind the building.

In fact, a site-specific bluff erosion and setback analysis was provided in the HKA report, along with a separate focused HKA geologic report,[22] which describe the subsurface conditions, geology, expected erosion rate, seismicity and liquefaction hazards, and provides a coastal hazards analysis with built-in sea level rise considerations. The HKA analyses found that the historical coastal bluff retreat rates seaward of Cannery Row in the vicinity are very low, which they attribute to the competence of the grandiorite bedrock, the prominence of offshore bedrock outcrops, and the easterly (inland) direction of the shoreline at this location on the curved Monterey Bay. Additionally, the existing building physically prevents any natural bluff retreat, so very little (if any) observable bluff retreat has occurred at the site itself. Nevertheless, they estimate that, absent the existing structure (i.e., if it were to be fully removed), bluff retreat in the next 50 to 75 years could total 13 to 19.5 feet (this bluff retreat line is illustrated on page 5 of **Exhibit 3**). The area landward of this line (which amounts to approximately the landward-most one-third of the existing structure and site, or the area that the Applicant currently owns in fee title) is typically where the Commission would require proper siting and design without reliance on armoring. About two-thirds of the site is located seaward of this setback line, which is only possible with the use of armoring to abate such flooding and hazards threats.

As such, the project includes components that are either currently over/in coastal waters (i.e., at least the seaward-most one-third of the building) or potentially over such waters (depending upon the outcome of State Lands and related efforts to identify the mean high tide line and the nature of the Applicants' property interest in the previously described 'gap' area), and that may increase over time with the landward movement of the mean high tide. That means that the project proposes to fill such coastal waters with the building and its augmented foundation. And this also represents a Coastal Act problem for the proposed project. Specifically, the Coastal Act only allows seven enumerated types of uses to fill coastal waters (and even then subject to exacting criteria), and the project's primary proposed uses (i.e., residential and commercial uses) do not qualify. Specifically, Coastal Act Section 30233 states, in relevant part:

> ***Section 30233.*** *(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following: (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities. (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps. (3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public*

[22] *Focused Geologic Report, 300 LLC,* prepared by Haro, Kasunich and Associates, Inc. (HKA), October 21, 2020.

> *access and recreational opportunities. (4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines. (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas. (6) Restoration purposes. (7) Nature study, aquaculture, or similar resource dependent activities. …*

The only proposed use that might qualify for fill of coastal waters is the proposed public access overlook (as a type of public recreational pier (see Section 30233(a)(3)), but that is actually a fairly minor component of the overall project, and cannot by itself qualify the project otherwise under Section 30233. Other than that overlook, the seaward third of the project would be all commercial, and the middle third would be all residential. At a minimum the commercial use raises questions about allowability, and depending on the location of the mean high tide line when that is finalized, the proposed residential use is not allowed by Section 30233. Thus, the fill proposed as part of this project is not for an allowed use under Section 30233, which therefore directs its denial.

This proposed project attempts to oversubscribe the amount of development that a site like this might be able to handle consistent with Coastal Act requirements, including placing it well seaward (and over the bluff, beach, and ocean) of what might be construed as the more typical blufftop setback line, where that component of the project extends some 90 feet seaward of that line. In addition, the only way of being able to accomplish a project of that sort is with a proposed shoreline protective device, where the entire proposed building and its embedded armoring both "substantially alters natural landforms along bluffs and cliffs" and essentially leads to complete "destruction of the site",[23] all of which is prohibited by Section 30253, which also directs denial. In

[23] Moreover, even were shoreline armoring to be approvable in this case, which it is not, the Commission's impact assessment methodology for allowable shoreline armoring also requires that it mitigate for its shoreline sand supply impacts, among other things. And the Commission's methodology typically focuses on the manner in which the proposed armoring might affect sand contribution, as well as beach recreational space in terms of the armoring's footprint and the amount of beach that would have been created naturally but for the presence of the armoring. Here, even a fairly preliminary/rough impact analysis shows that the armoring has a footprint of approximately 4,500 square feet, and based on the HKA erosion rate of 0.67 feet per year without its presence, and a linear shoreline of 50 feet, it would lead to a loss of 34 square feet of beach per year, or 665 square feet over 20 years due to passive erosion impacts, or a total loss of 5,165 square feet of sandy beach due to the armoring over an initial 20 year period (which is the time frame the Commission typically initially calculates). Based on real estate values of oceanfront properties in the vicinity of approximately $1,000 per square foot (based on Zillow.com recent sales), it would cost roughly $5,165,000 million to acquire a property and let it erode naturally to create a beach as mitigation for that impact. When added to the cost to bring in the 185 cubic yards of sand that would be lost from the system due to the armoring at a cost of $50 per cubic yard delivered, the total impact would be valued at approximately $5,174,000 million. The project does not propose any mitigation for these impacts, and thus even if it were approvable, the Applicant would need to commensurately offset some over $5 million in impacts, or address it through paying the calculated amount as an in-lieu mitigation fee (see similar analytic frameworks in CDPs 2-10-039 (Land's End Seawall), 2-11-009 (City of Pacifica Shoreline Protection), A-3-PSB-12-042 (Capistrano Seawall), A-3-PSB-12-043 (Vista del Mar Seawall), 3-16-0345 (Honjo Seawall), 3-18-0720 (Candau Armoring), 3-19-0446 (Rockview Seawall and Accessway), 3-19-1287 (Fanshell Beach 17-Mile Drive Armoring), 3-20-0166 (Wavefarer Partners LLC Armoring), 3-22-0440 (Casanova Armoring), 3-22-1027 (Hofmann Seawall), and 2-21-0912 (San Francisco Ocean Beach Armoring).

short, the proposed project does not use a Coastal Act consistent way to ensure stability and structural integrity and to minimize coastal hazards risk.

At this basic level, the project proposes shoreline armoring to protect new development (i.e., eight new residential structures and almost 9,000 square feet of retail/commercial space). This proposal is inconsistent with the Coastal Act Section 30253 requirement prohibiting new development from utilizing such armoring 'in any way.' Thus, from a land use perspective, the project proposes new development in a hazardous location, inconsistent with the Coastal Act. And second, from a structural perspective, the project proposes to redevelop the site, including via additions and structural element replacements, in excess of the Coastal Act's 50% thresholds for considering the project a replacement. And to the extent there was any question, new replacement structures by definition are post-Coastal Act and cannot qualify as an 'existing structure' in the Coastal Act 30235 sense where the Applicant might be able to avail themselves of the Section 30235 'override' that can allow for the approval of armoring in very limited and narrow cases notwithstanding its inconsistencies with other Coastal Act provisions. On the contrary, the proposed project must be able to demonstrate stability and structural integrity without armoring, which means that the only way that a project at this site could demonstrate Section 30253 compliance would be via a proper setback. But that is not what is proposed here, and therefore, the proposed project in this form must be denied.

More specifically with respect to the proposed structural work, the proposed project would repurpose a nearly 80-year old vacant structure currently in a state of disrepair into a new mixed-use residential and commercial building. The project necessitates a complete overhaul and reconfiguration of the existing structure for functionality, current building code, and safety reasons, without which the Applicant indicates the building will continue to fall into disrepair and remain unsafe for occupancy and use. The building is essentially at or very close to the end of its structural design life without a major renovation/replacement. From a functionality perspective, the project can thus be understood as 'replacing' a structure that currently is vacant and unsafe for use into a revamped structure newly safe for use, and one that must retain the use of shoreline armoring to do so. The proposed project would not remove the seawall element but would instead utilize it as part of the repurposing of the structure as well as augment and strengthen the existing building foundation. Again, this is new/replaced structural development utilizing shoreline armoring, inconsistent with the Coastal Act.

Further, and more quantitatively with respect to the foundation, HKA indicates that the existing foundation is currently partially undermined, and very little to no embedment into granite bedrock exists adjacent to the upcoast seaward corner. The proposal would include constructing new deepened footings a minimum of four feet into bedrock at regular intervals (approximately 8 feet apart). And while they estimate that the proposed fix to such structural foundation problems (i.e., the placement of some 39 new piers and new interior pedestal foundation walls) totals some 46.9%, calculated simply by comparing the square footages of the new piers with the square footage of the block foundation as a whole, the Commission, including the Commission's Coastal Engineer Jeremy Smith, disagrees with the Applicant's calculation methods and instead finds it to be a fully replaced foundation for a variety of reasons. For one thing, the new piers should not even be considered repair/maintenance to the existing foundation, as they

themselves are new development. Repair and maintenance means putting something back to its permitted/existing state, rather than augmenting it and changing it with new elements. Thus, when viewed in this light, the new piers are new development themselves. And second, the foundation in its current state must be bolstered for stability and structural integrity with the proposed new piers, which are meant to ultimately elevate the structure over coastal waters and future scour and allow for ocean waters to flow underneath the building. Put another way, the entire foundation's functioning, as with the rest of the building, needs to be augmented and replaced by the proposed new piers. In sum, the proposed foundation elements, including new piers, constitutes redevelopment of the structure in and of itself. And again, the redeveloped building and its augmented foundation act as a shoreline protective device to enable its stability and structural integrity. Doing so is inconsistent with Coastal Act Section 30253.

With respect to other proposed elements, including structural walls and flooring, the Applicant argues that the project would fall below the 50% threshold for redevelopment. In support of that argument, the Applicant provided calculations that separate out different types of work for the same type of structural component (i.e., "modified openings" (alterations to the existing walls, through changing the configuration) and "additions" for exterior elevations, and "modifications" and "additions" for floors). With respect to exterior walls, they estimate that the modifications would be 12.9% modified openings and 8.9% additions through the addition of the fifth level. With respect to floors, they estimate that 47.6% of alterations would be modifications (which the Applicant refers to as changing the leveling of the floor) and 49.98% would be additions.

Again, there are flaws with such reasonings. First, the additional floors and floor area are themselves new development and new intensities of use required to be set back from coastal hazards without any armoring, which they are not. And, for the purposes of calculating redevelopment of structural components, additions and modifications should not be calculated separately, but rather all alterations for one type of structural component must be included within the calculation. When examining the proposed work through this understanding, the exterior elevation calculations look to remain below the 50% redevelopment threshold (i.e., at 21.8% by adding the 12.9% modified openings and 8.9% additions together), but the floor calculations greatly exceed the threshold (at 97.58% by adding the 47.6% alteration and 49.98% addition together). Thus, almost 100% of the floors are proposed to be replaced, either through physical modification of existing floor space by raising/lowering their elevation, or by adding such new interior structural floor space to the project (again, replacing the existing three-story structure with five stories).

The proposed project (repurposing this structure from a dilapidated former industrial use to a modern mixed-use building) represents a significant replacement of the existing structure, including new/intensified residential and commercial uses, a new foundation system, and new structural floor space. As such, it is clear that the proposed work far exceeds the 50% threshold for what constitutes a replacement structure vs. ordinary repair and maintenance of an existing structure. It therefore must be considered a new/redeveloped structure, for which it must be set back away from coastal hazards risk without armoring. This project simply does not do that, but does the opposite by proposing to remain in situ within coastal waters and on a sandy beach and coastal

bluff, well seaward of any Coastal Act appropriate hazards setback, and utilize armoring as the primary mechanism to ensure safety. This construct is not consistent with Coastal Act Sections 30233, 30253, or 30270.

Coastal Hazards Conclusion

The proposed project surpasses the criteria to be considered as "redeveloped," as evidenced above. Therefore, the proposed project does not qualify for the shoreline armoring "override" available when Coastal Act Section 30235 tests are met, and the proposed project is not entitled to armoring protection from coastal hazards. Allowing the existing armoring to continue for the newly developed structure would be inconsistent with Sections 30233 and 30253 (and other coastal resource protection policies, see also below). Thus, the project cannot be found consistent with the Coastal Act, which directs denial.

2. Water Resources

Applicable Coastal Act Provisions

Water supply on the Monterey Peninsula, including in the City of Monterey, is severely constrained. As a general rule, the Coastal Act seeks to promote infill development within existing developed communities with adequate public services and where such development will not cause adverse impacts to coastal resources. Applicable provisions include:

> ***30250.*** *(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. …*
>
> ***30254.*** *New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted, consistent with the provisions of this division; provided, however, that it is the intent of the Legislature that State Highway 1 in rural areas of the coastal zone remain a scenic two-lane road. Special districts shall not be formed or expanded, except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use, essential public services, and basic industries vital to the economic health of the region, state, or nation, public reaction, commercial recreation and visitor-serving land uses shall not be precluded by other development.*

And the water sources from which water supplies are derived are also protected, including as environmentally sensitive habitat areas (ESHA) in certain circumstances, including as follows:

> ***Section 30230.*** *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of*

special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231. *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Section 30107.5. *"Environmentally sensitive area" means any area in which plant or animal life, or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

Section 30240. *(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

The Commission has generally understood the Coastal Act to require that new development be served by an adequate water supply, and has interpreted 'adequate' to mean in an amount that will not result in any adverse impacts to sensitive coastal resources, including creeks, rivers, wetlands, bays, and/or the ocean.

Water Supply Background

Unlike other parts of the State that rely on imported water,[24] the Monterey Peninsula is entirely dependent on local water sources. California American Water Company (Cal-Am) is the private utility that provides water service to much of the area, including all of the City of Monterey. The Monterey Peninsula Water Management District (MPWMD, or District) is the public entity that regulates/oversees water management in the Peninsula, including allocating the amount of water each city is allowed to use each year, tracking water usage at each particular site in the region, and ultimately deciding where Cal-Am

[24] For example, while much of the San Francisco Bay Area relies on canals and aqueducts that carry water from reservoirs in the Sierra Nevada mountains (e.g., the Hetch Hetchy Reservoir), Central Valley cities and farms rely on the State Water Project (with Lake Oroville the largest reservoir in the system) and the Federal government's Central Valley Project (with Shasta Lake the largest reservoir in the system and the State overall), and Southern California relies on water from the Colorado River, the Sierra Nevada (e.g., Owens Valley), and the two water projects.

is allowed to serve water. The region's two primary water sources are the Seaside Groundwater Basin and the Carmel River.[25] Historically, these two sources have been overtapped, and have resulted in water supply scarcity in the greater region for decades.

More specifically, with respect to the Carmel River, it drains a roughly 225 square mile basin that begins in the Santa Lucia Mountains south of the Monterey Peninsula and travels about 30 miles before emptying into the Pacific Ocean at the Carmel River Lagoon within Carmel River State Beach just south of the City of Carmel-by-the-Sea. The Carmel River ecosystem has traditionally been an important steelhead habitat, as it "historically supported the largest anadromous steelhead run in the chaparral ecosystems of central and southern California, but development of water and land resources led to habitat degradation and an estimated 75% population decline by 1975".[26] The National Marine Fisheries Service listed the south-central California coast steelhead Distinct Population Segment as threatened under the Endangered Species Act in 1997, and designated the Carmel River as 'critical habitat' under the Act necessary for its protection and survival in 2005.[27] By 1999, the Carmel River was listed as one of North America's ten most endangered rivers given the demands placed on it by urban water consumption.[28]

In 1995, in a seminal decision as a result of investigations into both the health of steelhead and the River more broadly, as well as an analysis of historic legal water rights, the California State Water Resources Control Board (State Water Board, or Board) issued a cease-and-desist order (CDO 95-10) that substantially reduced the amount of water Cal-Am was able to legally withdraw from the Carmel River.[29] The Order determined that Cal-Am was diverting 14,106 acre feet per year (afy) from the River when it only had legal right to divert 3,376 afy [30] (or, put another way, Cal-Am was determined to be illegally diverting about 10,730 afy). The State Water Board also determined that Cal-Am's Carmel River diversions were the largest single impact on instream beneficial uses of the River, including adverse effects on fisheries and overall River habitat values. Because of a lack of available supply to substitute for and offset

[25] There are some other smaller sources, including desalinated water produced by the City of Sand City and recycled water produced by the City of Pacific Grove and the Carmel Area Wastewater District generally used for non-potable purposes. All of these facilities have received CDP approval from the Commission for their water production and use.

[26] Lopez Arriaza, Juan, et al. "Size-conditional smolting and the response of Carmel River Steelhead to two decades of conservation efforts." *PLOS ONE*, vol. 12, no. 11, 30 Nov. 2017, p. 3, https://doi.org/10.1371/journal.pone.0188971.

[27] See https://www.federalregister.gov/documents/2005/09/02/05-16389/endangered-and-threatened-species-designation-of-critical-habitat-for-seven-evolutionarily.

[28] See, "The Conservancy at 40: The Carmel River" at https://scc.ca.gov/2016/06/26/conservancy-at-40-the-carmel-river/#:~:text=In%201999%20the%20Carmel%20River,once%20again%20healthy%20and%20vibrant.

[29] See State Water Resources Control Board, Order No. WR 95-10, Order on Four Complaints Filed Against the California-American Water Company, Carmel River, Monterey County, July 6, 1995.

[30] Where that total reflects 2,179 afy based on SWRCB License 11866, 1,137 afy based on pre-1914 appropriative rights, and 60 afy based on riparian rights.

the almost 11,000 afy of illegal diversions, and because the effect that such an immediate reduction in water supply would have on the Monterey Peninsula, the Order allowed Cal-Am to continue to divert up to 14,106 afy from the Carmel River beginning in 1995 with 20% per year reductions until a combination of new water sources and water use reduction would bring the amount of River water used to its legal amount.

In the intervening decade,[31] the State Water Board was generally dissatisfied with Cal-Am's efforts to reduce Carmel River diversions and to identify supplemental legal and sustainable water sources, and in 2009 issued replacement CDO 2009-060,[32] which maintained the previous CDO's tenets while also finding that Cal-Am: "(a) failed to comply with the requirements of Order 95-10, and (b) is in violation of Water Code Section 1052", and that "diverting water from the river for growth is unacceptable when (a) Cal-Am has no legal right to divert the water, (b) the steelhead in the river has been declared a threatened species, (c) the river has been designated critical habitat for the steelhead and (d) miles of the river bed are dry for five to six months a year." The State Water Board concluded that "water should not be diverted from the river for growth and that the quantity of water that is illegally diverted by Cal-Am should be reduced over a period of years until illegal diversion from the river is ended." As such, the revised Order was structured only to accommodate existing users and not to accommodate new growth dependent on Carmel River water. To implement this requirement, CDO Condition 2 states:

> *Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.[47]*
>
> *Footnote 47: Multiunit residential, commercial or industrial sites may currently be served by a single water meter. The installation of additional meters at an existing service will not be viewed as a new service connection provided that the additional metering does not result in an increase in water use...*

In sum, the CDO does not allow Cal-Am to extract and provide water for any type of growth and development proposed after the CDO's effectiveness in 2009 (e.g., building new water-using development from the ground up on vacant lots, intensifying existing water-using development with additional units, etc.).[33]

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[31] Note that in 2007, the State Water Board recognized Cal-Am's right to divert an additional 2,425 afy from the River, thus putting Cal-Am's maximum legal diversion at 5,801 afy (i.e., 3,376 + 2,425 = 5,801).

[32] See State of California State Water Resources Control Board Order WR 2009-0060 at https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/caw_cdo/docs/wro2009_0060.pdf

[33] Subsequently, in 2016 SWRCB issued CDO 2016-0016, which was designed to supersede and replace CDOs 95-10 and 2009-0060, and which maintained all previous requirements other than it reduced the

While applying the prohibitions on new residential or commercial units from the ground up is fairly easy to understand and enforce, how to apply it to existing development at an existing service connection is a bit more complicated, including how to define what does and does not constitute an intensification of water use. To provide guidance, the California Public Utilities Commission (CPUC)[34] opined on how to interpret certain CDO provisions, particularly what constitutes an increase in water usage as it relates to intensifications of existing development. Specifically, in 2011, the CPUC determined[35] that Cal-Am could allow new connections and/or increased use of water for existing service addresses if (1) such connection/increase was due to a change in zoning or use, and where all necessary approvals had been obtained prior to October 20, 2009; or (2) if the new connection was associated with the installation of additional meters but without an increase in water use. Ultimately, CPUC's intent was to clarify that Cal-Am was not authorized to provide water in a way that would violate CDO Condition 2. Importantly, CPUC also reinforced that the CDO requirements affecting Cal-Am also apply to the MPWMD and the manner in which it divvies up water to Monterey Peninsula cities and users. Thus, CPUC's 2011 action also directed "Cal-Am to confer with MPWMD and then consult with the SWRCB to develop or select a workable protocol for determining the past use baseline as well as measuring increase in water use at existing service addresses resulting from a change in zoning or use."

In response to the State Water Board's Order and the CPUC's guidance, the MPWMD developed a comprehensive system of assigning water credits to each land use in the Monterey Peninsula so as to both establish a baseline of each site's water usage as well as enforceable criteria for what would constitute an increase in water usage above that baseline. The MPWMD assigns each use a water credit, which is determined by the site's square footage, number of restaurant seats, number of bathrooms, or some other quantifiable metric for the site, and then multiplied by the identified water use factor for that metric. The water use factor is the estimated amount of water used by each particular land use type, which the District determines based on actual water use data derived from such uses in various setting.[36] Thus, the District's position is that such water factors are accurate since they are based on empirical water usage data specific to the Monterey Peninsula region. In short, the District's water credit represents the District's conclusion regarding the maximum amount of water that a site is physically equipped to use. The District maintains that as long as a proposed project is at or below that amount, then it can allow Cal-Am to serve it water.[37]

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amount of interim allowed diversions to 8,310 afy (starting in 2015-2016) and extended the deadline to terminate unlawful diversions to December 31, 2021.

[34] Since Cal-Am is a private utility, the CPUC has jurisdiction over and regulates many of Cal-Am's operations, including in terms of rates charged for water service, akin to how CPUC regulates Pacific Gas and Electric as a private energy and natural gas utility provider.

[35] See CPUC's 2011 "Decision Directing Tariff Modifications to Recognize Moratorium Mandated by State Water Resources Control Board" (CPUC Decision 11-03-048).

[36] The District's water use factors are found here: https://www.mpwmd.net/rules/Rule24.pdf.

[37] Note, however, that the District's water credit system hasn't been 'approved' by the State Water Board as a legally enforceable mechanism to implement CDO Condition 2. In fact, the State Water Board has

In summary, as it relates to the Carmel River, Cal-Am is under a State Water Board Order to reduce extraction to its legal limit of about 5,800 afy and to preclude most types of new development and intensifications of existing uses that would result in an increase in water usage, including as determined by the MPWMD.

With respect to the Monterey Peninsula's other primary source of water, the Seaside Groundwater Basin, it, too, is under legal constraint. The Basin provides about 30% of the Monterey Peninsula's water usage, but has been under Court order, also known as an adjudication, since 2006. The adjudication specifies how much water is allocated to the various entities that use the Basin (Cal-Am, as well as private wells for agricultural uses, etc.), as well as broader management and conservation efforts overseen by a Court-identified Watermaster. The decision resulted in an ultimate reduction in available groundwater sourced from the Seaside Groundwater Basin by approximately 50 percent, or down to 3,000 afy, as the identified Natural Safe Yield (where natural replenishment would avoid seawater intrusion and other adverse environmental effects). Prior to the adjudication, Cal-Am pumped approximately 4,000 afy from the Seaside Basin. Following the adjudication, Cal-Am's allocation was reduced to 1,474 afy. The establishment of adjudicated water rights of all the users of the Basin is intended to avoid long-term damage to the Basin, including potential seawater intrusion, subsidence, and other adverse impacts of over-pumping. The adjudication establishes a physical solution to Basin management that is "intended to ultimately reduce the drawdown of the aquifer to the level of the Natural Safe Yield; to maximize potential beneficial use of the Basin; and, to provide a means to augment water supply for the Monterey Peninsula."

In line with the adjudication, the Watermaster produces an annual report specifying the health of the basin and its progress in meeting identified objectives. The most recent report from 2022[38] noted that water usage from the Basin was about 2,871 afy, below the Court-ordered limit of 3,000 afy as the defined Natural Safe Yield. And while seawater intrusion wasn't affirmatively found to be affecting water quality at that time, basin water levels were continuing to drop, and thus rendered the basin susceptible to intrusion. Specifically, the report found there are "ongoing detrimental groundwater conditions within the Basin that pose a potential threat of seawater intrusion. Groundwater levels below sea level, the cumulative effect of pumping in excess of recharge and freshwater inflows, and ongoing seawater intrusion in the nearby Salinas Valley all suggest that seawater intrusion has the potential to occur in the Seaside Groundwater Basin. However, no data collected in Water Year (WY) 2022 indicate that seawater intrusion is occurring within the [Basin]."

In summary, the Seaside Groundwater Basin is Court-ordered to supply no more than 3,000 afy. And while the adjudication is meant to limit water usage to a sustainable level in the long-term, at the current time, the Basin remains in a somewhat precarious state given the threat of seawater intrusion. This is therefore a critically important time in Seaside Groundwater Basin management so as to prevent seawater from infiltrating the

opined that a more defensible baseline water use should be based on the past 5 years of actual flowing water at a particular site.

[38] See https://seasidebasinwatermaster.org/Other/2022%20Annual%20Report%20Final%2012-8-22.pdf.

Basin. In other words, Basin management becomes orders of magnitude more complex should seawater intrude upon the resource, and thus prevention efforts at the current time are key.

In light of the limitations – legal, chemical, and biological – of the region's two primary water sources, Cal-Am, the MPWMD, area cities, and the region's wastewater collection and treatment agency, Monterey One Water, have been working on solutions to both reduce consumption and to augment supplies. On the consumption front, and working in concert with the fact that most forms of new development have not been allowed in the region for some nearly 15 years since the CDO's Condition 2 went into effect, the region has a robust water efficiency program that has worked in reducing water usage. For the 2023 water year, which ran October 1, 2022 through September 30, 2023, Cal-Am's customers in the entire Monterey Peninsula service area used just 9,118 acre-feet from all supply sources – including the Carmel River, Seaside Groundwater Basin, and recycled and stored water. This number is less than the 9,516 acre-feet used in the 2022 water year, below the 10-year average of 9,813 acre-feet annually, and well below the roughly 18,000 acre-feet it had been pumping when the State Water Board's initial CDO was promulgated in 1995 (14,000 from the Carmel River and 4,000 from the Seaside Groundwater Basin).

And on the supply side, as the Commission is well aware, there are numerous projects completed, under construction, or permitted that will provide additional supplies to the region. One of these projects, the Pure Water Monterey project by Monterey One Water, is a water recycling and groundwater injection/replenishment/reuse project that has been operational since 2020. This project takes treated wastewater and then injects it into the groundwater basin, with the benefits of having a supply generally unaffected by the whims of annual precipitation, reducing the need for water from the Carmel River, and replenishing the Seaside Groundwater Basin's supplies and staving off seawater intrusion. The project is currently operational and treating 3,500 acre-feet in this manner. Relatedly, the Pure Water Monterey Expansion project is currently under construction and will expand the project's overall capacity by some 2,250 acre-feet, for a total of 5,750 acre-feet that can be added to the region's water supply portfolio.

And lastly in terms of new supplies, Cal-Am is working on final approvals to construct a 4.8 million gallon per day (or 14.7 acre-feet per day, or 5,365 afy) desalination facility. After several decades of planning and various proposed project iterations, the Commission ultimately approved the CDP for this project in November 2022, but subject to conditions of approval. Among the most notable is the need for updated supply and demand figures documenting how much water is needed to serve identified levels of growth over the next several decades. This point is currently subject to extensive debate, and drives to the heart of the matter regarding whether the desalination plant is actually needed in the long term. Cal-Am estimates that water demand by 2050 will be 14,480 afy. Hence, Cal-Am argues that the additional roughly 5,400 afy produced by the desalination plant is needed to augment the roughly 11,000 afy available once the Pure Water Monterey Expansion is operational. MPWMD, however, disagrees with such demand figure, and has instead forecasted a 2050 water demand of 10,599 afy, which is within the amount provided by existing legal supplies and the forthcoming water recycling projects. Thus, the District's position is that Cal-Am's desalination project is

not needed for at least the next 30 years, and that the State Water Board should lift the CDO. The Commission, as part of its CDP approval and findings, found that while the water recycling projects would appear capable of satisfying water demand in the short term (for the next 20 years or so), there was also substantial evidence to reasonably conclude that desalination was also needed in the water portfolio for the long term. Hence, the Commission approved the CDP, but with several special conditions. Chief of among them to definitively answer the supply/demand/long-term need question is Special Condition 1, which identifies the CPUC as the final arbiter of this issue with revised supply and demand figures. If such determination shows there is a demand (i.e., a need for the project) for water in excess of what the recycling projects can provide by or before 2050, the desalination project can continue to proceed.

Coastal Act Considerations and Analysis

Putting all of the above water supply background in the context of the Coastal Act, a few things can be noted. Foremost, the preceding background information is meant to inform a common baseline understanding of the complicated and complex water supply situation in the Monterey Peninsula. While water is controversial and complex in most parts of California, it is particularly so in the Monterey region given its isolated nature relative to the large water projects that serve much of the rest of the state. And while there are a mélange of agencies involved, the Commission's role and review, as part of this project or otherwise, is not enforcement of the State Water Board's CDO, or the MPWMD's allocation/water use calculations, or the manner in which the CPUC estimates supply and demand. While these other agencies' decisions and findings can inform Commission understandings, the Commission has an independent review authority under the Coastal Act to protect coastal resources, including sensitive water bodies, from impairment and ensuring that new development receives water from a source that does not result in such impairment. This is not to suggest that the Commission will always disagree and 'override' other agencies' determinations, as good public policy would suggest that other government agencies, particularly other state agencies, work together so that their respective mandates harmonize and reinforce each other. It also does not mean that the Commission will simply defer and agree with other agencies as a rule either. But it does mean that satisfaction of one law or agency does not automatically mean that another's is similarly satisfied.

In this light, and applying what the Commission understands about the current state of affairs in the peninsula regarding water and coastal resource health, while the Monterey Peninsula has made significant strides in recent years regarding new water supplies and decreases in demand in ensuring a sustainable water supply portfolio, there is still much uncertainty. In 2023, NOAA Fisheries reaffirmed the threatened status of Carmel River steelhead, finding that drought and fish barriers remain concerns to the long-term health of the species.[39] Similarly, the Seaside Groundwater Basin remains at risk of seawater intrusion, and while a goal of the Pure Water Monterey projects is to affirmatively guard against such impairment, they are not fully operational at this current time. And while there is general consensus that, in the short term, the water recycling

[39] As part of its "2023 5-Year Review: Summary & Evaluation of South-Central California Coast Steelhead", available at: https://www.fisheries.noaa.gov/feature-story/south-central-california-coast-steelhead-maintain-threatened-listing-status.

projects can provide a sustainable water source once fully operational, there isn't consensus beyond this time frame, including whether desalination can or will be part of a needed solution. It also bears reiterating that, at the current time, the State Water Board's CDO is still in effect, prohibiting most forms of new water using development.

The Coastal Act requires new development to be served by an identifiable, available, and long-term sustainable water source. The Commission has typically interpreted such requirement to generally mean that water must come from a source without impairment to sensitive coastal resources and the species that inhabit and use them, including wetlands, streams, groundwater resources, and the ocean. In light of the above, the Commission cannot find that these tests are met in the Monterey Peninsula at this time, and thus, for purposes of Coastal Act for CDP review purposes, there is not an adequate and long-term sustainable water source to serve new development in Monterey.

That said, the Applicant argues, essentially notwithstanding the above analysis, that they have adequate water given the MPWMD has allotted the site 1.3 acre-feet annually of water, and the proposed project will use less than that at 1.248 afy. The 1.3 afy amount represents what MPWMD estimates that the site is equipped to accommodate at full use, and what it historically did use when it was at full capacity/operation, and thus the amount the District has 'allotted' and thus what it will allow Cal-Am to serve. As applied here, the District has indicated that, so long as water usage remains at or below the 1.3 afy amount, the project doesn't run afoul of their water allocation provisions. To be clear, this is akin to the requirement for a 'will-serve' letter or some other type of affirmative determination that the applicable water provider can and will legally provide water to the proposed development, including in conformance with their own procedures. If the entity cannot or will not provide water for whatever reason, then this independently would require a project's denial regardless of whether the water source is sustainable or not. In other words, this can be understood as a factual yes or no in terms of the water provider allowing water to be served to this proposed project. The District has said yes, so long as it is below the 1.3 afy amount.

However, the question then goes to how to apply such understanding of an inadequate water supply to this proposed project. While it is more straightforward to apply it to a new use on vacant land (as it is clearly new water-using development when there is not available supply to newly serve it), it is somewhat more complex to apply it to existing developed sites. One way to understand it is that the public policy goal of the area is to reduce water usage from existing levels so as to bring the Peninsula's water usage into a sustainable state. As such, it does not really matter if there is an existing water-using use, as any form of new water-using development must be denied unless and until the requisite Coastal Act findings regarding water supply health and adequacy can be met. This position would certainly be consistent with the intent of the State Water Board's CDO, which is premised overall on the requirement to reduce water usage to legal and sustainable levels. Reducing water usage would also clearly be consistent with the Coastal Act's requirement to protect sensitive aquatic resources and only provide water in an amount that sustains such resources. Applying this understanding to this proposed project would result in its denial, as there wouldn't be any water available to serve it unless and until there is evidence about the sustainability of the region's water supply.

A second way to approach this is to cap water usage at existing usage amounts. For sites that have actual flowing water (and a project simply proposes to convert/transfer such water from one use to another), the idea in this scenario would be to recognize that there is currently water flowing at the site, and thus limiting new development to that actual flowing amount would not exacerbate the problem. It would effectively maintain the baseline status quo. The question then would become one of how to calculate and determine the appropriate 'baseline.' The MPWMD has its own protocols for doing so, including establishing water demand and use calculations based on the site's 'capacity for use,' or what the site is physically equipped to accommodate water-wise at full build out rather than what it actually uses. The State Water Board has opined that, while the District's 'capacity for use' method may be appropriate in some cases, another analytically compelling method would be to determine the actual average water use for a water year from the past five years, or to use both methods and use whichever is the lessor amount. This makes sense for a variety of analytical reasons, not the least of which being that the idea that a baseline should be based on the amount of water the site could use at full occupancy and use is also inaccurate from a CDP perspective inasmuch as certain changes in use and changes in intensity of use, such as would occur should new/different tenants come into the space, is development requiring its own CDP, and such development itself would be required to meet the same LCP water supply tests as this proposed development, and would not be somehow allowed to use that amount of water simply based on historical use. As a result, the concept embedded in the District's 'full use' baseline is inherently flawed.

That said, MPWMD has strongly opposed the use of actual water consumption data, arguing that doing so may incentivize prospective property sellers to artificially increase water use to facilitate changes in use by prospective buyers, as well as penalize those that implement conservation features to reduce water consumption. Additionally, MPWMD claims that it is unlawful to use actual water consumption data because it would violate CPUC policies regarding customer privacy,[40] and MPWMD's Board even went as far as to adopt a resolution identifying the flaws and legal problems associated with using actual water data, and concluding that they will not do so when establishing baseline water usage.[41]

In any event, when using the Water Board's preferred last 5 year scenario, the site has not been at full occupancy and use for many, many years. Using these numbers as a proxy for what the State Water Board suggests is a more accurate determination of existing/baseline water use shows that the site's running water is essentially zero. Applying this metric to the site would similarly result in its denial as there would not be any existing water to serve it.

[40] Specifically, the District cites to a non-disclosure agreement required by Cal-Am of its customers as a prerequisite to providing water service that prohibits providing access to water use records to anyone other than the specific account holder. The District indicates that this agreement means that neither MPWMD nor Cal-Am are legally allowed to provide actual water consumption data for existing service addresses.

[41] See Resolution No. 2018-05 adopted in 2018 at: https://www.mpwmd.net/resolutions/2018/Resolution2018-05.pdf.

And finally, a third permutation, and related to the second one, is to cap water usage in line with what the MPWMD did for this site in terms of its capacity for use. As described previously, the MPWMD's 1.3 afy water allocation is based on the amount of water the site is physically equipped to accommodate at full occupancy. Water usage fluctuates, particularly at commercial/industrial sites like this one. And, to the District's point, looking at actual water usage can lead to deviations for a variety of reasons, particularly for commercial spaces, that can make it difficult for use in planning applications like this. At the same time, this is simply 'paper water' inasmuch as it doesn't actually reflect running water, nor the long-term sustainability of its source. When using this method, which is the version relied on by the District and the City, the site would be allowed no more than the 1.3 afy identified/allocated for it.

Each of the three permutations runs across the spectrum of methodologies for evaluating water use under the Coastal Act. And while the Commission has used different approaches in the past, they have all been in response to the unique aspects of a given project. For example, the Commission recognized the District's capacity for use metric for the American Tin Cannery project in adjacent Pacific Grove, matching estimated proposed water use with historic water use. Among other reasons for why the Commission found it appropriate in that case is that the project was for a high Coastal Act/LCP priority land use (visitor-serving overnight accommodations, including a robust amount of lower-cost ones), and also, at a fundamental level the Commission agreed that that site actually was physically equipped to use such water (and indeed had flowing water and existing tenants using such water). The ATC site was (and is) an active commercial center, and thus it wasn't inappropriate to match historic with proposed water use, even if there were some significant yearly fluctuations. The Commission has also allowed for some minor intensifications of water use to foster small residential units, finding that the negligible increase in water demand was appropriate given the need to provide for small housing options, including ADUs, in the coastal zone.[42] In such cases, the Commission found there would be an increase in water use as compared to existing use, by simple virtue of the fact that the projects were adding new residential units. However, in all three cases, all proposed units were actually fairly small, and included just one bathroom each, where the increase in water use was estimated by the MPWMD to be roughly 0.068 afy per unit (or about 61 gallons per day per unit). The Commission ultimately concluded that, with such context, it is appropriate in cases like those, where much needed small housing is being provided at smaller densities (i.e., less than 5 units), to allow for such water supply impacts given their relatively small scale.

In short, it is a judgment call as to the best method to evaluate Coastal Act consistency, requiring the weighing of costs and benefits of different potential resource outcomes, and applying various temporal considerations. And while it may not be directly applicable to other potentially proposed development on the Peninsula, including as it is attributable uniquely to the context and attributes of the proposed project at this location at this time, the Commission here believes the most analytically pure method to evaluate this project is to look at its actual flowing water, akin to the State Water Board's

[42] See CDP waivers 3-19-0961-W (Shake Apartments), 3-20-0082-W (Cannery Row Residences), and 3-24-0651-W (Cusenza Residence and ADU).

method. The site has not been using essentially any significant amount of water for at least the past 5 years, and actually much longer than that, and thus it clearly represents a significant water use intensification of a water resource that is not adequate or sustainable at this time. The project thus cannot be found Coastal Act consistent with respect to water supply, including because the withdrawals necessary to serve this proposed project would be expected to lead to adverse impacts to the water sources in question, here the Carmel River and the Seaside Groundwater Basin. All of which is inconsistent with Coastal Act Sections 30230, 30231, 30240, 30250, and 30254.

Conclusion

In terms of water supply, while the project has a will-serve letter from the water provider Cal-Am, there is significant question as to whether it is allowed to be so served due to limitations on its water withdrawals related to the State Water Board's Cease and Desist Order (related to Cal-Am's Carmel River diversions) that does not allow for water service to new units like this. At the same time, as the Commission is also aware, available evidence suggests that water supply issues on the Monterey Peninsula are improving (due to water conservation and water recycling/reinjection efforts), and there is light at the end of the water supply tunnel. Generally, the Commission has looked to identify the amount of water currently being used at a site versus the amount of water that would be used with any proposed development, and evaluated the potential coastal resource impacts (e.g., on Carmel River, etc.) associated with such increased water demand. Here, there would be an increase in water use as compared to existing/past five years, by simple virtue of the fact that new residential and commercial units would be added to a site that currently has essentially zero water usage and will need to be effectively redeveloped in order to make it operational for such water use. In short, it clearly represents a rather significant increase in water when there currently is not an adequate and sustainable source to serve it.

Overall, given the change in use, the overall increase in gross square footage, the property's long-term vacancy, and the need to completely redevelop the site to make it functional and usable, the project cannot be approved as proposed consistent with the above cited Coastal Act provisions. While such an assessment may change in the future given the Peninsula's water supply portfolio, it is too speculative today to find that a significant proposed mixed-use and high water-using project at a site that currently uses no water and is ill-equipped (and would functionally need to be structurally redeveloped) to actually use water can be found Coastal Act consistent.

3. Public Recreational Access and Public Views

Applicable Coastal Act Provisions

The Coastal Act protects and requires the provision of public recreational access, and maximizing public recreational access opportunities is a fundamental Coastal Act objective. Relevant provisions include:

> ***Section 30210.*** *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Section 30211. *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

Section 30212. *(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected…*

Section 30213. *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred…*

Section 30220. *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

Section 30221. *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

Section 30222. *The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.*

Section 30223. *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

Section 30224. *Increased recreational boating use of coastal waters shall be encouraged ….*

Section 30240(b). *Development in areas adjacent to…parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those…recreation areas.*

These overlapping Coastal Act provisions protect public recreational access to and along the beach/shoreline and to offshore waters for public recreational access purposes, particularly free and low-cost access. Specifically, Section 30210 requires the Commission to provide the general public maximum access and recreational opportunities, while Section 30211 prohibits development from interfering with the public's right of access. In approving new development, Section 30212 requires new development to provide access from the nearest public roadway to the shoreline and along the coast, save certain limited exceptions, such as existing adequate nearby

access. Section 30213 protects lower cost forms of access, such as the free access available along the beach fronting the project site. Section 30220 protects coastal areas suited for ocean-oriented activities, such as the beach/offshore area here, for such purposes. Sections 30221 and 30223 protect oceanfront and upland areas, like this, for public recreational uses, and Section 30222 prioritizes the private portion of the land in question in this application for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation, making it explicitly a priority over the residential and commercial uses proposed in this case. And Section 30240(b) protects parks and recreation areas, like Aeneas Beach and the Monterey Bay National Marine Sanctuary fronting the site, from degradation, and requires any allowed development to be compatible with the continuation of those areas. Finally, Section 30210's requirement to maximize access and recreational opportunities represents a different threshold than to simply provide or protect such access, and it is fundamentally different from other like provisions in this respect. Namely, it is not enough to simply provide access to and along the coast, and not enough to simply protect access; rather such access must also be maximized. This terminology distinguishes the Coastal Act in certain respects, and it provides fundamental direction with respect to projects along the California coast like this one.

Additionally, the Coastal Act provides that the scenic and visual qualities of coastal areas are resources of public importance that must be protected, and requires that new development protect public views and visual compatibility with the surrounding area. In highly scenic areas, such as the viewshed in which the proposed project is located, proposed development is also required to be subordinate to the character of its setting. Section 30251 states:

> ***Section 30251.*** *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

And because public views are a part of public access more generally, all of the above access and recreation provisions are also public view provisions, and vice versa. Additionally, Section 30253(e) recognizes the importance of unique coastal communities, such as the Cannery Row area, as worthy of protection where feasible, stating:

> ***Section 30253(e).*** *Where appropriate, protect special communities and neighborhoods that, because of their unique characteristics, are popular visitor destination points for recreational uses.*

Finally, Coastal Act Section 30233 only allows for fill of coastal waters for the following

uses and purposes:

> ***Section 30233.*** *(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following: (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities. (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps. (3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities. (4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines. (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas. (6) Restoration purposes. (7) Nature study, aquaculture, or similar resource dependent activities. …*

Analysis

In this case, the proposed project would redevelop a derelict vacant building into a new mixed-use residential and commercial project. While visually the project seeks to maintain the building's stark industrial character, it raises some rather significant public view concerns. The building is located on Cannery Row, between the road and the ocean, and is immediately adjacent to a public viewing plaza and public staircase down to the public beach. The existing structure is a stark concrete block approximately 70 feet tall that extends out into the ocean and completely blocks all views from the road as well as almost all of the upcoast blue water ocean views from the public beach. The proposed project would be located in the same footprint and "shell" of the existing structure and would extend its height by up to eight feet. While this proposed height extension would not block any new views from pedestrian-level vantage points on Cannery Row, in the public plaza, or on the beach that are not already blocked, it would increase the structure's overall mass and scale in this sensitive visual environment.

In addition, the building (both existing and proposed) sits at the beach-ocean interface, both partially submerged and atop some roughly 4,500 square feet of what would otherwise be sandy beach open and available to public use and enjoyment. Such pocket beaches, such as the one adjacent to the site and that could exist at the project site, are rare along Cannery Row given that much of the shoreline is developed, both with old cannery development as well as newer visitor-serving and coastal-dependent uses. The proposed project would perpetuate this adverse public access and recreation impact because the beach area would continue to be occupied by development and the back of the beach/shoreline area will continue to be fixed by the continued placement of the structure, contributing to cumulative impacts to beach area in the vicinity. Furthermore, importantly, the proposed project, which would be partially located in coastal waters, does not constitute one of the seven allowed uses for such a location, inconsistent with Section 30233, as discussed earlier, but that also invokes public trust

concerns as described more fully below.

With sea level rise and increasing coastal erosion, the mean high tide line will generally move landward over time depending on the beach/shoreline profile, seasonal tidal activity, and continued sea level rise. Given that that line often defines the demarcation point between public and private property (with the public's property lying on the seaward side, and generally held in public trust by the California State Lands Commission or other delegated public agency (like the City of Monterey in this case)), it is also important to consider the effect of shoreline projects like this one on what is best understood as an ambulatory public trust area, including where structures can halt the inland migration of the mean high tide line, and thus potentially halt the inland migration of public trust areas, at least physically.[43] Bracketing the question of how much of the public trust area is covered by the proposed building in this case (see above under 'Property Ownership'), the proposed project would reduce public trust resources and thwart their natural creation.

In addition to the Coastal Act policies that support public access and equal opportunities for recreation, the Commission has the responsibility to protect public trust resources and public trust uses.[44] Coastal Act regulations define public trust lands as "all lands subject to the Common Law Public Trust for commerce, navigation, fisheries, recreation, and other public purposes," where public trust lands include "tidelands, submerged lands, the beds of navigable lakes and rivers, and historic tidelands and submerged lands that are presently filled or reclaimed, and which were subject to the Public Trust at any time."[45] In the common law, the doctrine traditionally protects in-water uses such as fishing and navigation, but has been extended to protect the environment,[46] and associated resources that affect trust lands, such as non-navigable tributaries supplying water to a lake[47] and groundwater resources that impact navigable waters.[48] California recognizes access as a component of public trust resources. Agency regulation must also consider impacts to the public trust that are caused by upland or upstream development outside the trust boundary.[49] And as noted previously,

[43] It is important to note, however, that this artificial fixing of the shoreline does not permanently fix the legal property boundary. See *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009).

[44] The State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable waterways upon its admission to the United States in 1850. The State holds and manages these lands for the benefit of all people of the State for statewide purposes consistent with the common law Public Trust Doctrine ("public trust"). In coastal areas, the landward location and extent of the State's sovereign fee ownership of these public trust lands are generally defined by reference to the ordinary high-water mark (Civil Code Section 670), as measured by the mean high tide line (*Borax Consol. v. City of Los Angeles* (1935) 296 U.S. 10); these boundaries remain ambulatory, except where there has been fill or artificial accretion.

[45] See CCR Section 13577(f).

[46] See *Marks v. Whitney*, 6 Cal.3d 251, 259-260 (1971).

[47] See *Nat'l Audubon Soc. v. Super. Ct.*, 33 Cal. 419, 436-437 (1983).

[48] See *Envtl. Law Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393 (2018).

[49] The California Court of Appeals describes this distinction as follows: "As a consequence, the dispositive issue is not the source of the activity, or whether the water that is diverted or extracted is itself subject to

Coastal Act Section 30233 can generally be understood as implementing the public trust doctrine by specifying the seven allowed uses within coastal waters, including coastal-dependent industry, boating facilities, public recreational facilities, and nature study/restoration.

As noted earlier, the Coastal Commission is guided by the principle articulated in the *Milner*[50] case that an upland owner cannot unilaterally and permanently fix the tidelands boundary with shoreline armoring, such as the project that is proposed in this case. Here, as discussed above, the public's ability to recreate on the beach and in the ocean would be impacted as a direct result of the proposed project, which will interfere with these public trust uses. While the Public Trust Doctrine and the Coastal Act to a certain degree allow for such impacts to beaches and recreational access, as well as to views for that matter, for coastal-dependent uses and boating facilities and other allowable uses permissible on/over coastal waters, this is not what is being proposed here in this case. This project is for private residential and commercial uses that can – and are required to be – located elsewhere. Put another way, the Coastal Act does not allow for such public recreational access, public trust, and public view impacts, including loss of beach space, for this project. To be able to find consistency with Coastal Act public access and recreation policies, if the project were otherwise approvable (which, as described above under Coastal Hazards, it is not) any project at this site would need to restore beach space, at the very least, in the public trust area, and must account for landward migration of that area over time with sea level rise.

In sum, the proposed project perpetuates an encroachment that limits the public's ability to access the beach in this area, obstructs scenic coastal views, and contributes to the degradation of coastal resources by maintaining an armoring structure that interrupts natural coastal processes, all adversely affecting public trust resources. Approval of such a project would contradict Coastal Act policies aimed at conserving and protecting public access, recreation, and views, and no mitigation is available for the proposed project that would address those inconsistencies. Thus, the Coastal Act directs denial for these reasons as well.

4. Conclusion

As discussed above, the project site is subject to significant development constraints given it essentially occupies the bluff, beach, and ocean along Cannery Row, which leads to a series of impermissible Coastal Act inconsistencies, as described in detail above. Importantly, these are not the type of inconsistencies that can be easily cured by relatively minor project modifications through conditions of approval (e.g., if a house was two feet taller than allowed, then it could be conditioned to be made consistent by lowering it by two feet). In short, the Coastal Act requires denial of this CDP application, and although the Commission could attempt to craft terms and conditions to modify the

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the public trust, but whether the challenged activity allegedly harms a navigable waterway." (*Envtl. Law Found. et al. v. State Water Res. Control Bd.*, 26 Cal.App.5th 844 (2018).)

[50] *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009).

project in order to create a Coastal Act-consistent project, the Commission is under no obligation to do so.[51]

If and when the Commission considers denying a CDP application for a project, however, a question may arise as to whether the denial results in an unconstitutional "taking" of an applicant's property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

> *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.*

Consequently, the Commission must assess whether denial of a CDP for the proposed development could result in an unconstitutional taking of private property. If the Commission determines that a taking is possible, then Section 30010 allows the Commission to approve some amount of development in order to avoid such a taking, even if the approved development is inconsistent with LCP or Coastal Act provisions, provided LCP and Coastal Act inconsistencies are avoided/minimized as much as possible, and properly mitigated for, while still avoiding a takings.[52] On the other hand, if the Commission concludes that its action likely would not constitute a taking, then it may deny the CDP for the project while still complying with Coastal Act Section 30010. It is important to note, however, that in undertaking such analysis, the Commission is not a court, and it cannot ultimately adjudicate whether its action constitutes an unlawful taking as a matter of law. Only a court can make a final and determinative taking decision were the Commission's decision to be challenged.

Here, importantly, a takings claim for denial of this CDP application is simply not ripe for judicial review. Although this project is being denied for its Coastal Act inconsistencies, there are other projects that could be pursued at this site that can better address the Coastal Act in ways that conform to its requirements. For example, the major inconsistencies of the project are due to its location over the bluff, beach, and ocean, and the way in which it functions as a shoreline protective device, when none of those things are allowed by the Coastal Act. The Applicant did not analyze any alternatives to the proposed project in its submittal to the Commission, but it seems reasonable to presume that there are alternatives, including those that are focused on the Applicant's

[51] 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.").

[52] See, for example, CDP Numbers A-3-SCO-00-033 (Hinman), A-1-MEN-09-023 (Wernette), 1-12-023 (Winget), and A-2-MAR-21-0048 (Groneman).

fee-title ownership area (and not disputed property ownership areas and not coastal trust lands), where appropriately sited, designed and set back development would likely provide a framework for an approvable project, and where some range of uses focused on the explicit visitor-serving commercial/coastal-dependent priority for the site could be found Coastal Act consistent. In any case, no such alternative project is before the Commission at this time, and the Commission finds that denial of a CDP for this current proposed project, for the reasons articulated herein, is not only required by the Coastal Act, but it is does not raise the type of takings considerations that would invoke the provisions of Section 30010.

In short, although only a court can ultimately conclude, the available evidence strongly suggests that the Commission's denial of a CDP for the proposed project would not lead to a takings, as such determination is premature. Evaluation of a takings for a denial in this case isn't "ripe" as the Applicant can apply for another, more Coastal Act-consistent project, and, in addition, already has an existing building/economic use of the property. Thus, the Commission determines that denial in this case is not a taking, and that such denial is consistent with Coastal Act Section 30010.

5. California Environmental Quality Act (CEQA)

CEQA Section 21080.5(d)(2)(a) prohibits a proposed development from being approved if there are feasible alternatives and/or feasible mitigation measures available that would substantially lessen any significant adverse effect that the development may have on the environment. The Commission's review, analysis, and decision-making process for CDPs and CDP amendments has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of the environmental review required by CEQA (CCR Section 15251(c)).

Pursuant to CEQA Guidelines (14 CCR) Section 15042 "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.

Accordingly, the Commission finds that denial, for the reasons stated in these findings, 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[53]

- CDP Application 3-20-0222

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

B. Staff Contact with Agencies and Groups

- City of Monterey
- California State Lands Commission