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Appeal Filed: 12/5/2023
 Action Deadline: 2/15/2024
 Staff: Nolan Clark - SC
 Staff Report: 1/26/2024
 Hearing Date: 2/9/2024

STAFF REPORT SUBSTANTIAL ISSUE & DE NOVO HEARING

Application Number: A-3-SCO-23-0051

Applicants: Kirk Kozlowski and Mary Lacerte

Appellants: Surfrider Foundation and Michael Guth

Local Government: Santa Cruz County

Local Decision: Santa Cruz County Coastal Development Permit Application Number 211316, approved by the Santa Cruz County Planning Commission on November 8, 2023.

Project Location: At the top edge of a coastal bluff along the seaward property line of a blufftop parcel developed with a single-family residence and located at 266 Cliff Court within the unincorporated Aptos area of Santa Cruz County (APN 043-081-13).

Project Description: Construct an approximately 110 linear foot pin pier retaining wall (measuring approximately 2.5 feet wide by approximately 40 feet deep below grade) and related drainage infrastructure in the coastal bluff.

Staff Recommendation: Substantial Issue Exists; Denial

IMPORTANT HEARING PROCEDURAL NOTE

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

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

SUMMARY OF STAFF RECOMMENDATION

Santa Cruz County approved a coastal development permit (CDP) for the construction of an approximately 110 linear foot pin pier retaining wall (measuring approximately 2.5 feet wide by approximately 40 feet deep below grade) and related drainage infrastructure at the top edge of the coastal bluff along the seaward property line at 266 Cliff Court within the unincorporated Aptos/Rio del Mar area of Santa Cruz County. Per the Applicants, the wall is not intended to protect their home or residential back yard, but rather it is intended to protect three homes at the base of the coastal bluff from landslide debris emanating from their property.¹

The appeals contend that the County-approved project is inconsistent with Santa Cruz County LCP coastal hazard and shoreline armoring provisions, and thus that the County's decision leads to concerns/conclusions that: 1) the development constitutes a shoreline protection structure and it is not clear that such structure is allowed by the LCP based on the circumstances that apply; 2) the approved shoreline protection structure would not be placed as close as possible to the structures requiring protection, as the LCP requires; 3) the project alternatives analysis identifies a less-structurally-intensive and less environmentally damaging feasible alternative which was ultimately not approved by the County (despite the LCP requiring such alternative to be selected in such cases); 4) the approved project fails to adequately protect the homes it is intended to protect at the base of the bluff; and, 5) the coastal resource impacts of the approved project were not appropriately identified nor mitigated (which also raises potential Coastal Act access issues). Following review of the local record, staff recommends that the Commission find that the County's approval of the project raises a substantial LCP and Coastal Act conformance issue with respect to the above issues, that the Commission take jurisdiction over the CDP application, and that the Commission deny that CDP application due to Coastal Act/LCP inconsistencies.

¹ The houses at the base of the bluff are within the Beach Drive neighborhood, which is a subdivision that pre-dates the Coastal Act that allowed for development to be constructed essentially at beach level at the base of the bluff. Thus, whereas a 'normal' blufftop development scenario might consist of a blufftop house, then the bluff face itself, and then the beach extending seaward of the base of the bluff, in this case there exists several homes and a public road at the base of the bluff, with the beach (Seacliff State Beach) seaward of that.

At a fundamental level, it is unclear if the LCP can authorize a shoreline protection structure for the subject residence onsite and/or the residences at the base of the bluff on Beach Drive because the County did not evaluate these residential structures in light of the LCP's criteria for evaluating shoreline protection structures. In order to even consider such shoreline protection structures, the LCP requires that an existing structure or structures is/are present (i.e., where 'existing' in such context means present onsite as of 1977 and not redeveloped since), and that such structure(s) is/are significantly threatened. The County's analysis omitted this crucial step and, absent such analysis, the County erred in its decision because it did not properly work through the LCP-required analytical framework for shoreline protection projects. And in any case, based on available information, it appears that although all of the structures in this case have been present in some form since before 1977, at least some of them have had significant alterations since that time, including at least two of the beach level homes that may make them no longer "existing" for LCP and Coastal Act purposes. In short, the County did not establish the "existing structure" in this case to which further LCP tests would be applied.

As to the degree of threat (were there to be shown to be an existing structure or structures), the Applicants' own geotechnical consultants concluded that the Applicants' residence is not significantly threatened. As to the base of bluff structures, the County's record indicates that portions of the bluffs in question have sloughed off into the backyards and to the base of the beach-level homes in the past. Given the fast-moving nature of landslides when they occur, such events lead to dangers to users of the property. In addition, larger events, were they to occur, could significantly threaten the beach-level structures themselves. Further, the unpredictability of landslides in general suggests that such events pose a significant threat to the beach-level homes. Even so, to the degree that one or more of the beach-level homes could be found to be both 'existing' and 'significantly threatened' in LCP coastal hazard terms, the Applicants' geotechnical consultants, the County's Geologist, and the Commission's own Geologist and Coastal Engineer all have articulated that the County-approved project would not be able to fully abate the threat, because the County-approved retaining wall would be constructed at the top of the bluff, whereas the landslide scars and landslides are predominantly seaward of that point.

And even if the County's analysis had established existing significantly threatened structures in shoreline protection structure terms, which it did not, the LCP also identifies a preference for soft solutions over hard armoring, requires the use of the least environmentally damaging feasible alternative for abating threat, requires that all coastal resource impacts be avoided, and where unavoidable mitigated, among other things. None of those LCP requirements were adhered to in this case. In fact, the Applicants' own alternatives analysis identifies a less environmentally damaging feasible alternative that would appear – including in the view of the County's Geologist and Commission's own Geologist and Coastal Engineer – to better protect the beach-level homes on Beach Drive that entails landslide mitigation measures placed nearer to those homes designed to intercept materials. And if the objective of the project is to protect those homes, and if allowable otherwise under the LCP (not shown by the County's action), then the LCP requires any approved shoreline protection structure to be located as close as possible to the structures requiring protection, which would be

the case with that alternative project, but not the one that the County approved. Finally, the County did not evaluate the project in relation to its coastal resource impacts, despite the above-referenced LCP requirements. Thus, the County did not identify potential impacts, did not identify ways to avoid such impacts, did not require impact avoidance, and where unavoidable, did not require any mitigation for such impacts. On this point, while the current pattern of development along Beach Drive, with private residences and a public road at the base of the bluff and on the beach, may suggest that the coastal bluff in question does not significantly contribute to sand supply, the project would appear to have other coastal resource impacts over time during its lifetime (including alteration of the natural landform and, as the wall becomes exposed, public view degradation, etc.),² none of which were identified nor mitigated in the County's action as is required by the LCP and the Coastal Act's access provisions.

In summary, staff recommends that the Commission find that the County's action raises substantial LCP and Coastal Act conformance issues and that the Commission take jurisdiction over the CDP application. Due to the above Coastal Act/LCP inconsistency issues, staff further recommends that the Commission, on de novo review, deny the CDP. To the extent that the Applicants believe that they can resolve all such inconsistencies, the opportunity to reapply to the County with a CDP application which considers and seeks consistency with all applicable Coastal Act/LCP provisions remains. The motions and resolutions to implement the staff recommendation are found on page 5 below.

² In addition, such resource impact evaluation applies to the life of the project, where it is possible that over some period of years the development at the base of the bluff can no longer be maintained in light of sea level rise and increased coastal hazards, and the evaluation framework in that regard would become more similar to typical coastal armoring projects along bluffs.

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EXHIBITS

Exhibit 1 – Location Maps

Exhibit 2 – Site Photos

Exhibit 3 – County Final Local CDP Action Notice

Exhibit 4 – County-Approved Project Plans

Exhibit 5 – Commission Staff Comments to County Prior to County CDP Action

Exhibit 6 – Appeal Documents

Exhibit 7 – Commission Staff Coastal Engineer and Geologist Memorandum

1. MOTIONS AND RESOLUTIONS

A. Substantial Issue Determination

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

***Motion:** I move that the Commission determine that Appeal Number A-3-SCO-23-0051 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and I recommend a no vote.*

***Resolution to Find Substantial Issue:** The Commission hereby finds that Appeal Number A-3-SCO-23-0051 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Santa Cruz County Local Coastal Program.*

B. CDP Determination

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 A-3-SCO-23-0051 for the development proposed by the Applicants, and I recommend a no vote.*

***Resolution to Deny CDP:** The Commission hereby denies Coastal Development Permit Number A-3-SCO-23-0051 on the grounds that the development will not be in conformity with the Santa Cruz County Local Coastal Program and/or the Coastal Act's public access and recreation provisions. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

2. FINDINGS AND DECLARATIONS

A. Project Location

The Santa Cruz County-approved project is located along the seaward property line of a blufftop parcel developed with a single-family residence located at 266 Cliff Court (APN 043-081-13) within the unincorporated Aptos/Rio del Mar area of Santa Cruz County (see location maps and site area photos in **Exhibits 1** and **2**). The site is just downcoast of the Rio del Mar esplanade area near Aptos Creek, and just inland of State Parks' Seacliff State Beach unit, one of the County's most popular sandy beach areas that provides both a typical beach-going experience as well as a shoreline public promenade area enjoyed by members of the community and visitors to the area. That promenade is mostly associated with Beach Drive, which itself lies seaward of the base of the bluffs at this location. Beach Drive supports a beach-level residential subdivision (pre-Coastal Act), with homes at the base of the bluff, Beach Drive seaward of these homes, and State Parks' Seacliff State Beach unit seaward of the road. This development configuration – with Beach Drive and this stretch of private homes and public infrastructure sandwiched between an eroding coastal bluff and the beach/ocean – has resulted in a situation where many private homes, the public road (i.e., Beach Drive), and public infrastructure have historically been impacted both by wave/tidal action (during high tide and/or large storm and swell events) as well as by landslides during heavy rain and runoff events. Put another way, the beach-level Beach Drive area can face coastal hazards from both inland and seaward forces, both of which are implicated by this project.

B. Project Description and History

The County's approval authorized the construction of an approximately 110 linear foot pin pier retaining wall³ along the seaward property line of the Applicants' property, essentially at the top edge of the coastal bluff. The wall would consist of an estimated nineteen 30-inch diameter steel-reinforced concrete piers, spaced a maximum of 6 feet apart, drilled 40 feet deep into the bluff below grade. The uppermost 8 feet of each pier would be connected by 8-inch-thick concrete lagging below grade, forming a continuous soil retention wall. The project would also include the collection of surface drainage onsite via a 2-foot-wide swale above the wall, which would divert water from running over the bluff edge and instead direct it towards the inland side of the property and into a private storm drain system that drains to the west towards the Del Shore Condominiums, to the northwest of the subject property. See **Exhibits 3** and **4** for the County's final local action notice and approved project plans, respectively. Per the Applicants, the retaining wall is not intended to protect their home or residential back yard, but rather it is intended to protect three homes at the base of the coastal bluff (i.e., 307, 309, and 311 Beach Drive) from landslide debris emanating from their property.

The County's ultimate approval of the CDP for this project has a rather complicated history, including eight hearings at the local level in total, resulting in three CDP denials,

³ A pin pier retaining wall (also called a shear pin wall) is a row of piers (or piles) that are installed below grade, typically by drilling out soil, inserting a steel cage or I-beam into the borehole, and pumping in concrete. The piers are spaced a few feet apart and act to help retain the soil behind them. In this case, the row of piers are connected at the top with a steel-reinforced concrete grade beam.

appeals of those denials, and ultimately the one CDP approval that is before the Commission on appeal. On September 29, 2021, the Applicants submitted a CDP application to the County that was deemed incomplete, with County staff citing a lack of necessary information related to the proposed onsite drainage improvements and unpaid fees. On March 21, 2022, the Applicants resubmitted the CDP application to the County, and again the application was deemed incomplete, due primarily to a lack of information regarding the proposed onsite drainage improvements. At this time, the Applicants were also informed by County staff that the proposed project had significant Local Coastal Program (LCP) consistency issues with respect to the LCP's coastal hazards and shoreline protection structure provisions. This second incomplete determination was appealed by the Applicant to the County Planning Director on May 4, 2022, and ultimately the Planning Department deemed the application complete with compliance issues (citing, again, to noncompliance with the LCP's coastal hazards and shoreline armoring provisions) on May 14, 2022.

The proposed project was first heard by the County Zoning Administrator on November 18, 2022, and this hearing was ultimately continued to December 16, 2022. At the December 16 hearing, in accordance with the County Planning staff recommendation, the Zoning Administrator denied the CDP application due to inconsistencies with the LCP's coastal hazards and shoreline protection structure provisions, specifically citing inconsistencies with LCP Implementation Plan (IP) Chapter 16.10 (the County's Geologic Hazards Ordinance), in that the application did not include the LCP-required alternatives analysis,⁴ among other issues. The Applicants appealed this CDP denial to the County Planning Commission.

The Planning Commission first heard the appeal of the Zoning Administrator's denial on March 22, 2023, where again County Planning staff recommended denial of the CDP application. At that time the Planning Commission voted to continue the hearing due to the lack of the LCP-required alternatives analysis, in part because the Applicants committed to provide an alternatives analysis to County Planning staff by the continuance hearing. However, at the April 26, 2023 Planning Commission continuance hearing for the CDP application,⁵ the Applicants still had not submitted an alternatives analysis for the project, and the Planning Commission ultimately voted to deny the CDP application in accordance with County Planning staff's recommendation. This denial came with direction from the Planning Commission to properly prepare the alternatives analysis, as well as any other necessary application materials, and for the Applicants to re-apply for a CDP to be re-heard by the Zoning Administrator, citing concerns that if another continuance was issued and the Applicants still had not prepared the LCP-required alternatives analysis, the application would potentially continue to return to the Planning Commission without resolution. Rather than heed this direction from the

⁴ Here, and throughout the local process, the Applicants and their representatives consistently claimed that such an analysis was unnecessary, insisting that the proposed project was the only preferred option for the Applicants.

⁵ Coastal Commission staff submitted comments to the Planning Commission in advance of the April 21, 2023 hearing, supporting County Planning staff's recommendation for denial, citing inconsistencies with LCP coastal hazards and shoreline protection structure provisions. See **Exhibit 5** for these Commission staff comments to the County prior to the County's final CDP action.

Planning Commission, the Applicants instead appealed the denial decision to the Santa Cruz County Board of Supervisors.

On June 13, 2023, the appeal of the Planning Commission's CDP denial was heard by the Board of Supervisors at a jurisdictional hearing to consider whether the Board should take jurisdiction over the application.⁶ County Planning staff recommended that the Board not take jurisdiction over the application, and that the Board allow the Planning Commission's denial decision to stand. Importantly, during the Board's deliberations, it was revealed that the Applicants submitted the LCP-required alternatives analysis⁷ to the Planning Department only two days prior to the Board hearing.⁸ Therefore, with this new information available, the Board voted to take jurisdiction over the CDP application, and subsequently remanded it to the Zoning Administrator for further consideration in light of the alternatives analysis submittal, to be heard within 60 days of the Board's action.

Subsequently, on August 4, 2023, the Zoning Administrator, for a second time, heard the CDP application by direction of the Board of Supervisors, providing an opportunity for County Planning staff to review the alternatives analysis. County Planning staff, including the County Geologist, reviewed the alternatives analysis and continued to recommend denial of the CDP application, again due to noncompliance with LCP coastal hazards and shoreline protection structure provisions. Notably, Jeff Nolan, the County Geologist, and Rick Parks, the Civil Engineer for County Environmental Planning staff, wrote in their review⁹ of the alternatives analysis that:

[T]he proposed project will not remove the threat of future landsliding posed to the homes at the base of the bluff. While it may reduce the overall landslide threat to some extent, it would not have prevented the 2019 and 2023 landslides that impacted these homes, and it will not prevent future landslides from impacting the homes.

This finding is consistent with the Applicants' own preliminary geotechnical investigation

⁶ A jurisdictional hearing is not on the merits of the application itself, but only on whether the Board should take jurisdiction over the CDP application (not unlike a Coastal Commission substantial issue determination hearing).

⁷ See "Alternatives Analysis, 266 Cliff Court, Aptos, California, County of Santa Cruz, APN 043-081-13, Coastal Development Permit Application 211316" dated June 6, 2023 and prepared by Pacific Crest Engineering (see page 43 of **Exhibit 3**).

⁸ It should be noted that the Applicants' submittal of this alternatives analysis came fourteen months after they were notified that they were missing an alternatives analysis (via the second incomplete letter sent to the Applicants on April 20, 2022), and further noted that such alternatives analysis was and is an LCP requirement for CDP applications of this sort. In other words, the lack of an alternatives analysis makes a project inconsistent with the LCP by itself, notwithstanding any other LCP inconsistencies that might apply.

⁹ See page 58 of **Exhibit 3** for this review letter.

for the proposed project,¹⁰ which states:

It must be understood that the soldier piles will not stabilize the hillside downslope of the piers and that it should be anticipated that the area downslope of the piers will continue to fail.

Thus, despite the application being considered for nearly two years by this time, this represented the first time that it was identified – by both the County and the Applicants – that the proposed project would not adequately do what it was intended to do, namely to protect the downslope homes. In other words, it was not until some two years into the process that it was shown that the Applicants' stated project purpose was not fully achievable by the project. It is likely that it would have been identified earlier had the Applicants provided the multiple times requested analysis, but they chose not to. Due to this issue, as well as other cited LCP inconsistencies, the Zoning Administrator concurred with the County Planning staff recommendation, and once again denied the CDP application. The Applicants again appealed this denial to the Planning Commission.

Subsequently, on October 11, 2023, the Planning Commission heard the appeal of the second Zoning Administrator denial.¹¹ County Planning staff continued to recommend that the Planning Commission uphold the Zoning Administrator's denial due to unresolved and significant inconsistencies with the LCP's coastal hazards and shoreline protection structure provisions. However, after some deliberation, the Planning Commission ultimately disagreed with the County staff recommendation and voted to approve the CDP application, citing to the required findings for approval for general development permits (IP Section 18.10.230(A)), without citing to the required findings for coastal development permits (IP Section 13.20.110). Therefore, because all required findings for approval were not made at this hearing, the Planning Commission directed County Planning staff to return to the Planning Commission with revised findings for approval for the project at its next meeting. And at that subsequent hearing on November 8, 2023, the Planning Commission approved a CDP for the proposed project (County CDP Application No. 211316). The Planning Commission's decision was not appealed to the Board of Supervisors.¹²

Notice of the County's final action on the CDP was received in the Coastal Commission's Central Coast District Office on November 27, 2023 (see **Exhibit 3**). The Coastal Commission's ten-working-day appeal period for this action began on

¹⁰ See "Geotechnical Investigation – Design Phase, 266 Cliff Court, Aptos, California, APN 043-081-13" dated April 22, 2021 and prepared by Pacific Crest Engineering (see page 76 of **Exhibit 3**).

¹¹ Coastal Commission staff again submitted comments to the Planning Commission for consideration at its second denial appeal hearing, reiterating its support for County Planning staff's recommendation for denial, and citing its April 21, 2023 letter and the contents therein (see **Exhibit 5**).

¹² It is noted that the County charges a fee for appeals of Planning Commission CDP decisions to the Board of Supervisors. As a result, potential appellants are not required to exhaust local appeals through the Board in order to gain standing to appeal to the Coastal Commission (see Section 13573(a)(4) of the Commission's regulations), but rather can appeal directly to the Commission. And in this case that is exactly what happened, where those potential appellants bypassed paying a fee and a Board appeal, and appealed the Planning Commission decision directly to the Commission.

November 28, 2023 and concluded at 5pm on December 11, 2023. Two valid appeals were received during the appeal period. See **Exhibit 6** for the full text of the appeals.

C. Appeal Procedures

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. This County CDP decision is appealable to the Commission because the project site is located within 300 feet of the inland extent of the beach and the seaward face of the coastal bluff, within an area that constitutes a sensitive coastal resource area, located between the first through public road and the sea, and the approved development is not designated as the principal permitted use under the LCP.

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

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the "substantial issue" phase of an appeal. The Commission is required to begin its hearing on an appeal, addressing at least the substantial issue question, within 49-working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline. The Applicants in this case have not waived that 49-working day requirement.

The Coastal Act and the Commission's implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.¹³ At this stage, the Commission may only consider issues brought up by

¹³ The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no substantial issue..." (California Code of Regulations, Title 14, Section 13115(b)). Section 13115(c) of the

the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the former recommendation, the Commission will not take testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it, and, if no such hearing is requested, a substantial issue is automatically found. In both cases, when the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

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

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

D. Summary of Appeal Contentions

The appeals contend that the County-approved project is inconsistent with Santa Cruz County LCP coastal hazards and shoreline armoring provisions, and thus that the County's decision leads to concerns/conclusions that: 1) the development constitutes a shoreline protection structure and it is not clear that such structure is allowed by the LCP based on the circumstances that apply; 2) the approved shoreline protection structure would not be placed as close as possible to the structures requiring protection as the LCP requires; 3) the project alternatives analysis identifies a less-structurally-intensive and less environmentally damaging feasible alternative which was ultimately not approved by the County (despite the LCP requiring such alternative to be selected

Commission regulations provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a significant issue: (1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and the Coastal Act's public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

in such cases); 4) the approved project fails to adequately protect the homes it was intended to protect at the base of the bluff; and 5) the coastal resource impacts of the approved project were not appropriately identified nor mitigated (which also raises potential Coastal Act access issues). See **Exhibit 6** for the complete appeal documents and contentions.

E. Substantial Issue Determination

1. Coastal Hazards and Shoreline Protection Structures

Applicable LCP and Coastal Act Provisions

The appeals contend that the County-approved project raises LCP coastal hazards consistency issues related to shoreline protection structures. Specifically, the appeals contend that the LCP required tests to authorize the proposed shoreline protection structure have not been met, and that the project is inconsistent with the LCP on these points. The relevant coastal hazards and shoreline protection structure provisions include:

IP Section 16.10.040: Definitions. ...

(10) *“Coastal bluff” means a bank or cliff along the coast subject to coastal erosion processes. “Coastal bluff” refers to the top edge, face, and base of the subject bluff.*

(12) *“Coastal erosion processes” means natural forces that cause the breakdown and transportation of earth or rock materials on or along beaches and bluffs. These forces include landsliding, surface runoff, wave action and tsunamis.*

(59) *“Shoreline protection structure” means any structure or material, including but not limited to riprap or a seawall, placed in an area where coastal processes operate.*

LUP Policy 6.2.16: Structural Shoreline Protection Measures. Limit structural shoreline protection measures to structures which protect existing structures from a significant threat, vacant lots which through lack of protection threaten adjacent developed lots, public works, public beaches, or coastal dependent uses. Require any application for shoreline protection measures to include a thorough analysis of all reasonable alternatives, including but not limited to, relocation or partial removal of the threatened structure, protection of the upper bluff or area immediately adjacent to the threatened structure, engineered shoreline protection such as beach nourishment, revetments, or vertical walls. Permit structural protection measures only if non-structural measures (e.g., building relocation or change in design) are infeasible from an engineering standpoint or not economically viable. The protection structure must not reduce or restrict public beach access, adversely affect shoreline processes and sand supply, increase erosion on adjacent properties, or cause harmful impacts on wildlife and fish habitats or archaeological or paleontological resources. The protection structure must be placed as close as possible to the development requiring protection and must be designed to minimize adverse impacts to recreation

and to minimize visual intrusion. Shoreline protection structures shall be designed to meet approved engineering standards for the site as determined through the environmental review process. Detailed technical studies shall be required to accurately define oceanographic conditions affecting the site. All shoreline protective structures shall incorporate permanent survey monuments for future use in establishing a survey monument network along the coast for use in monitoring seaward encroachment or slumping of revetments or erosion trends. No approval shall be given for shoreline protective structures that do not include permanent monitoring and maintenance programs. Such programs shall include a report to the County every five years or less, as determined by a qualified professional, after construction of the structure, detailing the condition of the structure and listing any recommended maintenance work. Maintenance programs shall be recorded and shall allow for County removal or repair of a shoreline protective structure, at the owner's expense, if its condition creates a public nuisance or if necessary to protect the public health and safety. (emphasis added in bold)

IP Section 16.10.070(H)(3): Permit Conditions for Shoreline Protection Structures. Shoreline protection structures shall be governed by the following:

(a) **Shoreline protection structures shall only be allowed on parcels where both adjacent parcels are already similarly protected, or where necessary to protect existing structures from a significant threat, or on vacant parcels which, through lack of protection threaten adjacent developed lots, or to protect public works, public beaches, and coastal dependent uses.**

(b) Seawalls, specifically, shall only be considered where there is a significant threat to an existing structure and both adjacent parcels are already similarly protected.

(c) **Application for shoreline protective structures shall include thorough analysis of all reasonable alternatives to such structures, including but not limited to relocation or partial removal of the threatened structure, protection of only the upper bluff area or the area immediately adjacent to the threatened structure, beach nourishment, and vertical walls. Structural protection measures on the bluff and beach shall only be permitted where nonstructural measures, such as relocating the structure or changing the design, are infeasible from an engineering standpoint or are not economically viable.**

(d) **Shoreline protection structures shall be placed as close as possible to the development or structure requiring protection.**

(e) Shoreline protection structures shall not reduce or restrict public beach access, adversely affect shoreline processes and sand supply, adversely impact recreational resources, increase erosion on adjacent property, create a significant visual intrusion, or cause harmful impacts to wildlife or fish habitat, archaeological or paleontologic resources. Shoreline protection structures shall

minimize visual impact by employing materials that blend with the color of natural materials in the area.

(f) All protection structures shall meet approved engineering standards as determined through environmental review.

(g) All shoreline protection structures shall include a permanent, County approved, monitoring and maintenance program.

(h) Applications for shoreline protection structures shall include a construction and staging plan that minimizes disturbance to the beach, specifies the access and staging areas, and includes a construction schedule that limits presence on the beach, as much as possible, to periods of low visitor demand. The plan for repair projects shall include recovery of rock and other material that has been dislodged onto the beach.

(i) All other required local, State and Federal permits shall be obtained. (emphasis added in bold)

In addition, the LCP strongly protects coastal resources, and there are a host of LCP provisions requiring protection of such resources when development such as this is proposed. Applicable LCP provisions include:

LUP Policy 5.10.2: Development Within Visual Resource Areas. *Recognize that visual resources of Santa Cruz County possess diverse characteristics and that the resources worthy of protection may include, but are not limited to, ocean views, agricultural fields, wooded forests, open meadows, and mountain hillside views. Require projects to be evaluated against the context of their unique environment and regulate structure height, setbacks and design to protect these resources consistent with the objectives and policies of this section...*

LUP Policy 5.10.7: Open Beaches and Blufftops. *Prohibit the placement of new permanent structures which would be visible from a public beach, except where allowed on existing parcels of record, or for shoreline protection and for public beach access. Use the following criteria for allowed structures: (a) Allow infill structures (typically residences on existing lots of record) where compatible with the pattern of existing development. (b) Require shoreline protection and access structures to use natural materials and finishes to blend with the character of the area and integrate with the landform.*

IP Section 13.20.130: Design criteria for Coastal Zone developments:

(A) General. (1) Applicability. The design criteria for Coastal Zone developments are applicable to any development requiring a coastal development permit. (2) Conformance with Development Standards and Design Criteria of Chapters 13.10 and 13.11 SCCC. All applicable and/or required development standards and design criteria of Chapters 13.10 and 13.11 SCCC shall be met in addition to the criteria of this section. For projects that are listed in SCCC 13.11.040 as requiring Chapter 13.11 SCCC design review, and for those located in scenic

areas mapped on the LCP maps or as determined during project review, all applicable standards and conditions of that chapter shall be met. For projects that are not listed in SCCC 13.11.040 as requiring Chapter 13.11 SCCC design review, the standards and conditions of SCCC 13.11.072(A)(1) and 13.11.073(B)(1) only shall be met.

(B) Entire Coastal Zone. The following design criteria shall apply to projects located in the Coastal Zone: (1) Visual Compatibility. All development shall be sited, designed and landscaped to be visually compatible and integrated with the character of surrounding neighborhoods or areas. Structure design should emphasize a compatible community aesthetic as opposed to maximum-sized and bulkier/boxy designs, and should apply tools to help provide an interesting and attractive built environment (including building facade articulation through measures such as breaking up the design with some areas of indent, varied rooflines, offsets, and projections that provide shadow patterns, smaller second story elements set back from the first, and appropriate surface treatments such as wood/wood-like siding or shingles, etc.). ...

(7) Development shall be sited and designed so that it does not block or significantly adversely impact significant public views and scenic character, including by situating lots, access roads, driveways, buildings, and other development (including fences, walls, hedges and other landscaping) to avoid view degradation and to maximize the effectiveness of topography and landscaping as a means to eliminate, if possible, and/or soften, if not possible, public view impacts. ...

(C) Rural Scenic Resources. In addition to the criteria above that applies throughout the Coastal Zone, the following design criteria shall also apply to all development proposed outside of the Urban Services Line and the Rural Services Line located in mapped scenic resource areas or determined to be in a scenic resource area during project review: ...

(2) Site Planning. Development shall be sited and designed to fit the physical setting carefully so that its presence is subordinate to the natural character of the site, including through appropriately maintaining natural features (e.g., streams, riparian corridors, major drainages, mature trees, dominant vegetative communities, rock outcroppings, prominent natural landforms, tree groupings, etc.) and requiring appropriate setbacks therefrom. Screening and landscaping suitable to the site shall be used to soften the visual impact of development unavoidably sited in the public viewshed. ...

(D) Beach Viewsheds. In addition to the criteria above that applies throughout the Coastal Zone, and the criteria above that also applies within rural areas (as applicable), the following design criteria shall also apply to all projects located on bluffs and/or visible from beaches:

(1) Blufftop Development. (a) Outside of the Urban Services Line and the Rural Services Line, in addition to meeting the Rural Scenic Resources criteria in

subsection (C)(2) of this section, blufftop development and landscaping (e.g., houses, garages, decks, patios, fences, walls, barriers, other structures, trees, shrubs, etc.) shall be set back from the bluff edge a sufficient distance to be out of sight from the shoreline or, if such a setback is infeasible, to not be visually intrusive. (b) Within the Rural Services Line and the Urban Services Line, new blufftop development shall conform to the rural scenic resources criteria in subsection (C)(2) of this section.

And the Coastal Act's public access provisions are also relevant to the coastal resource protection question, including:

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. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.*

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

Section 30214(a). *The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:*

- (1) Topographic and geologic site characteristics.*
- (2) The capacity of the site to sustain use and at what level of intensity.*
- (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.*
- (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of*

the area by providing for the collection of litter.

Within this framework, as applicable here, the LCP limits consideration of shoreline protection structures¹⁴ to cases where existing structures are significantly threatened. There is thus a two-tiered set of criteria that must be evaluated in order to allow consideration of a proposed shoreline protection structure in this case. First, there must be an existing structure (i.e., a structure that was legally developed prior to the implementation of the Coastal Act on January 1, 1977 that has not been substantially redeveloped since).¹⁵ Second, if such structure is present, it must be significantly threatened (generally interpreted to mean it would be unsafe to use/occupy within the next 2-3 storm seasons).¹⁶

Then, if such LCP tests are met that allow for shoreline protection structure consideration, there are further requirements that must be met to approve such

¹⁴ It is noted that the Applicants dispute that their proposed pin pier retaining wall constitutes a shoreline protection structure, and thus dispute that the LCP's shoreline protection structure provisions apply to their proposed project. They are wrong on these counts. As indicated above, the LCP defines a shoreline protection structure as "any structure or material...placed in an area where coastal processes operate." Even though 'coastal processes' is a broader term than 'coastal erosion processes', the latter all occur at this location. Thus, this is a shoreline protection structure and the LCP's shoreline protection structure provisions apply to the proposed project. This is confirmed by the County in its action here, and independently by the Commission's Geologist, Phil Johnson, and Coastal Engineer, Jeremy Smith (see **Exhibit 7**).

¹⁵ As described in the Commission's 2015 Sea Level Rise Policy Guidance, the Commission interprets the term "existing structures" in Coastal Act Section 30235, as well as in the certified Santa Cruz County LCP, as meaning structures that were in existence on January 1, 1977, the effective date of the Coastal Act, and that have not been redeveloped since in way that would require them to be reevaluated against the Coastal Act/LCPs as if new. In other words, this 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 Coastal Act 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 development to support same. 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. See, for example, CDPs 3-14-0488 (Iceplant LLC seawall); 3-23-0014 (Grossman Armoring); 3-18-0720, 3-20-0166, 3-22-0440 (Pleasure Point Armoring and Access); and 3-19-1287 (17 Mile Drive Armoring).

¹⁶ Lacking a Coastal Act definition, the Commission has in the past evaluated the immediacy of any threat in order to make a determination as to whether an existing structure is "in danger" for the purposes of Coastal Act Section 30235 and related LCP section consideration, such as the "significant threat" threshold identified in the Santa Cruz County LCP. While each case is evaluated based upon its own particular set of facts, the Commission has in the past interpreted "in danger" (and by extension here, "significant threat") to mean that an existing structure would be unsafe to use/occupy within the next two or three storm season cycles (generally, the next few years) if nothing were to be done (i.e., in the no project alternative). See, for example, 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); 2-17-0702 (Sharp Park Golf Course revetment); 3-23-0014 (Grossman Armoring); and 3-18-0720, 3-20-0166, 3-22-0440 (Pleasure Point Armoring and Access).

structures. At a minimum, the LCP only allows shoreline protection structures when shown to be the least environmentally damaging feasible alternative to protect the existing significantly threatened structure, with priority given to nonstructural measures over structural measures, based on an analysis of alternatives. Moreover, shoreline protection that is considered in such an LCP analysis must not reduce or restrict public recreational access, adversely affect natural shoreline processes or sand supply, increase erosion of adjacent properties, create a significant visual intrusion or impact visual resources, or cause harmful impacts to wildlife, fish habitat, or archaeological/paleontological resources, among other things (some of which extend to the required Coastal Act public access considerations under appeal). Additionally, the LCP requires that the approvable shoreline protection structures must be sited as close as possible to the development or structure requiring protection.

Analysis

Considering the above-described LCP tests, first, if a shoreline protection structure is to be considered, then there needs to be a pre-1977 and not redeveloped significantly threatened structure that the shoreline protection structure is intended to protect. In this case, potential candidates include the Applicants' residence (at 266 Cliff Court) and the three beach-level residences downslope and seaward of the coastal bluff (at 307, 309, and 311 Beach Drive). Importantly, the Applicants have not clearly claimed that the proposed shoreline protection structure is intended to protect their home, rather they have consistently represented that it is intended to protect the three Beach Drive homes. In fact, according to the CDP application materials and the Applicants' testimony at local hearings, it appears that the goals of the proposed project include both protecting the downslope residences on Beach Drive from potential future landslides and insulating the Applicants from potential legal liability as a result of bluff materials and surface runoff emanating from their property and striking these downslope residences. For example, the primary geologic investigation prepared for the project states:¹⁷

The Kozlowskis do not want to be sued in the future for landslides issuing out of the bluff and striking the houses below, whether the landslides are truly triggered by water or soil from their property, or whether the Beach Drive homeowners simply perceive that the landslides were triggered by mismanagement of soil and water on the Kozlowski property.

The alternatives analysis submitted by the Applicants further states:¹⁸

¹⁷ See "Focused geologic investigation of coastal bluff erosion and landsliding, 266 Cliff Court, Aptos, CA, 95003, County of Santa Cruz APN 043-081-13" dated September 1, 2021 and prepared by Zinn Geology (see page 67 of **Exhibit 3**).

¹⁸ See "Alternatives Analysis, 266 Cliff Court, Aptos, California, County of Santa Cruz, APN 043-081-13, Coastal Development Permit Application 211316" dated June 6, 2023 and prepared by Pacific Crest Engineering (see page 43 of **Exhibit 3**).

The primary goal of the application and the design is to prevent the soil and water owned by the Kozlowskis from moving downslope and inundating or striking the residences that lie below their property along Beach Drive.

However, even with such focus on the protection of the beach-level homes, and although not entirely discussed by the various reviewing bodies at the local level, an expected additional outcome of the project would be the protection of the Applicants' residence and back yard. As a result, the LCP shoreline protection structure tests need to be applied there as well, particularly in order to fully understand all project ramifications. Although the County did not evaluate the Applicants' residence in that way, based on available evidence it appears that the Applicants' residence likely pre-dates CDP requirements and has not been substantially redeveloped since 1977. If this is the case, then it would qualify as an existing structure for shoreline protection purposes under the LCP. However, the County did not evaluate whether the Applicants' residence is in danger from erosion when ultimately deciding to approve the CDP application, and thus the County erred in its approval on this point in relation to that structure. Notably, the geologic investigation prepared for the project states:¹⁹

*It is important to note that the proposed soil retention system and changes to the storm water system **are not needed to protect the existing Kozlowski residence or access to the residence.** (emphasis added in bold)*

In other words, the Applicants' own analysis indicates that the project is not needed to protect the Applicants' residence. As a result, even if it were shown to be accurate that the Applicants' residence were existing, it is not significantly threatened. As a result, the Applicants' residence does not qualify under the LCP for the consideration of shoreline protection structures.

In terms of the residences at the base of the bluff on Beach Drive (307, 309, and 311 Beach Drive), the most recent Planning Commission deliberations (i.e., the Planning Commission hearings that approved the CDP) did include a brief discussion about whether these homes should be considered existing structures as that term is understood in relation to shoreline protection structures. Although County Planning staff acknowledged that they had not concluded on whether these homes constituted "existing structures" in LCP shoreline protection structure terms, one Planning Commissioner stated that, "unless there is evidence that it has been redeveloped, it is reasonable to assume that it hasn't."²⁰ While it sometimes may be true that a lack of evidence that would affirm that a structure is redeveloped, after due diligence searching for this evidence, can adequately support the finding that a structure has not been redeveloped, the lack of such analysis entirely is not adequate support for this finding, which is the case here. On the contrary, based on available evidence, it appears that at least 307 and 311 Beach Drive have undergone significant alterations since January 1,

¹⁹ Zinn Geology, 2021 (again, see page 67 of **Exhibit 3**).

²⁰ See approximate timestamp 1:55:30 of the October 11, 2023 Planning Commission meeting, available at https://www2.santacruzcountyca.gov/planning/plnmeetings/ASP/Display/SCCB_Meeting_Frame.asp?Type=Agenda&Date=20231011&MeetingType=1&ItemNumber=0.

1977,²¹ and it would appear that these residences have been redeveloped and would not constitute existing structures. As to 309 Beach Drive, it is simply unclear, and there is a lack of evidence in either direction in the County's record.

With respect to the degree of threat to these structures, it is clear that there have been landslides emanating from the bluff behind the homes as recently as 2019 and 2023 (as described in the geotechnical reports prepared for the project). And the County's record indicates that portions of the bluffs in question have sloughed off into the backyards and to the base of the beach-level homes in the past. Given the fast-moving nature of landslides when they occur, such events lead to dangers to users of the property. In addition, larger events, were they to occur, could significantly threaten the beach-level structures themselves. Further, based on those conclusions and the unpredictability of landslides in general, it is reasonable to presume that such events pose a significant threat to the beach-level homes. As such, it is possible that one or more of the three Beach Drive homes could be significantly threatened currently. In any case, though, the only one of the three homes that might meet the first two armoring tests (and thus the only one of the four homes associated with this application) appears to be the home at 309 Beach Drive.

On this point, as noted previously, County Environmental staff determined that the County-approved project would not substantially lessen the threat of landslides to the beach-level homes, including because it is sited at the top of the bluff, largely landward of the area where the 2019 and 2023 landslides originated from.²² And this conclusion is shared by the Commission's Coastal Engineer and Geologist (see **Exhibit 7**).²³ In other words, even if consideration of a shoreline protection structure were warranted under the first two LCP tests for one or more of the Beach Drive homes, it is not expected that the County-approved project would sufficiently lessen the threat.

In addition, even had the two required LCP tests been met to allow for a shoreline protection structure to be considered, which they were not, the County-approved project is inconsistent with a number of other LCP provisions governing shoreline protection structures. First, IP Section 16.10.070(H)(3)(c) requires that the approved project be the least environmentally damaging feasible alternative based on an analysis of alternatives. As previously noted, the Applicants did not provide an alternatives analysis when they first applied for the project in September of 2021, despite the LCP's requirements for same (see LUP Policy 6.2.16 and IP Section 16.10.070(H)(3)(c)), and

²¹ Including what appear to be substantial remodels for which County building permits (non-CDPs) were issued that, at the very least, appear to have entailed work to the structural elements of the interior walls and foundation at 307 Beach Drive, and at least an entire second story addition at 311 Beach Drive. Based on available information, it appears that CDPs would likely have been required for such work as well, and the absence of required CDPs would make such development unpermitted and an LCP violation. The Commission has opened violation cases for those properties.

²² Again, see **Exhibit 3**.

²³ Again, see **Exhibit 7** for an independent analysis of the County-approved project by the Commission's Coastal Engineer and Geologist affirming this conclusion.

only provided this alternatives analysis²⁴ after being directed to do so by the Planning Commission at its March 22, 2023 meeting.²⁵ The Applicants' alternatives analysis ultimately included six alternatives, namely a "do nothing" scenario (i.e., no project is implemented) (Alternative 1), construction of debris flow impact structures at the base of the bluff (Alternative 4), only diversion of surface runoff along the Applicants' seaward property line without the proposed pin pier retaining wall (Alternative 5), and the County-approved pin pier retaining wall sited at the top of the bluff and associated drainage improvements along the Applicants' seaward property line (Alternative 6). Of the six alternatives considered, Alternative 4 appears to be the least environmentally damaging alternative, though the alternatives analysis deems this option "logistically infeasible" because it would require the project be built off of the Applicants' property, and instead on the downslope properties (i.e., 307, 309, and 311 Beach Drive). On this point, Alternative 4 entails the construction of debris flow impact structures at the base of the bluff, and the alternatives analysis states:

Construction of flexible shallow landslide barriers...or debris flow impact walls would mitigate debris flow risk to the residences along Beach Drive. These structures are designed to stop and capture debris flows and prevent them from striking roads and buildings. They would need to be located as close to the structures being protected (which are the Beach Drive residences in this case) as possible in order to capture all permutations of potential debris flow sources...Unfortunately this alternative would need to be installed entirely off of the Kozlowski property, which conflicts with their objective of keeping the mitigation solely on their property.

Alternative 4 is expected to be less environmentally damaging than the County-approved project in that the construction is constrained to mostly above-ground improvements, with some elements of landform alteration in order to construct the necessary foundations, as opposed to an approximately 110-foot linear pin pier retaining wall with 40-foot-deep piers drilled into the top of a coastal bluff. And even though this alternative would necessarily be located off the Applicants' property, the LCP thresholds for selecting an alternative are that the project be feasible from an engineering standpoint and is economically viable (see IP Section 16.10.070(H)(3)(c)), neither of which have been shown to be untrue (and in fact, which criteria appear to readily be met here), not that they are logistically infeasible because it would require coordination between neighboring property owners. In short, the County-approved project is not the least environmentally damaging feasible alternative, including according to the Applicants' own alternatives analysis, yet the project was approved anyway.

²⁴ Again, see "Alternatives Analysis, 266 Cliff Court, Aptos, California, County of Santa Cruz, APN 043-081-13, Coastal Development Permit Application 211316" dated June 6, 2023 and prepared by Pacific Crest Engineering (see page 43 of **Exhibit 3**).

²⁵ And the alternatives analysis was provided some fourteen months after the Applicants were first notified it was a necessary application component, only two days prior to the June 13, 2023 Board of Supervisors hearing for the project.

Further, both LUP Policy 6.2.16 and IP Section 16.10.070(H)(3)(d) require that shoreline protection structures be sited as close as possible to the development or structure requiring protection. Here, the County-approved project is sited essentially the farthest it could be from the beach-level residences on Beach Drive, as it is sited at the top of the coastal bluff along the Applicants' seaward property line. Thus, the County-approved project is inconsistent with the LCP due to this fact alone.

Finally, the County did not evaluate the project in relation to its coastal resource impacts, even though the LCP clearly requires same (see LUP Policy 6.2.16 and IP Section 16.10.070(H)(3)(e)). Thus, the County did not identify potential impacts, did not identify ways to avoid such impacts, did not require impact avoidance, and where unavoidable, did not require any mitigation for such impacts. While the current pattern of development along Beach Drive, with private residences and a public road at the base of the bluff and on the beach, may suggest that the coastal bluff in question does not significantly contribute to sand supply, the project would appear to have other coastal resource impacts over time and its lifetime (including alteration of the natural landform and, as the wall becomes exposed, public views,²⁶ etc.),^{27,28} none of which have been identified nor mitigated as is required by the LCP. In short, the County's approval simply lacks the impact analysis and mitigation that is required by the LCP (and, for public access, the Coastal Act).

In summary, the County's approval lacks adequate analysis of whether consideration of the County-approved shoreline protection structure is allowable to begin with, in that the County did not analyze the Applicants' residence for its status as an existing structure that is significantly threatened, which although it may be an existing structure, it is not currently significantly threatened per the Applicants' own analysis, and thus does not meet the LCP requirements to allow consideration of shoreline protection. Furthermore, the County's approval did not adequately address whether the beach-level homes on Beach Drive qualify as existing structures, and based on available evidence it appears that at least two of them likely do not, and although there they are clearly threatened by landslides, the County-approved project is not expected to significantly lessen this threat. In fact, there appear to be less environmentally damaging feasible alternatives to protect such structures if they qualify for armoring, and these alternatives were not approved, which is also LCP inconsistent. In addition, the County approved project is not sited as close as possible to the structures being protected, and does not include any coastal resource impact assessment, avoidance, nor mitigation, despite all of these being required for a project such as this. For all of the above reasons, the County-approved project raises a substantial LCP conformance issue with respect to coastal

²⁶ It must be noted that the project site is located within an LCP mapped scenic area, and thus strict visual resource protections apply in this case, including over its lifetime.

²⁷ In addition, such resource impact evaluation applies to the life of the project, where it is possible that over some period of years the development at the base of the bluffs can no longer be maintained in light of rising sea levels and increased coastal hazards, meaning that the evaluation framework in that regard might substantively change at that point (i.e., and lead to even more impacts), including increasing the level and scale of beach level public access impacts.

²⁸ Some of which could also extend to Coastal Act access inconsistencies as well.

hazards and shoreline protection structure requirements, and a substantial Coastal Act public access issue.

2. Substantial Issue Determination Conclusion

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

Regarding the first factor, the County did not adequately demonstrate that the LCP's requirements to approve the proposed pin-pier retaining wall have been met. As discussed in detail above, the required LCP evaluations associated with shoreline protection structures are materially incomplete and cannot serve to support the County's approval, and where discussed did not adequately address said requirements. Primarily, the County did not evaluate the basic LCP requirements to determine whether the proposed shoreline protection structure met the LCP tests that would allow for it to be considered in this case, and similarly did not evaluate the potential impacts and mitigation strategies to offset impacts, including that a less environmentally damaging feasible alternative was not approved even though it was identified, failing such LCP (and Coastal Act public access) tests as well. Moreover, the LCP requirement that shoreline protection structures be located as close as possible to the structure requiring protection was not considered and effectively ignored. Further, on a factual basis, it appears that the approved project would not significantly reduce the threat of landslides to the downslope homes, and yet the County approved the CDP application despite testimony and written review by County Environmental Planning staff making this fact clear. As a result, the County-approved project lacks factual and legal support, including in terms of the LCP required tests to allow armoring; mitigation for potential impacts; and its approved orientation (not as close as possible to structures requiring protection). On the contrary, the available facts and evidence suggest that LCP requirements have not been met, thus requiring that the Commission find that the project raises a substantial issue of conformance with the LCP.

Regarding the second factor, the extent and scope of the development as approved by the County supports a finding of substantial issue because the County-approved project would constitute a major alteration of a natural landform, with a 110 linear foot pin pier retaining wall with piers drilled 40 feet deep into the bluff and associated changes to

surface drainage. In a location that is already seriously impacted by development, with private residences and a public road situated along the base of a coastal bluff and essentially on the beach, the County's approval here would only exacerbate these impacts, and this outcome raises a substantial issue.

Regarding the third factor, the proposed project affects core coastal resources in terms of natural landforms, shoreline resources, and coastal hazard mitigation, all of which go largely unaddressed by the County's approval. Thus, the third factor also supports a finding of substantial issue.

Regarding the fourth factor (i.e., the potential to set an adverse precedent for future interpretations of the LCP and/or Coastal Act), it should first be noted that any one case, like this one, is decided on its specific facts and its specific merits, and is not entirely dispositive as to how subsequent CDP decisions will be made. At the same time, there is always the potential that the County (and/or potential future applicants) might see the County's action here as precedential. And, in that context, the County's approval here raises significant concern. Here, the proposed project raises important coastal resource protection concerns which the County did not properly evaluate nor conclude consistent with the requirements of the LCP, or the Coastal Act (in terms of public access). Further, this project would allow for a shoreline protection structure which would do little to adequately abate the threat and would provide shoreline protection to the Applicants' residence and back yard, which are not currently threatened per their own admission, far in advance of any actual threat to the Applicants' property. Moreover, future applicants may look to this example and conclude that they need not meet the LCP's requirements in order to pursue and obtain approval from the County for shoreline protective structures, or alternatively, the County may seek to approve other shoreline protection structures that do not meet critical LCP and/or applicable Coastal Act tests. While this is perhaps most evident for the area of the County that includes beach-level development seaward of coastal bluffs, like Beach Drive, given the nearly 30 miles of coastline within the County's CDP jurisdiction, authorizing shoreline protective structures beyond what was narrowly envisioned by the Coastal Act and this LCP would be a particularly troubling precedent. Thus, the fourth factor supports a finding of substantial issue.

Finally, with respect to the fifth factor, the project raises issues of regional and statewide significance because concerns regarding the impacts of shoreline protection structures on coastal resources are much broader than just this site, or even Santa Cruz County alone. In fact, the question of how coastal communities throughout the coastal zone adapt to sea level rise, accelerating bluff erosion, and coastal hazards, including as it relates to shoreline protection structure decisions, is one of the most important coastal zone issues facing the State of California. The fifth factor also supports a finding of substantial issue.

For the reasons stated herein, the Commission finds that the County's approval of a CDP for the proposed project raises a substantial LCP conformance issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and therefore the Commission takes jurisdiction over the CDP application for the proposed project.

F. De Novo Coastal Development Permit Determination

The standard of review for this CDP determination is the Santa Cruz County certified LCP and the Coastal Act's public access and recreation provisions.²⁹ All Substantial Issue Determination findings above are incorporated herein by reference.

As indicated above, the LCP limits consideration of shoreline armoring to cases where existing structures are significantly threatened. There is thus a two-tiered set of criteria that must be evaluated in order to allow consideration of the proposed armoring in this case. First, there must be an existing structure (i.e., a structure that was developed prior to the implementation of the Coastal Act on January 1, 1977 that has not been redeveloped since). Second, if such structure is present, it must be significantly threatened (generally interpreted to mean it would be unsafe to use/occupy within the next 2-3 storm seasons). In other words, these criteria must be met to allow for a shoreline protection structure to be considered in the first place pursuant to the LCP.

Then, if such LCP tests are met, there are further requirements that must be met to allow for shoreline protection to be approved. At a minimum, the LCP only allows shoreline protection when it is shown to be the least environmentally damaging feasible alternative to protect the existing endangered structure, based on an analysis of alternatives. Additionally, the LCP requires that shoreline protection structures not reduce or restrict public recreational access, adversely affect natural shoreline processes or sand supply, increase erosion of adjacent properties, create a significant visual intrusion or impact visual resources, or cause harmful impacts to wildlife, fish habitat, or archaeological/paleontological resources, among other things. And the Coastal Act's public access and recreation provisions require that maximum access and recreation opportunities be provided, and similarly protect against adverse impacts to public recreational access. Finally, the proposed shoreline protection structure must be sited as close as possible to the development or structure requiring protection.

In this case, it has not been clearly demonstrated that the Applicants' residence (at 266 Cliff Court) or the residences at the base of the bluff on Beach Drive (at 307, 309, and 311 Beach Drive) meet the two-tiered test that would allow shoreline protection to be considered under the LCP. In terms of the first test, the Applicants have not provided any development and permit history for these structures. However, based on available information, it appears that all of these structures were present on the subject property and on Beach Drive as of January 1, 1977, but that only the Applicants' residence and the residence at 309 Beach Drive may not have been redeveloped since.³⁰ In short, the

²⁹ The requirement for consistency with the Coastal Act's access and recreation provisions applies to development within the County's CDP jurisdiction that is located between the first through public road and the sea, such as this proposed project. Thus, at least Coastal Act Sections 30210-30224 are also applicable in this case.

³⁰ As indicated previously, the residences at 307 and 311 beach Drive appear to have been modified in ways that constitute redevelopment without CDPs, and the Commission has opened violation cases for those properties. With respect to the Applicant's residence and the residence at 309 Beach Drive, there is simply a lack of available information currently in the record and/or readily available sufficient to determine their status with certainty.

proposed project would allow shoreline protection for at least two redeveloped structures, which is inconsistent with the LCP.

In terms of the second test, the Applicants' own consultants notably state that the Applicants' residence is not significantly threatened, and thus the proposed project does not meet the second LCP test based on that fact alone. As to the only residence on Beach Drive that might be allowed shoreline protection (i.e., 309 Beach Drive), it is clear that there is a threat, but equally clear that the proposed project is not the LCP consistent solution. In fact, as described earlier, the proposed project would do little to effectively abate this threat. The proposed pin pier retaining wall system and associated drainage improvements are focused on minimizing the amount of material from the Applicants' property that could erode and mobilize downhill, but would be located significantly landward (at the top of the coastal bluff) of where the majority of the most recent landsliding episodes originated from. Importantly, Santa Cruz County Environmental Planning staff concluded that the 2019 and 2023 landslides, which struck the homes on Beach Drive, would not have been significantly abated by the proposed pin pier wall. On this issue, the Commission's Coastal Engineer and Geologist have also conducted an independent analysis of the application materials and support this conclusion.³¹

In addition, even had these LCP tests been met to allow for shoreline protection to be considered, the Applicants' alternatives analysis identifies a less environmentally damaging feasible alternative that would likely better abate the threat and thus better protect the downslope residences on Beach Drive compared to the proposed project. Because it appears a less environmentally damaging feasible alternative that would better abate landslide threats exists, the proposed project is inconsistent with the LCP. Specifically, and as discussed previously, an alternative that would employ flexible shallow landslide barriers and/or debris flow impact walls is identified in the Applicants' alternatives analysis, and it appears that this alternative would likely better protect the downslope residences while minimizing the degree of natural landform alteration and other coastal resource impact concerns. However, because this alternative would be located off the Applicants' property, the Applicants do not believe it feasible. However, the actual LCP feasibility test relates to engineering and financial viability, and there is no evidence to suggest that the alternative project is infeasible in those terms. In fact, it appears feasible on both fronts, including it is likely to be significantly less costly than the proposed project. In addition, it is only a project similar to that alternative that would be consistent with the LCP's requirement that allowable shoreline protection structures are located as close as possible to the structures requiring protection.

Finally, the proposed shoreline protection structure would appear to have adverse impacts on natural landforms, public views, shoreline processes and sand supply, among other coastal resource impacts, including public access and recreation impacts, over the expected life of the proposed project. Although the LCP and the Coastal Act would typically require a detailed evaluation of such impacts, ways to avoid them, and mitigation for them when unavoidable, because the LCP inconsistencies detailed above

³¹ See **Exhibit 7** for a memorandum on these issues from the Commission's Coastal Engineer and Geologist.

require denial of the project, it is unnecessary at this time for the Commission to fully craft and condition for adequate mitigation of these impacts.

In sum, the Applicants' proposed project is inconsistent with the LCP (and the Coastal Act's access and recreation provisions) on multiple levels, and these inconsistencies require that the CDP application be denied. Although the Commission could attempt to craft terms and conditions to modify the project in order to create a Coastal Act/LCP-consistent project, the Commission is under no obligation to do so.³² And in this case, the project modifications that would be needed to correct the significant Coastal Act/LCP inconsistencies identified would themselves be significant, and would likely result in an entirely different project located in an entirely different area. In such a case it is much more appropriate for these Applicants to work with their downslope neighbors on a project that could be supported by the type of evidence that was missing in this case, and that could be found Coastal Act/LCP consistent through correcting the deficiencies identified in this report.

G. 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 County, acting as lead CEQA agency, determined that the proposed project was exempt from further review under CEQA Section 15303 (New Construction or Conversion of Small Structures).

Pursuant to CEQA Guidelines 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 that 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. Accordingly, the Commission's denial of the CDP application for 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.

³² 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.")).

3. APPENDICES

A. Substantive File Documents³³

- Appeal and Application File A-3-SCO-23-0051

B. Staff Contact with Agencies and Groups

- Santa Cruz County Community Development and Infrastructure Department

³³ These documents are available for review from the Commission's Central Coast District office.